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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

ERIKA HERMAN, Plaintiff and Respondent, v. MARK GOULD, Defendant and Appellant.	B279533 (Los Angeles County Super. Ct. No. SQ007519)

APPEAL from an order of the Superior Court of Los Angeles County, Bobbi Tillmon, Judge. Affirmed.

Wex Law and Michael S. Devereux for Defendant and Appellant.

Pepperdine University School of Law, Clinical Program, Tanya Asim Cooper and Kristine Toma, Armando Lopez, and Melissa Griffin, Certified Law Students for Plaintiff and Respondent.

Mark Gould appeals from the trial court's grant of a domestic violence restraining order sought by his former girlfriend, respondent Erika Herman. Gould argues that the evidence of abuse was insufficient and that the court violated his right to due process by not allowing his minor daughters to testify. In the conclusion of his opening brief he also asks that the prohibition against his owning a firearm be reversed, but he makes no argument and cites no authority for that contention. We hold that there was substantial evidence of abuse, that Gould was not prejudiced by the exclusion of his daughters' testimony, and that he has forfeited his challenge to the firearm prohibition. Accordingly, we affirm.

BACKGROUND[1]

On August 12, 2016, the trial court granted Herman's ex parte petition for a temporary restraining order against Gould. The court held a hearing on October 5, 2016 to determine whether to impose a longer-term restraining order, the outcome of which is the subject of this appeal. Herman was represented by pro bono counsel and two certified law students, and Gould represented himself.

At the hearing, Herman testified to the following: She and Gould met in June 2014 and began dating in August of that year. In July 2015, Herman and Gould were in Gould's home. Gould "expressed that [Herman] was dismissing him," and Herman "reached over to hug him." Gould pushed Herman's shoulders and she fell back towards some bookshelves. Gould said, "Good.

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[1] The facts summarized herein are limited to those relevant to the issues on appeal.

Just . . . cry. Now you can be the victim." Herman went into the bathroom; Gould followed and threw a bowl of ice cream over her head and into the toilet. Herman went into the hallway and Gould grabbed her by the shoulders and shoved her down the hall, telling her to "[j]ust get out, get out."

On New Year's Day in 2016, Herman and Gould were at Herman's apartment on her bed. Gould became "agitated" as they were talking and Herman tried to calm him down. Gould "pound[ed] his fists around [Herman] on the bed, telling [her] that [she] was going to get punched." He also kicked her foot "really hard."

On August 3, 2016, during an argument in Herman's apartment about the behavior of Gould's daughters, Gould told Herman to "shut the fuck up." The argument continued, and Gould tore a poster off of the bathroom door, then ripped a drawer out of a cabinet and "smashed it onto the floor right next to" Herman. Herman shouted, "Get the fuck out of my house." Gould grabbed the back of her head and squeezed his hand over her mouth, "muffl[ing]" her. Herman got away from him, but Gould blocked the door, got down on his knees, clasped his hands together, and asked Herman to calm down. Herman opened the front door and told him to get out. Gould grabbed her by the shoulders and tried to push her out the front door instead. Herman resisted. Gould grabbed Herman's purse and threw it out the door, then "with the full weight of his body" pushed her out as well. Herman went back in a little while later after realizing her phone was not in her purse, and told Gould to leave, which he refused to do. Herman again left. Gould sent her a "barrage of text messages," including one referring to "DEFCON1," which Herman interpreted as "a severe like

military expression of just eminent nuclear threat, and that he was going onto the offense." Herman called the police "a couple hours" after the incident.

Herman's neighbor Larry Greenfield testified. He had served the original restraining order on Gould on or about August 17, 2016 as a favor to Herman. He explained that Gould and his three daughters were staying at Herman's apartment at that time. Greenfield summoned the police to assist him with service and observed them take two assault rifles and a handgun from the apartment. Greenfield had seen Gould and Herman have "spats" in which Gould would tell Herman to be quiet and not to contradict him, but Greenfield otherwise had not seen them fight. The first he had heard of Gould being physically violent with Herman was when she obtained the restraining order.

