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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

LIZBETH MENDEZ, Petitioner and Appellant, v. JESUS GABRIEL SALCIDO, Respondent.	B293669 (Los Angeles County Super. Ct. No. 18CHRO00443)

APPEAL from an order of the Los Angeles Superior Court, Susan Lopez-Giss, Judge. Affirmed.

Los Angeles Center for Law & Justice, Sarah Reisman and Erica Carroll, and Gibson, Dunn & Crutcher LLP, Theane Evangelis, Jeremy S. Smith, and Lori C. Arakaki, for Petitioner and Appellant.

Family Violence Appellate Project and Cristina Henriquez as Amicus Curiae for Petitioner and Appellant.

No appearance for Respondent.

* * * * * *

Lizbeth Mendez (petitioner) applied for a domestic violence restraining order against her then-boyfriend, Jesus Gabriel Salcido (boyfriend). The trial court denied her application. Petitioner now appeals. Because the court did not commit reversible error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In early March 2018, petitioner and boyfriend were dating. Late in the evening of March 9, 2018, they went to a bar, and petitioner drank until she was intoxicated.

Sometime after 2 a.m. the next morning, as boyfriend was driving them home, the couple got into a verbal argument about petitioner's fidelity. "[S]ick of [boyfriend's] negative comments," petitioner told boyfriend to drop her off on the side of the road in a warehouse district near the railroad tracks. Petitioner then started to open the passenger side door, although it is unclear whether the car was still moving at the time. To keep petitioner from exiting the car in an abandoned area (and potentially from jumping out of a moving car), boyfriend grabbed petitioner's hair; while pulling her back into the car, petitioner bumped her chin. Boyfriend then continued driving to petitioner's home.

The next day, petitioner sent a text message to boyfriend: "As you know, I have a bruise on my chin."

II. Procedural Background

A. *The parties' filings*

Five days after the incident, petitioner filed a request for a domestic violence restraining order pursuant to the Domestic Violence Protection Act (DVPA) (Fam. Code, § 6200 et seq.). With

her request, petitioner filed a declaration stating that (1) her verbal disagreement with boyfriend in the car constituted "verbal[] abus[e]," (2) after pulling her back into the car, boyfriend "slammed" her face into the car's stereo and "tr[ied] to slam [her] with something else," bruising her right eye, left forearm, and chest, and (3) she filed a police report two days after the incident.

Boyfriend opposed the request. With his opposition, boyfriend filed a declaration stating that (1) the car was still moving when petitioner tried to "dive out" of it, (2) he did pull her by the hair to keep her from "falling out of the car and being seriously injured," and (3) petitioner "ended up with a bruise on her chin because of the wa[y] [he] pulled her back."

B. *The hearing*

The trial court conducted a hearing on May 3, 2018. Petitioner appeared pro se and with the assistance of a Spanish-language interpreter. Boyfriend had retained counsel.

At the outset of the hearing, the court swore in both parties and asked each of them if "everything [each] put in [their respective]" filings was "true and correct"; both said, "yes."

The court then made a few prefatory remarks. The court explained how two witnesses to the same incident "can walk away with two entirely different versions of the same set of facts and neither person is lying." The court then set forth its tentative view on petitioner's entitlement to relief based on the facts recounted in the filings—namely, that (1) the parties' verbal argument was "not [a] ba[sis] for [a] restraining order" and (2) the hair pulling *could* be a basis for an order, except that (a) boyfriend's "explanation of what happened with the hair pulling

is not unreasonable" and (b) petitioner "waited five days" to seek out a restraining order.

The court then questioned petitioner about what it perceived as the weaknesses in her case. The court asked why petitioner waited five days to request a restraining order. Petitioner responded that (1) boyfriend had after the incident come to her house one time when she was not home and then sent a single text message indicating that he "didn't see [her] car outside" and that "maybe [she] was busy, and that [she] should enjoy, enjoy," and (2) she had "some proofs . . . of the blows [she] had after the physical aggression." With respect to the second point, petitioner offered 12 photographs and an untranslated text message conversation. After the court verified that petitioner had shown these items to boyfriend's counsel, the court ruled that it "can't look" at "anything that's not translated." The court then asked petitioner further questions about what she and boyfriend were arguing about, how much petitioner drank that night, whether petitioner exhibited good "judgment" "get[ting] in[to] a car" with boyfriend "if he had three drinks" and whether it was "safe" to have boyfriend drop her off "in the middle of a warehouse district by the railroad tracks at 2:30 in the morning."

