Filed 4/29/15 D.G. v. J.F. CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

D.G., Plaintiff and Appellant, v. J.F., Defendant and Respondent.	B250676 (Los Angeles County Super. Ct. No. BD476257)

APPEAL from an order of the Superior Court of Los Angeles County. Christine W. Byrd, Judge. Affirmed.

D.G., in pro. per.; Gibson, Dunn & Crutcher, Richard J. Doren and Michael Holecek for Plaintiff and Appellant.

No appearance for Defendant and Respondent.

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D.G. appeals from a July 12, 2013 order denying her request to renew a restraining order issued on November 14, 2012, against her former boyfriend, J.F. We conclude that the trial court did not abuse its discretion in declining to renew the restraining order and affirm.

BACKGROUND

J.F. has not filed briefs in opposition to the appeal. We may thus accept as true the facts stated in D.G.'s opening brief. (*Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1077–1078; Cal. Rules of Court, rule 8.220(a)(2).) D.G. "still bears the 'affirmative burden to show error whether or not the respondent's brief has been filed,' and we 'examine the record and reverse only if prejudicial error is found.' [Citation omitted.]" (*Smith*, at p. 1078.)

D.G.'s application for temporary restraining order

On October 22, 2012, D.G. applied for and received a temporary restraining order against J.F. Contained in the record is a declaration signed by D.G. and dated October 22, 2012, which declaration apparently was attached to the application for the temporary restraining order, and which we now summarize.

D.G. and J.F. dated for seven years and broke up in 2006. D.G. and J.F. were never married to each other. D.G. and J.F. have a child named R.F., who was born in 2005. D.G. has sole physical custody of R.F. and shares legal custody with J.F. J.F. was granted monitored visitation with R.F., but did not exercise his visitation for more than a year after the visitation order was entered in 2007. J.F. served about one year in jail for narcotics sales and was released in 2009.

On October 15, 2012, J.F. called D.G. and asked why she ignored his calls and texts and did not answer the door when he had pounded on it on October 12, 2012. On June 21, 2012, while D.G. and J.F. were in her car discussing R.F., J.F. threatened D.G. and her new boyfriend, J.M., stating he would strangle D.G. and get some "niggers to fuck [J.M.] up." He lunged at her with a gripping motion. D.G. reported the incident to the police on June 26, 2012. On October 2, 2012, D.G. reported to the police that she had

received a threatening call from J.F., who told her he would assault J.M. and sodomize D.G.

On October 15, 2012, J.F. called D.G. and threatened to make false reports about her to the Department of Children and Family Services (DCFS). He told her she would never see R.F. again and that he would "'take' her." That same day, the police and DCFS contacted D.G. about allegations that she was abusing R.F. and J.M. was sexually abusing R.F. After investigating the matter, the police closed their investigation. On October 15, 2012, D.G. received a call from DCFS, informing her that it had received a referral that she was abusing R.F. and J.M. was sexually abusing R.F. D.G. was advised that the matter would be open for 60 days for further investigation.

The hearing on the restraining order

On November 14, 2012, D.G., J.F., and J.M. appeared and testified at the hearing on the restraining order.[1]

D.G. reiterated the information in her declaration and also claimed J.F. was a convicted drug felon, had a gun, and was under investigation by the Montebello Police Department. She testified that J.F. had tried to strangle her on June 21, 2012, and had previously tried to force her to get an abortion. She proffered texts sent by J.F. threatening to contact DCFS in order to put R.F. in foster care. She also referred to a status review report dated November 2007 from DCFS regarding incidents that occurred in 2006. The court did not admit the DCFS records.

