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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BRYAN B., Plaintiff and Appellant, v. GREER B., Defendant and Respondent.	B287443 (Los Angeles County Super. Ct. No. SD036141)

APPEAL from an order of the Superior Court of Los Angeles County. Mark A. Juhas, Judge. Affirmed.

Fernandez & Karney and Crystal Boultinghouse for Plaintiff and Appellant.

Law Offices of Honey Kessler Amado, Honey Kessler Amado and James A. Karagianides for Defendant and Respondent.

Bryan B. appeals from an order denying his request for a restraining order against his former spouse, Greer B., in their dissolution action.[1] Bryan contends that: (1) the trial court abused its discretion in denying a restraining order against Greer, and (2) the court erred in finding that Bryan himself engaged in domestic abuse without adequate notice to Bryan that it might do so.

We affirm. The trial court's finding that Greer did not commit domestic violence is supported by substantial evidence. Bryan forfeited his argument that he did not receive sufficient notice of a possible finding against him by failing to object at trial. And the trial court reasonably found that Bryan engaged in domestic abuse by surreptitiously installing video cameras in Greer's bedroom closet and in a family bathroom, and by installing a surveillance device on Greer's car.

BACKGROUND

Bryan and Greer married in 1998 and separated in May 2017. They have four minor children.

Bryan initiated dissolution proceedings on May 18, 2017. On August 10, 2017, he sought and obtained a temporary restraining order against Greer based on alleged incidents of domestic violence. The hearing on his request for a permanent order occurred over four days, from October 10 to13, 2017.

Greer did not seek a restraining order against Bryan. However, during the third day of the hearing on Bryan's petition, Greer's counsel indicated that Greer might seek findings that

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[1] For clarity and simplicity, we refer to the parties using their first names. No disrespect is intended.

Bryan had engaged in domestic abuse as a "context for what happened."

1. The Evidence

A. *Greer's conduct*

In the trial court, Bryan made allegations and testified about a variety of alleged acts by Greer that he argued constituted abuse. On appeal, he focuses on only two categories of alleged conduct: (1) Greer's attempts on several occasions to knock his cell phone out of his hands, in the process allegedly hitting him; and (2) Greer's alleged conduct on one occasion of throwing a calculator at him.

Greer denied attacking Bryan during these incidents. She admitted that she did in fact attempt to knock Bryan's cell phone away on several occasions but did so when Bryan was recording her or taunting her with the phone. She denied that she hit him.

Greer also admitted that she pushed a calculator off Bryan's desk along with other items during an argument but denied that she threw the calculator at him.

B. *Bryan's conduct*

Bryan admitted installing video cameras in Greer's closet and in a common bathroom. He testified that he did so to monitor Greer's drinking.

Bryan also admitted to placing a GPS device on Greer's car to track her whereabouts. He similarly justified this measure by testifying that he wanted to monitor whether Greer was drunk while she was driving with the children.

Greer testified that, after Bryan obtained the temporary restraining order against her without notice on August 10, 2017, Bryan caused a process server to serve her at home in the evening with copies of the order and with the summons in the

dissolution action, which she also did not know that Bryan had filed. After Greer had been served, she called for Bryan. Bryan came out carrying a duffel bag, which he threw on the ground in front of Greer. In the presence of the children, he said to Greer that "by law, you have 15 minutes to take what you can and leave the residence, or I'm calling 911 and having you removed." The children were upset, and the younger ones cried. The children tried to keep Greer from leaving and followed her while she packed her things. Bryan held up his cell phone during the incident and appeared to be recording it.

C. *The trial court's ruling*

In a written ruling after the hearing, the trial court found that Greer "did not commit domestic violence." The court also found that "it does not have independent corroboration of substance or alcohol abuse by [Greer]." Accordingly, the court terminated the temporary restraining order against Greer.

With respect to Bryan's conduct, the court found that Bryan "committed domestic violence by surreptitiously placing cameras and videotaping in a bathroom and in a closet of the family residence, and in attaching a GPS tracking device to [Greer's] car, which constitutes stalking as defined in Civil Code § 1708.7, and by his actions in creating and controlling the situation surrounding service of his ex parte Domestic Violence Temporary Restraining Orders. There was no request by [Greer] for a Restraining Order, so the Court is not issuing a Restraining Order against [Bryan]."