Boyfriend's attorney proffered that boyfriend would testify that petitioner "had about five drinks" that night, but the court stated that it did not "need any more testimony."

C. *The court's ruling*

The court then ruled that "petitioner has [not] met her standard" because "the fact that [boyfriend] pulled [petitioner's] hair . . . under th[e] circumstances [of this case] is not abuse." The court elaborated: "There is a recent case that just came down from the court of appeals, [*Fischer v.*] *Fischer* [(2018) 22

Cal.App.5th 612, ordered unpub. July 25, 2018 (<u>*Fischer*</u>)], that indicates when people are just acting out does not necessarily mean it is domestic violence. I don't find this to be domestic violence." Finding "no basis for the issuance of a permanent restraining order," the court denied petitioner's request.

D. *The appeal*

Petitioner filed this timely appeal.

DISCUSSION

Petitioner argues that the trial court erred in denying her request for a domestic violence restraining order because the court (1) refused to "look at" her photographs, (2) did not allow her to cross-examine boyfriend, and (3) applied the wrong legal standard. Although boyfriend did not file a respondent's brief on appeal, we are still charged with "examining the record and reversing only if prejudicial error is shown." (*Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 334 (*Nakamura*).)

I. Photographs

Petitioner argues that the trial court erred in refusing to "look at" the photographs she offered as "proof[]" of the injuries she sustained on March 10. At bottom, petitioner is challenging the court's exclusion of this evidence. (E.g., *Nevarez v. Tonna* (2014) 227 Cal.App.4th 774, 785 [treating court's "refusal to look at" evidence as an objection to exclusion of evidence] (*Nevarez*).) We review such an exclusion for an abuse of discretion. (*People v. Powell* (2018) 5 Cal.5th 921, 961 (*Powell*).) Further, such an abuse warrants relief only if "it is . . . reasonably probable that admission of the testimony would have affected the outcome" of the proceeding. (*People v. Cudjo* (1993) 6 Cal.4th 585, 612 (*Cudjo*).)

We agree with petitioner that the trial court likely erred in excluding the photographs from evidence.[1] The photographs had some relevance to prove the existence and extent of the injuries she sustained on March 10. (Evid. Code, §§ 350, 210.) They were not hearsay. (*Id.*, § 1200; *People v. Cooper* (2007) 148 Cal.App.4th 731, 746.) And petitioner ostensibly could have authenticated them by testifying that they accurately portrayed her condition on the dates taken. (Evid. Code, § 1400; *People v. Goldsmith* (2014) 59 Cal.4th 258, 267-268.)

However, we disagree with petitioner that this error warrants reversal because it is not "reasonably probable" that admission of the photographs "would have affected the outcome" of the proceeding. (*Cudjo*, *supra*, 6 Cal.4th at p. 612.) We have reviewed them: According to handwritten notations (rather than date stamps), six were taken the day of the incident and depict petitioner's face, upper chest, and knee, and another six were taken two days after the incident and depict her face, whole body (clothed), chest, forearm, and the back of one of her biceps. It is not reasonably probable that either group of photos would have affected the outcome of the hearing, as the photos show either faint bruising or no discoloration at all. In the photos of petitioner's face, the purported bruising is virtually indistinguishable from shadows cast on other (uninjured) areas of her face. Assuming that the handwritten notations are accurate,

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1 We will treat petitioner's objection as properly preserved, even though the court's ruling seemed to only pertain to the "untranslated" text messages (*People v. Cornejo* (2016) 3 Cal.App.5th 36, 56 ["failing to press for a ruling" "forfeit[s]" any objection to that evidence on appeal]), because petitioner proffered the photographs and the court refused to consider them.

even though the photos were taken either immediately or shortly after the incident, they show little, if any, evidence of injury consistent with the graphic violence alleged by petitioner in her declaration. Particularly given the even more reliable contemporaneous evidence of injury presented at the hearing—namely, petitioner's admission roughly six hours after the incident that she bruised her chin and nothing else—it is not reasonably probable that admitting petitioner's photographs would have altered the outcome of the hearing.

Petitioner responds with three categories of arguments.

