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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

SHANNON MITCHELL,
Plaintiff and Respondent,
v.
MATTHEW MITCHELL,
Defendant and Appellant.

A131632

(Contra Costa County
Super. Ct. No. D09-05093)

Matthew Mitchell appeals from an April 6, 2011, domestic violence protective order restraining him from committing certain acts against his ex-wife Shannon Mitchell.¹ He challenges the order on various grounds. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND²

After the parties had married and had two children, Matthew and Shannon separated in 2007. On September 30, 2009, the court granted Shannon's same day request for a temporary restraining order, pursuant to the Domestic Violence Prevention Act (Fam. Code, § 6200 et seq.) (hereafter DVPA)³. The court's Judicial Council form order⁴ directed that

¹ Because the parties share the same surname, we hereafter refer to them by their first names for clarity and convenience

² We recite only those facts necessary to resolve this appeal.

³ All further unspecified statutory references are to the Family Code.

⁴ Matthew did not request that the clerk's transcript include any of the documents filed by the parties relating to Shannon's request for a temporary restraining order. With his brief, Matthew has submitted a filed endorsed copy of the Judicial Council form order filed on September 30, 2009.

Matthew “must *not* do the following things to” Shannon: “Harass, attack, strike, threaten, assault (sexually or otherwise), hit, follow, stalk, molest, destroy personal property, disturb the peace, keep under surveillance, or block movements,” or “[c]ontact (either directly or indirectly), or telephone, or send messages or mail or e-mail,” “[e]xcept for brief and peaceful contact as required for court-ordered visitation of children unless a criminal protective order says otherwise.” The order also advised Matthew that a hearing was scheduled for October 20, 2009, at which time the court could “make restraining orders that last for up to 5 years,” and “consider whether denial of any orders will jeopardize [Shannon’s] safety.” “[A]ny orders made in this form end at the time of the court hearing . . . , unless a judge extends them.”

On October 20, 2009, at the scheduled hearing, Shannon appeared by counsel, and Matthew represented himself.⁵ The court had read and found the “rude,” “persistent,” and “incessant,” text messages attached to Shannon’s moving papers constituted harassment supporting the issuance of a temporary restraining order. The court also read the documents that Matthew had filed on October 15th. The court reissued the temporary restraining order because there was “a prima facie case” supporting Shannon’s request. The matter was continued for a hearing to allow the parties to present further evidence on the DVPA proceeding and to address certain custody issues.⁶

On October 28, 2009, Shannon petitioned for dissolution of the marriage, which proceeding was later consolidated with the pending DVPA proceeding on January 7, 2010.

⁵ Matthew requests that we take judicial notice, or in the alternative, augment the record on appeal to include the reporter’s transcript of the October 20, 2009 proceeding. In the absence of any objection, we grant Matthew’s request to the extent that we deem the record on appeal to be augmented to include the transcript.

⁶ At the time of the October 20, 2009 proceeding, former section 244 read, in pertinent part: “When the cause is at issue it shall be set for trial at the earliest possible date and shall take precedence over all other cases, except older matters of the same character, and matters to which special precedence may be given by law.” (*Id.* at subd. (b).) Effective January 1, 2012, section 244 now reads, in pertinent part: “The hearing on the petition shall be set for trial at the earliest possible date and shall take precedence over all other matters, except older matters of the same character, and matters to which special precedence may be given by law.” (*Id.* at subd. (b).)

Each time the consolidated matter was thereafter continued, the court reissued the temporary restraining order.

