No. [redacted]

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION ONE

Court of Appeal
First Appellate District
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BUT NOT FILED
Mar 06 2014
Diana Herbert, Clerk
by Fred Abad, Deputy Clerk

[redacted]

Respondent and Appellant,

v.

[redacted]

Petitioner and Respondent.

On Appeal From the Superior Court for the County of [redacted]
The Honorable [redacted]
Issuance of Domestic Violence Restraining Order
Case No. [redacted]

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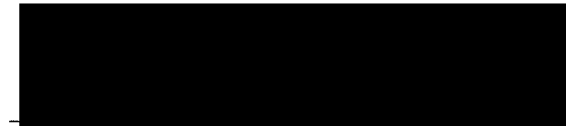
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208)

There are no interested entities or persons to list in this certificate

(Cal. Rules of Court, rule 8.208(e)(3).)

Dated: March 6, 2014



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INTRODUCTION

The superior court granted a domestic violence restraining order against appellant ████████ after receiving indisputable written proof (essentially unchallenged on appeal) that he had incessantly telephoned, e-mailed and texted respondent ████ over a period of several months, even after she had twice notified him in writing that she wished to have no further contact from him. This unwanted stalking persisted even after Ms. ███ changed her phone number and e-mail address in an effort to escape it. Much of the communication was threatening in nature. Mr. ███ told Ms. ███ that he had photos of her and had assembled a "packet of evidence" against her that he intended to turn over to the police if she did not respond to his entreaties.

This evidence was more than sufficient to sustain the superior court's limited restraining order. Under the Domestic Violence Prevention Act, such harassing phone calls and contacts are grounds by themselves for a restraining order. No proof of any physical injury or actual physical assault is necessary. Mr. ███ does not seriously argue otherwise.

Instead, he argues that the restraining order should be overturned because the trial court excluded some evidence that he says would have undermined Ms. ███'s credibility. This argument is groundless for at least two independent reasons.

First, even if the evidence had been erroneously excluded, no prejudice occurred because of the overwhelming documentary evidence establishing beyond question that Mr. ██████ had been harassing Ms. ████ through his incessant telephone, e-mail and other contacts. None of that evidence depended on Ms. ████'s credibility.

Second, the evidence was in any event not erroneously excluded. Indeed, much of it was not excluded at all because the superior court's *in limine* rulings left it open to Mr. ██████ to offer the evidence during the trial. To the extent the Court granted the *in limine* motions or otherwise excluded any evidence, those rulings were correct. The excluded evidence did not reasonably bear on Ms. ████'s credibility. Mr. ██████ was instead trying only to engage in unfounded and gratuitous character attacks that are all too common in domestic violence cases such as this. The superior court properly prevented him from doing so.

STATEMENT OF THE CASE

A. Procedural Overview

On December 24, 2012, Ms. ████ filed for a domestic violence restraining order against Mr. ██████. (See Appellant's Appendix at 6-35 (hereafter "AA").) As detailed below, Ms. ████'s request included a lengthy declaration and extensive documentary evidence of harassing phone calls, text messages and e-mails. (AA 11-35.) Mr. ██████ responded with his own declaration on February 25, 2013, with emails, text

messages, and Ms. ████'s medical records attached. (AA 36-97.) Ms. ████ filed motions *in limine* on March 25, 2013, to which Mr. █████ filed objections on April 3, 2013. (AA 101-108, 129.)

The court held an evidentiary hearing on April 4, 2013. (AA 129.) At the conclusion of the hearing, the court entered a three-year restraining order that, among other things, prohibited Mr. █████ from contacting Ms. ████ "by any means, including, but not limited to, by telephone, mail, e-mail or other electronic means." (AA 115-120.) Neither party requested a statement of decision before the matter was submitted. (Code Civ. Proc., § 632; *In re Marriage of Gray* (2002) 103 Cal.App.4th 974, 975, 980 [stating court has no obligation to issue statement of decision if party fails to make timely request].) Mr. █████ filed his notice of appeal on June 4, 2013. (AA 121-122.)

B. The Evidence Showing Mr. █████' Harassment of Ms. █████

Ms. ████'s request for a restraining order described Mr. █████ prolonged pattern of unwanted contact, and his transparent efforts to manipulate and control her through threats, promises, and abuse. (AA 11-16.)

Within days of the final break-up of their relationship in July 2011, Mr. █████ informed Ms. ████ that he had incriminating photos of her on his computer. (AA 11 (¶ 6).) When Ms. ████ told Mr. █████ that she had

not committed the alleged behavior, he tried to convince her that she had a psychological condition that affected her memory. (AA 12 (¶ 7); Reporter's Transcript of Proceedings, Apr. 4, 2013 (hereafter "RT") 36:12-18.) At that time and repeatedly since then, Mr. claimed that he had a "packet of evidence" against Ms. that he could give to the police, but that he refused to show her. (AA 12 (¶ 8).)