First, she argues that she is excused from any requirement to show prejudice because the trial court's refusal to admit her photographs denied her a fair hearing, thus violating her right to procedural due process and entitling her to automatic reversal. We reject this argument. "Due process guarantees '"notice and opportunity for hearing *appropriate to the nature of the case*."' [Citation.]" (*In re Jesusa V.* (2004) 32 Cal.4th 588, 601.) Because proceedings for injunctive relief under DVPA are often prosecuted by pro se litigants seeking immediate protection, the process that is due in such proceedings must have "expedited and simplified procedures for victims" (*S.A. v. Maiden* (2014) 229 Cal.App.4th 27, 40-41), and decision-makers who "play a far more active" and almost "inquisitorial" "role in developing the facts" (*Ross v. Figueroa* (2006) 139 Cal.App.4th 856, 861, 866 (*Ross*)). A trial court's evidentiary rulings do not transgress these mandates and violate due process unless the court "denies *all* evidence relating to a claim" or excludes "*essential* expert testimony without which a claim cannot be proven." (*Gordon v. Nissan Motor Co.* (2009) 170 Cal.App.4th 1103, 1114 (*Gordon*); accord, *In re Marriage of Carlsson* (2008) 163 Cal.App.4th 281, 284, 290-293 [trial court's

"summary termination of the trial" by "walk[ing] out of the courtroom midtrial"; due process violation]; *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, 1357-1359, 1366 [trial court's refusal to consider any oral testimony; due process violation]; *Nora v. Kaddo* (2004) 116 Cal.App.4th 1026, 1028-1029 [same] (*Kaddo*); *Kelly v. New West Federal Savings* (1996) 49 Cal.App.4th 659, 672-677 [trial court's grant of motions in limine that "prevent[ed] plaintiffs from offering evidence to establish their case"; due process violation]; *Noergaard v. Noergaard* (2015) 244 Cal.App.4th 76, 81-88 [trial court's refusal to allow responding party to put on any affirmative defense; due process violation], superseded by statute on another point as stated in *In re Marriage of Swain* (2018) 21 Cal.App.5th 830, 840; *Kaddo*, at pp. 1028-1029 [same].) What is at issue here is the exclusion of two items of evidence (only one of which is challenged on appeal and the other of which was properly excluded (see *Spencer v. Doane* (1863) 23 Cal. 419, 420 [affidavits in foreign language should be excluded]; see also Evid. Code, § 753)). This is no more than "[t]he erroneous denial of some but not all evidence relating to a claim" and, as such, is not a deprivation of due process which relieves petitioner from proving prejudice. (*Gordon*, at p. 1115.)

Second, petitioner contends that the exclusion of the photographs *was* prejudicial because (1) a picture is worth a thousand words (e.g., *People v. Kelly* (1990) 51 Cal.3d 931, 963), and (2) boyfriend later entered a no contest plea to a misdemeanor battery count. The combination of the photographs and boyfriend's plea, petitioner continues, would have corroborated petitioner's claims of injury and undermined boyfriend's statement that he did no more than pull her hair and bruise her chin. While photographs are often helpful in

elucidating testimony (see *People v. D'Arcy* (2010) 48 Cal.4th 257, 299), they are not *always* elucidating—let alone capable of making a different outcome reasonably probable (see, *People v. Allen* (1986) 42 Cal.3d 1222, 1258; *People v. Johnson* (2015) 61 Cal.4th 734, 767). Here, for the reasons discussed above, the exclusion of these photographs was not prejudicial. And because boyfriend's conviction did not occur until months after the hearing on petitioner's domestic violence restraining order, it is irrelevant to whether the omission of the photographs was prejudicial to the court's ruling *at that hearing*.

Lastly, petitioner asserts that she is entitled to reversal because the trial court never asked any follow-up questions about the extent of her injuries. However, petitioner had already discussed her injuries in the declaration that she re-affirmed at the outset of the hearing. Although courts in these types of hearings should take a more active role, we decline to adopt a rule that converts into a due process violation the court's failure to explicitly revisit every topic in a declaration.

II. Cross-Examination of Boyfriend

Petitioner next argues that the trial court erred in denying her the right to cross-examine boyfriend. Relatedly, she asserts that the court violated the hearsay rule and denied itself evidence of demeanor that comes from in-court testimony by treating the parties' declarations as evidence. We review a court's control of proceedings and its evidentiary rulings for an abuse of discretion. (*People v. DeHoyos* (2013) 57 Cal.4th 79, 123 [scope of cross-examination]; *Powell*, *supra*, 5 Cal.5th at p. 961 [evidentiary rulings].) A single viable basis for exclusion is sufficient to affirm an evidentiary ruling. (E.g., *Lockheed Litigation Cases* (2004) 115 Cal.App.4th 558, 565.)

