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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

CRAIG STOLARCZYK et al., Plaintiffs and Respondents, v. HOGAN CHEUNG, Defendant and Appellant.	A152870 (San Mateo County Super. Ct. No. 17-CIV-03578)

This appeal is from a Code of Civil Procedure section 527.6[1] civil harassment restraining order Craig and Shana Stolarczyk obtained against their neighbor Hogan Cheung. Cheung contends the trial court erred in granting the order because the Stolarczyks failed to establish several elements of section 527.6 by clear and convincing evidence. We affirm.

BACKGROUND

The Stolarczyks and their two small children live on Ark Street in San Mateo. Cheung, his wife, two small children, and mother-in-law live on Clipper Street in San Mateo. The Stolarczyks and Cheung are neighbors whose houses are separated by a fence that runs between the Stolarczyks' backyard and Cheung's side yard.

[1] All statutory references are to the Code of Civil Procedure.

The Stolarczyks filed a petition for a civil harassment restraining order against Cheung on August 7, 2017. The petition was not included in the appellate record.[2]

On September 7, 2017, the superior court held a hearing on the petition. The court took evidence from the Stolarczyks, who appeared in propia persona, and Cheung.

The Stolarczyks stated that everything set forth in their restraining order petition was true and correct. Additionally, they presented video evidence of an August 2, 2017 verbal altercation between Craig and Cheung. The video was taken from a camera set up by the Stolarczyks' landlord adjacent to but not on Cheung's property. Based on a transcript of the video included in the record, the video shows that Craig and Cheung quarreled over the camera installation. After he was called a "fuckface," Cheung asked Craig and his companion if they wanted to take the camera down. When he was told it would be left up, Cheung covered the camera lens. Craig then told Cheung he was under arrest followed by the same vile epithet first used to address him. Cheung responded by asking Craig if he was threatening him. Craig again told Cheung that he was under arrest, and Cheung responded, "That's fine, thank you. And I will always come back for you." Craig asked Cheung if he 'want[ed] to do something?" Cheung said, "I already did something." Craig accused Cheung of pouring gasoline on his yard, to which Cheung replied, "No one put gas, you put your gas and you['re] blaming it on people." Craig asked Cheung if he "want[ed] to settle it," to which Cheung responded, "You don't need to settle it, you're dead." Laughing, Craig told Cheung he was going to call the police because he was just threatened.

Cheung testified about a series of conflicts between the neighbors that led up to the restraining order petition. He acknowledged he cut down overgrown trees planted in the Stolarczyks' backyard in March 2016. Prior to cutting the trees, Cheung twice requested the Stolarczyks' landlord manage the trees to no avail. According to Cheung, the trees grew fast, crossed the fence by three feet to four feet, and left limbs over his

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[2] We granted Cheung's unopposed motion to augment the record to include the petition, and we ordered Cheung to serve and file a certified copy of the petition or to cause the trial court to do so. Cheung did not comply with our order.

house and satellite dish. In addition, noise from the trees swaying in the wind and scraping and rubbing against the walls of his house made it difficult to sleep. Cheung stated he did not cut down the trees completely, only the portions rubbing against his house that were overgrown.

Cheung was also asked about his statement in the video that he "already did something." He said his comment did not refer to pouring gasoline in the Stolarczyks' yard.

With respect to the August 2, 2017 incident captured on video, Cheung testified the camera was "really close . . . on the fence line right between my master bedroom and my master bathroom." He explained he placed tape over the camera lens because his wife was worried, afraid, and frightened and saw the camera as "a really bad invasion looking into my house in the bathroom[], whatever [his wife] was doing." He acknowledged he called the police about the camera before he taped over it and that an officer told him not to touch it. Prior to covering it, he also asked the Stolarczyks to take it down but they threatened and cursed him. Addressing the "you're dead" statement he made to Craig, Cheung explained that Craig and his companion were cursing and provoking him, that his English was not "too good," and he did not know what to say. He said his comment was not a threat but his way to end the conversation and signal he no longer wanted to talk. Cheung denied ever threatening to kill Craig.

