File 4/18/12 Ortega v. Galles CA2/3

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ANTHONY ORTEGA, Plaintiff and Respondent, v. JOEY GALLES, Defendant and Appellant.	B228417 (Los Angeles County Super. Ct. No. YS021455)
ANTHONY ORTEGA, Plaintiff and Respondent, v. KELLY GALLES, Defendant and Appellant.	B228419 (Los Angeles County Super. Ct. No. YS021454)
ANTHONY ORTEGA, Plaintiff and Respondent, v. TONY GALLES, Defendant and Appellant.	B228420 (Los Angeles County Super. Ct. No. YS021453)

APPEAL from orders of the Superior Court of Los Angeles County, Douglas G. Carnahan, Commissioner. Affirmed.

Lionel Albanese for Defendants and Appellants.

Brown White & Newhouse, Alfredo X. Jarrin, Katherine C. McBroom and Charles P. Fairchild for Plaintiff and Respondent.

INTRODUCTION

Defendants Tony Galles, Joey Galles, and Kelly Galles appeal restraining orders protecting plaintiff Anthony Ortega and his family from defendants. We affirm.

FACTS

1. *The Parties*

Kelly is the mother of Tony and Joey, who were 16 and 14 years old, respectively, when the events which gave rise to this action occurred.[1] Plaintiff Anthony was 14 years old at all relevant times.

Anthony met Tony and Joey while playing on a baseball team together in the Spring of 2010. Kelly was the "team mother." Anthony, Tony and Joey attend the same high school.

2. *Defendants' Harassment of Plaintiff*

In June of 2010, defendants began expressing open hostility toward Anthony. According to Anthony, Joey started making "harassing comments" toward him. The record does not indicate why the relationship between the parties deteriorated.

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[1] We refer to individuals in this case by their first name for the sake of clarity and not out of disrespect to the individuals. Tony and Joey are also known as Tony Parente and Joseph Parente.

On June 16, 2010, Kelly told Anthony that Joey did not go to the last baseball game "because he was going to beat you up." She also stated that even though Joey had recently injured his hand, he "can still beat you up." When Anthony responded Joey could not beat him up, Kelly stated, "you talk a lot of shit for a person who can't fucking play baseball." Kelly also made several additional comments about how Anthony could not "fucking play baseball" and that her son Joey "doesn't fucking suck like you." When Anthony walked away from Kelly, she yelled, "Yeah, walk away punk." All of these statements were made by Kelly in a "harassing" and "threatening" manner.

On the same day of this incident, Anthony's mother and older brother took him to a police station to file a report. A police officer took Anthony's statement.

On June 25 or June 26, 2010, at about 11:30 p.m. or midnight, Anthony's mother Maria Ortega saw a yellow Nissan Xterra stop in front of her home. Maria knew that Kelly drove a yellow Xterra because she saw her in such a vehicle at baseball games. Kelly and her two sons do not live near the Ortega residence.

Maria saw two young men—teenaged boys—get out of the Xterra and walk on the sidewalk toward her vehicle, a Chevrolet Tahoe. One of the boys she identified as Joey. Maria believed the other boy was Tony, but she could not see him very well.[2] Joey bent over near the front right tire of Maria's vehicle and then started running. Maria came out of her house and yelled at Joey, "I saw you. I saw you." She then checked her car and found a puncture in the front right tire, with air coming out of it. Later that day, Maria filed a police report about the incident.

On July 19, 2010, Tony stated to Anthony, "Snitches get stitches."

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[2] At trial, the court and Maria had the following discussion about Maria's identification of Tony: "Q. . . . My question is, what is the relation, first, of Tony Parente to the incident on June 25th? [¶] Did you witness him there, for instance? Anything like that? [¶] A. With the incident on that day, because I saw him. [¶] . . . [¶] Q. You saw two young men? [¶] A. Yes. [¶] Q. And you've identified one of them as Joey? [¶] A. Yes. [¶] Q. Who was the other? [¶] A. No, I didn't identify him very well because he is the one who came out."

On July 24, 2010, Tony stated to his friends in front of Anthony's teammates that he was going to "kick [Anthony's] ass."

