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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

LEAH ROSENBERG,

Plaintiff and Respondent,

v.

YACOV AVILA,

Defendant and Appellant.

B268320

(Los Angeles County  
Super. Ct. No. LQ018698)

APPEAL from an order of the Superior Court of Los Angeles County, Michael J. Convey, Judge. Affirmed.

The Brinton Firm and Matthew L. Brinton for Defendant and Appellant.

LD Law Offices and Leonardo Drubach for Plaintiff and Respondent.

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## INTRODUCTION

Yacov Avila appeals from a restraining order issued pursuant to California’s Domestic Violence Prevention Act (Fam. Code, § 6200 et seq.) (the DVPA).<sup>1</sup> He contends the affidavit and testimony of the petitioner, Leah Rosenberg, did not constitute reasonable proof of abuse under the DVPA because Rosenberg was, in Avila’s assessment, “simply not credible.” We conclude the trial court’s credibility determinations and factual findings were reasonable in view of the evidence presented. We affirm.

## FACTS AND PROCEDURAL BACKGROUND

Consistent with our standard of review, we state the evidence in the light most favorable to the challenged order, accepting as true all evidence tending to establish the correctness of the trial court’s findings and resolving every conflict in favor of the order. (*Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1142 (*Burquet*).)

From December 2013 to May 2015, Rosenberg and Avila were engaged in an adulterous relationship. On August 28, 2015, Rosenberg filed a request for a domestic violence restraining order against Avila. In support of the request, Rosenberg offered an affidavit, under penalty of perjury, stating that Avila had made occasional threats of physical harm against Rosenberg and her family (her husband and two children), the most recent occurring on August 24, 2015, after she attempted to end the relationship. Among other things, Rosenberg declared that Avila made “threats of abuse,” “stalk[ed]” her, made statements in electronic messages about “how he will destroy my life,”

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<sup>1</sup> Statutory references are to the Family Code unless otherwise designated.

threatened to ruin her husband's business and to harm her husband physically. She also described an incident at a "Cambridge Farms" supermarket during which Avila put "a gun to [her] head and said 'if you ever try to leave I will find you and kill you.'" She declared that, in January 2015, Avila tied her up in the back of his car, "cut [her] leg and arm with a blade," and used a "taser" on her. She said incidents like this happened "a lot" and Avila would often threaten to lock her in an apartment and leave her there, or "he would just show up in places and slap [her] across the face for fun." Based on the affidavit, the court granted a temporary restraining order pending a full hearing.

On September 18, 2015, the court held a hearing on Rosenberg's request for a domestic violence restraining order. In response to direct examination by the court, Rosenberg testified that, throughout their one and a half year relationship, Avila constantly threatened to "destroy" her life and her family if she ever left him. She affirmed the statements made in her affidavit concerning the January 2015 incident in which Avila bound her in the backseat of his car and cut her with a blade. She also testified that he "tasered" her throughout the relationship, leaving her with physical injuries, including "marks" and "scars." The relationship ended in May 2015, but Avila continued to threaten and stalk her, both physically and through electronic messages. In August 2015, Rosenberg told Avila to stop contacting her. He responded with an electronic message telling her "it's just begun and it's not over." Soon thereafter, Avila contacted Rosenberg's father-in-law to tell him that Rosenberg and her husband were "having issues." He then sent a text message to her husband suggesting Rosenberg was "crazy." Rosenberg testified that her husband met with Avila in an

attempt to “work things out.” During the meeting, Avila threatened to physically harm her husband. A week or so later, Rosenberg filed her request for a restraining order.

On cross-examination, Rosenberg acknowledged that she had not contacted the police about Avila’s physical abuse. She explained Avila had threatened to “destroy me and lock me up and hurt me in really bad ways” if she ever contacted the police or if anyone ever found out about the abuse. When asked whether her husband saw the resulting marks and scars, she responded that he had. She testified that her husband thought about calling the police, but she “made excuses” and persuaded him not to. She said Avila “tasered” her about “once every two weeks,” and that he cut her with razor blades “throughout the relationship” until January 2015.

Avila’s attorney also questioned Rosenberg about a series of text messages and photographs she sent to Avila on August 16, 2015.<sup>2</sup> Rosenberg affirmed that in one of the messages she wrote, “‘I always wish you would stalk me, you would show your face,’” and in another she stated, “‘I’m still waiting for someone to rape me.’” Rosenberg acknowledged she sent the messages after ending her relationship with Avila. She explained that the purpose was to determine “what he was thinking and if I should still be nervous or not” and to “find out if he would actually do all this stuff he said he would,” including sending someone to rape her. She also acknowledged sending approximately 40 pictures of herself and friends to Avila on the same date. She said the

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<sup>2</sup> Our recitation of facts regarding the text messages and photographs is based on Rosenberg’s testimony because the exhibits containing these materials were not included in the record submitted by Avila.

pictures were meant to show him, “I’m okay. And I’m fine. And I don’t need you in my life. And I totally moved on.”

