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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

CITY OF SAN JOSE,

Plaintiff and Respondent,

v.

JOHN WEBSTER,

Defendant and Appellant.

H026491

(Santa Clara County
Superior Court
No. CV815401)

FILED
DEC 16 2004
Court of Appeal - Sixth App. Dist.
By _____
DEPUTY

Appellant John Webster appeals from the imposition of a permanent injunction prohibiting him from contacting Lieutenant Brenda Herbert, a police officer employed by respondent City of San Jose. We conclude that there was substantial evidence to support the issuance of the injunction, the trial court did not err in issuing a protective order, and Webster waived the issue of the disqualification of the trial judge. Thus, the order is affirmed.

I. Statement of Facts

In 1990, Herbert was involved in a police sting operation involving the investigation of possible child exploitation. Herbert spoke with Webster in a series of taped telephone conversations about his plan involving sexual relations with

children. Webster was later prosecuted and entered a plea of no contest to a felony charge of child pandering.

In September 1994, Lieutenant Glenn McCourtie, one of Herbert's colleagues, was working at a shopping mall in San Jose. Webster approached and spoke at length about Herbert and his criminal case. Webster claimed that he had been wrongfully arrested and prosecuted based on altered evidence. McCourtie's impression of Webster was that he was "strange, paranoid and somewhat disturbing." Due to his discomfort with Webster and concern for Herbert's safety, McCourtie told Herbert about the incident.

In September 1995, Webster went to Herbert's workplace and left a "reward" poster in which he accused her of fabricating evidence. Webster mailed similar flyers to the public and distributed them at the Saddle Rack Bar in San Jose.

In January 1996, Webster returned to Herbert's office where he left a petition for police officers to sign. He also left a copy of his letter to the grand jury foreperson in which he requested an investigation of alleged police misconduct.

Since 1996 to the present, Webster has maintained a Web site in which he complains of police and governmental corruption. The Web site includes a copy of Herbert's declaration in connection with Webster's criminal case as well as transcripts of the tape recordings of the conversations between Herbert and Webster that led to his arrest. Recently, the Web site has included a request for readers to provide information about Herbert and her family's address so that Webster can inform them by mail of Herbert's "evil deeds" and they can then pressure her to "[d]o the right thing."

In July 1999, Webster sent Herbert a postcard at her workplace in which he challenged her to a “duel to the truth.” The postcard also explained: “With polygraph tests being the weapon of choice.”

In the fall of 2000, a campaign flyer for Webster, who was running as the Libertarian candidate for the state senate, was sent to the police department. The flyer included a sketch of Herbert's likeness and accused her of editing the tapes used in his criminal case.

In June 2001, Herbert received a copy of the Libertarian newsletter at her workplace. Webster's article accused Herbert of falsifying evidence.

In January 2002, Webster attempted to subpoena Herbert to testify at his trial before the United States Tax Court for failure to pay income taxes. Webster believed that Herbert would establish that he was unlawfully prosecuted for child pandering, and thus he was not required to pay taxes due to his loss of income while serving his jail sentence.

In August 2002, Webster began driving a truck near the San Jose Police Department, the Hall of Justice, and the San Jose City Hall. The truck had a billboard that accused Herbert of falsifying evidence.

At about 5:30p.m. on September 17., 2002, Detective Julie Marin observed Webster in his truck in front of the Police Administration Building. The billboard on the truck stated, “San Jose Bad Cops” and “Lt. Brenda Herbert.” Webster was using a pair of binoculars to observe employees as they were leaving work. Marin conducted an investigation and learned that Webster and his truck had recently been sighted more frequently in the vicinity of the Police Administration Building.

At approximately 5:00 p.m. on February 19 or 20, 2003, Webster and an unidentified woman went to Herbert's home, rang the doorbell, and knocked on the front door. When they received no response, they left. Between noon and 2:00 p.m. on February 22, 2003, they returned again to Herbert's home, rang the

doorbell, and knocked on the front door. The following day, a neighbor advised Herbert's husband that a man and a woman had asked her 12-year-old daughter whether the Herberts's home was for sale. They also asked for the Herberts's telephone number.

On February 24, 2003, Webster delivered a letter to Herbert's workplace. He accused her of fabricating evidence against him, asked her to confess, and suggested that they write a book together. He believed that Herbert might have been his "soul mate," and blamed her for causing his estrangement from his children. He informed her that he had "gone to all the trouble with all the flyers, handouts, billboard truck, and the web-site," so that she or the City of San Jose would sue him for defamation. He explained that once the suit was brought, he could call her as a witness to prove that his accusations were true.

