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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

ERIKA LYN GFELLER,

Plaintiff and Respondent,

v.

MARK CHERNEY,

Defendant and Appellant.

E061846

(Super.Ct.No. RIV1400720)

OPINION

APPEAL from the Superior Court of Riverside County. L. Jackson Lucky IV,  
Judge. Affirmed.

Cumming & Associates and William R. Cumming for Defendant and Appellant.

The Law Offices of Robert A. McCarty, Jr., and Robert A. McCarty, Jr., for  
Plaintiff and Respondent.

The trial court issued a domestic violence restraining order protecting plaintiff and respondent Erika Lyn Gfeller (Mother) and her children from Mother’s brother-in-law, defendant and appellant Mark Cherney (Uncle). (Fam. Code, § 6300.)<sup>1</sup> Uncle raises four issues on appeal. First, Uncle contends the trial court erred by issuing the restraining order because the evidence does not support the issuance of the restraining order. Second, Uncle asserts the impact of the restraining order is tragic. Third, Uncle contends the restraining order sets a “bad precedent.” Fourth, Uncle asserts the trial court lacked jurisdiction to issue the restraining order. We affirm the judgment.

**FACTUAL AND PROCEDURAL HISTORY**

Mother has four children: (1) Charles, who was 10 years old; (2) Sally, who was six years old; (3) Henry, who was six years old; and (4) Frederick, who was two years old. Uncle and his family lived one block away from Mother and her family. Mother found the house for Uncle and his family; at the time, in August 2012, they had a friendly relationship. Uncle’s daughter attended the same school and was in the same grade as Mother’s twins, Henry and Sally.

Uncle has been a Little League umpire for 20 years. Charles played Little League, and his games were in the park closest to Uncle’s and Mother’s houses. When Uncle moved into his home in August 2012, he began umpiring Little League games in the nearby park—where Charles played. There were different division within the league, such as minor-A and minor-B. Charles played in minor-A.

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<sup>1</sup> All further statutory references are to the Family Code unless otherwise indicated.

In October 2013, Uncle's wife (Aunt), who was also Mother's sister, sent a text message to Mother informing Mother that Uncle would be umpiring Charles's game. Mother telephoned Aunt, and asked if Aunt thought it was good idea for Uncle to umpire Charles's game. Mother "kept saying, 'I just want to keep it separate. Things are going so well. I just want to keep it separate.'" Mother became upset during the telephone call, "almost to the point of being hysterical." Aunt told Mother, "I don't understand what the problem is. What is the problem?" Mother responded, "I just want to keep it separate. Baseball is Charl[es]'s whole world." Aunt again said she did not understand the problem. Mother "finally scream[ed] at the top of her lungs, 'Keep your husband away from my kid.'" Aunt was stunned and began crying. Aunt ended the telephone conversation.

Aunt told Uncle about the conversation with Mother, but did not mention the comment about keeping Uncle away from Charles because she thought that would be hurtful to Uncle. After that conversation with Mother, Aunt did not have substantive conversations with Mother; they only communicated about logistics involving their children, such as taking the children to school. Aunt shared with Uncle that Mother was not communicating with her in a substantive way.

Uncle umpired Charles's game on October 8, 2013. Uncle also umpired a second game of Charles's on October 15, 2013. After the second game, the person who assigned the umpires sent a text message to Uncle informing Uncle that Charles was uncomfortable with Uncle umpiring his games. "They" (it is unclear if "they" is Mother

or the assignor) asked that Uncle no longer umpire games at that particular park. Uncle did not ask why Charles was uncomfortable.

The Little League season ended in November. In early December 2013, Uncle overheard Aunt tell another person that Mother had screamed at Aunt to keep Uncle away from Mother's children. Uncle "was incredibly hurt" by the information. In March 2014, the Little League season began again, and the umpire assignor sent Uncle a text message "saying that another complaint had been filed . . . and that [the assignor] was not going to permit [Uncle] to umpire any games at [the park]." When Uncle discovered Mother had filed a complaint against him, requesting he not umpire games in the park, Uncle "was shaking" and "was so upset." At that point, Uncle agreed not to umpire any of Charles's games; he would only umpire upper division games, i.e., not the minor-A games.

Nevertheless, Uncle continued to attend Charles's games. In particular, in April and May 2014, Uncle attended six or seven of Charles's games and positioned himself near the umpire. Uncle explained that he watched Charles's games because Uncle was "a District 24 crew chief," which requires him to evaluate other umpires to recruit for the All Stars game and the Tournament of Champions game.