Gould testified, stating that "[t]he allegations are thoroughly false." He said he "wasn't violent" and "don't have a history of hurting people." He claimed the firearms taken from the apartment by the police did not work.

Gould called as a witness Detective Tyree Brown, one of the police officers who responded to Herman's call on August 3. Brown testified that the call suggested "an extremely dangerous situation" with weapons involved, so he arrived with seven other officers. Once they knocked on the door and made contact with Gould, however, Brown said there did not seem to be any danger. Herman asked that the police remove Gould and his three daughters. Brown said it appeared that Herman's true concern was getting Gould out of the apartment: "It seemed . . . in my opinion she wanted [Gould] to leave without properly going through" an eviction procedure. The record does not indicate that

the police took any action at that time against Gould or his daughters.

Brown testified that the weapons recovered from the apartment after the restraining order was served were inoperable. Brown further testified that Gould's daughters called him on August 12, 2016. In response to hearsay objections from Herman's counsel, the court did not permit further testimony regarding that communication.

The trial court found that Herman had sustained her burden and there was a factual and legal basis for issuing the restraining order. The court prohibited Gould from, among other things, engaging in violent or harassing conduct toward Herman and from contacting her directly or indirectly. The court ordered Gould to stay at least 100 yards from Herman, her home, her workplace, and her vehicle, and further ordered that Gould participate in a batterer's intervention program. The court prohibited Gould from possessing or obtaining firearms. The court denied Gould's request to keep one handgun "for protection," citing Gould's admission that he was suffering from post-traumatic stress disorder, but also stated that Gould could return to court with evidence demonstrating a basis for the return of a firearm. The court stated that the order would be in effect for three years.

Gould timely appealed.

STANDARD OF REVIEW

A trial court's order granting or denying a protective order under the Domestic Violence Prevention Act (DVPA) (Fam. Code,

§ 6200 et seq.)[2] is reviewed for abuse of discretion. (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420.) " 'The appropriate test for abuse of discretion is whether the trial court exceeded the bounds of reason. When two or more inferences can reasonably be deduced from the facts, the reviewing court has no authority to substitute its decision for that of the trial court.' " (*Ibid.*)

We review the trial court's factual findings for substantial evidence. (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822 (*Sabbah*).) "We accept as true all evidence tending to establish the correctness of the trial court's findings, resolving every conflict in the evidence in favor of the judgment. [Citation.] Under the substantial evidence test, the pertinent inquiry is whether substantial evidence supports the court's finding—not whether a contrary finding might have been made. [Citation.]" (*In re Marriage of Fregoso & Hernandez* (2016) 5 Cal.App.5th 698, 702 (*Fregoso*).) "The testimony of one witness, even that of a party, may constitute substantial evidence." (*Id.* at p. 703.)

DISCUSSION

I. The Court Did Not Abuse Its Discretion In Issuing The Restraining Order

Under the DVPA, a court may issue a restraining order "to prevent acts of domestic violence, abuse, and sexual abuse and to provide for a separation of the persons involved in the domestic violence for a period sufficient to enable these persons to seek a resolution of the causes of the violence." (§§ 6220, 6300.) A

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[2] Further undesignated statutory references are to the Family Code.

restraining order may issue "upon a showing of 'reasonable proof of a past act or acts of abuse.' " (*Fregoso*, *supra*, 5 Cal.App.5th at p. 702, quoting § 6300.) Under section 6203, subdivision (a), "abuse" includes, among other things, intentionally or recklessly causing or attempting to cause bodily injury, placing a person in reasonable apprehension of imminent serious bodily injury, or engaging in conduct specified in section 6320 such as "molesting, attacking, striking, . . . threatening, . . . [and] battering." "Abuse is not limited to the actual infliction of physical injury or assault." (§ 6203, subd. (b).)