J.F. also testified at the hearing. He recounted that because he saw D.G. smoking marijuana around R.F., yelling at R.F., and pulling her by her ponytail, he mentioned foster care to D.G. and that he would refer D.G. to DCFS. He did not make a report to DCFS and did not respond when DCFS attempted to contact him. J.F. had never

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[1] D.G. was self-represented in the trial court hearings at issue here, and also initially on appeal. We received the transcripts from the trial court proceedings only when current appellate counsel substituted in for D.G. and we granted her counsel's motion to augment the record with reporter's transcripts of hearings held on November 14, 2012, June 18, 2013, and July 12, 2013.

attempted to strangle D.G. He had never been arrested for assault or convicted of any such crimes and denied that there was an ongoing case with local law enforcement. He denied threatening D.G. or J.M. on the telephone or in person and denied owning a gun. He admitted that he had a felony drug conviction, but stated that it had been expunged.

He further testified that he was on his seventh year of sobriety and was taking courses at Los Angeles Trade Tech College. D.G. was trying "to paint [him] in the worst light possible" so that he would not get visitation with R.F. D.G. was capable of filing false reports with the police, and he was afraid that D.G. and her selected monitors would make false statements about him.

J.M., D.G.'s boyfriend, testified that he had a law degree but was not an attorney, although he practiced "administrative law." In January 2012, he represented D.G. in a matter regarding D.G.'s public benefits in a hearing before the Department of Public Social Services. After that hearing, he spoke briefly with D.G. and J.F. Subsequently, he began dating D.G.[2] In February 2012, J.F. used D.G.'s phone to call J.M. He told J.M. that D.G. was "a liar, a thief, a whore, a bitch, not to trust her." J.F. also left voicemail messages to that effect on J.M.'s phone. J.M. deleted the messages. J.M had no further contact from J.F.

The trial court reviewed documents submitted by J.F. and observed that J.F. had fulfilled the conditions of his probation and that his felony drug conviction had been reduced to a misdemeanor. The court noted that J.F. was currently attending classes at Los Angeles Trade Tech College and that he had five certificates from the Southern California Regional Occupational Center. The court stated that it was unclear whether J.F. initiated the current DCFS investigation. The court decided to leave in place the 2007 dependency order permitting J.F. monitored visitation with the monitor to be selected by D.G.

The trial court stated, "I've listened to both of you and looked at the information you provided, and I've observed your demeanor, and I've heard the one additional

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[2] We note that a police report indicates that J.M. "met" D.G. in 2011.

witness that was presented. And based [on] all the information presented, I have serious questions regarding the credibility of both of you. It is my firm belief that both of you are telling the truth in part and you're lying in part. The question is how much of what each of you is saying is truthful and how much is not truthful. But there's no question that some of it on both sides is not truthful." The court observed that D.G. was "tremendously interested in child support money," implying she was more interested in child support than in R.F.'s well-being. The court noted that "a restraining order that would restrict visitation entirely is one method of increasing child support."

The trial court also stated, "On the other hand, I'm concerned over the safety of both of you because it's clear that there is a problem between the two of you and that you're not able to control what comes out of your mouth or what you're doing between the two of you. There's nothing, no evidence that was presented today that says that [J.F.] started the current DCFS investigation. Maybe he did; maybe he didn't. But, clearly, the DCFS investigation is a centerpiece of this dispute. [¶] So I'm going to issue a restraining order that will last approximately as long as the DCFS investigation should take and a little bit longer."

The trial court stated it would issue a six-month restraining order—even though the court was "not sure that the restraining order really is necessary for even that six-month period"— to allow the DCFS matter to be resolved and "to let tempers cool down."

The trial court ordered J.F. to stay 100 yards away from D.G. and not to contact or harass D.G. The court ordered that J.F. could have "brief peaceful" contact with D.G. as required for court-ordered visitation of R.F. The court granted the restraining order, which by its terms terminated on May 14, 2013 (restraining order). A copy of the restraining order is not contained in the record on appeal.

Request to renew restraining order

On May 24, 2013, D.G. filed a request to renew the restraining order, the denial of which is the subject of this appeal. In her written request to renew, D.G. described J.F.'s purported history of harassment and threats against D.G., J.F.'s lack of support for R.F.

since her birth, and J.F.'s involuntary hospitalization. D.G. argued that J.F. "threatened [D.G.] and stated he would kidnap [R.F.] and take her to the [B]ay [A]rea," referring to "[t]wo separate police reports [that] are attached hereto." D.G. referenced threatening statements made by J.F. to D.G. and J.M., as described in the "June 26, 2012" and "October 2, 2012" police reports. The request to renew stated J.F. sent numerous texts to D.G., including texts that stated, "'go to hell,'" "'[h]ey you stupid fucking bitch,'" and "[y]our child will be put in foster care. I'm working on that & doing all I can to see that this happens.'"