During one of Charles's games, Uncle again "positioned himself over the head of the [game] umpire." A person who worked for the Little League organization told Uncle that Uncle "wasn't supposed to be anywhere near Charles and asked him to move away from the game and told [him] that there were other games going on [at] other fields to watch," but Uncle refused to leave. A Little League board member asked

Uncle to leave several times, but Uncle repeatedly refused. During the last inning of the game, Charles was “hysterical, red and crying.” Charles complained that Uncle was “staring [him] down.”

On another occasion, Mother saw Uncle standing between two game fields; one of the fields was where Charles was playing. Uncle was speaking to two other umpires. Mother heard Uncle “loudly and bitterly announce ‘the reason is Charl[es] Gfeller.’” Later, Mother spoke to one of the umpires with whom Uncle had been speaking. The umpire told Mother that Uncle “was talking bitterly about the reason he couldn’t ump” the games for the Little League’s lower divisions, and was explaining that Charles was the reason. Mother felt scared as a result of this incident.

On May 15, 2014, Mother was walking her children to school. Uncle was driving toward Mother and the children. Uncle swerved his car toward Mother and the children, while honking his car horn and waving his arms in an attempt to scare them. Charles was closest to the curb and was “really, really scared.” Charles stopped, was very pale, shaking, and said, “Mom, that scared me so, so much.” That night, when Mother and Charles were returning home from his pitching practice, a car similar to Uncle’s car turned the corner and Charles became “pale as a ghost,” was shaking, and said, “Is that—” Charles was still “terrified,” and he stopped every time he saw a car similar to Uncle’s car.

In regard to swerving his car, Uncle explained that he did not swerve his car, but he honked and waved at Mother and the children in a friendly manner. Uncle continued

to umpire games in the park near the families' houses and was still a District 24 crew chief.

On May 15, 2014, Mother requested a domestic violence restraining order against Uncle, to protect herself and her children. In the application, Mother explained the "driving force" behind the request for a restraining order was to protect Charles; however, Mother also needed protection, and Henry and Sally were typically with Mother and Charles so all four needed to be protected.

The trial court concluded there was sufficient evidence to grant a domestic violence restraining order. The trial court explained that, in October 2013, Mother screamed that she did not want Uncle around her children. The court remarked that it did not know Mother's reasons for feeling this way "but it doesn't matter because she is the child's mother. And she gets to choose who is around that child. That is her purview as a mother." The trial court explained that Uncle learned about Mother's desire for him to stay away from her children in December 2013, and that information was again conveyed to Uncle when Mother filed complaints with the Little League organization in February or March. However, in May 2014, Uncle continued to attend Charles's games and "put himself in a position where Charl[es] was aware of his presence."

The trial court explained, “[M]aybe Charl[es] is overly sensitive, maybe [Mother and her husband (Father)] are really unreasonable people. Maybe they have stupid reasons for not wanting [Uncle] around. These all may be true, but [Mother and Father] get to choose who is around their child. [Uncle], you may have very good reasons for being upset about this, and they may have no good reason for them not wanting you to be around their child, but you poked at them and this notion that in May when you honked the horn at them, that it was some kind of welcome contact is so incredibly unbelievable based on your in-laws [not] want[ing] to speak to you.

“[Mother] doesn’t want to speak to you. They’re putting in complaints about you. They’re trying to get you off the umpiring squad where you’re an umpire. I don’t see any reasonable way that you could think that it was okay to honk at them, wave at them, go to games, watch Charl[es]. I don’t think that they could have made it any clearer to you for seven months stay away from our child. And yet you chose to just keep doing it. And the domestic violence statute for restraining order[s] does not require physical violence, it does not require threats. It requires only a pattern of harassment, and to me, if somebody clearly tells you stay away from my kid and for five to seven months you completely ignore that and you continue to have contact despite the fact that you are aware that it is unwelcome, that is enough to issue a domestic violence restraining order.” The trial court issued the restraining order, making it effective through June 4, 2017.

## DISCUSSION

### A. SUBSTANTIAL EVIDENCE

#### 1. *CONTENTION*

Uncle contends the trial court abused its discretion by issuing the restraining order because the decision is not supported by the evidence.

#### 2. *LAW*

We review the trial court's issuance of a domestic violence restraining order under the abuse of discretion standard of review. (*Nevarez v. Tonna* (2014) 227 Cal.App.4th 774, 782.) At the trial court, the petitioner bears the burden of establishing her case by a preponderance of the evidence. (*Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 138.)

