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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. RANDY HINE, Defendant and Appellant.	B285640 (Los Angeles County Super. Ct. No. PA083821)

APPEAL from a judgment of the Superior Court of Los Angeles County, Gregory A. Dohi, Judge. Affirmed and remanded with directions.

Linda L. Gordon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General and Thomas C. Hsieh, Deputy Attorney General for Plaintiff and Respondent.

INTRODUCTION

A jury convicted Randy Hine of stalking Barbara B. and violating a protective order between January and March 2016. Hine argues the trial court erred in admitting evidence of uncharged acts of domestic violence, under Evidence Code section 1109, that Hine contends were remote, dissimilar, and cumulative. Hine also argues the prosecutor engaged in misconduct. Finally, Hine argues the trial court erred in issuing an order protecting Barbara's son and in not terminating a protective order issued to protect one of the prosecution's witnesses during trial.

We conclude that the trial court did not abuse its discretion in admitting the evidence and that any prosecutorial misconduct was harmless. We also conclude that the trial court properly included Barbara's son in the protective order, but that we do not have an appealable order to review to determine whether the trial court erred in not terminating the protective order as to the prosecution's witness. Therefore, we affirm and remand with directions.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Hine Stalks Barbara and Violates a Court Order*

Barbara and Hine dated for five months in 2014. This began in March 2014 when, after Hine asked Barbara if she needed any help with her house, she asked him to look at her pool equipment. Hine began coming to Barbara's house unannounced to work on her pool and yard. Barbara, feeling overwhelmed, told Hine to stop coming to her house so often. Over time, Barbara

noticed Hine became more emotional. In August 2014 Barbara told Hine she no longer wanted to date him and paid Hine $1,000 for his yardwork.

From August 2014 to December 2014, Hine, often using different phone numbers, sent Barbara text messages and left her voicemail messages. He also wrote her letters. In these communications, Hine would "go from being nice to being angry to being nice again." In one text message, Hine pretended he was going to kill himself and sent a picture of himself with a bloody forehead. In another text message, Hine wrote, "I can see you. I hope you have a gun." In a voicemail message, Hine said, "It would be a crime of passion." Barbara feared Hine might harm her. She tried on several occasions to get help from the police, but the police told her they could not help unless Hine expressly threatened to kill her.

After Barbara ended her relationship with Hine, someone vandalized her pool equipment and her son Christopher's car. She suspected it was Hine but could not prove it. She also received a voodoo doll, later determined to have traces of Hine's DNA, with a note stating, "By opening this box, you have released the spirit of your own demon upon yourself. Should you disregard this troll, your son will be affected by his own."

In April 2015 Hine sued Barbara in small claims court for landscaping work he had done at her home. After the court ruled in her favor, Barbara continued to receive calls from Hine, including a voicemail message saying, "I hate you. Now you should be scared. Now you can be scared."

In May 2015 someone vandalized Barbara's car by cutting her brake lines and puncturing her tires. The next day, Barbara received voicemail messages from Hine and an unknown person

telling her not to use her car. She also received text messages from a phone number she did not recognize, later determined to be Hine's.

In October 2015 Barbara obtained a restraining order requiring Hine to stay more than 100 yards away from her and to have no direct contact with her. Hine, however, continued to leave Barbara voicemail messages, using fake accents and other means to disguise his voice. Eventually, Hine stopped calling and texting.

In January 2016 Barbara went to a restaurant. Hine approached her and said, "I forgive you." After that encounter, Barbara found another voodoo doll, this time wrapped in material from her bathing suit, with blood on the face of the doll and a rope around its neck, at the entrance of her home. Barbara believed Hine left it there, and she feared he would kill her.

On March 1, 2016 Barbara received a voicemail from a person using a disguised voice she believed was Hine's voice. It sounded as though the voice said, "If I die, you die." Barbara interpreted this to mean Hine would try to kill her. She reported all these incidents to the police.

B. *The People Charge Hine, and the Jury Convicts Him*

The People charged Hine with stalking (Pen. Code, § 646.9, subd. (b)),[1] three misdemeanor counts of intentionally and knowingly violating a court order (§ 273.6, subd. (a)), and making a criminal threat (§ 422, subd. (a)). The People further alleged Hine had served a prior prison term within the meaning of section 667.5, subdivision (b).

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1 Undesignated statutory references are to the Penal Code.

Hine represented himself for part of the trial. During the prosecution's case, however, Hine gave up his right to represent himself, and the court appointed standby trial counsel. The jury found Hine guilty of stalking and three counts of violating a protective order, but acquitted him of making a criminal threat. The jury also found true the allegation Hine suffered a prior prison term.

