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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 ONE

ANNE CROWNINSHIELD, Plaintiff and Respondent, v. STEPHEN CUTTER, Defendant and Appellant.	B271881 (Los Angeles County Super. Ct. No. SQ006997)

APPEAL from orders of the Superior Court of Los Angeles County, Matthew St. George, Commissioner. Affirmed.

Stephen Cutter, in pro. per., for Defendant and Appellant.

No appearance for Plaintiff and Respondent

Stephen Cutter (Cutter) appeals a restraining order in favor of his former girlfriend, Anne Crowninshield (Crowninshield), and from the denial of his motion to set aside the restraining order pursuant to section 473 of the Code of Civil Procedure.[1] We affirm both orders.

BACKGROUND

I. The restraining order

A. CROWNINSHIELD'S REQUEST

On July 23, 2015, Crowninshield, without the assistance of counsel, filed judicial council form DV–100, a request for domestic violence restraining order under the Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200 et seq.) (request).

In the request, Crowninshield alleged that Cutter had been contacting her "via phone and email over the course of the last decade," accusing her of "poisoning him and putting computer chips in his brain." Crowninshield alleged further that despite changing her address "often" Cutter "continues to find [her.] His tone has gotten angrier and angrier over the years," making Crowninshield afraid for her life: "I am terrified of him." According to Crowninshield, Cutter had been "stalking" her since 2004. As an example of Cutter's alleged stalking, Crowninshield averred that in April 2009, Cutter "was waiting for her in a lobby of a hotel he found out [she] was staying in and the police had to be called." In

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[1] All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

1999, when Crowninshield separated from Cutter, he allegedly "had his pitbull attack [her] until neighbors came to [her] rescue."

Crowninshield filed her request after she was served with a complaint filed in Arizona state court by Cutter, because "those papers had [Cutter's] address on them"; prior to being served, Crowninshield did not know where Cutter was living.

In support of the request, Crowninshield submitted the following documents: (1) a copy of complaint filed in April 2015 in Arizona state court by Cutter against Crowninshield and John Whyte, alleging that, between March and April 2002, Crowninshield and Whyte exposed Cutter to "nanoparticles and nonoparticle matter" and asserting various tort causes of action, including negligence, "negligent interference with enjoyment of life," and "strict liability: engaging in an ultrahazardous activity;" (2) photos of wounds to a woman's thigh and upper arm; (3) various emails sent by "sc," "Steve C," "steve," and "Mr. Australia" to Crowninshield between 2005 and 2013, all of which begged Crowninshield to help the sender of the emails deal with a "psycho" that was purportedly "tormenting" and "torturing" the sender; and (4) a copy of a 2004 "abuse prevention order" issued by a Massachusetts state court in favor of Crowninshield and against Cutter.

On the same day that Crowninshield filed the request, the trial court granted a temporary restraining order.

B. CUTTER'S RESPONSE

On September 1, 2015, Cutter, utilizing judicial council form DV–120, filed his written response to the request. Cutter argued that Crowninshield has "no proof or reasonable suspicion that creates a basis for a protective order. She has never been threatened or harmed and [he has] never done anything to place her in reasonable fear of imminent serious bodily injury." Cutter stressed that geography and his health made any direct face-to-face contact between himself and Crowninshield in the future unlikely: "I live in the state of New York and am currently suffering from a serious medical condition that makes my ability to travel unlikely, if not impossible." Cutter emphasized that the most current contact of which Crowninshield complains was directly related to ongoing litigation between himself, Crowninshield, and other parties. Cutter offered to refrain "from contacting Ms. Crowninshield for any reason not related to the litigation and to refrain from contacting her in person with the exception of litigation[-]related proceedings such as hearings and depositions."

Cutter, however, did not offer any other evidence beyond his written statement. And he did not object in any way to any of the evidence submitted by Crowninshield in support of the request. For example, he did not deny that the emails proffered by Crowninshield were in fact authored

by him[2] or object to them on some other ground (e.g., lack of foundation, hearsay).