In July 2010, Anthony attended summer baseball training at his high school along with Joey and Tony. According to Anthony, both Joey and Tony continuously teased him. On one occasion, Tony threatened to "kick [Anthony's] ass."

3. *Requests for TRO's and Injunctions*

On July 30, 2010, Anthony commenced separate lawsuits against Kelly, Tony and Joey. In each action plaintiff sought a temporary restraining order (TRO) and injunction requiring the defendant to stay away from Anthony and his family. On the same date the lawsuits were filed, the trial court issued TRO's pending a trial on the matters.

4. *Trial*

The three actions were tried together on September 21, 2010. In the beginning of the trial the court acknowledged the numerous declarations filed by both sides and took a recess in order to read them.

The three main in-person witnesses were Anthony, Maria and Kelly, who testified in that order. When Anthony testified, the court asked him if all of the facts stated in his declaration were true. Anthony said that they were. At one point during Anthony's testimony, the court turned to defendants and stated: "You guys over here need to be aware of the fact that when you're eyeballing your opponent and giving him kind of the 'evil eye,' we're going to be aware of that." Anthony acknowledged on the stand that he did not witness the tire slashing incident himself.

After Anthony's testimony, the trial court indicated to the parties that it preferred to finish the trial that day and that if the parties could not do so, the court could not commit to continuing the trial the next day. The court further stated it was "focused" on the tire slashing incident and that the live testimony should mainly concern that incident, which the court characterized as the "nub" of the dispute and the "big issue, the real issue[.]"

Maria testified almost exclusively about the tire slashing incident. She essentially described the incident as we have *ante*.

Kelly, too, mainly testified about the tire slashing incident. She denied having anything to do with it. Kelly admitted, however, that she, Tony and Joey drove near Anthony's home at about 10:00 or 10:15 p.m. on the day of the tire slashing incident. Kelly stated: "We were going to T.P. [toilet paper] a friend's house that lives in the area, and the boys thought it would be funny to T.P. Anthony Ortega's house . . . ." But Kelly and her sons did not "T.P." the Ortega residence that evening.

Kelly also admitted that she had on about five previous occasions driven her sons to "T.P." houses of "friends." She denied ever engaging in this activity against an "enemy" or someone who was not a friend.[3]

During cross-examination, Kelly admitted to being convicted two times for theft.

5. *Restraining Orders*

At the end of the trial the court issued restraining orders against Kelly, Tony and Joey. The restraining orders prohibited defendants from harassing or contacting Anthony, and required defendants to stay at least 100 yards away from plaintiff and his family, as well as their home and vehicles. Defendants, however, were not prohibited from being present at the high school Anthony, Joey and Tony attend.

The trial court did not enter a statement of decision, and there is nothing in the record indicating the parties requested one. The three minute orders regarding the restraining orders simply stated: "The court finds clear and convincing evidence to support the restraining order."

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[3] This testimony was contradicted by Kelly Lozzi's declaration filed on plaintiff's behalf. Lozzi, a 45-year-old mother of two children, stated she was previously a friend of Kelly Galles and Lozzi's son was a friend of Tony Galles. She further stated: "Kelly would tell me how she and her boys would t.p. houses, turn over garbage cans on people's lawns and key cars late at night." Additionally, Lozzi stated: "On one occasion, my son slept over Kelly's house. The next day, my son told me that he had accompanied Kelly and her sons as they vandalized several properties late at night." According to Lozzi, she distanced herself and her son from Kelly's family after that incident. In response, Kelly threatened to kill Lozzi's son and his family. Lozzi filed a police report regarding Kelly's threat.

ISSUE

The issue on appeal is whether there was substantial evidence to support the restraining orders against defendants.

DISCUSSION

1. *Statutory Basis for the Injunctions*

The three injunctions were issued pursuant to former Code of Civil Procedure section 527.6 (Former Section 527.6).[4] Former Section 527.6, subdivision (a) provided: "A person who has suffered harassment as defined in subdivision (b) may seek a temporary restraining order and an injunction prohibiting harassment as provided in this section." Subdivision (b) of Former Section 527.6, in turn, provided: "For the purposes of this section, 'harassment' is [1] unlawful violence, [2] a credible threat of violence, or [3] a knowing and willful course of conduct directed at a specific person that seriously alarms, annoys, or harasses the person, and that serves no legitimate purpose. The course of conduct must be such as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the plaintiff.

