

No. G060832

**IN THE COURT OF APPEAL
FOR THE STATE OF CALIFORNIA**

FOURTH APPELLATE DISTRICT, DIVISION 3

JOSELIN GONZALEZ,

Appellant,

v.

JOSEPH GONZALEZ,

Respondent.

APPELLANT'S OPENING BRIEF

Appeal from an Order of the Superior Court, County of Orange,
Hon. Maurice Sanchez, Judge, Case No. 19D002540

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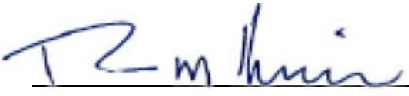
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CERTIFICATE OF INTERESTED PARTIES

Pursuant to California Rules of Court, rule 8.208, Appellant Joselin Gonzalez knows of no interested entity or person with either (1) an ownership interest of 10 percent or more in the party filing this certificate, or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves.

Dated: May 3, 2022

Respectfully submitted,
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I. INTRODUCTION

This appeal seeks relief from the trial court's multiple, reversible legal errors that directly contravened on-point Court of Appeal precedent. Appellant Joselin Gonzalez ("Joselin") is a domestic violence survivor who was wrongly denied the protections of a Domestic Violence Restraining Order ("DVRO"), and she now appeals the decision below.

Respondent Joseph Gonzalez ("Joseph"), from whom Joselin is legally separated and is seeking a divorce, engaged in a pattern of abuse spanning several years.¹ In October 2018, Joseph threatened Joselin during an argument and then hit her on the arm when she tried to call 911, all in the presence of their infant twins. Joseph was criminally charged and Joselin subsequently filed a request for a DVRO ("DVRO Request"). The trial court found good cause to issue a temporary restraining order ("TRO"). Although the TRO restricted Joseph's contact with Joselin, he knowingly violated the TRO by repeatedly texting her in October and December 2020 to pressure her about his criminal case, to guilt her with unfounded allegations of being a bad parent, and to attempt to reconcile with her.

Despite ample evidence of Joseph's ongoing abuse, the trial court denied Joselin's DVRO Request based on its conclusions that (a) the 2018 incident was the last incident of abuse, and (b) at the time of the hearing, Joselin lacked a reasonable apprehension of future abuse. These conclusions were infected by

¹ To avoid confusion, and not out of disrespect, this brief refers to the parties by their first names.

several legal errors—each of which contravenes Court of Appeal precedent and is an independent basis to reverse—and are inconsistent with the undisputed facts of the case.

First, the court failed to find that Joseph’s TRO violations qualified as abuse. This disregarded recent, binding precedent from this Division, which reaffirmed that TRO violations constitute abuse under the Domestic Violence Prevention Act (“DVPA”) and are a basis for issuing a DVRO. (See *N.T. v. H.T.* (2019) 34 Cal.App.5th 595, 603 (N.T.).) Under *N.T.*, this Court should reverse and remand with instructions to issue the DVRO.

Second, the trial court improperly applied the legal standard for renewing an existing DVRO, and therefore denied the DVRO based on its conclusion that Joselin did not have a reasonable apprehension of future abuse. The Court of Appeal has routinely held that victims are not required to show reasonable apprehension of future abuse (the standard for renewing a DVRO) to receive a DVRO in the first instance, and that the issuance of a DVRO requires only reasonable proof of past abuse. (See, e.g., *Nevarez v. Tonna* (2014) 227 Cal.App.4th 774, 784.). The trial court failed to follow this precedent, which led to a cascade of other legal and factual errors, including its failure to apply the standard for issuing a DVRO. This further justifies reversal.

Finally, the trial court reversibly erred in denying the DVRO Request based on the length of time since the 2018 incident. The Court of Appeal has rejected this reasoning as an

“error of law” that warrants reversal. (See *Rodriguez v. Menjivar* (2015) 243 Cal.App.4th 816, 824.)

These legal errors led to the court’s erroneous conclusion that Joselin did not need a DVRO, and that any prior abuse by Joseph was not likely to recur. The trial court therefore abused its discretion in denying the DVRO. The ruling below must be reversed.

II. FACTUAL AND PROCEDURAL HISTORY

A. Joseph Yelled at Joselin, Threatened Her, and then Hit Her Arm when She Attempted to Call 911 During an Argument in October 2018.

On October 30, 2018, the parties were preparing to leave their home to spend Halloween with Joseph’s mother. (Reporter’s Transcript (“RT”) at 7:2–9.) They were putting their infant twin sons in the car when Joseph became upset and started yelling at Joselin. (*Id.* at 7:21–23, 8:7–9.) He yelled that “[Joselin] would ruin his life and that he hated [her] and that was the reason why he was unhappy.” (*Id.* at 7:25–8:1.)

“[Joselin] got scared” and Joseph “was so mad,” so she removed the children from the car and took them into the house. (*Id.* at 8:11–13; see also *id.* at 8:17–18 [Joseph “was so upset, so angry”].) Joselin blocked the front door because Joseph “wanted to take [the children] by force.” (*Id.* at 8:16–18.) Joseph followed Joselin inside the house and said that “he hated [her] and that [she] ruined his life,” and that she should “just let him take the kids.” (*Id.* at 9:5–6, 9:14–15.) At the same time, Joseph “hit the walls and hit chairs ... with a closed fist and ... kick[ed] them too.” (*Id.* at 9:5–11.) Joselin was afraid and asked Joseph to calm

down, but he did not. (*Id.* at 9:16–18.) She stopped him from taking the children, so he left the house, slamming the front door on his way out. (*Id.* at 9:21–23, 49:2–10.)