Here the trial court did not abuse its discretion in issuing the restraining order. There was substantial evidence of past acts of abuse to support a claim under section 6300. Herman testified that, over three incidents, Gould shoved and kicked her, grabbed her head and squeezed his hand over her mouth, threw a bowl at her, smashed a drawer next to her, pounded his fists around her while threatening that she was going to get punched, and pushed her out of her own apartment. The trial court reasonably could conclude that Gould caused or attempted to cause bodily injury or placed Herman "in reasonable apprehension of imminent serious bodily injury." (§ 6203, subd. (a)(3).) His actions could also be construed as "attacking," "threatening," and "battering" under section 6320, subdivision (a). Thus, Herman's testimony alone was substantial evidence supporting the court's ruling. (*Fregoso*, *supra*, 5 Cal.App.5th at p. 702.)

Gould argues that "[a]ll Herman could muster was two shoving incidents a year apart, having her foot kicked in bed, and Gould's bumptiousness." To the extent Gould is arguing that the incidents described by Herman do not constitute abuse under the

DVPA, we disagree with his characterization. He omits key details from her testimony, including the fact that Herman described three incidents of abuse, not just two. Regardless, Gould fails to explain how shoving and kicking do not constitute abuse under section 6203, subdivision (a)—both describe "attacking" and "battering." (§ 6320, subd. (a).)

Gould also challenges Herman's credibility. Gould points to evidence he claims contradicts or undercuts Herman's testimony, such as his own testimony denying any violence, Greenfield's testimony that he was unaware of any abuse before Herman sought the protective order, and Brown's testimony that he saw no crime and believed Herman was using the police simply to evict Gould and his daughters. Gould argues that Herman's testimony was "self-serving" and uncorroborated. He contends that Brown, as a domestic violence detective, "should have been believed."

These arguments misconstrue our standard of review. Even if there was evidence supporting Gould's position, "the trial court put more weight in other, contrary evidence, and drew other, reasonable inferences contrary to the ones [Gould] advocates here." (*Fregoso*, *supra*, 5 Cal.App.5th at p. 703.) Under the substantial evidence standard, " '[t]he issue is not whether there is evidence in the record to support a different finding, but whether there is some evidence that, if believed, would support the findings of the trier of fact.' " (*Ibid.*) Herman's testimony, which the court believed, supported the court's findings. " ' " ' "[I]t is the exclusive province of the [trier of fact] to determine the credibility of a witness," ' " ' " and we will not intrude upon that determination. (*Sabbah*, *supra*, 151 Cal.App.4th at p. 823.)

We also note that Greenfield's and Brown's testimony did not in fact contradict Herman's testimony. Neither challenged her description of the three incidents of abuse, nor could they because neither of them witnessed those incidents. Greenfield merely testified that he was unaware of the abuse until Herman told him about it. Brown testified that when he arrived at Herman's apartment several hours after the August 3 incident, there did not appear to be any danger. Although Greenfield and Brown arguably did not corroborate Herman's account of the three incidents, they did not (and could not) contradict it. The court could have believed both witnesses and still found Herman credible.

Gould cites *People v. Johnson* (1980) 26 Cal.3d 557, 577, for the proposition that under the substantial evidence standard a reviewing court "does not . . . limit its review to the evidence favorable to the respondent," but must "resolve the issue [on appeal] in the light of the *whole record* . . . and may not limit [its] appraisal to isolated bits of evidence selected by the respondent." While we accept the proposition that evidence cannot be taken in isolation and must be viewed in context, the law is clear that we cannot substitute our own credibility determinations for those of the trial court nor reweigh evidence on appeal. (*Fregoso*, *supra*, 5 Cal.App.5th at p. 702; *Sabbah*, *supra*, 151 Cal.App.4th at p. 823.) Thus, we reject any suggestion that Herman's testimony does not constitute substantial evidence merely because it was contested by Gould's testimony.

Gould argues that "mere annoyance" is insufficient to support a restraining order. We fail to see how the violent acts described by Herman constitute "mere annoyance."

Gould further argues that Herman failed to show a risk of future harm. There is no such requirement before a restraining order may be issued under the DVPA. All that is required is evidence of past abuse. (§ 6300; *Nevarez v. Tonna* (2014) 227 Cal.App.4th 774, 783 (*Nevarez*).)

