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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 EIGHT

MICHAEL RAUCH, Plaintiff and Respondent, v. DANIEL RAUCH, Defendant and Appellant.	B233568 (Los Angeles County Super. Ct. No. SQ004940)

APPEAL from an order of the Superior Court of Los Angeles County. David S. Cunningham, Judge. Affirmed.

Conrad Barrington and Ryan Okabe for Defendant and Appellant.

Michael Rauch, in pro. per., for Plaintiff and Respondent.

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The trial court issued a three-year restraining order against appellant Daniel Rauch, requiring that he stay away from his brother, respondent Michael Rauch, and respondent's family, and prohibiting other conduct. Appellant challenges the trial court order. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

In March 2011, respondent filed a request for a domestic violence prevention protective order. According to the request, in February 2011, appellant told respondent over the telephone that respondent would " 'get what's coming to [him]' and then called [respondent] a 'faggot.' " Respondent further represented that appellant had made harassing telephone calls to respondent's work and respondent's boss; appellant had been arrested for assault and battery; and appellant was a "diagnosed schizophrenic." Respondent stated he and his wife were "terrified" appellant would hurt them, or their son.

Attached to the petition were e-mails appellant sent to respondent and respondent's wife. Much of the content of the e-mails appeared to relate to a financial dispute between the parties, and assertions that respondent would be violently defeated in a threatened legal proceeding. For example, appellant wrote: "[M]y lawyers will gladly have a field day on your lying ass, and you, will pay DEARLY, I promise. [¶] . . . If you continue and don't cut me loose I'll have no sympathy for you when the court pounds your ass into the ground, it will be a beating long overdue, thanks to your dishonesty and cruelty." However, there were also statements such as the following, in an e-mail to respondent's wife: "Long after you find out the truth, and take the little scumbag for everything he owes you [referring to respondent], years afterwards, on some cold rainy day, I'll be there to settle our debt, yours and mine, and the dishonesty that you've personally victimized me with; promise. [¶] . . . [¶] Rest assured that filthy liars and cheats like you and [respondent] get the suffering they deserve in this world for their dishonesty. [¶] . . . [¶] . . . Like I said, after this is all over we'll have a chance to really settle up . . . ." The trial court issued a temporary restraining order.

Respondent and respondent's wife testified at an April hearing. Appellant was not present and did not offer any evidence. Respondent testified that in 2006, appellant told respondent he had been arrested for assault with a deadly weapon after assaulting the building manager in his apartment building. Respondent bailed appellant out of jail. Respondent also testified that appellant had practiced martial arts for 20 years and had a history of mental illness. Respondent indicated that in March 2011, appellant sent him an e-mail that included the statements: "I haven't reciprocated against your actions yet. When I take action against your illegal and immoral crusade . . . it will be swift, successful and just, I assure you." The e-mail also stated: "I really nicely, literally beat the living shit out of [a] Jung Min-like, savage, fruitcake stalker with a weapon. . . . Keep telling yourself and your wife that you aren't the person we both know you to be. I have proof, buddy. And trying to . . . fuck me over was pretty much the stupidest thing you ever did." Respondent testified he understood the mention of appellant beating someone to refer to appellant's 2006 assault on his apartment building manager.

Respondent further reported that in a February telephone conversation with appellant, appellant said "something to the effect that he would get my ass or he would make me pay or something along those lines." Respondent testified that appellant lived in San Francisco, but he had been to respondent's home and knew where respondent lived. On cross-examination, respondent said appellant told him "I would get what was coming to me, 'faggot.'" Respondent recalled that appellant had screamed at him in an intense and frightening way in person in the recent past, but they had not had a physical altercation since they were children, at least 20 years earlier. Respondent's wife testified that appellant had threatened to cause her physical harm in e-mails, telephone calls, and telephone messages.

Appellant argued the evidence showed only that he made threats of litigation, but no threats of physical violence against respondent or respondent's family. The trial court issued a three-year restraining order. The court explained it considered the totality of the circumstances and that appellant's threats went beyond money.

DISCUSSION

I. The Trial Court Did Not Abuse its Discretion In Issuing a Restraining Order

We review the trial court's issuance of a protective order under the Domestic Violence Protection Act (DVPA) for abuse of discretion. (*S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1264 (*S.M.*).) Under the DVPA (Fam. Code, § 6200, et seq.),[1] the trial court may issue a restraining order "for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved, if . . . an affidavit and any additional information provided to the court pursuant to Section 6306, shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse." (§ 6300.) The DVPA defines abuse as " 'any of the following: [¶] (a) Intentionally or recklessly to cause or attempt to cause bodily injury[;] [¶] (b) Sexual assault[;] [¶] (c) To place a person in reasonable apprehension of imminent serious bodily injury to that person or to another[;] [¶] (d) To engage in any behavior that has been or could be enjoined pursuant to Section 6320.' (§ 6203.) The behaviors outlined in section 6320 include 'molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal Code, 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.' (§ 6320, subd. (a).)" (*S.M., supra,* 184 Cal.App.4th at p. 1264.)