The trial court sentenced Hine to a prison term of five years. The court also found Hine violated probation in another case relating to Hine's vandalism of Barbara's car and sentenced him to a consecutive term of eight months. Hine filed a timely notice of appeal.

DISCUSSION

A. *The Trial Court Did Not Abuse Its Discretion in Admitting Evidence of Hine's Uncharged Acts of Domestic Violence Against Kim B.*

1. *Relevant Proceedings*

Hine and Kim B. dated from 1989 to 2002, and they have two children. In 2002 Kim obtained a restraining order against Hine after a jury convicted him of "misdemeanor domestic violence." The restraining order precluded Hine from contacting Kim by telephone or in person. Hine, however, was not deterred.

In one incident after the court issued the protective order, while Kim was inside her mobile home with her children, she saw Hine's "face plastered up against the outside of the window." Hine did not have permission to be there, and Kim feared for her

safety. In another incident, Hine showed up at Kim's mobile home and confronted her new boyfriend.

In 2002 Hine, wearing a wig and glasses, approached Kim ranting and yelling while Kim was helping someone put items into the back of a truck. Hine eventually left, and Kim drove home using a different route to avoid Hine. Hine, however, sped up behind Kim, came alongside her car, and tried to drive her off the road. Kim slammed on her brakes. Hine drove his car past Kim, spun out, and drove directly at her. Kim got away and called the police.

In 2008 Kim moved to a new location with her boyfriend and did not tell Hine where she lived. Hine, however, managed to rent a room "right around the corner," which made Kim afraid. Another time, Kim noticed a car, driven by Hine, following her. Kim pulled over, and so did Hine. Hine was upset and said he wanted to go inside the bar where Kim worked and talk. Kim told Hine to find someone else to talk to. Hine left.

Kim invited Hine to her home several times in 2012 for barbecues or their boys' birthday parties. On those occasions, Hine behaved normally and was not disruptive. One time Hine made a collage of the children and left it on Kim's front porch. The collage was not disturbing, but "just . . . him leaving it there" unannounced made Kim uneasy. At times, Hine would show up uninvited to bring gifts for the boys.

The trial court ruled the People could not introduce Hine's previous "actual battery or assault-related conduct" concerning Kim. The court ruled, however, that all of Hine's other stalking conduct as to Kim was admissible under Evidence Code sections 1109 and 352. Hine contends the court erred in admitting the uncharged acts of domestic violence against Kim.

2. *Applicable Law*

Under Evidence Code section 1101, subdivision (a), evidence of a person's prior conduct is generally inadmissible to prove that person's conduct on a specified occasion. (*People v. Lindberg* (2008) 45 Cal.4th 1, 22.) Evidence Code section 1109, subdivision (a)(1), however, provides that, "in a criminal action in which the defendant is accused of an offense involving domestic violence, evidence of the defendant's commission of other domestic violence is not made inadmissible by Section 1101." "Critically, section 1109 is 'an express exception to the prohibition against [bad character or] propensity evidence set forth in . . . section 1101, subdivision (a).' [Citation.] '[T]he statute reflects the legislative judgment that in domestic violence cases, as in sex crimes, similar prior offenses are "uniquely probative" of guilt in a later accusation. [Citation.] Indeed, proponents of the bill that became section 1109 argued for admissibility of such evidence because of the "typically repetitive nature" of domestic violence. [Citations.] This pattern suggests a psychological dynamic not necessarily involved in other types of crimes.'" (*People v. Megown* (2018) 28 Cal.App.5th 157, 168; see *People v. Brown* (2011) 192 Cal.App.4th 1222, 1233 ["'it is apparent that the Legislature considered the difficulties of proof unique to the prosecution of these crimes when compared with other crimes where propensity evidence may be probative but has been historically prohibited'"].)

While evidence of past domestic violence is presumptively admissible under Evidence Code section 1109, subdivision (a)(1), section 1109, subdivision (e), establishes the opposite presumption for evidence of conduct more than 10 years old:

"Evidence of acts occurring more than 10 years before the charged offense is inadmissible under [section 1109], unless the court determines that the admission of this evidence is in the interest of justice." "[T]he 'interest of justice' exception is met where the trial court engages in a balancing of factors for and against admission under section 352 and concludes . . . that the evidence was 'more probative than prejudicial.'" (*People v. Johnson* (2010) 185 Cal.App.4th 520, 539-540.) Evidence Code section 1109, subdivision (e), does not require "an inquiry different in kind from that involved in a determination under section 352." (*Id.* at p. 539; see *People v. Megown*, *supra*, 28 Cal.App.5th at p. 168.)