C. THE ORDER

On September 3, 2015, the trial court held a hearing on the request. Crowninshield attended the hearing, but without the assistance of counsel. Cutter neither attended the hearing nor was represented at the hearing by counsel.

Crowninshield testified at the hearing that all of the factual averments in her request were true, including the fact that Cutter had been stalking her since 1999. The trial court, because Cutter had "stalked [Crowninshield] from state to state," issued a permanent restraining order against him (the order). Although the order placed a number of restrictions on Cutter, including not contacting Crowninshield directly or indirectly by telephone, mail, email or other electronic means, it did allow "[p]eaceful written contact through a lawyer or process server . . . for service of legal papers."

II. Cutter's motion to set aside the order

On March 2, 2016, Cutter, pursuant to section 473, subdivision (b) and with the assistance of California counsel, moved to set aside the order on the grounds of mistake and excusable neglect (motion).

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[2] In his subsequent motion to set aside the restraining order on grounds of mistake or excusable neglect, Cutter denied authoring the emails.

In his motion, Cutter explained that after he was served with the request, he retained Kelly Bonanno (Bonanno), a person he believed to be an experienced, licensed attorney, to advise him on how best to respond to the request. Bonanno purportedly advised Cutter to neither appear at the hearing nor hire a California attorney to represent him at the hearing; instead, Bonanno allegedly recommended filing only a written response, which she helped Cutter to prepare. Approximately one month after the trial court issued the order, Cutter discovered that Bonanno was not licensed to practice law—her Pennsylvania license had been "administratively suspended." [3]

In addition to a declaration by his recently retained California counsel, Cutter supported the motion with his own declaration and a number of letters from his doctors which indicated, that despite his relatively young age (38 years old at the time he filed his motion), he suffered from impaired memory and cognitive function, and the early onset of dementia and Alzheimer's disease.

On April 5, 2016, the trial court heard the motion. During the hearing, the trial court expressed a number of evidentiary concerns. First, the trial court questioned the lack of any evidence beyond Cutter's self-serving declaration supporting his claim that he had mistakenly retained and

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[3] Cutter did not offer any evidence regarding the meaning of an administrative suspension under Pennsylvania's rules of practice. As a consequence, it is unclear what the basis of Bonanno's suspension was.

relied upon an unlicensed, non-California attorney to help him respond to the request; in particular, the court was discomforted by the absence of a declaration by Bonanno confirming Cutter's story. Second, the trial court was uneasy relying on any statement by Cutter given his various mental impairments: "the complicating factor here is based on all your paperwork, Mr. Cutter is not in his right mind. Mr. Cutter allegedly suffers from early onset Alzheimer's and doesn't remember things from day-to-day." Although Cutter's counsel conceded that his client "has trouble on a day-to-day basis," he argued that the emails, while "bizarre," were not "necessarily harassing." Moreover, there were only five emails sent over a nine-year period and the most recent allegedly harassing conduct was merely the service of legal papers.

After hearing oral argument from Cutter's counsel, the trial court denied the motion, but modified the order so that it would only be in effect for five years or until April 5, 2021.

DISCUSSION

Although Crowninshield did not file a respondent's brief in this appeal, her failure to do so does not mandate a reversal. (*Griffin v. Haunted Hotel* (2015) 242 Cal.App.4th 490, 505; *Kruger v. Department of Motor Vehicles* (1993) 13 Cal.App.4th 541, 546.) It is well established that an appellant "still bears 'the affirmative burden to show error whether or not the respondent's brief has been filed.' " (*Smith v. Smith* (2012) 208 Cal.App.4th 1074, 1078; *In re Marriage of Rifkin and Carty* (2015) 234 Cal.App.4th 1339,

1342, fn. 1.) Accordingly, we will decide the appeal on the record and the opening brief, and will reverse "only if prejudicial error is found." (*Petrosyan v. Prince Corp*. (2013) 223 Cal.App.4th 587, 593, fn. 2; Cal. Rules of Court, rule 8.220(a)(2).)

I. The issuance of the order

Cutter, in reliance on the Penal Code's definition of stalking, argues that the trial court erred in issuing the order because Crowninshield "failed to allege any acts that would place [her] in a fear of violence." As discussed in more detail below, Cutter's argument is without merit because the order is not based on provisions in the Penal Code, but on provisions in the Family Code.