"As used in this subdivision:

"[¶] . . . [¶]

"(2) 'Credible threat of violence' is a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.

"(3) 'Course of conduct' is a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose . . . ."

2. *Implied Findings of the Trial Court*

"The role of the court in a section 527.6 hearing does not differ from its role in other trial settings where the court is the trier of fact. It is the function of the trial court to

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[4] Former Section 527.6 was effective when the trial court issued the orders defendants appeal. The statute was amended effective January 1, 2012. (Assem. Bill No. 454 (2011-2012 Reg. Sess.) § 1.)

draw inferences from the evidence and to base its findings thereon. [Citations.] Inferences may be drawn not only from evidence but from the demeanor of witnesses and their manner of testifying." (*Ensworth v. Mullvain* (1990) 224 Cal.App.3d 1105, 1110 (*Ensworth*).)

Former Section 527.6 did not require a statement of the court's findings of fact. (*Ensworth*, *supra*, 224 Cal.App.3d at p. 1112.) Where, as here, the trial court grants an injunction without issuing a statement of decision, we assume the trial court impliedly found the defendant engaged in conduct constituting "harassment" within the meaning of Former Section 527.6. (*Ensworth*, at p. 1112.)

3. *Standard of Review*

" 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.)

We review the trial court's express and implied findings under the substantial evidence test. (*Huntingdon Life Sciences, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2005) 129 Cal.App.4th 1228, 1265; *Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 958.) " 'When a trial court's factual determination is attacked on the ground that there is no substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether, *on the entire record*, there is substantial evidence, contradicted or uncontradicted, which will support the determination, and when two or more inferences can reasonably be deduced from the facts, a reviewing court is without power to substitute its deductions for those of the trial court. *If such substantial evidence be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.*' " (*Jameson v. Five Feet Restaurant, Inc.* (2003) 107 Cal.App.4th 138, 143; accord *Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.)

Moreover, we must affirm an order that is correct on any legal basis, "even if that basis was not invoked by the trial court. [Citation.] There can be no prejudicial error from erroneous logic or reasoning if the decision itself is correct." (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 269 (*Shaw*).)

4. *There Was Substantial Evidence That Defendants Engaged in Harassment*

When viewed in a light most favorable to the judgment, the evidence at trial showed that Kelly and her two sons, Joey and Tony, engaged in a campaign of intimidation and threats against Anthony and his family. Joey and Tony continuously teased and taunted Anthony, telling him they were going to "kick [his] ass" and that "snitches get stitches." These statements implied Joey and Tony were going to physically harm Anthony. The two boys then went to Anthony's home and slashed a tire on a vehicle belonging to his mother.

Kelly, too, made a series of intimidating statements implying that her son Joey was going "beat up" Anthony. Additionally, Kelly drove her two sons to Anthony's home so that they could vandalize his mother's vehicle.

Anthony stated in his declaration: "I am afraid for my safety as well as the safety of my family members. Additionally, I am concerned that Ms. Galles and her sons will continue to damage my family's property." In light of defendants' conduct, Anthony's fear was reasonable.

Defendants' behavior constitutes a knowing and willful course of conduct by each defendant directed at Anthony that seriously alarmed, annoyed, or harassed Anthony, and served no legitimate purpose.[5] It was plainly harassment within the meaning of Former Section 527.6.

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5 Because we conclude there was substantial evidence defendants engaged in a course of conduct that constituted harassment, we need not determine whether defendants made a credible threat of violence. We note, however, the restraining orders stated that no fee was required for service of the orders because the orders were based on "stalking" and "a credible threat of violence." (See former Code Civ. Proc., § 527.6, subd. (q)(1) [no fee for service shall be charged where a restraining order is based on, inter alia, "stalking" or a "credible threat of violence"].)

a. *We Cannot Reverse the Orders Based on the Trial Court's Oral Statements During the Course of the Trial*

Defendants argue that the trial court based its restraining orders solely on the tire slashing incident and disregarded defendants' other conduct. That one incident, defendants contend, cannot be a "course of conduct" within the meaning of Former Section 527.6. We reject this argument.