Evidence Code section 352, which section 1109 "expressly incorporates" (*People v. Kerley* (2018) 23 Cal.App.5th 513, 532), gives the trial court discretion to exclude or admit evidence of past domestic violence after the court weighs the probative value of the evidence against "the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) The law requires that "'the probative value of the evidence must be balanced against four factors: (1) the inflammatory nature of the uncharged conduct; (2) the possibility of confusion of issues; (3) remoteness in time of the uncharged offenses; and (4) the amount of time involved in introducing and refuting the evidence of uncharged offenses.'" (*People v. Culbert* (2013) 218 Cal.App.4th 184, 192.) "'The principal factor affecting the probative value of an uncharged act is its similarity to the charged offense.'" (*People v. Hollie* (2010) 180 Cal.App.4th 1262, 1274.) We review a trial court's decision to admit evidence of domestic violence for abuse

of discretion. (*People v. Johnson*, *supra*, 185 Cal.App.4th at p. 531.)

3. *The Trial Court Did Not Abuse Its Discretion in Admitting Hine's Prior Conduct with Kim, and Any Error Was Harmless*

The probative value of Hine's prior conduct regarding Kim was high. Hine engaged in a similar course of conduct against both Kim and Barbara after his relationship with each ended. In both instances, Hine repeatedly violated restraining orders by continuing to contact, visiting unannounced, and approaching the two women. On numerous occasions, Hine's conduct caused both women to fear for their safety. Though there were minor differences between Hine's stalking of Kim and his stalking of Barbara, Hine's overall conduct reflected his propensity to ignore court orders and exert control over women who rejected him. (See *People v. Brown*, *supra*, 192 Cal.App.4th at p. 1237 [evidence of the defendant's prior relationships was admissible because it showed the defendant's ""larger scheme of dominance and control,"" which the defendant attempted to assert over the victim by watching over her activities, following her, and attempting to prevent her from having other relationships]; see also *People v. Hernandez* (2011) 200 Cal.App.4th 953, 968 [evidence of the defendant's prior uncharged sexual conduct was more probative than prejudicial where the similarity of charged and uncharged offenses outweighed the remoteness of the conduct, some of which occurred "'as long as 40 years'" ago].) Moreover, Hine's prior conduct was not unduly inflammatory because the trial court excluded evidence of Hine's 2002 assault of Kim. Nor, as the trial court found, did the evidence unduly

confuse the issues—the past acts of violence occurred at a different time and involved different victims and witnesses. (See *People v. Johnson*, *supra*, 185 Cal.App.4th at p. 533.) Finally, as the court also found, the evidence did not consume much trial time. Kim's trial testimony occupies only 50 pages of the over 500 pages of trial transcript. (Cf. *Ibid*. [40 pages].)

In any event, any error in admitting Hine's prior acts of domestic violence against Kim was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 836. (See *People v. Ogle* (2010) 185 Cal.App.4th 1138, 1145 [error in admitting evidence of a defendant's prior acts of domestic violence under Evid. Code, § 1109 is subject to the *Watson* standard of prejudice].) The evidence of Hine's stalking of Barbara and violations of a court order was overwhelming. Indeed, Hine admitted he knew he violated a court order that prohibited him from contacting Barbara. Hine also testified that in January 2016 he approached Barbara at a restaurant and that he left the voodoo doll on her front doorstep. And Hine's DNA was on the voodoo doll. There is also no indication that, in finding Hine guilty, the jury punished Hine for the prior offenses. (See *People v. Hernandez*, *supra*, 200 Cal.App.4th at p. 969.) Considering the strength of the evidence against Hine, it is not reasonably probable that, had the trial court excluded the evidence relating to Kim, the result would have been any different.

B. *The Prosecutor Did Not Engage in Prejudicial Misconduct*

Hine accuses the prosecutor of three separate incidents of misconduct: (1) objecting during Hine's opening statement, (2) eliciting inadmissible evidence, and (3) strategically and unfairly

positioning herself in the courtroom. Hine contends these acts of misconduct violated his rights to due process and a fair trial. While most of the prosecutor's conduct did not amount to misconduct, any that did was harmless.

1. *Applicable Law*

"[T]o establish reversible prosecutorial misconduct a defendant must show that the prosecutor used "'deceptive or reprehensible methods'" and that it is reasonably probable that, without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] A prosecutor's misconduct violates the federal Constitution if the behavior is """"""so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."""""" [Citation.] To preserve a claim of prosecutorial misconduct for appeal, a defendant must object and request an admonition. [Citations.] An exception exists where the objection and request for admonition would have been 'futile or ineffective.'" (*People v. Caro* (2019) 7 Cal.5th 463, 510.)