As to J.F.'s current acts of harassment, D.G. argued J.F. "violated the restraining order issued November 14, 2012, sending a card to [R.F.] AND most recently sending an email to [D.G.]," copies of which were attached to the request to renew. Contained in the record is a copy of a Valentine's Day card to R.F. from J.F., with the note, "Dear [R.F.], [¶] Harts [*sic*] will never be practical until they can be made unbreakable[.] A heart is not judged by how much you love, but by how much you are loved by others. [¶] Happy Valentines Day [¶] Love, [¶] Your Dad." Also contained in the record is a copy of an e-mail from J.F. addressed to multiple recipients, including D.G., dated May 9, 2013, showing attachments of pictures of the performers at a Rolling Stones concert.

D.G. conceded that sending the most recent email and the card were only "technical[]" violations of the protective order. J.F., however, had "expressed no interest as a father."

D.G. also sought to revise the child custody order because, according to D.G., J.F. had abandoned his daughter and had "**NO INTENTION OF PROVIDING FOR HIS DAUGHTER AND CANNOT DO SO.**"

The hearing on the request to renew the restraining order

After a continuance from June 18, 2013, the trial court heard D.G.'s request to renew the restraining order on July 12, 2013.

D.G. called as a witness Montebello Police Department Detective Paul Antista, who identified police reports dated June and October 2012. Detective Antista testified that he believed that there had been enough of a threat to D.G. to refer the matter to the

Los Angeles County District Attorney's Office. Because J.F. was calm and cooperative on the telephone, it was not necessary to interview him in person. J.F. told Detective Antista that the allegations against him were the result of a child custody dispute. Detective Antista stated the district attorney's office had rejected the referral for insufficient evidence, and that D.G. had told him she did not want to prosecute J.F. J.F. had no questions for Detective Antista.

D.G. called Vincent Carberry, an attorney for the Los Angeles County Department of Child Support Services, questioning him about J.F.'s payment of child support. J.F. briefly questioned Carberry and elicited testimony that child support bills had been sent to J.F.'s current address and that payments had been made in person at the Torrance office.

D.G. called J.M., who testified that he had accompanied D.G. to the police department to report the threats that J.F. allegedly made to her. He never personally received threats or texts from J.F. On cross-examination by J.F., J.M. stated that he assisted D.G. in preparing the restraining order documents.

Before D.G. called J.F., the trial court asked her for an offer of proof. The court stated it had considered all of the texts sent prior to November 14, 2012, and wanted D.G. to focus on texts or exchanges that had occurred subsequent to the issuance of the restraining order that would assist the court in making its decision. D.G. offered an e-mail sent to her on May 10, 2013, showing a photograph of J.F. and his friends at a Rolling Stones concert, and a text on June 15, 2013, stating, "'Tomorrow is Father's Day,'" regarding a visit with R.F. The court stated the text was not a violation of the restraining order because it was related to court-ordered visitation. D.G. stated she was afraid that if the restraining order was not renewed, J.F. would continuing texting, phoning, and threatening D.G. She was fearful that he would come to her house unannounced.