Avila testified that his relationship with Rosenberg ended a few months before she filed the request for restraining order; however, she continued to pursue the relationship. He opposed the request for restraining order only because he and Rosenberg were part of a “very small” ultra-orthodox Jewish community, and he worried that if the restraining order were granted, he would be “classified as the person that’s pursuing [the relationship].”

Avila denied that the incident at the Cambridge Farms supermarket occurred; he denied pointing a gun at Rosenberg and denied threatening to kill her if she ended the relationship. He also denied cutting her with a blade, using a taser on her, and slapping her across the face.

With respect to the August 24, 2015 episode, Avila testified that the incident principally concerned a text message conversation between himself and Rosenberg’s husband. Avila admitted writing to Rosenberg’s husband that he would have “every one of your clients, starting with [names of two individuals], drop you.” Apart from that statement, Avila denied making any threats against Rosenberg or her family. On August 25, 2015, Avila had a face-to-face meeting with Rosenberg’s husband. The meeting was cordial. After it concluded, Rosenberg’s husband sent a text message to Avila stating, “Thanks for the meeting.”

On rebuttal, Rosenberg challenged Avila’s account of the conversation with her husband, testifying that Avila omitted many of the text messages from their exchange. She also

reiterated that she had scars on her arms and legs to prove Avila abused her.

The court granted Rosenberg's request for a three-year restraining order, finding Rosenberg presented credible evidence of abuse and physical violence by Avila. While the court found Rosenberg's testimony about the "frequency of tasing" was "not entirely believable," it found "the evidence of cutting to be credible." The court also found Rosenberg's testimony concerning Avila's threats at the "Cambridge Market" to be "more credible than [Avila's] denial of that event." And, in general, the court found Rosenberg's and Avila's respective demeanors at the hearing lent credence to Rosenberg's account.

Finally, the court rejected Avila's suggestion that Rosenberg's failure to report the abuse undermined her credibility. In that regard, the court observed: "The reporting of an incident to the police is not relevant, nor is it required under the Domestic Violence [Prevention] Act. Quite the contrary. It is quite common for victims not to report and to have repeated acts inflicted upon them and perhaps . . . provocatively invite contact where contact is not such a wise thing to do. . . . Extremely dangerous, but within the realm of reasonable possibility given [Rosenberg's] testimony, [and] given [Rosenberg's] other evidence."

## **DISCUSSION**

The DVPA's stated purpose is 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.) To that end, the DVPA authorizes the trial court to issue a restraining order "if an

affidavit or testimony and any additional information provided to the court . . . shows, to the satisfaction of the court, reasonable proof of a past act or acts of abuse.” (§ 6300.) “‘Abuse’” is statutorily defined to include, among other things, an act to “intentionally or recklessly cause or attempt to cause bodily injury.” (§ 6203, subd. (a)(1).) However, “[a]buse is not limited to the actual infliction of physical injury or assault.” (*Id.*, subd. (b).)

Avila contends Rosenberg failed to present credible evidence of “a past act or acts of abuse” sufficient to warrant a restraining order under the DVPA. (§ 6300.) An appeal challenging the grant or denial of a DVPA restraining order is generally reviewed for an abuse of discretion. (*Burquet, supra*, 223 Cal.App.4th at p. 1143.) However, where the asserted abuse is premised on the insufficiency of evidence, “the reviewing court must apply the ‘substantial evidence standard of review.’” (*Ibid.*; see also *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.’ ”].)

When an appeal challenges the sufficiency of evidence, the appellant’s burden is a heavy one; he must show that there is no substantial evidence, contradicted or uncontradicted, to support the trial court’s findings. (*Burquet, supra*, 223 Cal.App.4th at p. 1143; *Division of Labor Law Enforcement v. Transpacific Transportation Co.* (1979) 88 Cal.App.3d 823, 829.) In reviewing the record to determine whether the appellant has met this burden, “ ‘[w]e must accept as true all evidence . . . tending to establish the correctness of the trial court’s findings . . . ,