Things came to a head in August 2012. Mr. sent Ms. several long, rambling emails, one on August 22, two on August 24, and another on August 25. (AA 17-21, 60.) Among other things, he claimed that he needed to spend "just a couple of minutes making your computer and phone more secure." (AA 18.) He assured her that she need not worry he was inserting any spyware into her computer because he had "a perfect paper trail that the FBI was able to cross-match and confirm" that proved that he had not previously hacked into her computer. (AA 17.) When she did not respond, he threatened her by writing that he had "incontrovertible evidence . . . of the serious crimes you have committed that are now in the hands of my new attorneys." (AA 21.) He said he did not know how much longer he would be alive and urged her to contact him to "come up with a mutually amicable solution to that issue." (*Ibid.*) He also told her that she need not worry about her computer being hacked again by someone he referred to as "RS"—but he warned that hacking might occur again if she did "anything to provoke him again." (*Ibid.*)

Prompted by these e-mails, Ms. ████ hand-delivered a letter to Mr. █████ building on August 27, 2012, instructing him to stop contacting her and telling him to dispose of her things however he wished. (AA 14 (¶ 16), 109; RT 24:8-28.)

Mr. █████ was undeterred. In the middle of the night on September 4, 2012, he sent her an e-mail again requesting that he be allowed access to her computer, purportedly so that he could repair a hack that he said was causing her computer to send him texts and e-mails. (AA 22.) That month, Ms. ████ obtained a new phone number and created a new e-mail address. (AA 15 (¶ 29), 16 (¶ 30).) However, the unwanted communications from Mr. █████ continued. (*Ibid.*)

On October 6, 2012, an attorney sent Mr. █████ a cease and desist letter via mail and e-mail on Ms. ████'s behalf. (AA 14 (¶ 19), 110-111.) Mr. █████ responded with still more phone calls, e-mails and texts. (RT 29:2-7; AA 23-25, 27-35.) Ms. ████ did not respond to a single contact. (AA 14 (¶ 17); RT 29:14-15.) On October 21, 2012, Ms. ████ received a number of calls from an unknown number, all within a couple of hours. After Ms. ████ finally answered, the caller said, "It doesn't have to be like this." (AA 14-15 (¶ 22).)

On November 15, 2012, Mr. █████ began texting and calling Ms. ████ more regularly, threatening to use the "packet" and insisting that they talk. (AA 15 (¶ 23).) Mr. █████ sent Ms. ████ text messages

between November 18 and 22—which Ms. introduced at trial—telling her to contact him or he would turn in the "packet." (AA 15 (¶ 24), 33-35; RT 29:24-34:17.) Mr. e-mailed Ms. on November 25, 2012, accused her of attempting to poison him, and claimed to have her private online search history to support his accusation. (AA 15 (¶ 25), 23.) He demanded that she tell him what poison she used and promised that he would "squash this evidence if you point me in the right direction." (AA 23.)

On November 28, Ms. received another long e-mail from Mr. with two recordings attached. The e-mail told a wild story of Mr. writing a book about his relationship with a person called RS, whom he claimed was engaged in "cybergeddon," including an effort to get nuclear missile launch codes that North Korea could use to mount an attack on the United States. (AA 24.) Mr. again accused Ms. of trying to poison him and claimed to have "decided to ditch most of the original packet and keep it focused on a 'V2' version." (*Ibid.*) He concluded the e-mail with, "I suggest contacting me very soon." (*Ibid.*)

On December 2, Mr. left Ms. four voicemail messages (some as long as 5 minutes) over the course of just 30 minutes, and then another one the next day. (AA 15 (¶¶ 27-28).)

In an e-mail dated December 12, 2012, Mr. again accused Ms. of various crimes ("your assaults and attempted homicides") and

again threatened consequences if Ms. ███ refused to contact him. (AA 25.) Apparently worried about accusations Ms. ███ might make against him, he asserted that his "main goal" was to get an agreement "to have no further contact, not disparage, breach confidentiality, or either of us bringing legal or criminal action." (*Ibid.*) He wrote:

> If I don't hear from you or if you inform me that you want this to continue getting bigger and worse, then you will force my hand yet again (e.g. you are welcome to think I am 'harassing' you and do whatever you feel appropriate, but that involves proving that these communications have no legitimate purpose, so that will guarantee that I have to defend my self and show the contrary, thereby creating the very things I keep trying to help you avoid)… Honestly, if we could keep just one email or text number available between us for emergencies then I don't need to try to leave messages in multiple places; unless you tell me that even if I am giving you a warning about something serious or trying to help (or at least minimize damage), you would rather be charged with more crimes, never be license-eligible, etc. than respond with even a one-line email moving forwards.

