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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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

STEPHANIE M. HOGAN, Plaintiff and Respondent, v. RONALD AVILA, Defendant and Appellant.	B232627 (Los Angeles County Super. Ct. No. GQ007504)

APPEAL from an order of the Superior Court of Los Angeles County. Dianna J. Gould-Saltman, Judge. Affirmed.

Ronald Avila, in pro. per., for Defendant and Appellant.

Stephanie M. Hogan, in pro. per., for Plaintiff and Respondent.

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Ronald Avila appeals from a February 23, 2011 order of the trial court granting Stephanie M. Hogan's request for a restraining order against him. He contends that substantial evidence does not support the court's order. We disagree and affirm the order.

BACKGROUND

Hogan and Avila have never been married to each other, but have a child together (the minor). In 2000, Hogan filed an application for a restraining order against Avila, which resulted in a stipulated order filed on November 7, 2000. Among other things, the order required Hogan and Avila to stay at least 100 yards away from each other and to refrain from making derogatory comments about each other to the minor. The order further provided that Hogan "will not raise allegations of any acts of violence by [Avila] towards herself or any other person alleged to have occurred prior to March 30, 1999 in any future proceeding regarding custody and or visitation of" the minor. On November 10, 2008, Hogan filed a request for restraining order against Avila and a temporary restraining order (TRO) was granted. On December 2, 2008, the trial court dissolved the TRO and denied Hogan's request for a restraining order, finding "insufficient evidence to grant the request for the permanent restraining order."

The instant appeal concerns Hogan's request, filed on February 1, 2011, for an order requiring Avila to not harass, physically assault, or contact Hogan, Hogan's mother, and the minor. In support of her request for a restraining order, Hogan declared that on January 23, 2011, she had reported to police that Avila was making annoying phone calls and sending annoying texts. On January 24, 2011, Hogan was in her home office located in the backyard off the side of the garage. Avila sent her multiple faxes requesting information regarding the minor. Hogan turned off the lights in the office. The backyard lights were not on and it was dark outside. When Hogan opened the door, someone punched her in the jaw. Hogan believed Avila was the attacker. She thought that Avila hit her because he was angry that on the previous day she had not turned on the fax machine to receive messages. The police responded to the incident but did not give Hogan an emergency protective order. Hogan also declared that Avila had hit her on

many occasions and had pushed and shoved her and grabbed her by the throat. In recent months, Avila sent Hogan demanding, harassing, and threatening letters and texts. On one occasion, Avila showed Hogan his loaded gun and asked her if "she trusted him." Avila threatened Hogan constantly by saying, "'Unless you have any proof of what I say and do, don't even bother saying anything because you won't have any proof.'" Avila was in current violation of court orders by failing to attend anger management and joint counseling sessions with the minor. The "Child Custody Evaluator" reported that the minor's mental health would be at serious risk if he were placed in Avila's primary custody. When Avila was prosecuted for an assault on another woman, he "threatened [Hogan] on what to say on his behalf."

On February 1, 2011, the trial court issued a TRO ordering Avila to stay 100 yards away from Hogan and the minor and not to harass or contact them. The TRO also ordered Hogan to have legal and physical custody of the minor. On February 14, 2011, Avila filed an answer to the TRO, denying that he had ever battered or harassed Hogan, and denying that he had assaulted her on the evening of January 24, 2011. He also denied that he had sent Hogan threatening or harassing letters or text messages and denied that the gun incident described by Hogan had occurred.