Gould cites cases denying injunctions for conduct Gould contends was "far worse" than that alleged by Herman. *Schild v. Rubin* (1991) 232 Cal.App.3d 755 reversed an injunction under Code of Civil Procedure section 527.6 barring a family from playing basketball on their property, which purportedly annoyed their neighbors. (*Schild*, at pp. 757-758.) *Scripps Health v. Marin* (1999) 72 Cal.App.4th 324 (*Scripps*) held that a single incident of a defendant angrily striking a hospital administrator with a door as he pushed past was insufficient to show a reasonable probability the wrongful act would be repeated in the future, as required for an injunction under Code of Civil Procedure section 527.8. (*Scripps*, at pp. 328, 336.) *Russell v. Douvan* (2003) 112 Cal.App.4th 399 (*Russell*) held that a single incident of an attorney forcefully grabbing another attorney's arm following a court appearance was insufficient to show a risk of future harm justifying an injunction under Code of Civil Procedure section 527.6. (*Russell*, at pp. 400-401.)

These cases are inapposite in that they involve injunctions under the Code of Civil Procedure, not the DVPA. "The DVPA . . . permit[s] issuance of protective orders on a different, broader basis than permitted under Code of Civil Procedure sections 527.6 and 527.8." (*Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 137.) Indeed, *Scripps* and *Russell* were decided expressly on the issue of future harm, which is not a showing required under the DVPA. (*Nevarez*, *supra*,

227 Cal.App.4th at p. 783.) Moreover, we disagree with Gould that the conduct in his cited cases was "far worse" than the conduct at issue here. Unlike the single incidents of striking or grabbing in *Scripps* and *Russell*, Gould attacked Herman on three occasions, and his attacks were more sustained with multiple acts of violence (hitting, throwing, pushing, grabbing, kicking). The suggestion that Gould's acts were less egregious than people noisily playing basketball on their property does not merit further discussion.

II. Gould Was Not Prejudiced By The Court Not Permitting His Daughters To Testify

The trial court did not allow Gould's daughters to testify, stating that doing so would be traumatic for them. Gould argues this was error and a violation of his right to due process.[3]

We need not decide whether the court properly excluded these witnesses because Gould has failed to show that his daughters' testimony would have affected the outcome of the proceeding. (Code Civ. Proc., § 475; *In re Marriage of Shimkus* (2016) 244 Cal.App.4th 1262, 1269 (*Shimkus*) ["[W]e may not reverse a judgment unless an error was prejudicial and a different result was likely in the absence of the error"].) Gould argues that his daughters could have testified about their relationship with Herman and "could have supplied evidence

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[3] Herman argues that Gould expressly agreed with the trial court that having his daughters testify might be traumatic for them, thereby forfeiting this challenge on appeal. Because we hold that Gould's challenge fails on the merits, we do not address this contradictory challenge.

relevant to Detective Brown's opinion about Herman using a 911 'SWAT' call to get rid of the girls and Gould." Gould also suggests that his daughters could have testified about the call they made to Brown on August 12, 2016, nine days after Herman's last reported incident of abuse. Gould does not explain, however, how this evidence would have related to the crucial factual question in this case, namely, whether Gould abused Herman as defined by the DVPA. There is no indication in the record, including from Gould's testimony, that his daughters were witnesses to any of the three incidents of abuse described by Herman. It was uncontested that the daughters were present when the police arrived several hours after the incident on August 3, 2016, but this would not allow them to shed light on the incident itself, or either of the two earlier incidents. Gould does not explain how his daughters' call to Brown on August 12 is relevant to the question of his abuse of Herman; in his reply he suggests only that the call was evidence of "alienation between the girls and Herman" (some capitalization omitted), which does not appear pertinent to the issue of Gould's abusive conduct.

To the extent Gould's daughters might have provided testimony helping to establish that Herman's motive in calling the police was to evict them rather than protect herself, this would be duplicative of Brown's testimony, which the trial court did receive. Brown unequivocally stated that the circumstances he observed at the apartment were inconsistent with Herman's protestations of danger on the 911 call, and that in his opinion, Herman was using the police to evict Gould. Given that the trial court imposed the restraining order despite this evidence, we are not persuaded that similar testimony from Gould's daughters

would have led to a different result. We also note that Herman's motive in summoning the police was largely irrelevant, given that the DVPA does not require a person seeking a restraining order to show fear of future danger so long as there is evidence of past abuse. The trial court could have found Brown's testimony credible and still imposed the restraining order.