DISCUSSION

1. Standard of Review

A trial court's decision granting or denying a restraining order under Family Code section 6300 is reviewed for abuse of

discretion. (*Marriage of Fregoso & Hernandez* (2016) 5 Cal.App.5th 698, 702).)[2] When reviewing the facts underlying the trial court's ruling, an appellate court applies the substantial evidence standard. (*Ibid.*; *Marriage of G.* (2017) 11 Cal.App.5th 773, 780.) Under that standard, the reviewing court resolves every conflict in the evidence in favor of the trial court's order. (*Fregoso, supra,* at p. 702.) The "pertinent inquiry is whether substantial evidence supports the court's finding—not whether a contrary finding might have been made." (*Ibid.*)

2. The Trial Court Did Not Abuse Its Discretion in Denying Bryan's Request for a Restraining Order

Bryan argues that the trial court abused its discretion in denying the restraining order he requested because Greer used physical violence against him, including force amounting to battery, and her use of force was not excused by provocation. His argument fails because the trial court expressly found that Greer did *not* commit domestic violence and that finding is supported by substantial evidence.

Bryan attempts to surmount the high hurdle posed by the deferential substantial evidence standard of review by arguing that Greer *admitted* to acts amounting to domestic violence. However, the trial court could reasonably have found that the conduct Greer admitted did not amount to domestic violence.

The Domestic Violence Prevention Act (§ 6200 et seq.) (the Act) provides that a court "may" issue a restraining order based upon "reasonable proof of a past act or acts of abuse." (§ 6300,

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[2] Subsequent undesignated statutory references are to the Family Code.

subd. (a).) Section 6211 defines domestic violence as "abuse" perpetrated against specific persons, including a spouse or former spouse. (§ 6211, subd. (a).) Physical forms of abuse include "intentionally or recklessly" causing or attempting to cause bodily injury, or placing a person in "reasonable apprehension of imminent serious bodily injury."[3] (§ 6203, subd. (a)(1) & (3).) Physical abuse can also include "attacking," "striking," or "battering" a partner. (§§ 6203, subd. (a)(4), 6320, subd. (a).)

The elements of civil battery include the intent to "harm or offend" the alleged victim by touching him or her (or causing a touching). (*So v. Shin* (2013) 212 Cal.App.4th 652, 669, citing CACI No. 1300.) Criminal battery requires proof that a person willfully touched another in a harmful or offensive manner. (*People v. Martinez* (1970) 3 Cal.App.3d 886, 889; CALCRIM No. 960.)

As these definitions show, not every form of physical contact is necessarily abuse. The trial court could reasonably have found that Greer did not attack or strike Bryan, or intentionally cause any physical contact amounting to battery.

Bryan claims that Greer "admitted that she kicked, slapped or attempted to slap Bryan's cell phone out of his hand on multiple occasions" and that she "admitted to throwing a calculator at Bryan in a fit of anger." With respect to the cell phone incidents, Greer stated in a declaration she filed prior to the hearing that there were occasions when she "responded to [Bryan's] emotional abuse and his taunting" by "trying to knock his cell phone out of his hand while he was pointing it at me." In

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[3] As discussed below, abuse may take nonphysical forms as well. (See §§ 6203, subd. (a)(4) & (b), 6320.)

testifying about one of those occasions at the hearing, she explained that she "felt [Bryan] was taunting me with his cell phone, and I didn't want him to be taunting me with his cell phone and recording me. So I tried to knock the phone out of his hand and told him he had no permission to record me." On another occasion, she attempted to kick Bryan's cell phone out of his hand, but missed the phone and did not touch Bryan.

From this testimony, the trial court reasonably could have concluded that Greer attempted to knock Bryan's cell phone away because she wanted to keep Bryan from recording her, but that in doing so she did not intend to harm Bryan or even to touch him.