On December 2, 2010, January 26, 2011, and March 2, 2011, a bench trial was held to resolve both the dissolution of the parties' marriage, custody and visitation issues, and Shannon's request for a DVPA restraining order. Both parties were present and represented by counsel. The court heard testimony from several witnesses, including Shannon and Matthew.⁷ Additionally, the court admitted into evidence several exhibits submitted by the parties.⁸

After the trial, the court issued a "decision" resolving the marital dissolution proceeding and Shannon's request for a DVPA restraining order.⁹ Neither party requested a statement of decision. However, the court proffered "findings and reasoning" in support of its issuance of the DVPA restraining order "to assist the parties in their future dealings." The court found, in pertinent part, that Shannon had met her burden of proof by a preponderance of the evidence that Matthew had engaged in abusive behavior of "harassing, telephoning, [and] disturbing" Shannon, which conduct fell "well within the parameters of" abuse as defined in section 6203 that could be enjoined pursuant to section 6320.¹⁰ The

⁷ Matthew requested reporter's transcripts of only the first two days of trial, which includes Shannon's direct testimony. The court's minute order of March 4, 2011, indicates that on the third day of trial, the court heard Shannon's testimony on cross-examination and redirect, and Matthew's testimony.

⁸ Matthew requested that the clerk's transcript include four of his exhibits; three exhibits were admitted into evidence and one exhibit was not. Matthew did not request that the clerk's transcript include any of Shannon's exhibits that were admitted into evidence.

⁹ Matthew did not request that the clerk's transcript include the court's decision. With his brief, Matthew has submitted a filed endorsed copy of the court's decision.

¹⁰ Section 6203 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; emphasis added.) At the time of the trial in this case, section 6320, subdivision (a), read, in pertinent part, that a court may issue an ex parte order enjoining a party from, among other things, "harassing, telephoning, including, but not limited to, annoying telephone calls as described in Section 653m of the Penal code, . . ., contacting,

court had “received in evidence numerous text messages sent by [Matthew] to [Shannon], inundating her with a barrage of vulgar, personally demeaning, and derogatory statements.” “[T]he language used by [Matthew] was not designed or intended to be factually descriptive, but demeaning, destructive, and upsetting. [His] method of communicating with [Shannon] represented an assault on [her] in every way, but physically.” The communications did not represent “ ‘brief and peaceful contact as required for court ordered visitation of children’ ” in compliance with the temporary restraining order, as Matthew suggested. Instead, the communications were “gratuitously derogatory, intimidating and controlling. [Matthew] did not intend to co[m]municate information necessary to the well being of his children. He used the children as an excuse to assault their mother.”

The court found credible Shannon’s testimony that Matthew’s conduct “affected her ability to work, affected her appetite, created stress in her life, that adversely affected her health.” The court rejected Matthew’s argument that Shannon did not fear he would physically harm her as being inconsistent with the facts, and “not the test which the court must apply. To be factually sufficient under the [DVPA] the applicant must prove by a preponderance of the evidence that abuse took place as defined by the act. It does not require an allegation of physical injury or assault. ‘The plain meaning of the phrase

either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party” (§ 6320, subd. (a).) Operative on January 1, 2012, section 6320, subdivision (a), was amended by inserting the word “making” before “annoying telephone calls.” (Stats. 2010, ch. 572, §§ 16, 28.) Penal Code section 653m states, in pertinent part: “(a) 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. [¶] (b) Every person who, with intent to annoy or harass, makes repeated telephone calls or makes repeated contact by means of an electronic communication device, or makes any combination of calls or contact, to another person is, whether or not conversation ensues from making the telephone call or contact by means of an electronic communication device, guilty of a misdemeanor. Nothing in this subdivision shall apply to telephone calls or electronic contacts made in good faith or during the ordinary course and scope of business.”

[“]disturbing the peace[”] in section 6320 may include, as abuse within the meaning of the DVPA, a former husband’s alleged conduct in destroying the mental or emotional calm of his former wife by accessing, reading and publicly disclosing her confidential e-mails.’ *In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1498. The conduct of [Matthew] in this case was of the type that could have been reasonably expected to destroy the mental or emotional calm of [Shannon], especially in light of [his] refusal to abstain from the objection[able] behavior, even after the issuance of the [temporary] restraining order.” The court noted it was “not so concerned that [Matthew] uses profanity but rather that he uses it to verbally intimidate [Shannon] and to continue to [harass] her.”