(*Ibid.*)

In a December 17 e-mail, sent to e-mail addresses used by Ms. ███ but that she had never given to Mr. ███, Mr. ███ continued his attempts at manipulation. (AA 27-28.) He claimed he was still receiving information from her computer and that he could help her stop it if she would respond to him. (*Ibid.*) Repeating his previous e-mail, he said he would stop contacting her if she agreed that they would "not defame each other or break confidences, and not do anything legal or otherwise that might harm the other." (*Ibid.*) He also reiterated his threat to file

accusations against her with the police, explaining that "I'm not even bothering with the original 'packet' anymore, other than the crimes you committed against others, since the more recent incidents are more than enough." (AA 27.) He wrote that his "email is not 'harassment,' a 'threat,' or 'blackmail' as you always seem to think; it is generous and compassionate towards you and others." (AA 28.)

Mr. [redacted] did not dispute—either in his written papers or at the hearing—that he had repeatedly called, e-mailed and texted Ms. [redacted] even after she twice requested in writing that he not do so. In his declaration opposing the application for a restraining order, he largely admitted that he had sent the e-mails and texts that Ms. [redacted] attached to her declaration, although he claimed that she had altered the text of one or two of them. (AA 50 (¶ 17), 52-54 (¶¶ 23-32).) He denied that he had telephoned her as often as she said that he did (and asserted that she did not have records to prove those calls), but he did not deny having frequently called her after she twice requested in writing that he stop. (AA 51 (¶¶ 20-22).)

Nor did Mr. [redacted] attempt to deny this conduct at trial. Mr. [redacted] denied that he had attempted to blackmail Ms. [redacted], that he had ever threatened her with a knife, or that he forced her to have sex with him. (RT 51:10-52:12.) But he did not deny his repeated phone calls, e-mails and texts to her after August 2012. His attorney elected not to question him on that subject.

Rather than disputing his long trail of harassing communications, Mr. ████ approach was to attack Ms. ████ as supposedly unstable and untrustworthy. He offered a series of e-mails and a letter in which she supposedly apologized to him for abusive behavior against him. (E.g., AA 59, 71, 74-75, 81-86, 97.) Even if these e-mails all accurately portrayed what had happened, they would be irrelevant for the reasons described below. But the language of these so-called "apologies" makes clear that they were at the very least coached by him, if not outright coerced. (E.g., AA 82, 85-86.) Indeed, one e-mail exchange shows that Mr. ████ wrote a response for Ms. ████ to send to her father after her father responded to an "apology" she sent him. (AA 74; see also AA 88 [Mr. ████ telling her that "I just edited your e-mail, as you requested," and further stating "I am worried that you will somehow make it seem like I am coercing you like you spun all the other times I was actually helping you."].)

The trial court had ample evidence of Mr. ████ ongoing harassment of Ms. ████ when it issued the restraining order.

C. The Trial Court's Evidentiary Rulings

As noted, Ms. ████ filed a motion *in limine* before trial to exclude certain evidence Mr. ████ had submitted with his declaration or that she anticipated him attempting to offer at the hearing. (AA 101-108.) Ms. ████ asserted additional evidentiary objections during the hearing.

Mr. ████ challenges the court's rulings with respect to four categories of evidence:

Medications: The court sustained an objection to Mr. ████ question asking Ms. ████ to name all of the medications she was taking. (RT 46:13-26.) His counsel argued that the medications may be relevant "if any of them are psychosomatic drugs or relating to memory loss or having the side effects of behavioral related incidences." (RT 46:9-22.) But counsel never asked any question inquiring specifically about those types of medications and, in response to the superior court's request for an offer of proof, offered no reason to believe she was taking any such medications. (RT 46:23-25.)

Medical History and Mental Health Conditions: The court did not categorically exclude all evidence of or relating to Ms. ████'s medical history or mental health conditions. (See AA 103-105; RT 10:6-28.) The court only excluded, as speculation, the statement from Mr. ████ declaration that, "Being a trained professional, I speculated (apparently correctly) that she had developed a brain lesion that was exacerbating her already existing sociopathy to the point of being quite dangerous." (RT 10:6-11, AA 104.) Mr. ████ counsel agreed with the court that it "seems like it is going to be hard to overcome any evidentiary hurdle on that one." (RT 10:6-11.)

The superior court judge refused to exclude at the *in limine* stage the remaining pieces of evidence regarding Ms. ███'s medical history or mental health, choosing instead to consider these when offered during the hearing. (RT 10:12-28.) But Mr. ███ never returned to these issues during the hearing, never tried to introduce any of the challenged evidence, and never asked questions about any of the underlying alleged conditions.