After Cheung testified, the Stolarczyks were questioned by the court. Shana stated that Cheung cut the trees below the fence line and left the debris lying in their backyard. Shana further noted that after the March 2016 cut, their gardeners redirected the branches and the trees have since continued to grow upward at least twice the height of the fence. Craig described an incident in May or June 2016 not included in their petition in which he suspected herbicide was dumped over the fence into their yard, but on cross-examination he acknowledged he never saw anyone pour any herbicides or liquids over his fence. Craig also discussed an incident in July 2017 in which he was overwhelmed by the smell of gasoline in his backyard. Craig said he smelled gas in the soil all along the fence line and observed discolored and foul-smelling mulch. He added that the fire

department confirmed the presence of a gasoline odor and doused the area with water. Several days later, soil samples were taken which returned "anecdotal" detections of formaldehyde. Craig stated that police had reviewed the August 2017 video and agreed with the Stolarczyks that there was no intrusion by them into the Cheung property. Craig also said his laughter and response to Cheung's "you're dead" comment was "a nervous response because [he] could not believe what [he] just heard."

After observing that "[n]eighbor disputes are ugly," the court acknowledged Cheung's right to reasonably trim a neighbor's trees that cross into his property but stated he was not entitled to simply cut off the foliage to a point below the fence line. The court also noted the ongoing and escalating nature of the dispute between the neighbors given the trees were initially cut in 2016. But the court found Cheung "not the most believable witness" ever to appear in court. The court found his explanation that he did not understand what he was saying on the video to be "ludicrous" and did not see him as a victim in any way. Based on the video, the court found Cheung was self-confident and assertive when he taped over the camera, which the court said the property owner had every right to place on his property. Observing that the camera was trained on the yards of both properties, the court found nothing to suggest the camera was positioned to film the interior of Cheung's home. With respect to the chemicals on their property, the court found it unreasonable to think the Stolarczyks would place chemicals in their own yard and said it was "a reasonable inference to draw that someone else is responsible for that and I think that [the Stolarczyks'] concerns are legitimate that [Cheung was] responsible for that." In conclusion, the court stated, "I think without question, it has been sufficiently proven that Mr. Cheung damaged their property. He vandalized their property. There is a reasonable inference to be drawn, and it's for that issue I am still going to issue a restraining order."

The order requires Cheung to stay five yards away from the Stolarczyks and to refrain from harassing or contacting them, or destroying their personal property. The order expires on September 7, 2020. Cheung appeals.

DISCUSSION

Section 527.6 was enacted " 'to protect the individual's right to pursue safety, happiness and privacy as guaranteed by the California Constitution.' [Citations.] It does so by providing expedited injunctive relief to victims of harassment. [Citation.]" (*Brekke v. Wills* (2005) 125 Cal.App.4th 1400, 1412.) "A person who has suffered harassment . . . may seek a temporary restraining order and an order after hearing prohibiting harassment as provided in" section 527.6. (§ 527.6, subd. (a)(1).) " 'Harassment' " is defined as "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 that as would cause a reasonable person to suffer substantial emotional distress, and must actually cause substantial emotional distress to the petitioner." (§ 527.6, subds. (b)(3).) The trial court may issue an injunction under section 527.6 on "clear and convincing evidence that unlawful harassment exists[.]" (§ 527.6, subd. (i).)

On appeal of the grant of a section 527.6 restraining order, "[w]e review issuance of [the] protective order for abuse of discretion, and the factual findings necessary to support the protective order . . . for substantial evidence." (*Parisi v. Mazzaferro* (2016) 5 Cal.App.5th 1219, 1226 (*Parisi*).) The substantial evidence rule applies without regard to the standard of proof required before the trial court. In other words, we review the record for substantial evidence even if the standard in the trial court was clear and convincing evidence. (See *Crail v. Blakely* (1973) 8 Cal.3d 744, 750; *In re Marriage of Ruelas* (2007) 154 Cal.App.4th 339, 345.)

Cheung argues the court erred in granting the restraining order because the Stolarczyks failed to establish several of the required elements of section 527.6 by clear and convincing evidence. In particular, Cheung contends they failed to prove his conduct served no legitimate purposes, caused them substantial emotional distress, or posed any risk of future harm. We do not agree.