On April 6, 2011, the court filed a DVPA restraining order using a Judicial Council form. The order started on March 2, 2011, and ends on June 30, 2012 at midnight. The DVPA form included personal conduct orders prohibiting Matthew from harassing or disturbing the peace of Shannon, and prohibiting him from contacting her (either directly or indirectly) by telephone, sending messages or mail, or e-mail, “[e]xcept for brief and peaceful contact as required for court-ordered visitation of children unless a criminal protective order says otherwise.” Matthew was also prohibited from, among other things, owning, possessing, having, buying or trying to buy, receiving or trying to receive, or in any other way getting guns, other firearms, or ammunition. Matthew filed a timely notice of appeal from the April 6, 2011 order.¹¹

DISCUSSION

I. Temporary Restraining Orders and Order Denying Request to Dissolve September 24, 2010 Temporary Restraining Order

Because Matthew’s notice of appeal seeks review only of the restraining order filed April 6, 2011, he has forfeited review of the October 20, 2009, temporary restraining order, any of the orders reissuing the temporary restraining order through October 12, 2010, and the December 2, 2010 order, which denied his request to dissolve the September 24, 2010, temporary restraining order, which orders were all appealable. (Code Civ. Proc., § 904.1,

¹¹ We deem Matthew’s notice of appeal filed April 5, 2011 to be a premature notice of appeal from the order filed April 6, 2011. (Cal. Rules of Court, rule 8.104(d).)

subd. (a)(6); see *McLellan v. McLellan* (1972) 23 Cal.App.3d 343, 357.) Concededly, an order can be set aside at any time on the ground that it is void when “the court lack[s] personal or subject matter jurisdiction or exceed[s] its jurisdiction in granting relief which the court had no power to grant.” (*Rochin v. Pat Johnson Manufacturing Co.* (1998) 67 Cal.App.4th 1228, 1239.) However, Matthew’s arguments, which are premised on errors of “abuse of discretion” and “mistake of law,” “have been held nonjurisdictional errors for which collateral attack will not lie.” (*Armstrong v. Armstrong* (1976) 15 Cal.3d 942, 950; see *Redlands etc. School Dist. v. Superior Court* (1942) 20 Cal.2d 348, 360; *City of Los Angeles v. Superior Court* (1925) 196 Cal. 445, 449-450.) Also, the temporary restraining orders have “fulfilled [their] function and been supplanted by” the restraining order filed April 6, 2011. (*City of Los Angeles v. Superior Court, supra*, 196 Cal. at p. 449.) Thus, any purported appeal from those earlier orders would be moot. (*O’Kane v. Irvine* (1996) 47 Cal.App.4th 207, 210.)

II. April 6, 2011 Restraining Order

Matthew raises several challenges to the court’s April 6, 2011, restraining order, none of which warrants reversal.

Matthew challenges the sufficiency of the evidence supporting the court’s findings. He argues that (1) the court relied heavily on, and gave much credence to Shannon’s testimony, even though it was demonstrated, “beyond any doubt,” that she had “lied under oath, and on one occasion at least, had attempted to suborn perjury”; (2) the court “seriously misstated the testimony of two witnesses, and failed to acknowledge the testimony of several other abundantly credible witnesses, without comment”, and (3) “*none*” of the court’s attributions to testimony are supported in the record. However, in this portion of his opening brief, Matthew “fail[s] to provide any citations to the record to support any of the assertions as to what the [witness testimony showed] on this point, as required by California Rules of Court,” rule 8.204(a)(2)(C).¹² (*City of Lincoln v. Barringer* (2002) 102

¹² All further unspecified references to rules are to the California Rules of Court. Rule 8.204(a)(1) reads, in pertinent part: “Each brief must: [¶] . . . (C) Support any reference to a

Cal.App.4th 1211, 1239.) As an appellant, Matthew “must do more than assert error and leave it to the appellate court to search the record and the law books to test his claim. The appellant must present an adequate argument including citations to . . . relevant portions of the record.” (*Yield Dynamics, Inc. v. TEA Systems Corp.* (2007) 154 Cal.App.4th 547, 557.) We therefore decline to consider these arguments. (See *Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 796 [appellate court declines to address those arguments not properly briefed “with appropriate citation to the location of the challenged evidence in the record”].)¹³