Previous Relationships: Ms. ███'s motion *in limine* requested the exclusion of evidence "concerning Petitioner's previous relationships not involving the Respondent" and "any evidence about Petitioner's conduct in prior relationships." (AA 105.) The court excluded the evidence for lack of relevance, rejecting Mr. ███ offer of proof, that "she has assaulted other people in the past. All of her previous boyfriends." (RT 11:1-12:15.)

Sexual Conduct: Ms. ███ moved *in limine* to exclude evidence of her alleged past sexual conduct or interests. (AA 105-106.) Mr. ███ sought to introduce this evidence as supposedly going to Ms. ███'s "veracity," "character," and supposed "desire to harass" Mr. ███ (RT 12:20-26.) The superior court granted Ms. ███'s motion. (RT 13:13.)

ARGUMENT

I. A RESTRAINING ORDER MAY BE GRANTED BASED ON A FINDING OF ABUSE, INCLUDING TELEPHONE AND OTHER CONTACT.

Domestic violence restraining order requests in California are governed by the Domestic Violence Prevention Act (DVPA). (Fam. Code, § 6200 *et seq.*)

The DVPA authorizes restraining orders "for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved, if an affidavit . . . shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse." (Fam. Code, § 6300.) "'[T]he requisite abuse need not be actual physical injury or assault'" to be restrained. (*Burquet v. Brumbaugh* (Feb. 11, 2014) ___ Cal.App.4th ___, 2014 Cal. App. LEXIS 134, *10 [quoting *Conness v. Satram* (2004) 122 Cal.App.4th 197, 202].)

To the contrary, "abuse" under the DVPA also includes engaging in behavior that has been or could be enjoined under Family Code section 6320. (Fam. Code, § 6203.) That section is very broadly phrased. Among the behaviors that can be enjoined are "stalking," "harassing," "telephoning, including, but not limited to, making annoying telephone calls as described in section 653m of the Penal Code," "contacting, either directly or indirectly, by mail or otherwise," and "disturbing the peace of the other party." (Fam. Code, § 6320(a).)

The "protective purpose" of the DVPA is "broad both in its stated intent and its breadth of persons protected." (*Caldwell v. Coppola* (1990) 219 Cal.App.3d 859, 863.) The statute was enacted in response to "increased public concern" regarding domestic violence and was intended to "expand remedies to domestic violence victims." (*Ibid.*) Accordingly, the DVPA should be "broadly construed in order to accomplish the purpose of the DVPA." (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1498.)

The court of appeal reviews the issuance of a domestic violence restraining order for abuse of discretion, because "'granting, denial, dissolving or refusing to dissolve a permanent or preliminary injunction rests in the sound discretion of the trial court upon a consideration of all the particular circumstances of each individual case.'" (*Id.* at p. 1495 [quoting *Salazar v. Eastin* (1995) 9 Cal.4th 836, 849-850].) "This standard applies to a grant or denial of a protective order under the DVPA." (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420.)

A trial court has not abused its discretion unless, considering all of the circumstances, the court's decision "exceeds the bounds of reason" and "clearly appear[s] to effect injustice." (*Denham v. Superior Court* (1970) 2 Cal.3d 557, 566.) "[W]hen a lower court has made no specific findings of fact, it is presumed that the court made such implied findings as will support the judgment." (*Hall v. Municipal Court* (1974) 10 Cal.3d 641,

643; *In re Marriage of LaMusga* (2004) 32 Cal.4th 1072, 1093.) The reviewing court "'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.'" (*Burquet v. Brumbaugh*, *supra*, 2014 Cal. App. LEXIS 134, *6 [quoting *Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822-823].) The complaining party bears the burden of establishing an abuse of discretion. (*Denham*, *supra*, 2 Cal.3d at p. 566.)

II. THE EXCLUSION OF THE EVIDENCE WAS NOT PREJUDICIAL BECAUSE THERE WAS SUBSTANTIAL UNDISPUTED EVIDENCE SUPPORTING THE ISSUANCE OF THE RESTRAINING ORDER

Mr. [redacted] attacks the restraining order on the ground the trial court's evidentiary rulings impaired his ability to attack Ms. [redacted]'s credibility. As Mr. [redacted] recognizes, to prevail on this argument, he must establish prejudice by showing that it is reasonably probable that the result would have been different had the evidence not been excluded.[1] A different result is reasonably probable if there is a "reasonable chance," and not just an "abstract possibility," that the result would have been different. (*Cassim v. Allstate Insurance Co.* (2004) 33 Cal.4th 780, 800 [quoting *College Hospital Inc. v. Superior Court* (1994) 8 Cal.4th 704, 715].)

