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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SABRINA L. HADDAD,

Plaintiff and Respondent,

v.

GREGORY R. SOUSA,

Defendant and Appellant.

B248470

(Los Angeles County
Super. Ct. No. LQ014892)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Steff R. Padilla, Commissioner. Affirmed.

Gregory R. Sousa, in pro. per., for Defendant and Appellant.

Law Offices of William S. Fitch and William S. Fitch for Plaintiff and
Respondent.

INTRODUCTION

Appellant Gregory R. Sousa appeals from a March 14, 2013 order granting a restraining order, issued pursuant to the Domestic Violence Prevention Act (DVPA) (Fam. Code, § 6200, et seq.).¹ Sousa makes the following contentions on appeal: (1) the trial court erred in excluding evidence concerning certain audio recordings he made; (2) the trial court's exclusion of such evidence violated his due process rights; and (3) insufficient evidence supports the trial court's decision to grant the restraining order. We affirm the trial court's order.

FACTUAL SUMMARY

In summarizing the evidence presented at the hearing on the restraining order, we accept as true all evidence tending to establish the correctness of the trial court's findings and resolve all conflicts in favor of the judgment. (*Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1142 (*Burquet*).

Sousa met respondent Sabrina L. Haddad around April 2009, while they were both separately married. At the time, Haddad was still married to, but recently separated from, her husband of 18 years, and Sousa was "on his way out" of his own marriage. Sousa and Haddad had children with their respective spouses before they met. Throughout their relationship, Sousa and Haddad would visit at each other's home, and their children would sometimes sleep over at each other's house. Sousa and Haddad eventually developed a romantic relationship.

Haddad ended her relationship with Sousa around April 2012. According to Haddad, Sousa wanted to continue seeing her, but she had grown dissatisfied with the relationship because Sousa had yet to leave his wife. In July 2012, Haddad began dating Robert Brown.

Around midnight on a night after Sousa and Haddad had broken up, Sousa entered Haddad's apartment uninvited. Before going to bed that night, Haddad's daughter had

¹ All further statutory references are to the Family Code unless otherwise specified.

been talking to Haddad in Haddad's bedroom. When Haddad's daughter returned to the living room, where she slept, she found Sousa moving around the room. Haddad's daughter became scared and went back to Haddad's bedroom to tell Haddad that Sousa was in the apartment. When Haddad came out of her bedroom to search the living room, Sousa had already left. Haddad's daughter testified that Sousa had entered the house through a window in the bathroom of Haddad's apartment. She noticed that, after she found Sousa in the apartment, the bathroom window was slightly ajar, and there was urine in the toilet that had not been there the last time she used the bathroom.

About 20 minutes later, Haddad drove to Sousa's house with her daughter to confront Sousa about whether he had entered her apartment earlier that night. Although Sousa initially denied Haddad's accusation, he eventually admitted that he had entered the apartment.

In August 2012, Haddad filed a request for a restraining order against Sousa, which was later dismissed. In October 2012, Haddad filed another request for a restraining order against Sousa, which was also dismissed.

Around December 2012, Haddad went on a trip to Spain. Before she left, Haddad asked Robert Brown to take care of her pets while she was out of the country. While she was out of the country, one of Haddad's dogs was hit by a car. Brown took the dog to the veterinarian, where it was determined that the dog should be euthanized. While Brown was waiting at the veterinarian's office, Sousa arrived and apparently authorized the veterinarian to euthanize Haddad's dog. After Haddad's dog was euthanized, its remains were cremated. Although Haddad had instructed Brown to prevent Sousa from taking possession of her dog's ashes, Sousa took the ashes before Brown was able to stop him.

After Haddad returned from Spain in December 2012, she tried to recover her dog's remains from Sousa. According to Haddad, Sousa had agreed to meet her at a public pool, where he would give her the ashes. However, when Sousa arrived at the pool, he did not have the ashes with him.

On January 7, 2013, Sousa confronted Haddad at her daughter's elementary school. According to Sousa, he went to the school to bring Haddad her dog's ashes;

however, Haddad testified that Sousa made no mention of the ashes during their confrontation. According to Haddad's daughter, Haddad began yelling at Sousa when she saw him, at which point Sousa left the school.