2. *Hine's Argument Based on Prosecutorial Misconduct During Opening Statement Is Forfeited and Meritless*

During Hine's opening statement, which Hine made while he was representing himself, the prosecutor repeatedly objected that Hine was testifying. The trial court repeatedly instructed the jurors that opening statements are not evidence, only a preview of the evidence the parties anticipate they will present during the trial.

At a sidebar conference, the trial court observed that the prosecutor was making repeated objections. The trial court stated that the "bulk" of the prosecutor's objections were "inappropriate" and that the court had admonished the jurors several times. The prosecutor responded she was not objecting to statements about which Hine could eventually testify, but rather to statements about evidence that would never be admissible. The trial court said that the prosecutor could have a standing objection and that Hine could proceed with his opening statement without interruption. The prosecutor made no further objections during Hine's opening statement.

Because Hine did not object to or request an admonition regarding the prosecutor's conduct during his opening statement, Hine forfeited this prosecutorial misconduct argument. (See, e.g., *People v. Redd* (2010) 48 Cal.4th 691, 734; *People v. Hill* (1998) 17 Cal.4th 800, 820.) Moreover, even if Hine had preserved the issue, and even if the prosecutor's objections during opening statement were improper (and the court found that the "bulk" of them were), Hine has not demonstrated that the prosecutor's objections infected the trial with such unfairness that they violated Hine's due process rights. (See *People v. Caro*, *supra*, 7 Cal.5th at p. 510.)

3. *Any Misconduct by the Prosecutor in Eliciting Inadmissible Evidence Was Harmless*

"'A prosecutor has the duty to guard against statements by his witnesses containing inadmissible evidence. [Citations.] If the prosecutor believes a witness may give an inadmissible answer during his examination, he must warn the witness to refrain from making such a statement.'" (*People v. Sanchez*

(2019) 7 Cal.5th 14, 65.) Prosecutorial misconduct occurs when a prosecutor asks a witness a question that is likely to elicit inadmissible evidence. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1405.) However, "a prosecutor cannot be faulted for a witness's nonresponsive answer that the prosecutor neither solicited nor could have anticipated." (*People v. Tully* (2012) 54 Cal.4th 952, 1035.)

At a pretrial hearing, the trial court excluded evidence of Hine's physical violence against Kim. During Kim's direct examination, however, the prosecutor elicited testimony that Kim obtained a restraining order against Hine after he beat her. The prosecutor began her line of questioning by stating, "I'm trying to phrase the questions properly." The prosecutor presented Kim with a certified document showing Kim obtained a restraining order against Hine. Kim stated, "Excuse me. I'm confused. Are we talking about the restraining order I got him originally or the one from the other day?" Counsel for Hine objected there was no question pending, and the trial court granted counsel for Hine's motion to strike and instructed the jury to disregard that testimony.

The prosecutor then asked Kim to describe one of the first instances she remembered Hine contacting her in violation of the restraining order:

"Q. [The Prosecutor] And did he have permission to be at your mobile home?

"A. [The Witness] No.

"Q. And when his face was plastered against the window, did he say anything?

"A. No.

"Q. Were you afraid?

"A. Yes.

"Q. Why?

"A. Because—

"The Court: I'm going to sustain my own objection. Next question.

"Q. [The Prosecutor]: Was there something about it that was scary?

"A. [The Witness] Yes.

"Q. What about it was scary?

"A. Everything.

"Q. Can you be more specific?

"A. Well, he wasn't supposed to be there. I had already taken a beating from him once before.

"The Court: I'm going to strike that.

"[Counsel for Hine]: Objection, Your Honor. I'd ask to approach.

"The Court: Not at this time. The jury will disregard that.

"[Counsel for Hine]: Move to strike.

"The Court: Next question.

"[Counsel for Hine]: Move to strike.

"The Court: Stricken.

"Q. [The Prosecutor]: So he wasn't supposed to be there. You were afraid for your safety?

"A. [The Witness] Uh-huh.

"Q. Is that 'Yes'?

"A. That's a 'Yes.' Sorry.

"Q. And was there something about the way his face looked in the window?

"A. Just him being there, period."