A trial court may issue a domestic violence restraining order when there is "reasonable proof of a past act or acts of abuse." (§ 6300.) The statutory definition of "abuse" includes "any behavior that has been or could be enjoined pursuant to Section 6320." (Former § 6203, subd. (d).)<sup>2</sup> Former section 6320 includes behaviors such as stalking, harassing, making threats and "disturbing the peace of the other party." (Former § 6320, subd. (a) [eff. Jan. through June 2014].)

In the instant case, the trial court found "a pattern of harassment." The term "harassing" is not defined in Family Code section 6320 or elsewhere in the Domestic

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<sup>2</sup> Section 6203 was amended effective January 2015. We use the 2014 version of the statute because the hearing at the trial court took place in 2014 and Mother applied for the restraining order in 2014.

Violence Prevention Act. Although we do not decide that section 6320's use of the term "harassing" is equivalent to the term "harassment" as used in Code of Civil Procedure section 527.6 (the civil harassment restraining order statute), we nevertheless believe that the definition found in that statute is instructive. Code of Civil Procedure section 527.6 defines "harassment" as "unlawful violence, a credible threat of violence, or 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 petitioner." (*Id.* at subd. (b)(3).)

### 3. *COURSE OF CONDUCT*

We examine the "course of conduct" element. The evidence reflects Uncle continued to attend Charles's games after learning that his presence at the games was unwanted. In particular, in October 2013, Uncle received a text message from the umpire assignor "saying that there had been a complaint filed against [Uncle], that [Charles] was uncomfortable with [Uncle] umpiring the games, and that they asked that [Uncle] not participate in any more games there at [the park]."

Also in October 2013, Mother screamed at Aunt to keep Uncle away from Mother's children. After that conversation, Mother and Aunt stopped having substantive conversations. Aunt told Uncle that Mother was not communicating with her in a meaningful manner. In early December 2013 Uncle overheard Aunt tell another

person that Mother had screamed at Aunt to keep Uncle away from Mother's children. Uncle "was incredibly hurt" by the information.

In March 2014, the umpire assignor sent Uncle a text message "saying that another complaint had been filed . . . and that [the assignor] was not going to permit [Uncle] to umpire any games at [the park]." At that point, Uncle agreed not to umpire any of Charles's games. Nevertheless, Uncle continued to attend Charles's games. In particular, in April and May 2014, Uncle attended six or seven of Charles's games and positioned himself near the umpire. Various people asked Uncle to leave the games, but Uncle refused.

Arguably, the foregoing evidence could be interpreted as a person simply attending events in a public area; perhaps Uncle's presence was unwanted, but his behavior did not rise to the level of harassment. However, Uncle swerving his car toward Mother and the children in May 2014 created an escalation of Uncle's behavior. The evidence reflects that, after Uncle repeatedly attended Charles's games with the knowledge that his presence was unwanted, he then swerved his car toward Mother and the children while honking and waving his arms. The trial court could reasonably interpret Uncle's act of swerving the car toward the family as an act of aggression, a threat of bodily harm or an escalation of the behavior that was increasingly harassing. Uncle's act of swerving the car reflects that he was, indeed, targeting the family with aggressive and threatening behavior. In other words, the trial court reasonably found from the evidence that Uncle engaged in a course of conduct directed at a specific group of people.

4. *ALARM, EMOTIONAL DISTRESS, AND THE REASONABLE PERSON STANDARD*

Next, we examine whether the course of conduct caused the targeted people to be seriously alarmed or annoyed. Father said Charles was usually happy while playing baseball, but became distraught and upset when Uncle was at the games. At one of the games Uncle attended, in May 2014, Charles said Uncle was “staring [him] down.” As a result, Charles “was all red, hysterical, huffy, shaking. He was very, very, upset.” The foregoing evidence reflects Uncle’s behavior caused Charles to be seriously alarmed because he was so distraught by Uncle’s actions that he was having physical reactions, such as shaking.

Further, in October 2013, Mother became hysterical and was crying when screaming at Aunt to keep Uncle away from Mother’s children. After that conversation, Mother and Aunt stopped having substantive conversations and only sent text messages to each other about logistical matters, such as taking the children to dance classes. When Mother overheard Uncle, during a game, loudly say Charles’s name to other umpires, Mother felt scared and nervous. The foregoing evidence supports the finding that Uncle’s behavior affected Mother by causing her to be seriously alarmed, e.g., hearing Uncle say Charles’s name caused a reaction in that Mother was scared.