Upon D.G.'s questioning, J.F. testified that he had accidentally sent the Rolling Stones e-mail to D.G. He stated he had not scheduled visits because he was on general relief and could not afford to pay a professional monitor. He explained that in 2006 he

had gone to a hospital voluntarily and a Welfare and Institutions Code section 5150 hold had been placed on him. He explained that his father had died of cancer, he had lost his home and life savings, and he had been diagnosed with a severe episode of depression, but was otherwise "'normal.'" He stated he did not feel animosity toward D.G., but just wanted visitation with R.F. He had not attempted to modify visitation because he was "busy taking care of [his] mother in San Francisco," who had dementia. He denied incidents in 2012 when he had purportedly grabbed D.G. by the wrists, pushed D.G. against a wall, and pushed R.F. out of the way. He stated that D.G. had hit him in the head with a shoe, screamed and yelled in public, and "play[ed] the victim." When on several occasions D.G. attempted to refer to the 2006 DCFS records during her examination of J.F., the court reminded D.G. that the DCFS records were not admissible. In response to D.G.'s several questions to J.F. aimed at eliciting his failure to pay child support, the court also reminded D.G. that the hearing was not about revisiting the child custody order.

During the course of the hearing, the trial court noted that it recalled the previous hearing on the restraining order "quite well" and would consider the basis of the original restraining order in determining whether to extend the restraining order. At the conclusion of the hearing, the court stated: "The renewal of a restraining order is governed by the legal standard set forth in the case of Ritchie vs. Konrad, 2004 case, 115 Cal.App.4th 1275, and the recent case of Lister versus Bowen, which was issued April 12th of 2013. And the standard is that a trial court should renew the restraining order if and only if it finds, by a preponderance of the evidence, that the protected party entertains a reasonable apprehension of future abuse. This does not mean the court must find it is more likely than not future abuse will occur if the protective order is not renewed. It only means the evidence must demonstrate that it is more probable than not that there is sufficient risk of future abuse to find the protected party's apprehension is genuine and reasonable."

The trial court noted it had considered the testimony of the witnesses and was "mindful of the hearing with respect to the restraining order that was issued." The court

stated: "[D.G.'s] theory is that [J.F.] has engaged in threatening conduct because of [D.G.'s] efforts to collect child support. And the court, having taken into account all of the evidence presented, all of the witnesses today, having observed the demeanor of all of the witnesses and determined credibility, the court finds that the evidence of a risk of future abuse is extremely weak and that the evidence of the claimed motive behind the conduct that might occur in the future is very weak."

The trial court denied D.G.'s request to renew the restraining order. This appeal followed.

D.G.'s motions to augment and supplement the record

On April 22, 2014, D.G. filed a motion to augment the record on appeal, which we granted on June 16, 2014. The motion to augment attached exhibits A through Z and exhibits AA and BB. In her motion to augment, D.G. claimed that exhibits A through S were attached to her memorandum of points and authorities filed in support of her request to renew the restraining order, which request appears in exhibit Z. According to D.G., the superior court failed to include these exhibits and the supporting memorandum of points and authorities in the record sent on appeal.

D.G. also stated that exhibits T, V, and W were not available at the time she filed the request to renew the restraining order. Exhibit T contains documents apparently produced in response to D.G.'s September 10, 2013 request for access to DCFS records regarding her daughter. Exhibit V is an e-mail from D.G. to a Jackie Marin forwarding a November 22, 2013 e-mail from J.F. to D.G., telling D.G. not to contact him and to "DROP DEAD!" Exhibit W is a one-page "charge evaluation worksheet" dated November 29, 2012, apparently from the district attorney's office in Los Angeles County.[3]

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[3] In the "Comments" section to that document is the following statement: "THIS WAS A SERIOUSLY ANNOYING PHONE CALL NOT A SERIES OF PHONE CALLS. . . . THREATS OF A BATTERY ARE NOT CRIMINAL THREATS . . . . BOTH PARTIES TO THIS CUSTODY BATTLE NEED RESTRAINING ORDERS."

DISCUSSION

The trial court did not abuse its discretion in denying D.G.'s request to renew the restraining order

In her brief filed in propria persona, D.G. argued that (1) the trial court erred in requiring her to provide evidence that J.F. continued to harass D.G. and R.F. in order to renew the restraining order; (2) the evidence that she submitted to the court demonstrated that J.F. violated the restraining order; and (3) the evidence demonstrated a clear pattern of continuing harassment sufficient to cause a reasonable person to have apprehension for his or her safety and the safety of their minor child. After substituting in, D.G.'s current appellate counsel further argued that (1) the court improperly focused on the lack of abuse during the period of time the initial restraining order was in effect; and (2) the court abused its discretion in finding that D.G. lacked "'reasonable apprehension'" of future abuse.