Counsel for Hine argued that Kim's reference to a prior "beating" was inadmissible and "highly prejudicial" and that it appeared the prosecutor had failed to admonish Kim "to not go into those facts in accordance with the court's ruling." The court stated it had sustained its own objection to the prosecutor's question because the court feared Kim would testify about the prior violence. The court thought that, when the prosecutor again asked Kim why she was afraid, the prosecutor was trying to elicit details about the encounter at the mobile home. The trial court stated it was a "dangerous question" because it "invited" Kim to testify about the reasons she was afraid, which would include the prior domestic violence. The trial court asked the prosecutor if she had admonished Kim not to testify about the prior violence. The prosecutor responded:

"[The Prosecutor]: I tried to admonish her, yes. And it's abundantly clear from the questions I asked prior, I'm not asking why you went to court in 2002, but did you go to court in 2002? I think I've gone above and beyond and out of my way not to do that, and—

"The Court: Stop. Stop. Stop. When I ask something I'm not really asking for litigation. I'm just asking for [a] quick answer. The question was: Did you admonish her not to do that? And your answer was you tried. [¶] Here's my take on it: This isn't great. This is precisely the type of information I wanted to exclude. However, this would require a whole lot of precision in how questions are asked and answered, and I would not necessarily expect a lay person to understand all the nuances. [¶] I immediately told the jury to disregard. There is prejudice, but what's the motion here?"

Counsel for Hine argued the prejudice from Kim's prior response—that there were two restraining orders—exacerbated her testimony about the prior battery. Counsel for Hine moved for mistrial, arguing the two errors resulted in fundamental unfairness under the state and federal due process clauses. The trial court denied the motion, stating, "[A] motion for a mistrial is not well-taken at this time. . . . [Y]es, this is the type of thing that is inflammatory, but in the context of all the other allegations of misconduct, I don't think the jury would necessarily be surprised that there was some sort of violence . . . [¶] So that motion is denied. [¶] Please admonish Kim, she's not supposed to talk about the prior beating, if you haven't done so already."

Hine argues the prosecutor's misconduct resulted in undue prejudice and requires reversal.[2] Hine, however, has not demonstrated the prosecutor's conduct infected the trial with such unfairness that it violated Hine's due process rights. Nor has Hine shown it is reasonably probable that, absent any such misconduct, an outcome more favorable to him might result. (See

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[2] Although Hine did not specifically object on the ground of prosecutorial misconduct and request an admonition, he preserved the issue because objecting would have been futile—the trial court sustained its own objection and denied counsel for Hine's request for a sidebar hearing outside the presence of the jury. The record also indicates the trial court understood the issue presented—the attorneys at the sidebar conference discussed the prosecutor's actions in eliciting inadmissible evidence. (See *People v. Scott* (2015) 61 Cal.4th 363, 402 ["'In a criminal case, the objection will be deemed preserved if, despite inadequate phrasing, the record shows that the court understood the issue presented.'"].)

People v. Bell (2019) 7 Cal.5th 70, 116 ["Reversal is required only if it is reasonably probable defendant would have obtained a more favorable result absent the error."].) The court's admonitions to the jury cured any prejudice to Hine arising from the prosecutor's line of questioning and the witness's (in one instance, spontaneous) response(s). The court granted a motion to strike the statement and admonished the jury to disregard the testimony. (See *People v. O'Malley* (2016) 62 Cal.4th 944, 998-999 [even if the prosecutor elicited inadmissible testimony, there was no prejudice because the trial court sustained the defendant's objection to the testimony and directed the jury to disregard the inadmissible evidence].) Any misconduct by the prosecutor in questioning Kim was harmless.

4. *The Prosecutor Did Not Commit Misconduct in Positioning Herself During the Trial*

While Hine was testifying, counsel for Hine objected that the prosecutor, in cross-examining Hine, was not asking questions from counsel table, but was moving to an area in the courtroom opposite the jury. Counsel for Hine claimed the prosecutor positioned herself in the courtroom in that way as a tactic to put Hine in a bad light in front of the jury because, to answer the prosecutor's questions, Hine either had to turn his back to the jury and face the prosecutor or turn away from the prosecutor and face the jury. Counsel asked the trial court to admonish the prosecutor "to conduct her examination from her counsel table or the podium" and to instruct the jurors "that they are the trier[s] of fact and that witnesses are properly facing them and giving testimony." Counsel also moved for a mistrial.

The trial court denied the motion for mistrial, stating "any prejudice is minimal." The court also suggested that "one way around the issue would be for [Hine] to face [the prosecutor] when she asks the questions and then face the jury when he answers them," which is "something that's commonly done." The trial court also stated that counsel for Hine could argue to the jury, in closing argument, the prosecutor had engaged in gamesmanship when cross-examining Hine.

Counsel for Hine soon moved for a mistrial again, complaining the prosecutor was questioning Hine from the far side of the courtroom. The trial court again denied the motion but observed that, because Hine was testifying on the witness stand, a second bailiff stood in the courtroom, out of the sightline of the jury but close to Hine.