The trial court judgment is presumed correct, and Cheung has the burden of overcoming this presumption by affirmatively demonstrating prejudicial error. (*Denham*

v. Superior Court (2005) 2 Cal.3d 557, 564-566.) As the appellant, Cheung also has the burden to present an adequate record for appellate review. (*Maria P. v. Riles* (1987) 43 Cal.3d 1281, 1295-1296 (*Maria P.*).) Here, the appellate record does not include the Stolarczyks' request for a civil harassment restraining order. The Judicial Council form for this request requires that all factual allegations be made under penalty of perjury. Furthermore, on appeal, "[d]eclarations favoring the prevailing party's contentions are deemed to establish the facts stated in the declarations . . . ." (*Parisi, supra*, 5 Cal.App.5th at p. 1226.) Cheung attacks the restraining order as lacking evidence supporting harassment, but his failure to include the request leaves us with an incomplete, inadequate record of the evidence that was before the trial court. We cannot determine the evidence was insufficient if we do not know all the evidence presented to the trial court. We must therefore presume that substantial evidence supported the court's implied finding that harassment occurred and affirm the judgment. (See *Estate of Fain* (1999) 75 Cal.App.4th 973, 992 [appellant may not contest the sufficiency of the evidence with respect to a factual issue where appellant fails to provide an adequate record]; *Maria P., supra*, 43 Cal.3d at pp. 1295-1296 [failure to provide an adequate record on appeal requires that the issue be resolved against appellant].)

Even if we did not affirm the judgment because Cheung failed to provide an adequate record, we would reject his claims based on the limited record provided.[3] We find no merit to Cheung's broad contention that his version of what happened was "equally likely" as the Stolarczyks' and did not amount to harassment. (See *Parisi, supra*, 5 Cal.App.5th at p. 1226 [" 'We resolve all conflicts in the evidence in favor of respondent, the prevailing party, and indulge all legitimate and reasonable inferences in favor of upholding the trial court's findings.' "].) Neither do Cheung's more

[3] We do not consider the exhibits attached to the Stolarczyks's respondents' brief which were not part of the appellate record. See *Lona v. Citibank, N.A.* (2011) 202 Cal.App.4th 89, 102 ["Appellate review is generally limited to matters contained in the record. Factual matters that are not part of the appellate record will not be considered on appeal."].)

particularized arguments that the evidence does not qualify as "harassment" within the meaning of section 527.6 compel reversal.

Cheung claims the Stolarczyks failed to prove his acts served no legitimate purpose. Cheung argues that trimming trees encroaching on his property and covering a surveillance camera directed towards his house were lawful acts with legitimate purposes. But Shana explained that Cheung cut the trees below the fence line, and not just those portions extending into his property. Also, the court viewed the video taken from the camera and found it was neither located on property belonging to Cheung nor trained on the inner sanctum of Cheung's house. Cheung also testified that he was told by police not to touch the camera, and Craig stated that police reviewed video from the camera and saw no intrusion into the Cheung property. All of this evidence supports an implied finding that Cheung's acts served no legitimate purpose.

Cheung also claims the Stolarczyks failed to establish that his conduct caused them substantial emotional distress. He argues, "[I]t is clear from the video footage depicting the interaction that respondent did not suffer any emotional distress as a result of the statement. Indeed, quite the opposite—in the video, [Craig] can be heard laughing, taunting and insulting [him]." Even the trial court rebuked Craig for behaving badly, describing his behavior in the video as "antagonistic and sarcastic and profane." Nonetheless, the petition for a restraining order was not filed solely based upon the camera incident nor was Craig the sole petitioner. Nothwistanding the laughter and taunting Craig displayed that evening, the trial court could reasonably infer that both Craig and Shana suffered substantial emotional distress from having their trees chopped down and the debris left in their yard, and from having chemicals poured into their backyard where their small children play.

Cheung also contends the trial court failed to find a likelihood of future harm. Not so. The record supports the conclusion that a restraining order was necessary to prevent bad acts from continuing into the future. Cheung initially chopped down the Stolarczyks' trees in March 2016; the Stolarczyks smelled gasoline along their fence line in July 2017; the altercation over the camera occurred in August 2017; and by the time of the hearing

in September 2017, the trees had regrown to twice the height of the fence. Before issuing its ruling, the court commented, "[W]e're talking about a dispute that has not resolved itself in over a year. Because we're talking about trees that were cut in 2016, and Mr. Cheung still, it would appear, has issues with the fact that these trees are on his neighbor's property and continue to grow and grow tall." The record supports a finding of threat of future harm.

DISPOSITION

The civil harassment restraining order is affirmed.

Siggins, P.J.

WE CONCUR:

Petrou, J.

Wiseman, J.*

* Retired Associate Justice of the Court of Appeal, Fifth Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.