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[1] *Soule v. General Motors Corp.* (1994) 8 Cal.4th 548, 573 [judgment cannot be reversed unless error "caused actual prejudice in light of the whole record"]; *People v. Watson* (1956) 46 Cal.2d 818, 836 [court must be "of the opinion that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."].

Mr. ████ has not satisfied this standard. Even if the trial court had erred in excluding evidence pertaining to Ms. ████'s medication information, medical history and mental health conditions, prior relationships, and prior sexual conduct, the unchallenged record overwhelmingly established the propriety of the restraining order, leaving no chance—let alone a reasonable probability—that the result would have been different.

A. Mr. ████' Credibility Argument Fails in Light of the Objective Evidence of Abusive Conduct.

To try to establish prejudice, Mr. ████ asserts that "Ms. ████'s proof was based entirely on her credibility." (Appellant's Opening Brief (hereafter "AOB") 23.) That is simply not true. As discussed above, Mr. ████' repeated e-mailing, texting and calling after Ms. ████ had twice requested no contact was established by an extensive and essentially unchallenged written record below. Ms. ████ introduced photocopies of the e-mails and texts themselves to establish that they were sent. (AA 17-35.) Mr. ████ did not deny sending the e-mails and texts. Mr. ████ likewise admitted to having repeatedly called Ms. ████ and having left numerous, lengthy voicemail messages for her long after she had explicitly demanded that he stop doing so. (AA 50 (¶ 17), 52-54 (¶¶ 23-32).)

The content of the communications was indisputable and largely admitted. The unchallenged written record established that Mr. ████ communications were uninvited and unwelcome. (AA 14 (¶¶ 16-17, 19),

109-111.) And the communications were on their face threatening and harassing, under any definitions of those terms. (See AA 17-28.) The sheer number and length of the communications by themselves were enough to make them harassing, even if their content had been entirely benign. But it was not benign. Mr. repeatedly accused Ms. of serious criminal conduct, and threatened to jeopardize her professional license and report her to the police if she did not contact him, cooperate with him and do what he wanted. (AA 17-28.) These abusive accusations and threats are typical of how batterers treat their victims. (See Domestic Abuse Intervention Project, www.theduluthmodel.org/training/wheels.html [Power and Control Wheel identifying "Making and/or carrying out threats to do something to hurt her" as one of the means by which batterers maintain control].)

Because the conduct and its harassing nature was largely conceded, and was established beyond dispute by objective written evidence, the trial court was not required to make any credibility determinations to find that Mr. had engaged in behavior properly restrained under the DVPA. Even if the trial court had admitted all of the excluded evidence, and found that no part of Ms. 's declaration or oral testimony at trial was credible, the written record of Mr. prolonged, unwanted communications to Ms. was more than enough to sustain the restraining order. (See *Burquet v. Brumbaugh*, *supra*, 2014 Cal. App. LEXIS 134, *7-8, 12-

14 [sustaining restraining order based on unwanted contacts that disturbed the peace of the victim]; *Marriage of Nadkarni*, *supra*, 173 Cal.App.4th at pp. 1496, 1497, 1500 [reversing order that denied a restraining order against unwanted contacts].) There is no reason to believe that the superior court, which reviewed all of the evidence and was fully aware of the evidence Mr. ████ sought to admit, would have reached any different result had it admitted the evidence. Indeed, given the undisputed evidence, it is hard to conceive how the superior court could have permissibly refused to restrain Mr. ████ from continuing his unremitting campaign of unwanted communications.

Rather than address any of the foregoing, Mr. ████ focuses on Ms. ████'s testimony that Mr. ████ pushed her down, grabbed and pulled her hair, sexually assaulted her, and interrogated her at knifepoint. (RT 22:4-23:28, AA 12-13.) He asserts that Ms. ████ offered no "independent" evidence of this physical abuse, with the result that her claims "fall or stand with Ms. ████'s credibility." (AOB 3-4.) As discussed above, however, the DVPA does not require any proof of physical injury or assault to justify a restraining order. The superior court thus did not need to decide whether to accept Ms. ████'s testimony

regarding the physical abuse she endured.[2] It was enough to find that the harassing communications had occurred. And, because Mr. ███ did not request a statement of decision, the superior court is presumed to have made such findings. (*Hall v. Municipal Court, supra,* 10 Cal.3d at p. 643; *Marriage of LaMusga, supra,* 32 Cal.4th at p. 1093.)

B. The Evidence Refutes Mr. ███ Claim of Good Faith, Which Is Irrelevant in Light of Ms. ███'s Two Cease and Desist Letters.

Mr. ███ argues that his harassing communications do not qualify as "annoying telephone calls" under California Family Code section 6320, part of the DVPA, because the definition, set forth in California Penal Code section 653m, provides an exception for "telephone calls or electronic contacts made in good faith." (AOB 32-37.) This argument is groundless.