Under Family Code section 6345, subdivision (a), the trial court has the discretion to make a personal conduct order with a duration of up to five years. As D.G. has argued, the order may be renewed upon the motion of a party without a showing of any further abuse since the issuance of the original order. (§ 6345, subd. (a).)

The trial court may not renew a personal conduct order simply based on a party's subjective desire for such an extension. (*Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1282 (*Ritchie*).) Rather, "A trial court should renew the protective order, if, and only if, it finds by a preponderance of the evidence that the protected party entertains a 'reasonable apprehension' of future abuse. So there should be no misunderstanding, this does not mean the court must find it is more likely than not future abuse will occur if the protective order is not renewed. It only means the evidence demonstrates it is more probable than not there is a sufficient risk of future abuse to find the protected party's apprehension is genuine and reasonable." (*Ritchie*, at p. 1290.)

The *Ritchie* court set forth the following factors that the trial court may consider in determining whether the "'reasonable apprehension'" test is satisfied: (1) consideration

of the evidence and findings on which the initial order was based;[4] (2) significant changes in the circumstances surrounding the events justifying the initial protective order;[5] (3) the burdens the protective order imposes on the restrained party (for example, stigmatizing the restrained person, which could affect obtaining employment), especially "where the existing order focuses not on the threat of physical violence, but lesser forms of abuse—unwanted telephone calls or mail, for example"; and (4) the physical security of the protected party, which the court stated generally outweighs the burdens on the restrained party. (*Ritchie*, *supra*, 115 Cal.App.4th at pp. 1290–1292.) Once again, the *Ritchie* court distinguished between protective orders issued because of persistent unwanted phone calls or letters, and protective orders issued based on sexual assaults, battering, and stalking behavior. (*Ibid*.)

A trial court's ruling on a request to renew a restraining order is reviewed for abuse of discretion. (*Lister v. Bowen* (2013) 215 Cal.App.4th 319, 333.) An abuse of discretion occurs when the ruling exceeds the bounds of reason. (*Ibid.*) "'"When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court."' [Citation.]" (*Ibid*.)

We first observe that it is clear that the trial court was mindful of the requirements in renewing a restraining order because the court quoted directly from *Ritchie* at the hearing on the request to renew the restraining order. We now apply the factors set forth in *Ritchie*, beginning with the evidence and findings on which the initial order was based.

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[4] "All of which is to say the mere existence of a protective order, typically issued several years earlier, seldom if ever will provide *conclusive* evidence the requesting party entertains a 'reasonable apprehension' of future abuse of any kind should that order expire. But the existence of the initial order certainly is relevant and the underlying findings and facts supporting that order often will be enough in themselves to provide the necessary proof to satisfy that test." (*Ritchie, supra*, 115 Cal.App.4th at p. 1291.)

[5] "For instance, have the restrained and protected parties moved on with their lives so far that the opportunity and likelihood of future abuse has diminished to the degree they no longer support a renewal of the order? Or have there been no significant changes or even perhaps changes that enhance the opportunity and possibility of future abuse?" (*Ritchie, supra*, 115 Cal.App.4th at p. 1291.)

At the hearing on the initial restraining order, J.F. denied attempting to strangle D.G. and also denied a criminal history of assault. He also denied threatening D.G. or J.M. J.M. corroborated that J.F. had never personally threatened him. J.F. claimed to be sober for seven years, and he testified that his felony drug conviction had been reduced to a misdemeanor and expunged, and that he was attending technical college courses. The evidence substantiated D.G.'s claims that J.F. had texted and e-mailed her about putting R.F. in foster care. J.F. testified that he had good reasons for mentioning foster care to D.G., but denied making a report to DCFS.