PROCEDURAL BACKGROUND

On January 8, 2013, Haddad filed a request for a domestic violence restraining order, seeking a protective order requiring Sousa to stay at least 150 yards from her and her daughter. The request alleged that Sousa and Haddad had been in a dating relationship, and that Sousa had begun following Haddad, including appearing at her daughter's school, causing Haddad to fear for her safety. Later that month, the trial court issued a temporary restraining order against Sousa.

On February 20, 2013, Sousa filed a response to Haddad's request for a domestic violence restraining order. In his response, Sousa argued Haddad's request should be denied because, in his opinion, Haddad was not afraid of him. Sousa supported his allegations with, among other documents, a statement written by himself, a transcript of an alleged phone message from Haddad, and a declaration executed by Brown, in which Brown testified that he had listened to several audio recordings of telephone conversations between Sousa and Haddad.

On March 13, 2014, the trial court commenced an evidentiary hearing on Haddad's request for a restraining order. During the first day of the hearing, the trial court admitted a declaration executed by Haddad² and heard testimony from three witnesses, including Haddad's daughter.

Before the presentation of evidence resumed on March 14, 2013, Haddad filed a motion in limine seeking to exclude under the Invasion of Privacy Act (Pen. Code, § 630 et seq., hereafter the Privacy Act) evidence concerning audio recordings of telephone conversations between Sousa and Haddad. In support of the motion, Haddad's counsel filed a declaration describing an interview he had with Brown. During the interview,

² Haddad's declaration is not included in the record on appeal.

Brown told Haddad's counsel that he intended to testify about the content of certain recordings Sousa made of telephone conversations between Sousa and Haddad. In her motion, Haddad argued the recordings were inadmissible under the Privacy Act because they were confidential and made without her permission.

After reviewing the motion, the trial court asked Sousa's counsel whether he would like an opportunity to file a written opposition. Counsel declined and informed the court that he was ready to proceed with the hearing on the motion. Before ruling on Haddad's motion, the trial court informed the parties that it intended to advise Brown of his Fifth Amendment right against self-incrimination with respect to any testimony he intended to offer concerning the challenged recordings. Before the court advised Brown of his Fifth Amendment right, Sousa's counsel stated: "I, of course, have no objection to giving anybody legal admonitions" The court then advised Brown of his right against self-incrimination and warned him that he could face criminal prosecution if he testified about his involvement in the surreptitious recording of any conversation involving Haddad.

After admonishing Brown, the court requested that Sousa's counsel orally respond to Haddad's motion. Sousa's counsel expressed no opposition to the motion, and he did not attempt to explain how the recordings were admissible in light of Haddad's allegations that they were created in violation of the Privacy Act. Further, Sousa's counsel made no attempt to explain how the recordings were relevant to Sousa's position. In fact, Sousa's counsel informed the court that he did not possess the recordings or any evidence relating to them, and that he did not intend to introduce any documentary evidence concerning the recordings, including transcripts. The court granted Haddad's motion. Haddad's counsel then made an oral request that the court disregard any mention of the recordings made in Sousa's February 20, 2013 response to Haddad's request for a restraining order, which the court also granted. Sousa's counsel never objected or expressed any opposition to the court's rulings.

After the court ruled on Haddad's motion, Brown and Haddad testified. During Brown's testimony, Sousa's counsel asked two questions concerning the content of one

of the challenged recordings. Haddad’s counsel objected to each question, and the court sustained each objection. Sousa’s counsel again did not attempt to make an offer of proof concerning the content of the recordings, and the topic of the recordings was never raised again at the hearing.

At the conclusion of the hearing, the trial court granted Haddad’s request and issued a five-year restraining order against Sousa. Sousa timely appealed.

DISCUSSION

I. Standard of Review

A domestic violence restraining order is a type of injunction. Thus, a trial court’s order granting a restraining order is appealable under Code of Civil Procedure section 904.1, subdivision (a)(6), which allows appeals from orders granting or dissolving an injunction. (See *Loeffler v. Medina* (2009) 174 Cal.App.4th 1495, 1502, fn. 9, 1503-1504; see also *Burquet, supra*, 223 Cal.App.4th at p. 1143.)