In sum, the foregoing evidence reflects Mother and Charles were seriously alarmed by Uncle’s course of conduct. Further, this evidence reflects Mother and Charles actually suffered substantial emotional distress as a result of Uncle’s course of conduct. Both Mother and Charles were described as becoming hysterical in connection

with Uncle, which reflects substantial emotional distress. Additionally, the trial court could reasonably conclude that Uncle's behavior would cause a reasonable person to suffer substantial emotional distress, because a reasonable person would likely be greatly disturbed by a person who repeatedly attended events knowing his presence was unwanted and who then swerved his car into the group of people who were trying to avoid him.

#### 5. *LEGITIMATE PURPOSE*

Next, we examine if Uncle's behavior served a legitimate purpose. Uncle asserted he attended Charles's games because he was tasked with evaluating other umpires. The trial court could reasonably reject this alleged legitimate purpose and find there was no legitimate purpose because, while Uncle was watching one of Charles's games, a person from the Little League organization "addressed [Uncle] and asked why [Uncle] was there 1.5 hours early for the game that [Uncle] was due to umpire on a different field. [The Little League person] told [Uncle] that he wasn't supposed to be anywhere near Charles and asked him to move away from the game and told [him] that there were other games going on [at] other fields to watch."

From the foregoing evidence, the trial court could reasonably infer that there was no need for Uncle to be at the field evaluating the umpire if a person from the Little League organization requested Uncle leave. Additionally, the trial court could reasonably conclude there was no legitimate purpose in Uncle swerving his car toward Mother and her children. For example, there is nothing indicating Uncle was trying to

avoid a car accident. Accordingly, the trial court could reasonably find Uncle's course of conduct served no legitimate purpose.

6. *KNOWING AND WILLFUL*

Next, we examine if the evidence supports the knowing and willful finding. In October 2013, Uncle received a text message from the Little League umpire assignor "saying that there had been a complaint filed against [Uncle], that [Charles] was uncomfortable with [Uncle] umpiring the games, and that they asked that [Uncle] not participate in any more games there at [the park]."

In early December 2013, Uncle overheard Aunt tell another person that Mother had screamed at Aunt to keep Uncle away from Mother's children. Uncle "was incredibly hurt" by the information. In March 2014, the umpire assignor for Little League games sent Uncle a text message "saying that another complaint had been filed . . . and that [the assignor] was not going to permit [Uncle] to umpire any games at [the park]." At that point, Uncle agreed not to umpire any of Charles's games.

The foregoing evidence reflects Uncle was repeatedly informed that his presence at the games was unwanted. As early as October 2013, Uncle had been told that his presence made Charles uncomfortable. Thus, Uncle knew the reason he was asked to stay away from the games was due to Charles's emotions concerning Uncle. Given this evidence, the trial court could reasonably conclude the knowing and willful elements were met.

7. *CONCLUSION*

In sum, the trial court could reasonably find Uncle engaged in a knowing and willful course of conduct directed at Mother and Charles that seriously alarmed Mother and Charles, which served no legitimate purpose, actually caused substantial emotional distress to Charles and Mother, and which would cause a reasonable person to suffer substantial emotional distress. In other words, the trial court could reasonably conclude Uncle harassed Charles and Mother, which constitutes abuse. (Former § 6203, subd. (d), § 6320, subd. (a).) Because the abuse finding is supported by the evidence, the trial court did not abuse its discretion in issuing the restraining order. (§ 6300.)

8. *DISTURBING THE PEACE*

Uncle contends the trial court's comments, at the restraining order hearing, concerning why it issued the restraining order were unclear. Uncle asserts the trial court spoke about harassment and disturbing the peace, but it was unclear exactly what finding the trial court made in regard to issuing the restraining order. Uncle contends that, at the hearing for his motion for new trial, the trial court confirmed it issued the restraining order because Uncle's conduct constituted "disturbing the peace."

Uncle provides no record citation to support these assertions. (See Cal. Rules of Court, rule 8.204(a)(1)(C) [appellate briefs must include record citations].)

In our reading of the record of the restraining order hearing, we found the trial court's reasons for issuing the restraining order are clear, perhaps not absolutely explicit, but sufficiently stated. The trial court said, when issuing its ruling, "And the domestic violence statute for restraining order[s] does not require physical violence, it

does not require threats. It requires only *a pattern of harassment*, and to me, if somebody clearly tells you stay away from my kid and for five to seven months you completely ignore that and you continue to have contact despite the fact that you are aware that it is unwelcome, *that is enough* to issue a domestic violence restraining order.” (Italics added.)