In *In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483 (*Nadkarni*), the court explained that to constitute abuse under the DVPA, conduct " 'need not be actual infliction of physical injury or assault.' [Citation.] To the contrary, section 6320 lists several types of nonviolent conduct that may constitute abuse within the meaning of the DVPA . . . ." (*Nadkarni, supra,* at p. 1496.) This includes " 'disturbing the peace of the

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[1] All further statutory references are to the Family Code. The DVPA defines domestic violence as abuse perpetrated against a number of persons, including any person "related by consanguinity or affinity within the second degree." (§ 6211, subd. (f).)

other party,' " which the court in *Nadkarni* explained "may be properly understood as conduct that destroys the mental or emotional calm of the other party." (*Id*. at p. 1497.) In *Nadkarni*, the wife made a facially sufficient showing of abuse within the meaning of the DVPA by alleging her former husband had destroyed her mental or emotional calm by "accessing, reading and publicly disclosing the content of [her] confidential e-mails." (*Id.* at pp. 1498-1499.)

Thus, the trial court here could properly issue a DVPA restraining order if it found reasonable proof of past acts of abuse, including non-violent "conduct" within the meaning of section 6320. Overt threats of physical violence were not necessary. (See *Nadkarni, supra*, 173 Cal.App.4th at pp. 1498-1499.) There was evidence that appellant repeatedly threatened to harm respondent and respondent's wife. Although some of appellant's threats were couched in terms of aggressive legal action he intended to take, or a figurative "beating" respondent would take at the hands of the legal system, the trial court could reasonably conclude that other statements appellant made in telephone conversations and by e-mail were threats that appellant would physically harm respondent. There was also evidence that appellant made a number of harassing telephone calls to respondent and his wife.[2] Although appellant had not physically attacked respondent or respondent's family, the trial court could reasonably conclude that his conduct included threats or harassment, and that appellant intended to, and did, impermissibly destroy the mental and emotional calm of respondent and respondent's family.

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[2] Under section 6320, abuse under the DVPA may include making annoying telephone calls as described in Penal Code section 653m, which states, in relevant part: "Every person who, with intent to annoy, telephones or makes contact by means of an electronic communication device with another and addresses to or about the other person any obscene language or addresses to the other person any threat to inflict injury to the person or property of the person addressed or any member of his or her family, is guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith." (Pen. Code, § 653m, subd. (a).)

Appellant's reliance on *S.M.* for a contrary result is misplaced. In *S.M.*, there was one verbal altercation between the parties. The party seeking a restraining order, E.P., alleged the other party, S.M., said he would kill her, and acted aggressively and irrationally during a dispute over whether E.P. would leave the state with their child. (*Id.* at pp. 1254, 1258.) The trial court declared it was not finding S.M. made the alleged death threat. (*Id.* at p. 1263.) The court also made other statements indicating it did not find S.M.'s conduct was unreasonable. (*Id.* at pp. 1262-1263, 1265-1266.) Moreover, there was only one incident prompting the petition for a restraining order. (*Id.* at pp. 1258-1260.) The Court of Appeal concluded there was no evidence that S.M. engaged in behavior identified in section 6320, or that he placed E.P. in reasonable fear of serious bodily injury. (*Id.* at p. 1265.) In contrast, here, appellant sent respondent and respondent's wife multiple e-mails containing, at a minimum, obliquely threatening language. There was also testimony that appellant threatened respondent and his wife by telephone. The trial court credited respondent's and respondent's wife's testimony. Thus, unlike the trial court in *S.M.* which did not appear to believe the facts before it supported a section 6300 restraining order, here the trial court could reasonably conclude a restraining order was appropriate based on the evidence presented, which it implicitly found credible.

Appellant contends that under section 6306, the trial court impermissibly considered evidence of a prior arrest that did not result in a conviction. Appellant misinterprets section 6306. Under that provision, prior to a hearing on a petition for a DVPA order, the trial court must ensure a search has been conducted to determine if the subject of the proposed order has any violent or serious felony convictions, misdemeanor convictions for domestic violence, weapons, or other violence, is on parole or probation, or has any prior restraining order or violation of a prior restraining order. (§ 6306, subd. (a).) If any such information is obtained, the court is to consider it. (§ 6306, subd. (b)(1).) However, "[i]nformation obtained as a result of the search that does not involve a conviction described in this subdivision shall not be considered by the court in making a determination regarding the issuance of an order pursuant to this part. That information

shall be destroyed and shall not become part of the public file in this or any other civil proceeding." (§ 6306, subd. (b)(2).)

Information regarding appellant's 2006 arrest was not introduced in the proceedings as the result of a section 6306 search. Instead, it came in through respondent's testimony that appellant told respondent about the arrest, and appellant referenced the incident in an e-mail that was introduced at the hearing. Section 6306 had no bearing on that testimony. Appellant does not assert the trial court's consideration of his prior arrest was improper or prejudicial for any reason other than his argument based on section 6306. (*Century Surety Co. v. Polisso* (2006) 139 Cal.App.4th 922, 963.)

DISPOSITION

The trial court order is affirmed. Respondent shall recover his costs on appeal.

BIGELOW, P. J.

We concur:

RUBIN, J.

FLIER, J.