We also reject Matthew’s argument that the trial court misapplied the DVPA. The court was justified in issuing a DVPA restraining order based solely on its findings that Matthew had inundated Shannon with annoying and harassing text messages, containing “a barrage” of statements neither “designed [n]or intended to be factually descriptive,” or “to communicate information necessary to the well being of his children.” (§ 6320; Pen. Code, § 653m.) Consequently, we need not address Matthew’s challenge to the court’s finding

matter in the record by a citation to the volume and page number of the record where the matter appears.”

¹³ We rejected Matthew’s initial opening brief because he failed to comply with the rules of appellate procedure as set forth in the California Rules of Court. His refiled opening brief still suffers from significant deficiencies, including a failure to “[p]rovide a summary of the significant facts limited to matters in the record” as required by rule 8.204 (a)(2)(C). To the extent Matthew’s reply brief complies with the rules of court, it does not cure the error of the significant deficiencies in his opening brief. (See *City of Lincoln v. Barringer, supra*, 102 Cal.App.4th at p. 1239, fn. 16.) “It is the general rule, which is here applicable, that matters presented for the first time in an appellant’s closing or reply brief will not be considered by an appellate court. [Citations.] The obvious reason for this rule is that [the] opposing [party] is not afforded an opportunity of answering the contentions of the appellant or of assisting the appellate court by furnishing it with the benefit of research, and in the case of questioned findings of fact, references to the record where evidence might be found in support of such findings.” (*Richard v. Richard* (1954) 123 Cal.App.2d 900, 903.) The fact that Shannon’s responsive brief may suffer from deficiencies similar to those in Matthew’s opening brief is of no moment. As an appellant, Matthew has the burden of demonstrating he is entitled to relief. He cannot demonstrate reversible error by arguing that Shannon has not addressed, or adequately addressed, contentions for which he does not present cogent arguments supported by citations to the record in his opening brief.

that his conduct was also “of the type that could have been reasonably expected to destroy the mental or emotional calm of [Shannon], especially in light of [his] refusal to abstain from the objection[able] behavior, even after the issuance of the [temporary] restraining order.” “ ‘We uphold judgments if they are correct for any reason, “regardless of the correctness of the grounds upon which the court reached its conclusion.” [Citation.] . . . [Thus,] [w]e will not reverse for error unless it appears reasonably probable that, absent the error, the appellant would have obtained a more favorable result. [Citations.] Such is not the case here.’” (*In re Jonathan B.* (1992) 5 Cal.App.4th 873, 876.)¹⁴

Finally, we reject Matthew’s arguments that the restraining order violates his constitutional rights.¹⁵ Initially, we note the record on appeal does not include Matthew’s

¹⁴ *S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, cited by Matthew, is factually distinguishable and does not warrant setting aside the DVPA restraining order that was issued in this case. We deny Matthew’s request that we consider *Mendlowitz v. Mendlowitz* (Mar. 22, 2011, B217664 [nonpub. opn.]), which was “reviewed for reference.” “[A]n opinion of a California Court of Appeal . . . that is not certified for publication or ordered published must not be cited or relied on by a court or a party in any other action.” (Rule 8.1115(a).)

¹⁵ In its decision, the trial court stated, in pertinent part: “At the conclusion of the trial, on March 2, 2010, during his closing argument, [Matthew] submitted to the court two written objections. The first, entitled ‘Defendant’s (sic) Objection to Protective Order’ appears to object on three grounds. The first ground appears to argue that because the burden of proof in domestic violence proceedings is a preponderance of the evidence while the burden of proof in civil harassment proceedings is clear and convincing evidence that [DPVA] is not rational and should not be enforced. The second contends that the [DPVA] violates the 14th Amendment to the Constitution because it is not rationally related to a legitimate governmental purpose. No citations are provided to support the argument other than generalized cites for the general principle the law must bear a rational relationship to some legitimate end. Thirdly, [he] contends that Family Code section 6320 is impermissibly vague. The court overrules all three objections. . . . [¶] The second objection raised . . . asserts that a Domestic Violence Restraining Order issued under the [DVPA] would violate [his] constitutional right to bear arms as provided by the Second Amendment to the Constitution of the United States. That objection also is overruled. Again, the Court does not find the citations provided . . . to be helpful or on point. The court would note that in *Ritchie v. Konrad* (2004) 115 Cal.App.4th 1275 [*Ritchie*], the Court held that Family Code section 6389 denies the trial court the authority to effectively delete the firearm restriction. The firearm restriction is automatically activated when a Court imposes any of the enumerated forms of protective orders.”