“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.) In reviewing the trial court’s factual findings, “[o]ur sole inquiry is ‘whether, on the entire record, there is *any* substantial evidence, contradicted or uncontradicted,’ supporting the court’s finding[s]. [Citation.]” (*Sabbah v. Sabbah* (2007) 151 Cal.App.4th 818, 822-823 (*Sabbah*)). “““We 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.”” [Citation.]” (*Burquet, supra*, 223 Cal.App.4th at p. 1143.)

II. The DVPA

“The DVPA’s ‘purposes . . . are to prevent the recurrence of acts of violence 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.)” (*Qing Hui Gou v. Bi Guang Xiao* (2014) 228 Cal.App.4th 812, 818 (*Qing Hui Gou*)). Under the DVPA, domestic violence is defined as ‘abuse’ perpetrated against enumerated individuals, including a “person with whom the

respondent . . . has had a dating . . . relationship.” (§ 6211, subd. (c).) A court may issue a restraining order under the DVPA if an applicant establishes to the court’s satisfaction that there has been “a past act or acts of abuse.” (§ 6300.)

To support the granting of a restraining order, “[t]he requisite abuse need not be actual infliction of physical injury or assault.” [Citation.] Instead, ‘abuse’ is broadly defined as including behavior that ‘plac[es] a person in reasonable apprehension of imminent serious bodily injury to that person or to another’ or behavior that ‘has been or could be enjoined pursuant to Section 6320.’ [Citation.]” (*Qing Hui Gou, supra*, 228 Cal.App.4th at p. 818.) Section 6320 of the DVPA describes enjoinable behavior as including, among other acts, “molesting, attacking, striking, stalking, threatening, sexually assaulting, battering, . . . harassing, telephoning, . . . destroying personal property, contacting, either directly or indirectly, by mail or otherwise, coming within a specified distance of, or disturbing the peace of the other party, and, in the discretion of the court, on a showing of good cause, of other named family or household members.” (§ 6320, subd. (a).) “[D]isturbing the peace of the other party’ means ‘conduct that destroys the mental or emotional calm of the other party.’ [Citation.]” (*Qing Hui Gou, supra*, 228 Cal.App.4th at p. 818.)

III. Sousa Failed to Preserve His Evidentiary Claims on Appeal

Sousa contends the trial court violated his due process rights when it excluded evidence of the content of certain recordings he made of conversations between himself and Haddad. He argues the trial court erroneously believed the recordings contained telephone conversations that Haddad was not aware were being recorded. For the first time on appeal, Sousa asserts the recordings actually contained conversations he had with Haddad in public places. Sousa asserts the trial court “overlooked” this distinction and, as a result, incorrectly determined that the recordings were confidential and inadmissible under Penal Code section 632, subdivision (d), part of the Privacy Act.³ Sousa further

³ Penal Code section 632, subdivision (d) prohibits admission of “evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation

argues that even if the recordings fell within the scope of the Privacy Act, the trial court was required to admit evidence of the recordings under section 217.⁴ Finally, without citing any supporting authority, Sousa argues the trial court improperly “suppressed” Brown’s testimony concerning the recordings by advising Brown that he could face criminal prosecution if his testimony revealed that he was involved in the creation of the recordings. Each of these contentions lacks merit.

Evidence Code section 354 provides in pertinent part: “A verdict or finding shall not be set aside, nor shall the judgment or decision based thereon be reversed, by reason of the erroneous exclusion of evidence unless the court which passes upon the effect of the error or errors is of the opinion that the error or errors complained of resulted in a miscarriage of justice and it appears of record that: [¶] (a) The substance, purpose, and relevance of the excluded evidence was made known to the court by the questions asked, an offer of proof, or by any other means” (Evid. Code § 354, subd. (a).) “[T]he failure to make an adequate offer of proof in the court below . . . precludes consideration on appeal of an allegedly erroneous exclusion of evidence. [Citation.]” (*Shaw v. County of Santa Cruz* (2008) 170 Cal.App.4th 229, 282 (*Shaw*)).