After the prosecutor completed her closing argument, counsel for Hine argued to the court that, several times during her argument, the prosecutor moved closer to Hine, causing the bailiff to move closer to Hine. Counsel argued the prosecutor created an "aura of danger" that Hine posed a threat to the prosecutor. Counsel asked the court to admonish the prosecutor and instruct the jury to ignore the movements of the bailiff and the prosecutor during closing argument. The trial court denied the request, stating it did not see the bailiff move closer to Hine, but did not doubt counsel for Hine's assertion. The trial court stated, "If it was done, it was relatively subtle" (which, of course, was the point of counsel for Hine's objection).

The trial court did not abuse its discretion in denying Hine's motions for a mistrial. (See *People v. Clark* (2011) 52 Cal.4th 856, 990 ["'we use the deferential abuse of discretion standard to review a trial court's ruling denying a mistrial"].) As

the court pointed out, counsel for Hine, during his closing argument, was free to argue the prosecutor's conduct was "gamesmanship." While counsel for Hine's observations of the prosecutor's movements may have been accurate, Hine again has not shown that the prosecutor used "deceptive or reprehensible methods" that infected the trial and denied due process, nor that it is reasonably probable that, had the prosecutor not roamed the courtroom as she did, Hine would have obtained a more favorable outcome.

C. *The Trial Court Did Not Err in Issuing the Protective Orders, but Should Have Terminated One of Them at the End of the Trial*

1. *Relevant Proceedings*

At a pretrial hearing, the trial court ruled Hine could not have any direct contact with Barbara, Kim, or their family members during the case. The trial court also ordered Hine not to "bother, hit, threaten, attack, follow, damage the property of, disturb the peace of, keep under surveillance, or block the movements" of Barbara or Kim. After the jury convicted Hine, the trial court at sentencing issued orders protecting Barbara and Christopher for 10 years under sections 136.2 and 646.9, subdivision (k).

Hine argues the trial court erred in granting a protective order as to Christopher because Christopher is not a "victim" under section 136.2 and section 646.9, subdivision (k). Hine also argues the trial court should have terminated the pretrial protective order concerning Kim, which has an expiration date of September 6, 2021, because section 136.2 authorizes a protective

order only during the pendency of the criminal proceedings. The second argument has merit, but the first does not.

2. *The Trial Court Did Not Err in Including Christopher in the Protective Order*

We review whether a statute authorizes a criminal protective order de novo. (*Babalola v. Superior Court* (2011) 192 Cal.App.4th 948, 956.) With respect to whether the trial court properly issued a criminal protective order, "'"[w]e imply all findings necessary to support the judgment, and our review is limited to whether there is substantial evidence in the record to support these implied findings."'" (*People v. Therman* (2015) 236 Cal.App.4th 1276, 1279.)

a. *Statutes Authorizing Protective Orders*

"Section 136.2, subdivision (a) authorizes a trial court to issue protective orders to protect 'a victim or witness' in a criminal matter. (§ 136.2, subd. (a)(1).) Section 136 defines 'victim' for purposes of a section 136.2 protective order, stating: 'As used in this chapter: [¶] . . . [¶] (3) "Victim" means any natural person with respect to whom there is reason to believe that any crime as defined under the laws of this state . . . is being or has been perpetrated or attempted to be perpetrated. [¶] The courts have construed section 136.2, subdivision (a) to authorize imposition of protective orders only during the pendency of the criminal action. [Citations.] Thus, once the defendant is found guilty and sentenced, the court's authority to issue a protective order under section 136.2, subdivision (a) generally ceases. [Citation.] [¶] However, in 2011, the Legislature responded to this restrictive judicial construction by creating an exception to

the preconviction limitation of a section 136.2 restraining order for domestic violence cases. (Stats. 2011, ch. 155, § 1.) Effective January 1, 2012, the Legislature added section 136.2, subdivision (i) to the statutory scheme so that a 10-year postconviction protective order would be permissible when a defendant was convicted of a domestic violence offense." (*People v. Beckemeyer* (2015) 238 Cal.App.4th 461, 465, italics omitted (*Beckemeyer*).)

Section 136.2, subdivision (i)(1), states: "In all cases in which a criminal defendant has been convicted of a crime involving domestic violence as defined in . . . Section 6211 of the Family Code . . . , the court, at the time of sentencing, shall consider issuing an order restraining the defendant from any contact with a victim of the crime. . . . It is the intent of the Legislature in enacting this subdivision that the duration of any restraining order issued by the court be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family."