Webster also enclosed a flyer with his letter. Herbert's husband's name and home address were printed on it. The flyer stated. "Lt. Herbert sells her soul." The flyer also stated: "Bad Cops turn good citizens into Terrorists." Webster explained that when law enforcement agencies and police officers like Herbert hide or alter evidence, the lives of good citizens are destroyed. He also noted that our local courts are willing to participate in a cover-up when the police act with "good intentions." Thus, he continues, the "good citizen" is left with "no way to get a peaceful redress of grievances. When this occurs repeatedly that 'Government Gone Bad' loses its legitimacy and gives moral justification for its overthrow by force. This is what was happening to cause the Oklahoma bombing where hundreds of innocent people were killed as 'collateral damage' in an effort to send a message to the FBI and BATF for violating people's rights. Is a Bad Cop like Lt. Brenda Herbert putting your freedom in danger? Absolutely!" Webster also referred to Herbert as "[t]he face of EVIL, hater of men."

The City of San Jose then sought and obtained a temporary restraining order against Webster. At the hearing on the permanent injunction, Webster argued that he did not make a credible threat of violence. Webster also explained his reference to the Oklahoma City bombing: “MR. WEBSTER: I'm saying -- well, that was brought about by a frustration against a government gone bad. And that -- in trying to essentially let her neighbors know that there's -- really isn't something you can ignore. [¶] THE COURT: So the same type of frustration Mr. McVeigh felt towards his government? [¶] MR. WEBSTER: That's the type I'm talking about.” The trial court then issued an injunction prohibiting Webster from contacting Herbert and ordering him to stay at least 300 yards away from Herbert, her home, and her workplace.

II. Discussion

A. Disqualification of Judge

Webster contends that Judge Thomas Cain should have disqualified himself. Webster asserts that Judge Cain “was actively involved in covering up illegal activity by the police” when he signed the search warrant in 1990 in which the police were authorized to search Webster's residence

When a judge refuses to disqualify himself, “a party may seek the judge's disqualification. The party must do so, however, 'at the earliest practicable opportunity after discovery of the facts constituting the ground for disqualification.' (Code Civ. Proc., § 170.3, subd. (c)(1).)” (*People v. Scott* (1997)15 Cal.4th 1188, 1207.) Where the party does not raise the issue before the trial court, it may not be raised for the first time on appeal. (*Ibid.*)

Here Webster's counsel informed Judge Cain that he had signed the search warrant as well as orders to seal documents in Webster's criminal case in 1990. Judge Cain stated that he had reviewed the file in the instant case, and he did not

recall anything about Webster's criminal case. Counsel did not seek to disqualify Judge Cain. Accordingly, the issue has been waived.

B. Sufficiency of Evidence

Webster next argues that there is insufficient evidence to support the imposition of a permanent injunction under Code of Civil Procedure section 527.8.¹

“If the judge finds by clear and convincing evidence that the defendant engaged in unlawful violence or made a credible threat of violence, an injunction shall issue prohibiting further unlawful violence or threats of violence.” (§ 527.8, subd. (f).) When a party must establish proof of a fact by clear and convincing evidence, the sufficiency of the evidence to establish that fact is primarily a question for the trial court to determine. (*Crail v. Blakely* (1973) 8 Cal.3d 744, 750.) If the trial court's determination is supported by substantial evidence, it will be upheld on appeal. (*Edmunds v. Valley Circle Estates* (1993) 16 Cal.App.4th 1290, 1297.) In conducting a substantial evidence review, we “resolve all factual conflicts and questions of credibility in favor of the prevailing party and indulge in all legitimate and reasonable inferences to uphold the finding of the trial court if it is supported by substantial evidence which is reasonable, credible and of solid value. [Citations.]” (*Schild v. Rubin* (1991) 232 Cal.App.3d 755, 762.)