Although the right to cross-examine witnesses is "fundamental" (*Fremont Indem. Co. v. Workers' Comp. Appeals Bd.* (1984) 153 Cal.App.3d 965, 971; *In re Marriage of Swain* (2018) 21 Cal.App.5th 830, 841-842), it is not absolute and may be curtailed by a court (e.g., *In re Jeanette V.* (1998) 68 Cal.App.4th 811, 817). More to the point, it may be waived if a party does not seek cross-examination or object to the lack of any cross-examination. (*In re Marriage of S.* (1985) 171 Cal.App.3d 738, 745; *In re Marriage of Binette* (2018) 24 Cal.App.5th 1119, 1132). Because petitioner never asked to question boyfriend or objected when the trial court indicated it was done hearing evidence, petitioner waived her right to cross-examination. She argues that because she was acting pro se, the court was obligated to affirmatively ask if she wanted to conduct any cross-examination. We disagree. She cites no authority for this proposition, and creating a judicial duty to formally ask each party what they want to do at each step of the hearing is fundamentally inconsistent with the nature of these proceedings as a more informal and expedited hearing directed by an active judge.

Petitioner's other argument also lacks merit. Although the rules of hearsay ostensibly apply to this proceeding (Evid. Code, § 300), they were satisfied in this case: The court specifically asked each party, while each was under oath, whether they reaffirmed the "tru[th]" of their prior declarations; their reaffirmation converted their prior statements into their direct testimony. (E.g., *People v. York* (1966) 242 Cal.App.2d 560, 571 [so holding].) As such, they were not hearsay. (Evid. Code, § 1200.) What is more, the court had the opportunity to consider

petitioner's demeanor during questioning, and to adjudge whether her testimony satisfied her burden of proof.

III. Legal Standard

Petitioner lastly argues that the trial court's denial of her request rests on an incorrect legal standard. Although we review the denial of a request for a domestic violence restraining order for an abuse of discretion (*In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1495; *In re Marriage of Fregoso & Hernandez* (2016) 5 Cal.App.5th 698, 702 (*Fregoso*) [noting trial court's "broad discretion" in evaluating such requests]), it is well settled that a trial court abuses its discretion if it applies the wrong legal standard (*Costco Wholesale Corp. v. Superior Court* (2009) 47 Cal.4th 725, 733). We otherwise review the court's factual findings for substantial evidence. (*Fregoso*, at p. 702.) And where, as here, the substantial evidence challenge is brought by the party with the burden of proof below, we may overturn factual findings only if "'the evidence compels a finding in favor of the appellant as a matter of law'" because the evidence "'was (1) "uncontradicted and unimpeached" and (2) "of such character and weight as to leave no room for a judicial determination that it was insufficient to support [those] finding[s].""' (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838.)

The DVPA empowers a court to enter a restraining order lasting up to five years to prevent an occurrence or recurrence of domestic violence. (Fam. Code, §§ 6220, 6203, 6218, 6300, 6340, 6345; *Quintana v. Guijosa* (2003) 107 Cal.App.4th 1077, 1079.) The person seeking the order must prove, by a preponderance of the evidence, "a past act or acts of abuse" and that her safety would be jeopardized by the absence of an order. (Fam. Code,

§§ 6300, 6340; *Gdowski v. Gdowski* (2009) 175 Cal.App.4th 128, 137; *In re B.S.* (2009) 172 Cal.App.4th 183, 194.)