The trial court’s statements make it sufficiently clear that it issued the restraining order due to a finding of harassment because it said the statute requires “a pattern of harassment” and “that is enough to issue a domestic violence restraining order.” The court then issued the restraining order. We see nothing unclear about the hearing record. As a result, there is no cause for us to resort to the motion for new trial record in order to determine the trial court’s reasoning when issuing the restraining order. Because the record is clear that the trial court made a harassment finding, we do not delve into the ““disturbing the peace”” theory.

#### 9. *ARGUING EVIDENCE*

Uncle, in his Appellant’s Opening Brief, presents two tables with (1) Uncle’s Spring 2014 umpire schedule, and (2) Charles’s Spring 2014 game schedule. Uncle then argues that there “are a few problems” with the dates wherein Uncle was alleged to have been watching Charles’s games because, for instance, on one occasion, Uncle was supposed to be umpiring a game at approximately the same time Charles’s game took place—one game started at 7:00, and the other started at 7:15.

The appellate court is not the place to argue evidence. Rather, evidence is argued at the trial court, and weighed by the trial court. (*Lewis v. Hinman-Ball & Bonner*

(1957) 154 Cal.App.2d 710, 714 [“It is no part of the function of an appellate court to weigh the evidence. The trial court resolves conflicts”].) At the appellate court, under the abuse of discretion standard of review, our task is to determine if the trial court “exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.” (*Employers Reinsurance Co. v. Superior Court* (2008) 161 Cal.App.4th 906, 919.) This task does not involve weighing the evidence. As a result, we do not sort through the alleged overlapping schedules.

B. IMPACT

Uncle contends the impact of the restraining order has caused “an absolute tragedy” in that he is no longer able to attend his daughter’s school functions, due to his daughter attending the same school as Mother’s children. Uncle provides no legal citations or legal argument to support an assertion that a restraining order should be reversed when it has an impact on a child. Due to the lack of legal citations and legal argument, we deem this issue to be forfeited. (See *In re Marriage of Falcone* (2008) 164 Cal.App.4th 814, 830 [“The absence of cogent legal argument or citation to authority allows this court to treat the contentions as waived”].)

C. PRECEDENT

Uncle contends that if this court fails to reverse the restraining order, then we are “opening the door” to parents being able to obtain restraining orders anytime they want to keep a person away from their children. Contrary to Uncle’s position, this case reflects that a parent may obtain a restraining order when the person-to-be-restrained is repeatedly attending events where his presence is unwanted and when he then swerves

his car toward the parent and child who he knows are try to avoid him; when there is no legitimate reason for the person-to-be-restrained's behavior, and when such behavior is causing the victims substantial emotional distress. In other words, this case reflects proof of harassment is needed to obtain a restraining order. Accordingly, we are not persuaded by Uncle's "bad precedent" contention.

D. JURISDICTION

Uncle contends the restraining order was for Charles, not Mother, and therefore, Mother should have (1) brought the petition in Charles's name; and (2) sought a guardian ad litem appointment for Charles. Uncle contends that because Mother did not follow these procedural steps, the trial court lacked jurisdiction to issue the restraining order.

A domestic violence restraining order "may be granted to any person described in Section 6211, including a minor pursuant to subdivision (b) of Section 372 of the Code of Civil Procedure." (§ 6301, subd. (a).) Section 6211, subdivision (f), includes any "person related by consanguinity or affinity within the second degree." The trial court, within its discretion and upon a showing of good cause, can include "other named family or household members" as protected parties in the restraining order. (Former § 6320, subd. (a).)

The evidence supporting the issuance of the restraining order relates to both Mother and Charles. As explained *ante*, there is evidence reflecting Mother was present at Charles's Little League games, and she did not want Uncle at the games. Mother screamed at Aunt to keep Uncle away from Charles, and was "very upset" and crying.

Mother felt scared at a game when she heard Uncle mention Charles's name. Mother was also present when Uncle swerved his car toward Mother and the children.

We see no reason why the petition/application would have needed to be brought in Charles's name, rather than Mother's name. As explained *ante*, there is evidence supporting the finding that Mother needed to be protected from Uncle's harassment. The evidence concerning Charles provides good cause for including Charles as a protected party in Mother's order. As a result, it was proper for Mother to be the petitioning party and for Charles to be a family member that was protected as part of that order. Accordingly, we conclude the trial court had jurisdiction.

**DISPOSITION**

The judgment is affirmed. Respondent is awarded her costs on appeal.

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MILLER  
J.

We concur:

McKINSTER  
Acting P. J.

KING  
J.