First, section 6320 is not limited to telephone calls that fall within the definition of "annoying" under Penal Code section 653m. To the contrary, section 6320 expressly provides that a court may enjoin "telephoning, ***including, but not limited to,*** making annoying telephone calls as described in Section 653m of the Penal Code [emphasis added]." (Fam. Code, § 6320(a).) Section 6320 further provides that the court may also enjoin "contacting, either directly or indirectly, by mail or otherwise,"

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[2] At trial, Mr. ███ essentially admitted that, as Ms. ███ testified, he had requested that "Ms. ███ sit on [his] floor naked for extended periods of time" and that he had "sexual contact" with her on those occasions. (RT 51:19-52:6.) He asserted, however, that he had not coerced her to do so. (*Ibid.*)

and "disturbing the peace of the other party." (*Ibid.*) The record here overwhelmingly establishes that Mr. ███ engaged in "telephoning" Ms. ███ and in contacting her by mail and otherwise.

And it is beyond dispute that Mr. ███ threatening communications, after Ms. ███ had twice explicitly demanded that he stop, disturbed her peace. As the Court of Appeal held in *Marriage of Nadkarni, supra,* 173 Cal.App.4th at p. 1497, "the 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." (See also *Burquet v. Brumbaugh, supra,* 2014 Cal. App. LEXIS 134, *9-14.) That indisputably describes Mr. ███ conduct here. The conduct was thus properly restrained whether or not Mr. ███ believed in good faith that he had valid reasons to communicate with Ms. ███ This is particularly true given that he knew she was represented by counsel and could have communicated with her through counsel had there been any valid reason to do so. (AA 110-111; see also AA 51 (¶ 19) [admitting that he received the letter sent by Ms. ███'s lawyer].)

Second, even if good faith were a defense, the assertion that Mr. ███ contacts to Ms. ███ were made in good faith is belied by the objective content of the e-mails, texts and voicemails. They contain overt threats, manipulative statements, evidence of cyberstalking, and bizarre rants and stories. (AA 17-28.) None of this can be characterized as being

done in good faith. It is not even remotely close to the kind of legitimate, limited conduct the courts have found to fall within this defense. (See *J.J. v. M.F.* (Feb. 5, 2014) ___ Cal.App.4th ___, 2014 Cal. App. LEXIS 120, *15-16 [finding that mother acted in good faith in calling the father to obtain the return of their young son's only jacket, given that the son was ill, the weather was cold and the child had no other warm jacket].)

Indeed, Mr. █████ asserted reasons for contacting Ms. ████ were clearly pretextual, as demonstrated by the e-mails and texts themselves. Mr. █████ asserts that he needed to contact her to obtain an agreement that they would no longer contact each other. (AOB 35-36; AA 22, 52 (¶ 24).) But Ms. ████ had already made clear to him in her cease and desist letters that she did not want any contact, and it was undisputed that she initiated no contact with him. (AA 14 (¶¶ 16-17, 19), 109-111.) It was only Mr. █████ who persisted in harassing her. Several of his e-mails asserted that he needed Ms. ████ to tell him what to do with her things. (E.g., AA 25.) But she had already told him to dispose of them however he wished. (AA 109.) And the superior court was entitled to conclude that Mr. █████ purported need to access Ms. ████'s computer to stop it from supposedly sending data to his computer was simply a cover for his "main goal" of extracting from her a promise not to "disparage, breach confidentiality, or either of us bringing a legal or criminal action."

(AA 25.) In light of Ms. █████'s requests to cease and desist his conduct, Mr. █████ behavior unquestionably was not in good faith.

III. THE EVIDENTIARY RULINGS IN ANY EVENT WERE CORRECT.

Even if the court did not have such extensive objective evidence of harassment before it and had to rely on Ms. █████'s credibility alone, each of the superior court's evidentiary rulings was correct.

"Broadly speaking, an appellate court reviews any ruling by a trial court as to the admissibility of evidence for abuse of discretion." (*People v. Alvarez* (1996) 14 Cal.4th 155, 201.) The reviewing court should overturn such a decision only "on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

A. Mr. █████ Improper and Overbroad Inquiry Into Ms. █████'s Medications Was Correctly Rejected.

At the end of his examination of Ms. █████, Mr. █████ counsel asked what medications she was taking. (RT 46:13-15.) The question was obviously improper, as Ms. █████ could have been taking any number of medications that could not possibly have been relevant to this case, and questioning her about such information implicated important privacy rights. Ms. █████'s counsel accordingly objected. (RT 46:17.) In response, Mr. █████ argued that the question was relevant because Ms. █████ might

have been taking "psychosomatic drugs or relating to memory loss or having the side effects of behavioral related incidences, that it could impact the statements she has made today." (RT 46:19-22.) But, when asked by the court for his offer of proof, he pointed only to Ms. ███'s "statement that she made in her declaration." (RT 46:23-25.) That statement afforded no basis for the kind of inquiry Mr. ███ sought to launch. The declaration stated only that Ms. ███'s doctor had taken her off of Zoloft, and that she has "continued to be stable on other medication for another issue, which is not a personality disorder." (AA 12 (¶ 8).) Absent any basis to believe that Ms. ███ was taking any medication that could have affected her memory or perception, the trial court was well within its discretion in precluding questioning on that subject. And it was certainly entitled to sustain an objection to a question asking her to name any and all medications she was taking—which was the only question Mr. ███ counsel ever proffered.