Section 527.8 provides in relevant part: “(a) Any employer, whose employee has suffered unlawful violence or a credible threat of violence from any individual, that can reasonably be construed to be carried out or to have been carried out at the workplace, may seek a temporary restraining order and an injunction on behalf of the employee prohibiting further unlawful violence or threats of violence by that individual. "For purposes of this appeal we need only

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

focus on the definition of “credible threat of violence,” which is defined as “a knowing and willful statement or course of conduct that would place a reasonable person in fear for his or her safety, or the safety of his or her immediate family, and that serves no legitimate purpose.” (§527.8, subd. (b)(2).) “Course of conduct” is defined as “a pattern of conduct composed of a series of acts over a period of time, however short, evidencing a continuity of purpose, including following or stalking an employee to or from the place of work; entering the workplace; following an employee during hours of employment;... or sending correspondence to an employee by any means, including, but not limited to, the use of the public or private mails, interoffice mail, fax, or computer e-mail.” (§ 527.8, subd. (b)(3).) Constitutionally protected activity is not included within the meaning of "course of conduct." (§ 527.8, subd. (c).)

Here there was substantial evidence of a statement or of a course of conduct having no legitimate purpose that would have placed a reasonable person in fear for her safety. For almost ten years, Webster has been accusing Herbert of fabricating evidence in connection with his criminal case. He has distributed posters and flyers, and maintained a Web site in which he has documented her alleged misconduct. In 1999, he began sending items directly to her at her workplace. In 2002, he repeatedly circled her workplace in a truck with a billboard, and began observing employees as they left the office. When Herbert failed to respond to Webster's tactics, he went to her home twice. A couple of days later, he delivered a letter and a flyer to her workplace in which he referred to her as "the face of EVIL." warned that "Bad Cops turn good citizens into Terrorists," and referred to the Oklahoma City bombing. At the hearing on the petition for the injunction, Webster explained that he wanted Herbert's neighbors to know that they could not ignore her misconduct, and that he was experiencing the same type of frustration in connection with corrupt government that McVeigh

experienced. Given the passage of time, a reasonable person would be concerned when Webster intensified his efforts to contact her. A reasonable person would also fear for her safety when Webster began comparing his circumstances with the individual who bombed a federal building and killed hundreds of innocent people. Webster harassed Herbert so that she would sue him for defamation, and thus his statements and conduct did not serve a legitimate purpose. Accordingly, the evidence supports the finding that Webster made a credible threat of violence within the meaning of section 527.8.

Webster claims that his statements and conduct served a legitimate purpose, that is, exposing police corruption and misconduct. However, the injunction does not enjoin Webster from exercising his First Amendment rights about his grievances arising out of the 1990 prosecution. He may continue to petition government officials, he may continue to write letters, articles and flyers, he may continue to post information on his Web site, and he may continue to drive his truck where he chooses with the exception of a 300 yard radius of the police department and Herbert's house.

C. Motion for Protective Order

Webster also argues that the trial court abused its discretion in granting the protective order for the deposition of Herbert.

We review a discovery order for an abuse of discretion. (*Greyhound Corp. v. Superior Court* (1961) 56 Cal.2d 355,378-381.) Under that standard, we must uphold the order unless the trial court “exceed[ed] the bounds of reason, all of the circumstances before it being considered.” (*Foothill Properties V. Lyon/Copley Corona Associates* (1996) 46 Cal.App.4th 1542, 1557.)

“Under the discovery statutes, information is discoverable if it is unprivileged and is either relevant to the subject matter of the action or reasonably calculated to reveal admissible evidence. [Citations.]” (*Valley Bank of Nevada V.*

Superior Court (1975)15 Cal.3d 652, 655-656; § 2017, subd. (a).) Section 2025, subdivision (i) confers on trial courts broad power to enter a protective order to prevent deposition discovery from causing “unwarranted annoyance, embarrassment, or oppression, or undue burden and expense” to any party, deponent, or other natural person. A moving party must establish that these factors outweigh the likelihood that the information sought will lead to the discovery of admissible evidence. (*Emerson Electric Co. V. Superior Court* (1997)16 Cal.4th 1101, 1110.)

In the instant case, the City of San Jose applied for a temporary restraining order and injunction based on declarations of individuals with personal knowledge of Webster's conduct. The declarations submitted by Herbert's husband and coworkers documented that Webster's actions would place a reasonable person in fear for her safety and the safety of those near her home and at work. There was no declaration by Herbert, since section 527.8 does not include an individual's subjective fear as an element. Consequently, Herbert's deposition testimony was irrelevant. Moreover, Webster's attempt to depose Herbert was yet another opportunity for him to harass her. Accordingly, the trial court did not abuse its discretion in precluding this discovery.

III. Disposition

The order is affirmed.

Mihara, J.

WE CONCUR:

Rushing, P.J.

Premo, J.

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