A. STANDARD OF REVIEW

"In general, as with any order granting, or denying, injunctive relief, we review the trial court's order for abuse of discretion." (*Rodriguez v. Menjivar* (2015) 243 Cal.App.4th 816, 820.)

In applying this deferential standard, we review the record to determine whether the trial court's ruling is supported by substantial evidence. (*Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1143.) "In reviewing the evidence, the reviewing court must apply the 'substantial evidence standard of review,' meaning ' "whether, on the entire record, there is any substantial evidence, contradicted or uncontradicted," supporting the trial court's finding. [Citation.] "We must accept as true all evidence . . . tending to establish the correctness of the trial court's findings . . . ,

resolving every conflict in favor of the judgment." ' " (*Ibid*.) " 'The testimony of a witness, even the party himself, may be sufficient' " to constitute substantial evidence. (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 614; *Consolidated Irrigation Dist. v. City of Selma* (2012) 204 Cal.App.4th 187, 201; Evid. Code, § 411.) Moreover, a "trier of fact may accept part of the testimony of a witness and reject another part even though the latter contradicts the part accepted." (*Stevens v. Parke, Davis & Co*. (1973) 9 Cal.3d 51, 67.)

An abuse of discretion occurs when the ruling exceeds the bounds of reason. (*Lister v. Bowen* (2013) 215 Cal.App.4th 319, 333.) However, "[j]udicial discretion to grant or deny an application for a protective order is not unfettered." (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 337.) " 'All exercises of discretion must be guided by applicable legal principles, however, which are derived from the statute under which discretion is conferred. [Citations.] If the court's decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, the court has not properly exercised its discretion under the law. [Citation.] Therefore, a discretionary order based on an application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion and is subject to reversal. [Citation.]' [Citation.] The question of whether a trial court applied the correct legal standard to an issue in exercising its discretion is a question of law [citation] requiring de novo review." (*Eneaji v. Ubboe* (2014) 229 Cal.App.4th 1457, 1463.)

B. APPLICABLE LAW

Under the DVPA, abuse is "not limited to the actual infliction of physical injury or assault." (Fam. Code, § 6203, subd. (b).) Instead, abuse is defined as either: an intentional or reckless act that causes or attempts to cause bodily injury; an act of sexual assault; an act that places a person in reasonable apprehension of imminent serious bodily injury to himself or herself or to another; and an act that involves any behavior that has been or may be enjoined under section 6320. (Fam. Code, § 6203, subd. (a).) The behavior that may be enjoined under section 6320 includes "molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, . . . harassing, . . . [making] annoying telephone calls . . . , contacting, either directly or indirectly, by mail or otherwise . . . [or] disturbing the peace of the other party." (Fam. Code, § 6320.) In other words, under the DVPA "[a]nnoying and harassing an individual is protected in the same way as physical abuse." (*Perez v. Torres–Hernandez* (2016) 1 Cal.App.5th 389, 398.) So too is disturbing the peace of the protected party. "[T]he plain meaning of the phrase 'disturbing the peace of the other party' in section 6320 may be properly understood as conduct that destroys the mental or emotional calm of the other party." (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1497.)

A trial court is vested with discretion to issue a protective order under the DVPA simply on the basis of an affidavit or testimony showing past abuse. Specifically, with

or without notice, (Fam. Code, §§ 6300, 6340, subd. (a)), a trial court may issue an order "to restrain any person . . . if an affidavit or testimony . . . shows, to the satisfaction of the court, *reasonable proof* of a *past act or acts of abuse*. The court may issue an order under this part based solely on the affidavit or testimony of the person requesting the restraining order." (Fam. Code, § 6300, italics added.) Put a little differently, the person seeking protection need only provide reasonable evidence of a past act and does not need to show a probability of future abuse. (*Rodriguez v. Menjivar*, *supra*, 243 Cal.App.4th at p. 823.)