With respect to Greer's alleged admission that she threw a calculator at Bryan, Greer actually testified that she "shoved the calculator off his desk" along with some papers in Bryan's direction. She did so out of frustration and did not know if it hit him. Again, the trial court could have reasonably concluded that Greer did not intend to harm Bryan.

While Bryan claims that Greer's admissions alone show that she committed battery, his primary argument focuses on the trial court's comments during the hearing. Bryan argues that those comments show that the trial court found that Greer *did* commit acts amounting to abuse, but that they were excused because of Bryan's provocation.

Bryan principally relies on the trial court's explanation of its expected ruling during the last day of the hearing. The court explained, "I'm not going to make a domestic violence finding against Mom. And the reason I'm not is because I think all of the evidence demonstrates pretty clearly that . . . you cannot invite an expected response and then complain about that response." The trial court did not explain any legal reasoning underlying

this observation, other than to say, "I don't think there's any statutory—any case law on that particular point."

If this were the only explanation of the court's findings, it might support an argument that the court based its ruling on a theory that Greer actually committed acts of abuse that were excused by Bryan's provocation. But that is not what the court stated in its written findings. In its final order the court stated clearly and directly that Greer "did not commit domestic violence." As discussed above, that finding is supported by substantial evidence. We may not disregard the trial court's final written ruling in favor of inconsistent prior oral comments. (See *Whitlow v. Board of Medical Examiners* (1967) 248 Cal.App.2d 478, 487 ["[f]ortunately for the stability of judgments the findings of the court are those expressed in writing. What the judge said may be useful to explain the findings but it cannot overcome them, and if contradictory, must be disregarded"].)[4]

The plain meaning of the trial court's final ruling is further confirmed by events that preceded it. Following the hearing, Bryan filed objections to Greer's proposed findings and order. Among other things, Bryan objected to Greer's proposed finding

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[4] The battle over the meaning of the trial court's oral comments would not necessarily end in Brian's favor even if we were free to consider it. In addition to the comments that Bryan cites, the trial court also made oral comments expressing doubt about Bryan's evidence of Greer's alleged domestic violence. Moreover, a finding that Bryan provoked Greer could logically coexist with a finding that Greer did not engage in acts of domestic violence. The trial court could have concluded that Greer lashed out in response to Bryan's provocations but did not intend to harm him.

that Greer "did not commit domestic violence." Bryan argued that "the Court never made a specific finding that [Greer] 'did not commit domestic violence,' " and that the finding to that effect in the proposed order should therefore be struck. Bryan argued that, instead of such a finding, the court had "adopted [Greer's] counsel's arguments regarding self-defense and estoppel."

Bryan also filed a declaration from counsel several days later, referencing portions of the hearing transcript "that pertain to Petitioner's Objections and/or Requests for Clarifications to Respondent's Proposed Order After Hearing." The declaration quoted the trial court's explanation of its intended finding quoted above, along with the following conclusion and request: "In other words, the Court acknowledged that Respondent committed acts that would otherwise be considered domestic violence, but declined to make the specific finding in this case because of the 'inviting an expected response' defense. Petitioner requests that this reasoning by the Court be reflected in the Order After Hearing."

Despite these objections and requests, the trial court's final written ruling included only the simple finding that Greer did not commit domestic violence. The trial court's ruling thus impliedly overruled Bryan's objections to this finding. (*Angelier v. State Board of Pharmacy* (1997) 58 Cal.App.4th 592, 596 [objections to a proposed statement of decision "were impliedly overruled when the court signed the proposed statement of decision without modifying it"].) We decline to infer a factual basis for the trial court's ruling that the court itself rejected.

3. The Trial Court Acted Within Its Discretion in Finding that Bryan Engaged in Domestic Violence

Bryan argues that the trial court made its finding that he engaged in domestic abuse without sufficient notice and in the absence of supporting evidence. We reject both contentions.

A. *Bryan has forfeited his notice argument*

Bryan does not dispute that he did not object and did not ask for a continuance after Greer's counsel announced Greer's intention to seek a domestic violence finding against him. Nor did he object when the court indicated that it was considering making such a finding. By failing to object or request a continuance, Bryan forfeited his argument on appeal that he did not receive adequate notice of the fact that the court might make a finding of abuse against him. (*Marlene M. v. Superior Court* (2000) 80 Cal.App.4th 1139, 1149.)