The trial court did not apply the wrong legal standard in petitioner's case. Instead, the court found "no basis for the issuance of a permanent restraining order" because it did "not believe that [petitioner] has met her standard." The court's subsidiary findings also applied the correct legal standard. The court found that the verbal argument in the car regarding petitioner's fidelity did not constitute "abuse," which is consistent with the case law. (*S.M. v. E.P.* (2010) 184 Cal.App.4th 1249, 1251-1266 ["heated" conversation involving name calling; no "abuse"]; *Nevarez*, *supra*, 227 Cal.App.4th at p. 784 [conversation amounting to verbal '"badgering"'; no "abuse"]; see also *Nakamura*, *supra*, 156 Cal.App.4th at p. 337 ["switching of cars and cancelling of insurance"; no "abuse"]; cf. *Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1142-1143 [repeated, unwelcome email and text message contact, accompanied by appearing at house, banging on door and shouting; "abuse"]; *In re Marriage of Evilsizor & Sweeney* (2015) 237 Cal.App.4th 1416, 1420-1426 [downloading private emails and publicizing them to others, including the court; "abuse"]; *Nevarez*, *supra*, at p. 784 [physical violence, accompanied by repeated emails and text messages as well as appearing at workplace and home, banging on car window; "abuse"].) The court found that hair pulling *could be* "abuse" as a form of "caus[ing] or attempt[ing] to cause bodily injury" (Fam. Code, § 6203, subd. (a)(1) [definition of abuse]), but found that it was not abusive "under [these] circumstances" because boyfriend was trying to prevent petitioner from drunkenly exiting the car in an abandoned area in the middle of the night. And the court implicitly found that petitioner suffered

no further injury beyond the hair pulling and possible bruise to the chin. Faced with conflicting accounts of the extent of petitioner's injuries, the court was well within its rights to resolve that conflict against "the party with the burden of proof." (*Buzgheia v. Leasco Sierra Grove* (1997) 60 Cal.App.4th 374, 394 [court may use the "burden of proof" as a "tie-breaking tool" when "the evidence [stands] in relative equipoise"].) This was particularly appropriate where, as here, contemporaneous evidence supported the court's resolution because petitioner's day-of text indicates only a bruise to the chin.

Petitioner offers what boil down to four arguments in response.

First, she points to the court's observation, based on its reading of *Fischer*, *supra*, 22 Cal.App.5th 612, that "just acting out does not necessarily" amount to "domestic violence." Because *Fischer* was since depublished and because "acting out" appears nowhere in the definition of "abuse," petitioner reasons that the court applied the wrong legal standard. We disagree. In context, the import of the trial court's language was that the boyfriend's conduct in "acting out" of concern for petitioner's safety by pulling her hair to keep her in the car "does not necessarily" constitute "abuse." Petitioner herself admitted that it was "not a good idea" for her to exit boyfriend's car because it would leave her in an abandoned area in the middle of the night. We decline to construe the DVPA in a manner that would penalize an act meant to *protect* a person from harm just because it falls within the literal terms of the DVPA. Context matters, as the trial court properly recognized. Under these conditions, the court's citation to *Fischer* is beside the point.

Second, petitioner castigates the trial court for engaging in a "victim-blaming colloquy" because the court questioned her about her drinking and about whether she exercised good "judgment" when (1) getting into a car with boyfriend, who had also been drinking, and (2) demanding to be let out of the car in the middle of nowhere. We view the court's questioning differently. The court was taking an active role in questioning petitioner as to the events leading up to the alleged domestic violence and her ability to recollect them based on her level of inebriation (which may be established, among other ways, by the display of good or poor judgment). Far from creating reversible error, this line of questioning is precisely what the court should have been doing. (*Ross*, *supra,* 139 Cal.App.4th at pp. 861, 866.)

Third, petitioner asserts that the court was wrong to give dispositive weight to her delay in making a request for a DVPA protective order. However, the court did not give the delay *dispositive* weight; it merely considered petitioner's delay as one of many reasons to question the veracity of petitioner's statements. That is entirely appropriate.

Lastly, petitioner urges that the trial court wrongly ignored boyfriend's subsequent non-physical conduct in assessing whether she was subject to abuse—namely, boyfriend's conduct in stopping by her house and then sending her a text message saying he stopped by, that he "didn't see [her] car outside" and that "maybe [she] was busy, and that [she] should enjoy, enjoy." To be sure, the definition of "abuse" under the DVPA sweeps beyond physical aggression or threats of physical aggression. (Fam. Code, § 6203.) But boyfriend's non-violent and non-threatening act of stopping by petitioner's house and sending her a text message—after *she* had already initiated a text

conversation with him after the incident—does not compel a finding that she was subject to abuse. The cases petitioner cites declaring post-incident conduct to be "abuse" involved far more than these isolated and/or mutual interactions. (Cf. *Burquet*, *supra*, 223 Cal.App.4th at pp. 1142-1143; *Nevarez*, *supra*, 227 Cal.App.4th at p. 784.)

DISPOSITION

The order is affirmed.

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__________________________, J.
HOFFSTADT

We concur:

__________________________, P. J.
LUI

__________________________, J.
ASHMANN-GERST