The foregoing provisions of the DVPA "confer a discretion designed to be exercised liberally, at least more liberally than a trial court's discretion to restrain civil harassment generally. For example, the 'abuse' that may be enjoined under sections 6203 and 6320 is *much broader* than that which is defined as civil harassment. [Citation.] Moreover, an order after hearing may enjoin civil harassment only on proof by clear and convincing evidence. [Citation.] This stringent standard of proof does *not* apply to an order after hearing restraining abuse under the DVPA." (*Nakamura v. Parker*, *supra*, 156 Cal.App.4th at p. 334, italics added.)

C. NO ABUSE OF DISCRETION

Here, Crowninshield presented reasonable proof of past acts of abuse—both physical abuse and acts that disturbed her mental or emotional calm—by Cutter. In her written request, she presented evidence of dog bites, physical

stalking (waiting for her in the lobby of hotel) and nonphysical stalking (communicating with her through the mail and through email despite changes of address). According to Crowninshield, Cutter's acts terrified her. She also presented evidence that she had previously and successfully sought a court's protection from Cutter (the Massachusetts abuse prevention order). At the hearing, Crowninshield affirmed under oath the truth of her written allegations. In response, Cutter did not address, let alone specially deny, any of the past acts of alleged abuse. He simply offered not to contact Crowninshield in the future outside of the pending civil litigation in Arizona. Cutter's offer, however, was irrelevant to the court's analysis, because the focus under the DVPA is on *past* acts of abuse.

On appeal, Cutter argues that the trial court erred because the past acts of abuse are too remote in time to justify a protective order—that is, the most recent harassing email occurred in June 2013, more than two years before the request.

We are not persuaded. First, and most importantly, the DVPA does not contain a statute of limitations on past acts of abuse—that is, there is no statutory limit on which acts in the past are too remote in time to be considered as a basis for a restraining order. (See *Rodriguez v. Menjivar*, *supra*, 243 Cal.App.4th at pp. 820, 822, fn. 9 [trial court erred by denying order because past acts of abuse were purportedly too remote].) In fact, the notion of remoteness does not even enter into consideration when the protected

party seeks renewal of a protective order. The DVPA does not require the protected party to show new acts of abuse—i.e., acts occurring since the original order was issued—when seeking a renewal of the protective order. Section 6345, subdivision (a) of the Family Code expressly provides that the restraining order "may be renewed, upon the request of a party, either for five years or permanently, *without a showing of any further abuse since the issuance of the original order*." (Italics added; see *Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275, 1284; *Eneaji v. Ubboe*, *supra*, 229 Cal.App.4th at p. 1464.)

Second, even if we were inclined to read into the DVPA a temporal limit on past acts, the last harassing email was sent only a little more than two years before Crowninshield filed her request. This time lapse is well within operative periods considered by other courts dealing with issues covered by the Family Code. (See, e.g., *In re Marriage of Carney* (1979) 24 Cal.3d 725, 730, fn. 3 [matters or misconduct occurring five years before custody hearing is "too remote"].)

Cutter also argues that the request was improper because it was purportedly filed to interfere with his right to prosecute his case in Arizona state court. This argument lacks merit because, regardless of Crowninshield's motivations for filing the request, the order expressly allows the service of process—that is, the order does not interfere with Cutter's rights to advance his Arizona lawsuit.

Cutter also argues that it was error for the trial court to have the order remain in effect for five years. This argument is entirely without merit. The Family Code expressly provides that a trial court may make an initial protective order with a duration of "not more than five years." (Fam. Code, § 6345, subd. (a).)

In sum, the trial court did not abuse its discretion in issuing the order, because the order was supported by substantial evidence.[4]

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[4] In his opening brief, Cutter raises a number of evidentiary issues. For example, Cutter contends the evidence Crowninshield submitted in support of the request was hearsay. However, no such hearsay objection was ever made to the trial court. It has long been recognized in California that the failure to object to the admission of evidence during proceedings before the trial court constitutes a waiver and prevents a defendant from challenging the admissibility of such evidence on appeal. (See, e.g., *People v. Millum* (1954) 42 Cal.2d 524, 528.) Accordingly, we decline to address those arguments.