Bryan argues that this court should nevertheless consider the notice issue because it presents a novel question of law. We reject the argument. The concept of a continuance to prepare a defense to new allegations is not novel. Bryan's failure to object or request a continuance precluded the trial court from addressing the issue. We decline to address it for the first time on appeal.

B. *Substantial evidence supports the trial court's finding that Bryan engaged in domestic violence*

The trial court's finding that Bryan engaged in domestic violence is supported by the evidence of Bryan's surveillance alone, whether or not that surveillance amounted to statutory stalking. As the trial court observed, the conduct was an "odious" invasion of privacy. It falls within the broad category of

"disturbing the peace" in section 6320, and the trial court therefore properly concluded that it constituted domestic abuse. (See § 6320, subd. (a).)[5]

As mentioned, Bryan admitted that he installed surveillance cameras in Greer's closet and in a bathroom that Greer and others used (including the couple's children). He admitted that in doing so he understood that he was intruding on Greer's privacy.[6] He also admitted that he placed a tracking device on Greer's car without her knowledge.

A number of courts have found that invasions of privacy causing emotional distress meet the definition of "disturbing the peace" in section 6320, subdivision (a). For example, in *In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483 (*Nadkarni*), the court concluded that the phrase "disturbing the peace" in section 6320 should be interpreted broadly to include "a former husband's alleged conduct in destroying the mental or emotional calm of his former wife by accessing, reading and publicly disclosing her confidential e-mails." (*Id.* at p. 1498.) In *In re Marriage of Evilsizor & Sweeney* (2015) 237 Cal.App.4th 1416, the court upheld a restraining order based upon evidence that a husband had accessed and disclosed his wife's text messages. (*Id.* at pp. 1420–1421, 1426–1427.) And in *Altafulla v. Ervin* (2015) 238 Cal.App.4th 571, the court upheld findings of domestic abuse

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[5] We may affirm the trial court's ruling if it is supported by any correct legal reason, even if not the reason articulated by the trial court. (*Rappleyea v. Campbell* (1994) 8 Cal.4th 975, 980–981.)

[6] As Greer points out, this surreptitious video recording potentially violated Penal Code section 647, subdivision (j)(1).

based in part on evidence that a spouse had sent a surveillance report and photos documenting his partner's affair to friends, relatives and coworkers. (*Id.* at pp. 575, 579–580.) The court concluded that this conduct "did cause, and no doubt was calculated to cause," grave emotional distress. (*Id.* at p. 580.)

Bryan argues that his invasion of Greer's privacy could not amount to abuse because Greer was not aware of it until after the parties had separated.[7] Neither precedent nor policy supports the conclusion that an intrusive and potentially criminal invasion of privacy cannot constitute abuse if the parties live apart when it is discovered. Emotional abuse can occur whether spouses live together or apart. Indeed, in *Nadkarni,* the wife did not learn that her husband had accessed her e-mail account until the husband had filed court papers containing some of her e-mails several years after their marriage had been dissolved. (See *Nadkarni, supra,* 173 Cal.App.4th at pp. 1488–1489.) The fortuitous circumstance that Greer learned of Bryan's surveillance through legal discovery rather than by her own discovery of a camera in the family bathroom is immaterial.

Bryan also argues that Greer never testified about any emotional distress from learning that she (and her children) had been the subject of video surveillance in private locations, and that the trial court therefore could not find that she suffered such

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[7] The record from the hearing does not contain evidence showing when Greer first learned about the surveillance. Bryan claims that Greer learned about this conduct for the first time from Bryan's deposition testimony, "well over a month after she had vacated the family residence." Greer's counsel also represented during the hearing that Greer was not aware of the surveillance before Bryan's deposition.

distress. We disagree. The trial court could infer that Bryan's conduct caused Greer distress from circumstantial evidence concerning the egregious nature of the conduct. (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1110–1111.)

DISPOSITION

The trial court's order is affirmed. Respondent Greer B. is entitled to her costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

ASHMANN-GERST, J.

CHAVEZ, J.