On February 23, 2011, the date of expiration of the TRO, the trial court heard argument on the request for a restraining order. Hogan testified that Avila lived five minutes away from her. She testified that because Avila had faxed her at all times of the day instead of faxing her during agreed-upon time periods, Hogan had asked Avila to text her first when he needed to fax her so that she could turn on the fax machine. On January 23, 2011, Hogan, who is a nurse, was at work when Avila texted her and asked that she turn on her fax machine. Hogan texted back to Avila that she was at work and asked if she could connect the fax after 9:00 p.m. that evening or the next evening. After work, between 9:30 p.m. and 10:00 p.m., Hogan stopped at the police station to report that she feared Avila would retaliate against her because she had not turned on the fax machine. She told the police that in the past, when she had failed to comply with Avila's demands, he would hit her or damage her property. The next day, January 24, 2011,

Hogan texted Avila to make arrangements to turn her fax machine on for a four-hour period. At 6:42 p.m., after multiple attempts by Avila to fax messages to her, Hogan received a fax requesting the name of the minor's therapist. She sent Avila a text stating: "This is what you were demanding me to leave work and come home and turn my fax on." She did not receive a reply text. About 20 minutes after she received the fax, Hogan switched the fax machine off and shut off the office lights. It was dark outside because the backyard lights, which "come on automatically when it hits . . . a certain darkness," were not on. She opened the office door and was punched in the right side of her jaw and fell back into the office. She was dazed and saw "maybe a silhouette or a shadow." She stated, "If it wasn't [Avila], it was his twin." She did not get a good look at her attacker's face but noticed that he wore an orange jacket. The next day Hogan saw that a bush against a wall had been pushed down away from the wall. An electrician found that the lights were not working. Hogan testified, "Either there was a faulty wire or it had been pulled. But nothing that could be 100 percent like they had been cut. There's nothing like that."

Hogan further testified that in August 2009, when she entered her office she found Avila, who had not been invited to her home, sitting on a couch. Avila grabbed Hogan, shoved her, and pushed her against the filing cabinet. He said something about documents and legal custody. In May 2009, Avila grabbed Hogan, pulled her and stepped on her foot, fracturing her toe. In April 2008, Avila shoved Hogan into a concrete trash can when she intervened between Avila and the minor after Avila tried to pull the minor, who was resisting, into a therapist's office. She believed that Avila had kicked in the vents on the side of her house the day before a court hearing in November 2008, which she reported to the police. In 1996, Avila had pointed a loaded gun at her while he was drunk. Hogan reported that the minor has had diarrhea, headaches, abdominal pain, anxiety and stress because of Avila's actions. She stated that after the TRO was granted, the minor was "no longer breaking down on the steps of the school not wanting to go," and has not had headaches and diarrhea.

Avila testified that his relationship with the minor had improved from the time of the child custody evaluation and that the minor had told Avila that he wanted to live with him. Avila believed that Hogan filed a request for a restraining order to prevent the minor from living with Avila. Avila lives 10 to 12 minutes away from Hogan. Avila testified that he did not ask for the name of the therapist in a text and preferred faxing as a method of communication because: "I try to have everything in writing. I find texting unreliable. Because my particular phone, after a certain time when it gets full, all my sent texts get automatically deleted. And sometimes texts get accidentally deleted." Avila denied that he had assaulted Hogan on January 24, 2011, and stated that he believed someone else had assaulted her because on July 6, 2009, Hogan had sent him a text — which he believed was meant for someone else — claiming that "you" had fractured her foot. Avila still had that text in his phone. When questioned by the trial court, Avila conceded that his belief that someone else was harming Hogan was based on speculation. Avila denied that in August 2009 he had waited for Hogan in her office, then shoved her; that in April 2008 he shoved Hogan into a concrete trash can; and that in May 2009 he fractured Hogan's toe. Avila also testified that he had attended anger management sessions pursuant to a court order.

Avila's sister, Cecilia Avila, testified that Avila has lived with her for 12 years and that his normal routine was to come home between 6:00 p.m. and 6:30 p.m. She testified that on January 24, 2011, Avila came home at 6:30 p.m. and did not leave the house until the next morning. Cecilia testified that Avila always told her if he was planning to go to the gym after work, but he did not tell her he was going to the gym on January 24, 2011.

Martha Avila, Avila's mother, testified that she could not remember if Avila went to the gym the week of January 24, 2011. Martha believed Avila had been home on January 24, 2011, because she remembered him mentioning that he had been having problems faxing to Hogan and that he did not think she was going to respond to his questions about the therapist.