The record clearly reflects that Sousa made no offer of proof attempting to explain the admissibility or the relevancy of the contents of the challenged recordings. For

of this section . . . in any judicial, administrative, legislative, or other proceeding.” (Pen. Code, § 632.)

Under the Privacy Act, a “confidential communication” is defined as: “any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.” (Pen. Code, § 632, subd. (c).)

⁴ In relevant part, section 217 provides: “At a hearing on any order to show cause or notice of motion brought pursuant to this code . . . the court shall receive any live, competent testimony that is relevant and within the scope of the hearing and the court may ask questions of the parties.” (§ 217, subd. (a).)

example, Sousa's counsel never argued that the contents of the recordings were admissible under the Privacy Act despite Haddad's allegations that the recordings were made without her knowledge or consent. Further, Sousa's counsel never represented to the trial court, as Sousa does on appeal, that the recordings did not fall within the scope of the Privacy Act because they contained conversations held in public places as opposed to telephone conversations, as Haddad argued in her motion in limine. Sousa cannot attempt to make such a showing now. (*People v. Pearson* (2013) 56 Cal.4th 393, 470, fn. 10 [an appellant cannot, for the first time on appeal, assert alternative grounds for admissibility of evidence excluded at the trial level].) Sousa's counsel also did not oppose Haddad's motion or express any disagreement with the court's rulings on the motion, and he told the court that he did not intend to introduce any evidence concerning the recordings at the hearing. Accordingly, Sousa failed to preserve a claim on appeal that the trial court improperly excluded evidence concerning the recordings under the Privacy Act. (Evid. Code § 354; see also *People v. Ervine* (2009) 47 Cal.4th 745, 783 ["We have long held that the proponent of evidence must identify the specific ground of admissibility at trial or forfeit that basis of admissibility on appeal."].)

Sousa falls back on section 217 to argue the trial court should have admitted Brown's testimony concerning the content of the challenged recordings despite the court's finding that such evidence was obtained in violation of the Privacy Act. Sousa's reliance on section 217 is misplaced. Sousa misinterprets the statute as significantly lowering the threshold for admitting live testimony in family law proceedings, regardless of whether such testimony would be admissible under the Privacy Act or other statutes. Section 217 was not enacted for such a purpose. Rather, it was enacted to alleviate the harsh effects stemming from the common practice of family law courts seeking to expedite family law proceedings by requiring litigants to rely primarily on written declarations in lieu of introducing live testimony. (Com. on Judiciary, com. on Assem. Bill No. 939 (2009-2010 Reg. Sess.) Sept. 27, 2010.) In response to our Supreme Court's decision in *Elkins v. Superior Court* (2007) 41 Cal.4th 1337, in which the court held that such a practice conflicts with the hearsay rule (see *id.* at pp. 1354-1360), the California

Legislature enacted section 217 to encourage reliance on live, rather than written, testimony in family law proceedings. Section 217 is not implicated here, as the proceeding on Haddad's request for a domestic violence restraining order was conducted with live testimony. Accordingly, section 217 lends no support to Sousa's argument that evidence of the content of the challenged recordings should not have been excluded despite the trial court's finding that such evidence was obtained in violation of the Privacy Act.

We also reject Sousa's contention that the trial court improperly "suppressed" evidence favorable to his defense when it advised Brown of his Fifth Amendment right against self-incrimination. Contrary to Sousa's assertion, the trial court did not preclude Brown from testifying. Rather, with the approval of Sousa's counsel, the trial court advised Brown that he could face criminal prosecution if he testified about his involvement in the creation of the challenged recordings. Sousa later called Brown to the stand, and Brown testified at length about his relationship with Haddad and his interactions with Sousa.

Even if the trial court did exclude evidence favorable to Sousa's defense by admonishing Brown, Sousa has forfeited any claim of error stemming from that admonishment. Sousa never attempted to make an offer of proof as to the relevancy or admissibility of Brown's testimony concerning the recordings (see *Shaw, supra*, 170 Cal.App.4th at p. 282), and Sousa's counsel explicitly agreed with the trial court's decision to admonish Brown. (See *Mangano v. Verity, Inc.* (2009) 179 Cal.App.4th 217, 221 [statement of the appellant's counsel that he was "okay" with the trial court's exclusion of certain evidence forfeited the appellant's claim on appeal that the trial court improperly excluded that evidence].)