Section 6211 of the Family Code defines "domestic violence" as abuse perpetrated against certain listed persons. Section 6203 of the Family Code defines "abuse" as "engag[ing] in any behavior that has been or could be enjoined pursuant to Section 6320." Family Code section 6320, in turn, states, "The court may issue an ex parte order enjoining a party from molesting, attacking, striking, *stalking*, threatening, sexually assaulting, battering, credibly impersonating . . . , falsely personating . . . , harassing, telephoning . . . , destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of

other named family or household members." (Italics added.) Thus, the statute applies to, and authorizes courts to issue restraining orders to protect, stalking victims.

Section 646.9, subdivision (k), like section 136.2, subdivision (i)(1), authorizes the court to issue protective orders to protect stalking victims. Section 646.9, subdivision (a), provides: "Any person who willfully, maliciously, and repeatedly follows or willfully and maliciously harasses another person and who makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family is guilty of the crime of stalking . . . ." Section 646.9, subdivision (k), states, "The sentencing court also shall consider issuing an order restraining the defendant from any contact with the victim, that may be valid for up to 10 years, as determined by the court. It is the intent of the Legislature that the length of any restraining order be based upon the seriousness of the facts before the court, the probability of future violations, and the safety of the victim and his or her immediate family."

b. *Case Law on the Meaning of "Victim"*

Several courts have analyzed the meaning of "victim" in sections 136.2 and 646.9, subdivision (k). (See *People v. Delarosarauda* (2014) 227 Cal.App.4th 205 (*Delarosarauda*); *People v. Clayburg* (2012) 211 Cal.App.4th 86 (*Clayburg*); *People v. Race* (2017) 18 Cal.App.5th 211 (*Race*); *Beckemeyer*, *supra*, 238 Cal.App.4th 461.) Hine urges us to follow *Delarosarauda*, which held the term "victim" did not include an immediate family member, rather than *Clayburg*, which held it did. (Compare *Delarosarauda*, at p. 212 ["if the term 'victim' in the first sentence [of § 646.9, subd. (k),] included a child of the family, the

second sentence would have no need to refer to "'the victim and his or her immediate family'"'] with *Clayburg*, at p. 88 [a member of the immediate family of a stalking victim who suffers emotional harm is a "victim" under § 646.9, subd. (k)].)

In *Clayburg*, *supra*, 211 Cal.App.4th 86 the defendant's daughter witnessed her mother stalk her father. (*Id.* at pp. 89-90.) The daughter testified that on one occasion she heard her mother pounding a golf club on her father's front porch and demanding custody. (*Id*. at p. 89.) On another occasion, the daughter was awakened by the sound of shattering glass when the defendant broke three windows in the home where the daughter resided with her father. The daughter testified that sometimes she stayed elsewhere because these incidents made her "'feel scared and just nervous.'" (*Id*. at p. 90.) The jury convicted the defendant of stalking her former husband. At sentencing, the trial court ordered the defendant under section 646.9, subdivision (k), "not have any contact with [her] daughter for 10 years." (*Clayburg*, at p. 88.)

The defendant argued the restraining order was unauthorized because her daughter was not a victim. (*Clayburg*, *supra*, 211 Cal.App.4th at pp. 89-90.) The court stated, "[I]t is apparent that the Legislature wants the judiciary to protect the child of a named stalking victim. The statute is 'remedial' and consistent with time-honored precedent, must be liberally construed to effectuate the object and purpose of the statute and to suppress the mischief at which it is directed. [Citation.] To strictly construe the statute and read the first sentence to the exclusion of the second would defeat Legislative intent and defeat justice." (*Id*. at p. 91.) The court held that "a member of the immediate family of a stalking victim (§ 646.9, subd. (a)) who

suffers emotional harm . . . is a 'victim' for purposes of a postconviction restraining order." (*Id.* at p. 88.)

In *Delarosarauda*, *supra*, 227 Cal.App.4th 205 the defendant was convicted of inflicting corporal injury on a cohabitant and assault with a deadly weapon. (*Id.* at pp. 207-208.) At sentencing, the trial court issued a criminal protective order under section 136.2, subdivision (i)(1), that prohibited the defendant from contacting the defendant's cohabitant, son, and stepdaughter. (*Id.* at pp. 208-209.) The court concluded that former section 136.2, subdivision (i)(1), did not authorize the protective order as to the defendant's son and stepdaughter because they were not "'victims.'" The court distinguished *Clayburg* by explaining that in *Clayburg* there was evidence the defendant caused the victim's child to suffer emotional harm, whereas in *Delarosarauda* there was no evidence the victim's children "were similarly targeted or harmed." (*Delarosarauda,* at p. 212.) The court in *Delarosarauda* concluded, "[A]bsent evidence from which the trial court could reasonably conclude [the defendant] had harmed or attempted to harm [the children], the court lacked authority to issue the no-contact protective order as to the children under [former] section 136.2, subdivision (i)(1)." (*Ibid.*)