B. The Court's Exclusion of Ms. ███'s Health Conditions Was Limited to One Admittedly Speculative Subject.

As noted above, nearly all of the evidence of health conditions to which Mr. ███ now points on appeal as having supposedly been excluded was not excluded at all. Mr. ███ asserts that he wanted to introduce evidence of (1) a supposed history of Ms. ███'s "memory dysfunction," (2) a prescription for Ms. ███ to see a neuropsychiatrist,

and (3) e-mails in which Ms. ████ supposedly admitted to an inability to remember things. (See AOB 25-26.) The superior court, however, did not exclude any of this. Instead, it explicitly declined to rule on its admissibility at the *in limine* stage, stating that it was an issue to be resolved during the hearing. (RT 10:12-28.) Mr. █████, however, never sought to introduce the evidence during the hearing, and thus the superior court never ruled on it. Having failed to introduce the evidence, Mr. █████ cannot now claim it was improperly excluded. (See *Spanfelner v. Meyer* (1942) 51 Cal.App.2d 390, 392 [holding "that appellant cannot complain of the tentative refusal of the trial court to admit this contract into evidence in the absence of a showing that it was later again offered and a definite and final ruling obtained."].)

The only evidence of medical condition actually excluded was one sentence from Mr. █████ declaration stating that he "speculated" that Ms. ████ had a brain lesion. (AA 104.) The court noted that it "it seems like it is going to be hard to overcome any evidentiary hurdle on that one." (RT 10:6-9.) Counsel for Mr. █████ made no argument in response to the court's statement, instead replying, "I agree, your honor." (RT 10:10.) Because he offered no argument at trial that the statement was relevant and admissible, Mr. █████ may not so argue on appeal. (See *People v. Alvarez, supra,* 14 Cal.4th at pp. 186, 200, 202.) And, given his insufficient offer of any factual basis for the statement, the trial court was in

any event correct in excluding it. (*People v. Eid* (1994) 31 Cal.App.4th 114, 126 ["failure to make an adequate offer of proof precludes consideration of the alleged error on appeal."].)

C. Ms. ████'s Past Relationships Were Irrelevant.

Mr. ████ argues on appeal that he was precluded from offering evidence that Ms. ████ "had a habit of falsely accusing other people in the past." (AOB 26.) That, however, was not the offer of proof he made at the hearing, and was not the subject on which the superior court ruled. Instead, Mr. ████ said at the hearing that he wanted to introduce evidence of Ms. ████'s past relationships to show "that she has assaulted other people in the past. All of her previous boyfriends, that is what the reason [sic]." (RT 11:24-28.) Ms. ████ objected to this offer on the ground that it did not go to honesty or veracity and was thus irrelevant. (RT 12:1-5.) The superior court sustained that objection. (RT 12:9-15.)

Mr. ████ now makes several incoherent arguments about why this evidence was relevant and admissible. He argues in general terms that it was relevant to Ms. ████'s credibility and her "intent in applying for a restraining order," and that the alleged prior behavior was "admissible character evidence" because it established a "habit" of assaulting boyfriends. (AOB 9-10, 26, 37.)

Mr. ████ has provided no support for the claim that the evidence established a "habit." (See Evid. Code, § 1105; *Bowen v. Ryan* (2008) 163

Cal.App.4th 916, 926 ["Custom or habit involves a consistent, semi-automatic response to a repeated situation. . . . Improper character evidence does not become admissible simply by citing to section 1105 and claiming actions in accordance with a custom or habit. The evidence introduced here did not relate to custom or habit; it was instead plain and simple character evidence, and inadmissible."].)

Mr. ███ also failed to explain why the excluded evidence pertained to Ms. ███'s credibility. Even if he did have evidence of assaults by Ms. ███ on her prior boyfriends, such evidence would have no bearing on Ms. ███'s credibility, or the veracity of her testimony that Mr. ███ had sexually assaulted, threatened, and harassed her. It was accordingly inadmissible. (See Evid. Code, § 786 ["[e]vidence of [a witness'] traits of his character other than honesty or veracity, or their opposites, is inadmissible to attack or support the credibility of a witness."]; *People v. Willoughby* (1985) 164 Cal.App.3d 1054, 1064 fn.2.)