written objections in which he allegedly raised these issues before the trial court. Because we do not know whether the arguments he presents in his opening and reply briefs were presented to the trial court, we have no reason to conclude the court erred in rejecting his constitutional claims. In any event, we see no merit to them.

In his opening brief Matthew argues the restraining order violates his right to free speech under the First Amendment of the United States Constitution. However, “ ‘the goal of the First Amendment is to protect expression that engages in some fashion in public dialogue, that is, “ ‘communication in which the participants seek to persuade, or are persuaded; communication which is about changing or maintaining beliefs, or taking or refusing to take action on the basis of one’s beliefs’ ” [Citations.]’ . . . A statute that is otherwise valid, and is not aimed at protected expression, does not conflict with the First Amendment simply because the statute can be violated by the use of spoken words or other expressive activity. [Citation.]” (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 134.) Family Code sections 6203 and 6320, subdivision (a), allow for the issuance of a DVPA restraining order based on annoying and harassing telephone calls as described in Penal Code section 635m, which former version was upheld against a First Amendment challenge that it prohibited lawful free speech as well as unlawful conduct. (*People v. Hernandez* (1991) 231 Cal.App.3d 1376, 1381 [former Penal Code section 635m prohibiting annoying telephone calls does not violate caller’s First Amendment rights]; see *Rowan v. United States Post Office Dept.* (1970) 397 U.S. 728, 737 [statute allowing homeowner to restrict delivery of offensive mail does not violate mailer’s First Amendment rights].) Statutes that purportedly “ ‘restrict or burden the exercise of First Amendment rights must be narrowly drawn and represent a considered legislative judgment that a particular mode of expression has to give way to other compelling needs of society.’ [Citation.] The ‘protection of innocent individuals from fear, abuse or annoyance at the hands of persons who employ the telephone, not to communicate, but for other unjustifiable motives,’ is such a compelling interest. [Citation.]” (*People v. Hernandez, supra*, 231 Cal.App.3d at p. 1381.) Matthew has not demonstrated he has a First Amendment right to send Shannon text messages that are annoying or harassing despite their purported veracity

or accuracy. *Snyder v. Phelps* (2011) 562 U.S. ___, 131 S. Ct. 1207, is factually distinguishable, and does not support Matthew’s argument that the restraining order violates his First Amendment rights.

Matthew also argues that his right to bear arms under the Second Amendment of the United States Constitution is infringed on by the restraining order’s firearm restriction, required by section 6389,¹⁶ pursuant to *District of Columbia v. Heller* (2008) 554 U.S. 570 (*Heller*). (See *McDonald v. City of Chicago* (2010) 561 U.S. ___ [130 S. Ct. 3020, 3026] [Second Amendment right recognized in *Heller* “is fully applicable to the States”].) We disagree. “Although it struck down the District of Columbia handguns ban, *Heller* recognized and affirmed certain traditional limitations on the right to bear arms,” and “identified an expressly *nonexclusive* list of ‘presumptively lawful regulatory measures,’ stating ‘nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and government buildings, or laws imposing conditions [a]nd qualifications on the commercial sale of arms.’ [Citations].” (*People v. Delacy* (2011) 192 Cal.App.4th 1481, 1487-1488; emphasis added (*Delacy*) [upholding constitutionality of Penal Code section 12021, subdivision (c)(1), which prohibits possession of firearms by persons convicted of specified misdemeanors].)