In *Race*, *supra*, 18 Cal.App.5th 211 the court interpreted the term "victim" in section 136.2 broadly to include any person in the household whom the evidence shows the defendant harmed or attempted to harm. (*Id.* at p. 219.) The defendant in *Race* pleaded "no contest to attempted lewd and lascivious acts on a child under the age of 14." (*Id.* at p. 211.) The defendant argued the trial court erred in issuing an order protecting his daughter because he had pleaded no contest only with respect to his niece,

not his daughter. After reviewing *Delarosarauda* and *Beckemeyer*,[3] the court in *Race* held there was sufficient evidence for the trial court to conclude that the defendant's daughter was a "victim" and that the defendant harmed her. The court in *Race* held that, "in considering the issuance of a criminal protective order, a court is not limited to considering the facts underlying the offenses of which the defendant finds himself convicted . . . . Rather, in determining whether to issue a criminal protective order pursuant to section 136.2, a court may consider all competent evidence before it." (*Race*, at p. 220.)

c. *The Trial Court Did Not Err by Including Christopher in the Protective Order Because There Was Evidence Hine Targeted Christopher*

Section 646.9, subdivision (k), and section 136.2 both protect a child of a stalking victim. In both statutes, "victim" includes any person whom "some evidence" shows the defendant harmed or attempted to harm. (*Race*, *supra*, 18 Cal.App.5th at p. 219; accord, *Delarosarauda*, *supra*, 227 Cal.App.4th at p. 212; *Clayburg*, *supra*, 211 Cal.App.4th at p. 88.)

Hine asserts there was no evidence to support the trial court's conclusion Christopher was a victim of stalking. There was sufficient evidence, however, to support an implied finding Hine targeted Christopher. Christopher, while living with Barbara, witnessed Hine stalking Barbara. Christopher observed Hine drive by the house on numerous occasions and, on one

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[3] In *Beckemeyer*, the court held section 136.2 encompassed a person who was assaulted during a domestic violence incident.

occasion, knock on the door and yell at Barbara. Christopher also saw a nude photograph of his mother on Hine's social media account. In another instance, when Hine and Barbara had ended their relationship but still maintained contact, Hine became upset and yelled at Christopher after Christopher left his wallet in a restaurant. Hine also left Barbara a note threatening Christopher, and there was evidence Hine vandalized Christopher's car.

These incidents provided "some competent evidence" from which it was reasonable to conclude Hine targeted Christopher. (*Race*, *supra*, 18 Cal.App.5th at p. 219.) Therefore, because there was substantial evidence in the record to support the implied finding that Christopher was a victim, the trial court properly included Christopher in the protective order.

3. *We Cannot Review the Protective Order as to Kim at This Time*

Hine does not argue the trial court erred in issuing the protective order as to Kim. Indeed, section 136.2 provides that, "during the pendency of a criminal proceeding when the court has a 'good cause belief that harm to, or intimidation or dissuasion of, a victim or witness has occurred or is reasonably likely to occur,' the court is authorized to issue a restraining order.'" (*People v. Selga* (2008) 162 Cal.App.4th 113, 118.) The purpose of such a protective order "'is to protect victims and witnesses in connection with the criminal proceeding in which the restraining order is issued in order to allow participation without fear of reprisal.'" (*People v. Ponce* (2009) 173 Cal.App.4th 378, 383.)

Hines's only argument is that the trial court erred in not terminating the protective order as to Kim at the end of the trial.

(See *People v. Selga*, *supra*, 162 Cal.App.4th at p. 118 ["section 136.2 is limited 'to the pendency of [a] criminal action' because section 136.2 'is aimed at protecting only "victim[s] or witness[es]"'].)[4] However, because Hine did not ask the trial court to terminate the protective order as to Kim, there is no order refusing to terminate the protective order for us to review. Hine, however, may file a motion in the trial court asking the court to terminate the protective order and, if the trial court denies the motion, Hine may seek appellate review of that ruling.

DISPOSITION

The judgment is affirmed.

SEGAL, J.

We concur:

PERLUSS, P. J. FEUER, J.

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[4] The Judicial Council Form CR-160, which the trial court used in this case, states that courts should use Judicial Council Form CR-165, Notice of Termination of Protective Order in Criminal Proceeding (CLETS), to terminate the order.