We observe that the court found that both witnesses were not fully credible and believed that D.G.'s request for an extension was motivated in part by her desire for more child support payments. (See *Anderson v. State Personnel Bd.* (1980) 103 Cal.App.3d 242, 251 [appellate court does not reassess the credibility of witnesses].) Additionally, the court indicated the ongoing DCFS investigation was a "centerpiece" in the dispute. After reviewing the evidence and listening to the testimony, the trial court imposed a short six-month restraining order, commenting it was "not sure that the restraining order really is necessary for even that six month period." The court imposed the restraining order for only six months, hoping that the DCFS matter, which was a source of conflict between D.G. and J.F., would be resolved by the end of that six-month period. The initial restraining order was not issued based on unequivocal evidence of physically abusive, assaultive, or stalking behavior, but instead, was based on the parties' use of R.F. and DCFS as weapons against each other in a child custody and support battle.

As to whether a change in circumstances had occurred, at the hearing on the request to renew the restraining order, D.G. proffered as new evidence an e-mail sent to her by J.F. which showed him and his friends at a Rolling Stones concert. J.F. testified the e-mail had been sent to her accidentally, and D.G. conceded that this e-mail was only a technical violation of the restraining order.

In weighing the third and fourth factors—the burden placed on the restrained party versus the physical security of protected party—the evidence demonstrated that the burden imposed on J.F. was heavy relative to D.G.'s perception of risk to her physical

security. That is, the terms of the restraining order required J.F. not to contact D.G. except for "brief peaceful" contact regarding visitation of R.F. Yet when J.F. texted D.G. with respect to a visit with R.F., D.G. regarded it as a violation of the restraining order, which it was not. As stated above, the trial court was well within its discretion to conclude that the evidence regarding D.G.'s perception of risk to her physical safety was underwhelming.

D.G. argues that the trial court improperly required her to produce evidence of J.F.'s continuing harassment in order to renew the restraining order. In a similar vein, D.G.'s counsel urges that the court improperly focused on the lack of abuse during the period of time the initial restraining order was in effect. That is not a fair reading of what the court did.

The record reveals that the trial court carefully considered the evidence and findings underlying the initial order in determining whether to renew the restraining order. During the hearing on the request to renew the restraining order, the court attempted to focus D.G. on presenting evidence of continuing harassment—not as a requirement to renew the restraining order—but because the court was already familiar with the evidence produced with respect to the initial restraining order as well as the law governing the renewal of a restraining order. Rather than preventing D.G. from explaining why she was still apprehensive, the court repeatedly invited D.G. to present evidence supporting her apprehension.

We do not agree with D.G.'s further argument that the evidence showed that J.F. violated the restraining order. As the trial court noted, J.F. had the right to make peaceful contact with D.G. regarding monitored visits. As to J.F.'s e-mail to D.G. regarding the Rolling Stones concert, we conclude that the court acted within its discretion in regarding it as an inadvertent and immaterial violation of the restraining order. Even D.G. conceded that this violation was merely "technical[]."

For all of the above reasons, we conclude that the trial court did not abuse its discretion in finding that evidence was thin as to D.G.'s asserted apprehension of future

abuse.[6] Similarly, the court did not abuse its discretion when it considered the evidence underlying the initial restraining order and the new evidence proffered by D.G. and declined to renew the restraining order.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

BENDIX, J.*

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.

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[6] To the extent D.G. relies on the 2006 DCFS records that the trial court refused to admit into evidence and on events that occurred after the July 12, 2013 hearing, we may not consider this evidence or these events. (*In re B.D.* (2008) 159 Cal.App.4th 1218, 1239–1240 [appeal reviews correctness of judgment as of the time of its rendition, upon a record of matters which were before the trial court for its consideration]; *Kendall v. Barker* (1988) 197 Cal.App.3d 619, 625, superseded on other grounds by Code Civ. Proc., § 473, subd. (b) [appellate court is confined in review of proceedings which took place in court below and are brought up for review in properly prepared record on appeal].) Furthermore, it appears that much of the information in the DCFS records was already before the court in the form of testimony and other evidence. D.G. has failed to demonstrate how the court's refusal to admit the DCFS records was an abuse of discretion or prejudicial.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.