As stated *ante*, we must affirm the orders if they are correct on any legal basis, regardless if the trial court's reasoning was erroneous. (*Shaw*, *supra*, 170 Cal.App.4th at p. 269.) Thus, even assuming the trial court erroneously determined the tire slashing incident alone was a course of conduct, we must affirm the orders because there was substantial evidence that defendants engaged in a course of conduct harassing plaintiff.

Moreover, we cannot determine from the record whether the trial court only considered the tire slashing incident in arriving at its decision. Defendants' contention that the trial court did so is based on a number of oral comments the court made during the course of the trial, before it rendered a decision.[6] We cannot, however, consider such statements on appeal. (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 203 ["We review the result, not the trial court's reasoning, and do not consider comments by the trial judge"]; *Whyte v. Schlage Lock Co.* (2002) 101 Cal.App.4th 1443, 1451 (*Whyte*) ["Because we review the correctness of the order, and not the court's reasons, we will not consider the court's oral comments or use them to undermine the order ultimately entered"]; *Selfridge v. Carnation Co.* (1962) 200 Cal.App.2d 245, 249 ["oral opinions or

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6 The trial court interrupted defendants' cross-examination of Anthony and stated the following: ". . . The allegation[s] of harassment . . . basically, they fall into, I guess I would say, in sort of a generalized way, three categories. [¶] There's a generalized allegations of a history of threats without more, really. [¶] It just says: 'Tony and Joey have repeatedly threatened me and so has their mother.' [¶] Then there's incidents described at a baseball event in June where – instead, by Mr. Ortega here, that some insults were exchanged. [¶] Neither one of those two prongs of pleadings have I paid much attention to, actually, because even if true, they wouldn't necessary constitute harassment. [¶] As you've seen, what I focused on is the incident of either June 25 or 26, depending on what day it turns out to be."

statements of the court may not be considered to reverse or impeach the final decision of the court which is conclusively merged in its findings and judgment"]; *Birch v. Mahaney* (1955) 137 Cal.App.2d 584, 588 ["remarks made by a trial judge during a trial or argument, or even an opinion filed by him, cannot be used to impeach a formal decision, order or judgment later made or entered"].)

Oral comments made by the court during the course of the trial do not necessarily indicate the grounds upon which the court came to its decision. A trial court is free to change its view at any time up until its final order or judgment. Further, comments made during the course of the trial are made for a different purpose than explaining the basis for the court's final decision. In this case, for example, the court's comments were made in the context of trying to move the trial along so that it could get through a busy calendar. The trial court was not attempting to explain the basis for a ruling it had not yet issued.

Where, as here, the trial court is not required to prepare a statement of decision or explain its ruling on a request for an injunction, "it is especially important to refrain from using the court's oral comments as a basis for reversal. In that situation, reviewing the trial court's oral comments would in effect require the trial court either to prepare a statement of decision where none is required or to say nothing during the argument to avoid creating grounds for impeaching the final order. We decline to place the trial courts in such an untenable position." (*Whyte, supra*, 101 Cal.App.4th at p. 1451.)

b. *There Was Substantial Evidence Tony Participated in the Tire Slashing Incident*

Defendant Tony argues there was no substantial evidence showing he was involved in the tire slashing incident. We disagree. Maria stated that there was another young man with Joey and the person driving the yellow Xterra when the incident occurred. She thought the young man was Tony, but could not identify him very well.

There was also circumstantial evidence that the young man Maria saw was indeed Tony. Tony had a history of participating in vandalizing ventures at night with Joey and Kelly. Kelly admitted that Tony was with her and Joey in her Xterra near Anthony's home just a few hours before the incident. She further admitted that the three of them considered vandalizing Anthony's home. Additionally, Anthony testified that Tony repeatedly made threatening and bullying statements to him. Based on this evidence, a reasonable trier of fact could have made the inference that Tony participated with Joey and Kelly in the tire slashing incident.

DISPOSITION

The restraining orders dated September 21, 2010, are affirmed. Respondent Anthony Ortega is awarded costs on appeal in Case Nos. B228417, B228419 and B228420.

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KITCHING, J.

We concur:

CROSKEY, Acting P. J.

ALDRICH, J.