The trial court found that Hogan had met her burden of proof. It noted that Avila had "lost credibility" when he testified that he did not want to communicate with Hogan

by text because his phone does not retain texts, yet he later testified that he still had a text in his phone that was sent to him by Hogan on July 6, 2009. The court ordered Avila to not harass, threaten or stalk Hogan, not to contact her by telephone, email, or text except for peaceful contact as required for court-ordered visitation, and to stay 100 yards away from Hogan, her home, her vehicle, and her place of employment. The court ordered Avila into a 52-week batterers' intervention program and modified the custody order to give Hogan sole legal and physical custody of the minor, with visitation on the first and third weekends of the months, from Friday at 3:00 p.m. to Monday at 8:00 a.m. The court ordered the order to be in effect until February 23, 2016, at 10:15 a.m.

Avila appealed.

DISCUSSION

Substantial evidence supports the trial court's restraining order

Avila contends that the trial court erred by determining that he lacked credibility based on a perceived inconsistency in his testimony. We disagree.

Avila argues that the trial court relied on what it mistakenly believed to be inconsistencies in his testimony in determining that he was not a credible witness. Avila urges that his testimony that he chose to communicate by fax instead of text because his phone deletes "SENT" texts when the memory gets full and that texts are sometimes accidentally deleted is not inconsistent with his testimony that he still had a text on his phone that was sent to him by Hogan on July 6, 2009. He argues that the court did not understand the difference between "SENT" "RECEIVED" and "ALL" texts. Yet it was for the court to determine whether Avila was a credible witness. "It is an established principle that the credibility of witnesses and the weight to be given their testimony are matters within the sole province of the trier of fact, here the trial court. (*Smith v. Regents of University of California* (1997) 56 Cal.App.4th 979, 985, fn. 5.)" (*As You Sow v. Conbraco Industries* (2005) 135 Cal.App.4th 431, 454.) A trial court "is entitled to reject in toto the testimony of a witness, even if that testimony is uncontradicted." (*Valero v. Board of Retirement of Tulare County Employees' Assn.* (2012) 205 Cal.App.4th 960, 966, citing *Hicks v. Reis* (1943) 21 Cal.2d 654, 659–660.) The court had the "opportunity

to observe the appearance and demeanor of the witnesses," while we review a cold record. (*In re Sheila B.* (1993) 19 Cal.App.4th 187, 199–200.)

Accordingly, we conclude that the trial court did not err in determining that Avila lacked credibility.

Avila also contends that the trial court erred in issuing the restraining order because Hogan's false allegations were not supported by corroborative evidence, including police reports, witness testimony, photographs, faxes, text messages or emails. We disagree.

In order to obtain a restraining order the petitioner must show by a preponderance of the evidence "reasonable proof of a past act or acts of abuse." (Fam. Code, § 6300; *Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 137.) Family Code section 6300 provides, "An order may be issued under this part, with or without notice, to restrain any person for the purpose of preventing a recurrence of domestic violence and ensuring a period of separation of the persons involved, if an affidavit or, if necessary, an affidavit and any additional information provided to the court pursuant to Section 6306, shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse." The Domestic Violence Prevention Act (DVPA), codified in Family Code section 6200 et seq., "defines 'abuse' as either an intentional or reckless act that causes or attempts to cause bodily injury; an act of sexual assault; an act that places a person in reasonable apprehension of imminent serious bodily injury to himself or herself or to another; and an act that involves any behavior that has been or may be enjoined under section 6320. (§ 6203.) The behavior that may be enjoined under section 6320 includes 'molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, harassing, [and making] annoying telephone calls as described in Section 653m of the Penal Code.' (§ 6320.)" (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 334.) "A grant or denial of injunctive relief is generally reviewed for abuse of discretion. [Citation.] This standard applies to a grant or denial of a protective order under the DVPA. [Citation.]" (*Gonzalez v. Munoz* (2007) 156 Cal.App.4th 413, 420.)

