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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

DANA LEE YARMIE, Plaintiff and Respondent, v. THEODORE ALLEN MARTIN, Defendant and Appellant.	B176262 (Los Angeles County Super. Ct. No. EF000721)

APPEAL from an order of the Superior Court of Los Angeles County, Zaven Sinanian, Judge. Reversed.

Alan D. Negron for Defendant and Appellant.

Law offices of Loyst P. Fletcher, Loyst P. Fletcher and Christopher A. Pfau for Plaintiff and Respondent.

INTRODUCTION

Defendant and appellant Theodore Allen Martin (Martin) appeals from a restraining order issued pursuant to the Domestic Violence Protection Act, Family Code section 6200 et seq. (DMVA). We agree with Martin s contention that the record lacks substantial evidence to support the order. We reverse.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Preliminary facts.*

Dana Lee Yarmie (Yarmie) had a son Nicholas, born in August 1995. On February˚14, 2000, pursuant to stipulation, a judgment of paternity was entered establishing that Martin was Nicholas s father. Legal and physical custody was awarded to Yarmie; Martin was ordered to pay child support and was granted visitation.

On August˚29, 2003, Yarmie filed a request for order pursuant to the DMVA. Yarmie sought to stop all visitation and contact with her and her son due to [Martin s] arrest on 8/29/03 & charged with 5 felony counts of child abuse & sexual molestation [of Nicholas] & subsequent release on bail the next day. Yarmie additionally claimed she felt threatened by three letters from a company offering life and accident insurance that had been sent to Nicholas, her, and her fianc (Thomas M. James). With regard to injuries, Yarmie stated, emotional & mental fear of our lives.

It appears that on September 4, 2003, a temporary restraining order was issued.

On September˚18, 2003, Martin filed an answer in propria persona to the temporary restraining order. In his accompanying declaration he declared the following. Since his relationship with Yarmie had ended in 1997, she had brought false charges against him on more than 12 occasions. These charges had been investigated by the Department of Children and Family Services, the Burbank Police Department, and the Los Angeles Sheriff s Department. Additionally, Yarmie had filed at least six applications for restraining orders against him and his 91-year-old mother. While over 40 court hearings had been held, none resulted in orders against him. New accusations had resulted in his arrest on August˚29, 2003, and an arraignment in September˚2003. The insurance letters, which he denied sending, were like those routinely sent to residential addresses unsolicited. He never abused or threatened his son, with whom he had a close relationship.

The pending criminal charges exemplified Yarmie s continual fabrication of charges against him.

Martin also presented the declaration of his 91-year-old mother who declared that she always was present when Nicholas visited Martin and she had never seen any abuse.

On January 21, 2004, Yarmie filed a request to reissue temporary restraining order. On that date, the trial court reissued the order and continued the matter until April 22, 2004, pending the resolution of the criminal case.

On April 22, 2004, a hearing was held regarding Yarmie s request for a permanent restraining order. Martin acknowledged that a criminal matter was pending, in which he had a right not to incriminate himself. Martin requested a continuance until the criminal case was resolved, and informed the court that there was both a criminal protective order and a temporary restraining order. Martin offered to stipulate to extend the temporary restraining order until the criminal matter concluded.[1] The trial court acknowledged looking at the criminal record in the pending case, noted that Martin had been held to answer, and denied the request for a continuance.

The trial court considered the petition which was based upon the pending criminal charges against Martin. The trial court asked Yarmie if anything else has happened since the petition was filed? Yarmie testified that she, her fianc , and her son had received a number of letters from a life insurance company which were very scary. This was the only evidence Yarmie provided. When asked in cross-examination why she feared for her and her son s safety, Yarmie referred to the allegations contained in the criminal complaint and made generalized statements regarding her fear caused by Martin s expressions. Yarmie could not

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[1] The record does not contain any information with regard to the protective order and thus, does not reflect if it would have provided protection to Yarmie and Nicholas, pending the resolution of the criminal case.

provide any specifics. Yarmie testified that at the preliminary hearing, her son had testified he was scared of Martin.

On April 22, 2004, the trial court ordered Martin to stay away from Yarmie and their son for a period of three years. Yarmie was granted sole legal and physical custody. Martin was served with the restraining order while he was in court.

Martin appeals from the order.[2] We find persuasive Martin s contention that there was no evidence to support the order and reverse.

DISCUSSION

There was no evidence supporting the issuance of the restraining order.

Family Code section 6300, a section in the DVPA, permits the trial court to issue a protective order to prevent the recurrence of domestic violence if an affidavit or additional evidence shows, to the satisfaction of the court, reasonable proof of past act or acts of abuse.

Before the issuance of such an order, the trial court must search the criminal records to determine if the subject of the proposed order has been convicted of specified crimes, has outstanding warrants, has been subject to any prior restraining orders, or is in violation of such orders. (Fam. Code,/°6306, subd. (a).) The results of such search shall be considered by the trial court in deciding whether to issue an order and to determine the appropriate orders. (Fam. Code,/°6306, subd. (b)(1).) However, information obtained from a search that

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[2] This matter was originally on our July 2005 calendar. Yarmie was present in the courtroom, even though she had not filed a respondent s brief. We discovered the appellate record did not properly reflect that Yarmie had been served with Martin s opening brief. We continued the matter and directed Martin to serve Yarmie and to provide us with the proper proof of service. Subsequently the case was taken off calendar. It was not until November 2005, that Martin s counsel provided us with a proper proof of service demonstrating that Yarmie had been served with Martin s opening brief.

Yarmie s brief was due December 16, 2005. This court received respondent s brief on January 6, 2006, and denied permission to file as it was untimely.

does *not* involve a conviction [of the crimes specified] shall *not be considered* by the court in making a determination regarding the issuance of an order .˚.˚.˚. That information shall be destroyed and *shall not* become part of the public file in this or any other civil proceeding. (Fam. Code,⁄6306, subd. (b)(2), italics added.)

Here, Yarmie s request for a restraining order was based upon the fact that there were criminal charges *pending* against Martin. However, this evidence was not to be considered by the trial court in deciding if a restraining order should issue. (Fam. Code,⁄6306, subd. (b)(2).)

Further, the additional evidence presented at the April 22, 2004, hearing was insufficient to support the order. Yarmie s vague references to being fearful because of Martin s facial expression lacked any substance. In describing what had occurred, Yarmie simply stated, it s threats by the way he looks. They re intimidating looks. She provided no other explanation or description, nor did she testify as to when this occurred, or how often. Yarmie testified her son had testified in the preliminary hearing that he was scared of Martin. Again, there was no further explanation of this hearsay evidence. Lastly, there was evidence that members of Yarmie s household had received three unsolicited letters from an insurance company. Yarmie could not link these letters to Martin, nor explain why she suspected Martin was connected to them.

It is not our responsibility to re-weigh the evidence. However, to support the issuance of a protective order, there must be reasonable proof of past acts or acts of abuse. The fact that criminal charges are pending against Martin or Yarmie s unexplained, vague references to threats do not suffice. There must be substance to the accusations.[3]

CONCLUSION

The order of April 22, 2004, must be reversed because the record contains no evidence to support its issuance.

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[3] We have since been informed that Martin has since been acquitted of all criminal charges.

DISPOSITION

The order of April 22, 2004, is reversed. Costs on appeal are awarded to appellant on this matter.

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ALDRICH, J.

We concur:

CROSKEY, Acting P.J.

KITCHING, J.