Gould argues that it is impossible to determine whether his daughters' testimony would have had an impact on the case because it was never heard, citing *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281 (*Carlsson*). *Carlsson* involved a remarkable circumstance in which a trial judge "literally walked out of the courtroom in midtrial" and never returned. (*Id.* at pp. 289, 293.) In this unusual situation, "[t]he trial court's termination of the trial rendered an assessment of prejudice impossible. We cannot speculate on what evidence would have been submitted had [the appellant] been permitted to complete his presentation, much less determine whether it would have made a difference in the judgment." (*Id.* at p. 294.)

In contrast, here the trial court did not terminate the trial early, and merely decided to exclude certain witnesses from testifying. In such a circumstance, a party challenging exclusion of evidence must show prejudice. (See *Shimkus*, *supra*, 244 Cal.App.4th at p. 1269 [appellant required to show prejudice from trial court's exclusion of witness declarations].) Gould has failed to do so.

Also unavailing is *Webber v. Webber* (1948) 33 Cal.2d 153 (*Webber*), in which the Supreme Court found that a plaintiff seeking alimony was denied a fair trial because of the trial judge's "biased and prejudiced attitude . . . as reflected in his announced prejudgment of the issue." (*Id.* at p. 161.) Among

other things, the judge "indicated early in the presentation of plaintiff 's case—and before having heard her evidence as to need, condition of health, or lack of means of support—that he was not favorable to an award of alimony," in part because he "was of the opinion that 'anybody can get a job now' " and that "capable women earn not less than $7.00 per day for seven or eight hours' housework." (*Id.* at p. 156.) *Webber* has no application here, where Gould fails to point to anything in the record indicating that the trial court prejudged any issues in this case or expressed any bias.

III. Gould Has Forfeited His Challenge To The Court's Order Prohibiting Him From Possessing Firearms

In the conclusion of his opening brief, Gould asks that we reverse and remand the order prohibiting him from owning a handgun. Gould does not make any substantive arguments or cite any authority in support of this position in his opening brief, and thus forfeits the issue. (*Nickell v. Matlock* (2012) 206 Cal.App.4th 934, 947.) Although he cites a case purportedly in support of his position in his reply brief and argues the evidence was insufficient to deny him the right to possess firearms, that cannot cure the failure to argue the issue in his opening brief. (*Santa Clara Waste Water Co. v. Allied World National Assurance Co.* (2017) 18 Cal.App.5th 881, 884, fn. 2.)

Regardless, Gould cannot prevail on the merits. The DVPA mandates that a person subject to a protective order of the type imposed on Gould "shall not own, possess, purchase, or receive a firearm or ammunition while that protective order is in effect." (§ 6389, subd. (a).) The prohibition is mandatory, and the trial court has no authority to modify or omit it. (See *Ritchie v.*

Konrad (2004) 115 Cal.App.4th 1275, 1294-1295.) The only exception is for a firearm "necessary as a condition of continued employment" (§ 6389, subd. (h)), but Gould does not invoke that exception or make any showing that possession of a firearm is a necessary condition of his employment, nor did he in the trial court.

Gould's cited case in his reply, *People v. Jason K.* (2010) 188 Cal.App.4th 1545 (*Jason K.*), involved a hearing to lift a prohibition on owning firearms following admission to a mental health facility under Welfare and Institutions Code sections 5150 and 5151. (*Jason K.*, at pp. 1552-1553.) Gould does not explain how that case applies here, where the proceedings arose under the Family Code and involved the imposition of a prohibition required by statute rather than the lifting of an existing prohibition. The trial court did not err in imposing the firearm restriction mandated under section 6389, subdivision (a).

DISPOSITION

The order is affirmed. Herman is awarded her costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.