D. The Court Correctly Rejected Mr. ███ Attempt to Harass Ms. ███ With Irrelevant Evidence of Alleged Sexual Conduct.

Mr. ███ argues that he should have been allowed to introduce an alleged advertisement for Ms. ███'s massage services from backpage.com. (AA 105-106; RT 12:18-13:17.) Mr. ███ asserts that the advertisement "would help prove Ms. ███'s intent in applying for the restraining order." (AOB 10, 27-28.) He asserts that the advertisement's

relevance is that "prostitutes make their living on misrepresenting their intentions to their clients." (AOB 27.) The superior court sustained Ms. ████'s objections that the evidence was irrelevant, was impermissible character evidence, and was inadmissible under Evidence Code section 352. (AA 105-106; RT 12:18-13:17.) The court's ruling was not an abuse of discretion.

California has recognized the risks involved in allowing individuals accused of improper sexual conduct to introduce evidence related to the victim's sexual activity. "The Legislature concludes that the use of evidence of a complainant's sexual behavior is more often harassing and intimidating than genuinely probative, and the potential for prejudice outweighs whatever probative value that evidence may have. Absent extraordinary circumstances, inquiry into those areas should not be permitted, either in discovery or at trial." (Stats. 1985, ch. 1328, § 1, pp. 4654-4655.)[3]

Mr. █████ effort to deflect attention from his own harassing conduct by putting Ms. ████ on trial was precisely the kind of "harassing

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[3] As a result, the Evidence Code provides procedures to be followed "[i]n any civil action alleging conduct which constitutes sexual harassment, sexual assault, or sexual battery, if evidence of sexual conduct of the plaintiff is offered to attack credibility of the plaintiff under Section 780." (Evid. Code, § 783.) These procedures include a written motion by the defendant accompanied by an affidavit stating the offer of proof of the relevancy of the proposed evidence. (*Ibid.*) Mr. █████ did not follow those procedures here.

and intimidating" behavior that should not be permitted. Whether Ms. █████ advertised massage services (or engaged in prostitution, a claim not supported by the advertisement or any other evidence) is irrelevant to whether she was the victim of unwelcome, manipulative communications and abusive behavior by Mr. █████. Mr. █████ claims the advertisement shows her "intent" in seeking a restraining order. (AOB 10.) But he offers no reason why Ms. █████'s past sexual conduct provides any motive for her to seek protection from his harassing communications and abusive conduct. Nor does this single advertisement, offered without any supporting evidence, provide any meaningful basis for challenging Ms. █████'s credibility in this action. Certainly it was well within the superior court's discretion to find that any probative value of the evidence was far outweighed by its prejudicial effect. (Evid. Code § 352; *People v. Casas* (1986) 181 Cal.App.3d 889 [affirming exclusion under section 352 of evidence that rape victim had allegedly engaged in prostitution].)

Indeed, the court was entitled to find that it was nothing more than a continuation of Mr. █████ transparent effort (evident throughout his stream of manipulative e-mails, texts and phone calls) to victimize Ms. █████, control her conduct and silence her efforts to exercise her rights under the DVPA. That is an all too common pattern in domestic violence cases such as this. (See Emily J. Sack, *Battered Women and the State: The Struggle for the Future of Domestic Violence Policy*, 2004 Wisc. L. Rev.

1657 at 1682 [batterers often attempt to manipulate the justice system by making accusations against victims in a "pattern designed to exercise power and control over their victims"]; see also *Lister v. Bowen* (2013) 215 Cal.App.4th 319, 336 [recognizing that a party's litigation strategies and tactics may evidence inappropriate behavior that justifies a restraining order].) The superior court was properly vigilant in preventing it from occurring here.

CONCLUSION

Given the ample and essentially unchallenged evidence of harassment by Mr. ████ toward Ms. ████ after she repeatedly requested that he stop contacting her, the trial court's decision to issue a restraining order under the DVPA for her protection was correct and should be affirmed.

Respectfully submitted,

Dated: March 6, 2014

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CERTIFICATION OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

I, Craig E. Stewart, counsel of record for Respondent, [redacted] certify that the number of words in the text of this brief, excluding tables and the signature block, as calculated by Microsoft Office Word, the computer program used to prepare this brief, is 6,681.

Dated: March 6, 2014

[redacted]

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SFI-854838v2

PROOF OF SERVICE

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 California Street, 26th Floor, San Francisco, California 94104. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On March 6, 2014, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s): **Brief of Respondent** in a sealed envelope, postage fully paid, addressed as follows:

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on March 6, 2014, at San Francisco, California.

Margaret C. Landsborough