Similarly, we decline to address Cutter's argument that the trial court was biased against him, as no objection was made at the hearing to the trial court's allegedly improper remarks. " 'Generally, where bias and prejudice against a trial judge is claimed, the issue *must be raised when the facts first become known, and in any event, before the matter is submitted for decision*. . . . "A party should not be allowed to gamble on a favorable decision and then raise such an objection in the event he is disappointed in the result." ' " (*People v. Tappan* (1968) 266 Cal.App.2d 812,

II. The denial of the motion

A. STANDARD OF REVIEW

Section 473, subdivision (b) provides, in pertinent part, that "[t]he court may, upon any terms as may be just, relieve a party or his or her legal representative from a judgment, dismissal, order, or other proceeding taken against him or her through his or her mistake, inadvertence, surprise, or excusable neglect." " 'A party who seeks relief under section 473 on the basis of mistake or inadvertence . . . must demonstrate that such mistake, inadvertence, or general neglect was excusable.' " (*Zamora v. Clayborn Contracting Group, Inc*. (2002) 28 Cal.4th 249, 258 (*Zamora*).) We must ask " 'whether "a reasonably prudent person under the same or similar circumstances" might have made the same error.' " (*Ibid*., italics omitted; *Huh v. Wang* (2007) 158 Cal.App.4th 1406, 1419.) Section 473 is a "remedial statute strongly favored by the courts and 'liberally applied to carry out the policy of permitting a trial on the merits.' " (*Ramsey Trucking Co. Mitchell* (1961) 188 Cal.App.2d Supp. 862, 865; *Huh v. Wang*, *supra*, at pp. 1419–1420.)

The standard of review for such a motion is abuse of discretion. (*People ex rel. Lockyer v. Brar* (2005) 134 Cal.App.4th 659, 663 (*Brar*).) " 'A ruling on a motion for discretionary relief under section 473 shall not be disturbed on appeal absent a clear showing of abuse.' " (*Zamora*,

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817, italics added; *People v. Scott* (1997) 15 Cal.4th 1188, 1207.)

supra, 28 Cal.4th at 257.) "Moreover, all presumptions will be made in favor of the correctness of the order, and the burden of showing abuse is on the appellant." (*Brar*, at p. 663.)

B. NO ABUSE OF DISCRETION

Here, Cutter has failed to meet his burden. Instead of presenting argument showing how the trial court abused its discretion with regard to the motion, Cutter argues the merits of the order. Even if Cutter had properly focused on the merits of the motion, it would have been unavailing.

In his motion, Cutter failed to establish that his mistake, inadvertence, or neglect with respect to his retention of Bonanno was excusable. Cutter admits that he knew before consulting with Bonanno on the request that she was not an attorney licensed to practice in California. He also knew that Bonanno did not hold herself out as a lawyer experienced in domestic violence and/or family law matters. According to Cutter, Bonanno "advertised herself as an attorney with experience in personal injury cases, social security disability law, business law and appeals." (Boldface and underline omitted.) In fact, Cutter initially consulted with Bonanno in connection with his personal injury case in Arizona state court.

In short, Cutter knowingly put his trust in a lawyer who was not licensed to practice in California and who seemingly had no experience or expertise in domestic violence restraining orders. The only arguable surprise was that when Cutter consulted with Bonanno on his response to

the request, he did not know that her license to practice in Pennsylvania was under " 'administrative suspension.' " However, Cutter presented no evidence explaining why he did not discover the suspension when he first decided to consult with Bonanno on his Arizona court case or when he later decided to consult with her on the request. In other words, Cutter presented evidence that he made a mistake in consulting with Bonanno, but failed to show that his mistake or neglect was in anyway excusable. In addition, Cutter failed to produce any evidence showing how Bonanno's unlicensed status adversely affected his strategy in responding to the request.

In short, the trial court did not abuse its discretion in denying the motion because Cutter failed to show that he acted as a reasonably prudent person by consulting with and relying upon Bonanno in regard to the request.

DISPOSITION

The domestic violence restraining order and the order denying Code of Civil Procedure section 473 relief are affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

CHANEY, Acting P. J. LUI, J.