resolving every conflict in favor of the judgment.” ’ ’ ( *Burquet*, at p. 1143.) The trial court is the sole arbiter of all conflicts in the evidence, conflicting interpretations thereof, and conflicting inferences which reasonably may be drawn therefrom. ( *Ibid.*) It is the sole judge of the witnesses’ credibility. The appellate court has “ ‘no power to judge the effect or value of the evidence, to weigh the evidence, to consider the credibility of the witnesses, or to resolve conflicts in the evidence or in the reasonable inferences that may be drawn therefrom.’ ” ( *Leff v. Gunter* (1983) 33 Cal.3d 508, 518 ( *Leff*).) “The testimony of a single witness, even the party himself [or herself], may be sufficient, since it is the exclusive province of the trial court to determine the credibility of witnesses.” ( *Waller v. Brooks* (1968) 267 Cal.App.2d 389, 394; *In re Marriage of Fregoso & Hernandez* (2016) 5 Cal.App.5th 698, 703 ( *Marriage of Fregoso*).)

Avila contends the court abused its discretion because, in his view, Rosenberg’s testimony was too implausible to be credited. Emphasizing the lack of physical evidence, he argues, “[n]o reasonable court could believe . . . Avila had repeatedly and publically kidnapped [Rosenberg], or that [Rosenberg] had been repeatedly cut and shocked, yet never called the police, never sought treatment, and successfully convinced her husband not to intervene.” He stresses that “the only physical evidence, [Rosenberg’s] text messages, demonstrated that [Rosenberg] persisted in calling and texting [Avila], and that [Avila] and [Rosenberg’s] husband were forced to meet in order to get [Rosenberg] to leave [Avila] alone.” “More to the point,” he argues, “the fact that [Rosenberg] filed the request for restraining order three days after her husband met with [Avila] . . . strongly



suggests that [the] restraining order itself was yet another attempt to get [Avila's] attention.”

Avila's argument bears remarkable similarity to the argument advanced by the appellant in *Marriage of Fregoso*. In that case, the appellant husband, Fregoso, filed a petition for dissolution of his marriage to respondent wife, Hernandez, together with a request for full custody of the couple's child and a declaration asserting Hernandez was “ ‘an aggressive person who has hit me in the past.’ ” (*Marriage of Fregoso, supra*, 5 Cal.App.5th at p. 700.) Four days later, Hernandez filed a request for a DVPA restraining order, asserting Fregoso “grabbed her, pushed her hard onto a bed, and held her head down into the mattress so that she could not breathe” and “ ‘hit [their] daughter with a belt, almost 10 times.’ ” (*Ibid.*) After hearing the parties' testimony, the court granted the restraining order. (*Id.* at p. 701.) Fregoso appealed.

The appellate court recounted Fregoso's argument as follows: “Fregoso contends the court abused its discretion because ‘the evidence showed [Hernandez] was not afraid of [Fregoso].’ Noting that Hernandez sought the [restraining order] soon after he filed for dissolution of the marriage, Fregoso contends Hernandez's ‘*timing* and conduct in requesting that restraining order smacks of game-playing and bad faith.’ He emphasizes there were ‘*no police reports*’ of the alleged domestic violence, and no arrests or convictions. He claims Hernandez sought a restraining order to gain a tactical advantage against him in future child custody proceedings. Asserting there was undisputed evidence Hernandez had consensual sex with him after obtaining the [temporary restraining order], Fregoso contends such conduct ‘obviously showed that [Hernandez] *did*

*not fear [him] or need protection from him.’ ” (Marriage of Fregoso, supra, 5 Cal.App.5th at p. 703, italics added.)*

The appellate court found Fregoso’s argument “unavailing” because it was “inconsistent with the standard of review.” (*Marriage of Fregoso, supra, 5 Cal.App.5th at p. 703.*) Citing the principle that “[t]he testimony of one witness, even that of a party, may constitute substantial evidence,” the court explained that Hernandez’s testimony alone was “ample substantial evidence to support the [trial] court’s implied finding there was ‘reasonable proof of a past act or acts of abuse’ warranting a domestic violence restraining order.” (*Ibid.*) As for Hernandez’s admission that the parties engaged in sex after the temporary restraining order issued, the appellate court found no abuse in the trial court’s decision to credit Hernandez’s testimony, observing: “Hernandez also testified the parties’ post-TRO sex was part of their six-year repeated cycle of violence, gifts, forgiveness, sex, and then repeated acts of violence. Thus, the evidence Fregoso primarily relies upon as showing the court abused its discretion was explained by Hernandez in a manner consistent with the court’s determination to issue the order.” (*Ibid.*)