Contrary to Matthew’s contentions, we conclude section 6389 “is analogous to a prohibition on felon weapon possession, a type of restriction expressly listed by *Heller* as untouched by its holding.” (*Delacy, supra*, 192 Cal.App.4th at p. 1489; see *United States v. Luedtke* (E.D. Wis. 2008) 589 F. Supp. 2d 1018, 1021 [18 U.S.C. § 922, subdivision (g)(8),

¹⁶ The April 6, 2011, restraining order, defined as a protective order in section 6218, subdivision (a), states that Matthew “cannot own, possess, have, buy or try to buy, receive or try to receive, or in any other way get guns, other firearms, or ammunition.” He must also turn in to a law enforcement agency or sell to a licensed gun dealer any guns or other firearms within his immediate possession or control. Section 6389, subdivision (a), reads, in pertinent part: “A person subject to a protective order, as defined in Section 6218, shall not own, possess, purchase, or receive a firearm or ammunition while that protective order is in effect.”

which criminalizes possession of firearms and ammunition by persons subject to a domestic violence injunction, is a regulation of the type “that pass[es] constitutional muster” as “traditionally permitted in this nation”).) Additionally, even under strict scrutiny, the firearm restriction in the restraining order is sustainable as constitutional. “Reducing domestic violence is a compelling government interest [citation], and [section 6389]’s temporary prohibition, while the [restraining] order is outstanding, is narrowly tailored to that compelling interest. [Citations.]” (*United States v. Knight* (D. Me. 2008) 574 F. Supp. 2d 224, 226, fn. omitted [discussing constitutionality of 18 U.S.C. § 922, subd. (g)(8)].) “[A]nger management issues . . . may arise in domestic settings,” and the firearm restriction “is thus a temporary burden during a period when the subject of the order is adjudged to pose a particular risk of further abuse. [Citations.]” (*United States v. Mahin* (4th Cir. 2012) 668 F.3d 119, 125 [discussing constitutionality of 18 U.S.C. § 922, subd. (g)(8)].)

We also are not persuaded by Matthew’s argument that the firearm restriction is unconstitutional as applied to his situation. Contrary to his contention, the trial court did not issue the DVPA restraining order “solely based on . . . conduct ‘reasonably expected to destroy the mental and emotional calm of [Shannon].’ ” The court also found that Matthew had “engaged in repetitive and persistent conduct which any reasonable individual would characterize as offensive, demeaning, derogatory, and disturbing.” He had also “repeatedly demonstrated an inability to control his anger over the fallout arising from the demise of his relationship with” Shannon. Most notably, the court found it “extremely troubling” that Matthew believed “he was justified in violating a court order,” by continuing to harass Shannon even after the issuance of the temporary restraining order. The court’s rendition of Matthew’s conduct and behavior in its statement of decision demonstrates that issuance of a DVPA restraining order with the firearm restriction was necessary under the circumstances. On the facts in this case we see no reason “to revisit the wisdom of” the Legislature’s decision to require a firearm restriction on all domestic violence protective orders. (*Ritchie, supra*, 115 Cal.App.4th at p. 1299.)

We conclude that *Ritchie, supra*, 115 Cal.App.4th 1275, does not require us to remand the matter to the trial court, as Matthew suggests. In *Ritchie*, the appellate court

was concerned with weighing the burdens a DVPA restraining order might impose against the risk of future abuse in the context of a request for renewal of the order, pursuant to section 6345, and the trial court's erroneous striking of the firearm restriction in the renewed order. (*Id.* at pp. 1283-1284, 1292.) Unlike *Ritchie*, we are concerned here with the issuance of an initial restraining order. The trial court's decision demonstrates it considered evidence tendered by both parties, and the fact that the issuance of a DVPA restraining order would require the court to also impose a firearm restriction. We see no basis for reconsideration.

DISPOSITION

The April 6, 2011 order is affirmed. Plaintiff Shannon Mitchell is awarded costs on appeal.

McGuiness, P.J.

We concur:

Siggins, J.

Jenkins, J.