We conclude that substantial evidence supports the trial court's restraining order. In her declaration under penalty of perjury and sworn testimony, Hogan stated that although it was dark and she did not get a clear glimpse of her attacker's face, she believed it was Avila who had punched her in the jaw on January 24, 2011. She stated, "If it wasn't him, it was his twin." She believed he was angry because she had not had the fax machine turned on the day before. Hogan also stated that in recent months she had received oral threats and threatening texts, letters, and faxes from Avila. She stated that Avila had assaulted her in the past by grabbing and choking her, stepping on her toe and fracturing it in May 2009, and shoving her when he appeared at her office uninvited in August 2009. Further, Hogan stated that in April 2008, Avila had pushed her into a concrete trash can outside a therapist's office, and that in 1996 he had pointed a loaded gun at her head.

Avila argues that Hogan's allegations regarding threats and assaults by Avila and the minor's mental and physical health were false, uncorroborated by police reports, texts, and records of property damage, and were contradicted by himself and his witnesses. He urges that the trial court was biased against him because it did not require physical evidence and chose to believe Hogan rather than him. But "[a] trial court is vested with discretion to issue a protective order under the DVPA simply on the basis of an affidavit showing past abuse." (*Nakamura v. Parker*, *supra*, 156 Cal. App. 4th 327, 334; *id.* at p. 337 [under penalty of perjury, petitioner "provided numerous specific and admissible facts based on personal knowledge showing past acts and more recent and recurring acts showing that [respondent] intentionally or recklessly caused or attempted to cause her bodily injury and placed her in reasonable apprehension of imminent serious bodily injury"].) Accordingly, Avila's argument that physical corroborative evidence is necessary must fail. And as stated, Avila is attempting to have us reweigh the evidence, which we cannot do. "Weighing evidence, assessing credibility, and resolving conflicts in evidence and in the inferences to be drawn from evidence are the domain of the trial court, not the reviewing court." (*In re Alexis E.* (2009) 171 Cal.App.4th 438, 451.)

We also reject Avila's objections to Hogan's testimony presented for the first time on appeal. (See *In re S.B.* (2004) 32 Cal.4th 1287, 1293, superseded by statute on other grounds as stated in *In re M.R.* (2005) 132 Cal.App.4th 269, 273–274 [failure to object to errors committed at trial is a forfeiture of claim of error on appeal]; *In re Sheena* K. (2007) 40 Cal.4th 875, 880–881.) Similarly, Avila cannot claim for the first time on appeal that the court should have continued the hearing sua sponte in light of "new" allegations he claims Hogan raised. And Avila's contention that he has a twin brother — and therefore reasonable doubt exists as to his guilt for the January 24, 2011 assault — cannot be presented for the first time on appeal.

Avila contends that the trial court erred in considering the 1996 gun incident because Hogan stipulated that she would not raise allegations of any acts of violence by Avila prior to March 30, 1999, in any future custody or visitation proceedings. Even assuming he had objected, Avila has not made a cogent argument that Hogan could not use this evidence in a proceeding for a restraining order to protect herself, her mother, and the minor. Finally, Avila argues that the court should not have considered the incident in April 2008 during which Avila allegedly pushed Hogan against a concrete trash can outside a therapist's office because a court in a previous matter had found insufficient evidence to issue a restraining order. Assuming he had objected, again Avila cites no authority that this evidence is inadmissible simply because it was found insufficient, in light of the other evidence presented to the court. (See *People v. Griffin* (1967) 66 Cal.2d 459, 464.)

Accordingly, we conclude that the trial court did not abuse its discretion in issuing the restraining order.

Finally, Avila attacks the custody and visitation order on the grounds that his "past act or acts of abuse" are not supported by substantial evidence. As we have discussed previously, he fails in this regard.

DISPOSITION

The order is affirmed. Stephanie M. Hogan is entitled to costs on appeal.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

CHANEY, J.

JOHNSON, J.