Much of the same can be said about the argument Avila advances in this appeal. Like the argument in *Marriage of Fregoso*, Avila’s argument is “inconsistent with the standard of review.” (*Marriage of Fregoso, supra, 5 Cal.App.5th at p. 703.*) Contrary to Avila’s premise, Rosenberg’s testimony *standing alone* is substantial evidence sufficient to support the court’s exercise of discretion, and no corroborating physical evidence was required to bolster the court’s judgment. (*Ibid.*) Furthermore, issues concerning the “credibility of the witnesses” or “conflicts in

the evidence” are the exclusive province of the trial court and will not be second guessed on appeal absent an affirmative showing of abuse. (*Leff, supra*, 33 Cal.3d at p. 518; *Marriage of Fregoso*, at p. 703; *Burquet, supra*, 223 Cal.App.4th at p. 1143.)

To be sure, the trial court could reasonably have regarded Rosenberg’s account of the abuse with skepticism, given the lack of police and medical reports. But it was also well within the bounds of reasonable discretion to accept Rosenberg’s explanation that Avila had threatened to harm her if she reported the abuse to authorities. Likewise, it was not inherently implausible that Rosenberg might continue to contact Avila after suffering serious physical abuse, for, as the court explained, the evidence showed Rosenberg, like other abuse victims, had a proclivity to “provocatively invite contact where contact [was] not such a wise thing to do.” The issue for this court 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.’” (*Marriage of Fregoso, supra*, 5 Cal.App.5th at p. 703.) Rosenberg’s testimony supplied that evidence, and the court did not abuse its discretion by drawing reasonable inferences from that testimony, even if contrary inferences could also have been drawn. (See *Burquet, supra*, 223 Cal.App.4th at p. 1143.)

Lastly, California law recognizes that the credibility of a witness need not be judged solely upon the character of his testimony; rather, the determination may also embrace an appraisal of “[h]is demeanor while testifying and the manner in which he testifies.” (Evid. Code, § 780, subd. (a).) In this regard, the trial court’s cogent assessment of Avila’s and Rosenberg’s demeanor while testifying, and the credibility determinations the

court drew therefrom, underscores why it would be especially inappropriate for this court to second guess that determination on appeal. “The law has long recognized the problem of appellate review in the matter of credibility of witnesses based upon their demeanor, and for that reason the rule has evolved that the trier of facts is the sole and exclusive judge of the credibility of witnesses as determined by their demeanor. A written transcript of testimony is but a pallid reflection of what actually happens in a trial court. . . . ‘ “The cold record cannot give the look or manner of the witnesses; their hesitations, their doubts, their variations of language, their precipitancy, their calmness or consideration. A witness may convince all who hear him testify that he is disingenuous and untruthful, and yet his testimony when read, may convey a most favorable impression.” ’ . . . [¶] . . . Another witness may fumble, bumble, be unsure, uncertain, contradict himself, and on the basis of a written transcript be hardly worthy of belief. But one who sees, hears and observes him may be convinced of his honesty, his integrity, his reliability. All of this is because a great deal of that highly delicate process we call evaluating the credibility of a witness is based on what might be called, for lack of a better word, ‘intuition’—that intangible, inarticulable capacity of one human being to evaluate the sincerity, honesty and integrity of another human being with whom he comes in contact.” (*Meiner v. Ford Motor Co.* (1971) 17 Cal.App.3d 127, 140-141.)

The trial court’s account of Avila’s and Rosenberg’s respective demeanors reflects that highly delicate process of evaluating a witness’s credibility that can be performed only when one human being comes in contact with another. As the court explained in its oral ruling, “The court watched the parties

during this hearing when you were sitting there at the table and when you were testifying on the witness stand. [Rosenberg] presents as someone who has had a distressed look on her face. She is sitting literally at the corner of the table as far away from [Avila] as she can. She rocked back and forth during the testimony, during the case. This shows to the court that she has a great level of stress in her demeanor. And this enhances or increases her credibility as to the reporting of these [events]. [¶] [Avila] sits very confidently in the chair and the witness stand and emphasized at least two or three times for the court the effect that this restraining [order] would have on him. This emphasizes for the court the level of control he exercises and tries to exercise over [Rosenberg], another factor in determining that [Rosenberg's] testimony is more credible than [Avila's].”

The foregoing explanation demonstrates what our standard of review has long recognized—the trial court was in the best position to evaluate credibility and to resolve factual disputes presented by the evidence. Our review of the record finds sufficient evidence to conclude the court’s order was not an abuse of discretion.

**DISPOSITION**

The order is affirmed. Rosenberg is entitled to her costs.

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GOSWAMI, J.\*

We concur:

EDMON, P. J.

ALDRICH, J.

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.