Finally, we reject Sousa's contention that the trial court violated his due process rights by excluding evidence concerning the content of the challenged recordings. Constitutional claims arising out of a trial court's decision to exclude or admit evidence must be raised before the trial court. (*People v. Holloway* (2004) 33 Cal.4th 96, 130; *People v. Riggs* (2008) 44 Cal.4th 248, 292.) A failure to do so constitutes a forfeiture of

such claims on appeal. (*Ibid.*) Aside from failing to make an offer of proof as to the relevancy and admissibility of the evidence of the recordings, Sousa never objected on due-process grounds to the trial court's ruling excluding such evidence. Accordingly, he forfeited his due-process claim on appeal. (See *ibid.*)

IV. Substantial Evidence Supports the Trial Court's Findings

Sousa next contends the trial court abused its discretion in granting Haddad's request for a domestic violence restraining order because the court did not base its decision on substantial evidence. Specifically, Sousa sets forth two contentions relating to the trial court's treatment of the evidence at the hearing on the restraining order: (1) the trial court failed to weigh the evidence; and (2) even if the trial court properly weighed the evidence, insufficient evidence supports the trial court's granting of the restraining order. Sousa's contentions lack merit.

As a preliminary matter, we note that the trial court did not make an explicit finding as to which definition of abuse it found Sousa's conduct fell within. However, under the doctrine of implied findings, we presume the trial court made the necessary finding that Sousa's conduct constituted abuse under the DVPA. (See *Sammis v. Stafford* (1996) 48 Cal.App.4th 1935, 1942 (*Sammis*)). From there, we proceed first to Sousa's contention that insufficient evidence supports the trial court's findings underlying its decision to grant Haddad's request for a restraining order under the DVPA. (See *Sabbah, supra*, 151 Cal.App.4th at pp. 822-823; *Sammis, supra*, 48 Cal.App.4th at p. 1942.)

Here, substantial evidence supports a finding that Sousa disturbed the peace of Haddad, which amounts to "abuse" under the DVPA. (§ 6320.) As noted above, acts that disturb the peace of another party are those that destroy "the mental or emotional calm of the other party." (*Qing Hui Gou, supra*, 228 Cal.App.4th at p. 818; *Burquet, supra*, 223 Cal.App.4th at p. 1146.) As the trial court observed, the testimony of Haddad's daughter established that Sousa repeatedly engaged in conduct that was disruptive to Haddad's and her daughter's mental and emotional calm. For example, Haddad's daughter testified that, on a night after Sousa's and Haddad's relationship ended, she became frightened by Sousa when she found him inside Haddad's living room

after he had apparently entered Haddad’s apartment uninvited through a bathroom window. Haddad’s daughter also testified that, on a later occasion, she saw Sousa confront Haddad at her elementary school, causing Haddad to become upset and start yelling at Sousa. These acts support a finding that Sousa disturbed the peace of Haddad and her daughter. (See *Burquet, supra*, 224 Cal.App.4th at pp. 1144, 1147.)

Finally, Sousa contends the trial court failed to weigh the evidence. We disagree. The record reflects that the trial court considered, and weighed the credibility of, the witnesses’ testimony. For example, before issuing its ruling, the court stated, “If it were solely [Haddad’s] testimony, this petition would have been dismissed because there is [*sic*] enough inconsistencies in her own testimony.” Nevertheless, the trial court determined that the testimony of Haddad’s daughter was sufficiently clear and credible to corroborate Haddad’s allegations of abuse. (*Sabbah, supra*, 151 Cal.App.4th at p. 823 [“The testimony of a single witness may provide sufficient evidence.”].)

DISPOSITION

The judgment is affirmed. Haddad is awarded her costs on appeal.

WOODS, J.

We concur:

PERLUSS, P. J.

ZELON, J.