After less than a minute, Joseph returned to the house and “started kicking the door until he opened it.” (*Id.* at 9:26–10:3, 49:2–3.) He found Joselin “crying hysterically” inside and pushed her out of the doorway as he grabbed the children. (*Id.* at 10:7–14, 55:10.) In that moment, Joseph threatened, “Don’t make me do something that I will regret.” (*Id.* at 10:19–22.) Remembering the weapons Joseph kept in the closet, Joselin grabbed her phone to call 911 “and that’s when ... [Joseph] hit [her] with an open hand on [her] left arm.” (*Id.* at 10:20–25.) The blow left a red mark on her arm. (*Id.* at 10:26–11:2.)

When Joselin managed to call 911, Joseph “calmed down right away,” and she took the children into one of the bedrooms and locked the door. (*Id.* at 11:3–24.) Joselin did not hear Joseph say or do anything after the 911 call. (*Id.* at 11:24–25.) Law enforcement arrived soon after and separately interviewed the parties. (*Id.* at 12:2–11.) They took a picture of Joselin’s arm and removed Joseph’s weapons from the closet. (*Id.* at 12:11–12.) Joselin “kn[ew] he had a gun. There was a rifle and some knives, but [she was] sure he had others that [she] didn’t know about.” (*Id.* at 12:13–22.) Joseph was arrested and ultimately charged with (1) spousal battery and (2) disturbing the peace/fighting. (See *id.* at 13:6–17, 32:17–33:3; see also Appellant’s Request For Judicial Notice (“RJN”), Ex. A [Joseph’s Criminal Case Summary,

Case No. 18HM14326], Ex. B [Joseph’s Criminal Case Detail, Case No. 18HM14326].)

The parties are now separated, and Joselin petitioned for dissolution of marriage based on irreconcilable differences in March 2019. (Clerk’s Transcript (“CT”) at 8–10, 67.)

B. After the 2018 Incident, the Criminal Court Issued a Protective Order Prohibiting Joseph from Contacting Joselin.

As part of Joseph’s criminal case, the criminal court found good cause to issue a criminal protective order (“CPO”) on November 6, 2018, just one week after the incident. (*Id.* at 103; RT at 13:22–24.) The court issued the CPO pursuant to Penal Code section 136.2, which allows the criminal court to issue “[a]n order protecting a victim . . . from all contact by the defendant, or contact, with the intent to annoy, harass, threaten, or commit acts of violence, by the defendant.” (CT at 103; Pen. Code, § 136.2, subd. (G)(i).)

The CPO identified Joselin as the protected person and included a stay-away provision and a no-contact provision that prohibited Joseph from having any “personal, electronic, telephonic, or written contact” with Joselin, except through an attorney of record. (CT at 103, ¶¶12–14.) The criminal court modified the CPO in July 2019 to permit Joseph to have “*peaceful contact* with [Joselin] ... as an exception to the ‘no-contact’ or ‘stay-away’ provision ... *only* for the safe exchange of children and

court-ordered visitation.” (See Appellant’s Motion to Augment the Record (“MTA”), Ex. 1 at ¶16(b) [emphasis added].)²

C. Joselin Filed a DVRO Request that Detailed Joseph’s Abusive Conduct During the October 2018 Incident.

When Joselin learned that she could lose her protections under the CPO “depending on the outcome of [Joseph’s] criminal case,” she filed a DVRO Request against him on August 16, 2019. (CT at 19, 25.) She informed the trial court of the parties’ pending divorce action, Joseph’s pending criminal case, and the CPO. (*Id.* at 20, ¶5.) Joselin asked the court to issue the following protective orders: (1) a stay-away order, to prohibit Joseph from coming within 100 yards of Joselin, her home, her car, and her workplace; and (2) a personal-conduct order, to prohibit Joseph from harassing, attacking, or contacting her. (*Id.* at 20.) Her request contained a handwritten exception to the personal-conduct order: “Brief & peaceful contact with regards to the kids.” (*Ibid.*)

Joselin also requested court orders for child custody, visitation, and child support. (*Id.* at 21; see also *id.* at 27–29.) Joselin requested sole legal and physical custody because she was “afraid” that Joseph would “hurt [the] kids.” (*Id.* at 21, 25, 27–29.) She also requested that any visits between Joseph and the children be supervised. (*Id.* at 29.)

Joselin submitted a detailed affidavit, signed under penalty of perjury, as an attachment to her DVRO Request. (*Id.* at 25–

² The Court granted Joselin’s Motion to Augment the Record on Appeal on March 17, 2022.

26.) Joselin declared that, on October 30, 2018, Joseph “pushed [her] and hit [her] on the arm”; “yelled at [her] angrily that he hated [her]” and “that [she] ruined his life”; and “threatened [to do] things to [her] that he did not want to do.” (*Id.* at 25.) Joselin declared that she was fearful during the incident because Joseph kept firearms and knives in the closet, and “he was always worked up and anxious.” (*Ibid.*) Joseph “would smoke marijuana all the time, drink energy drinks, and sleep very little during the night.” (*Ibid.*)

Joselin also declared that Joseph “punch[ed] walls and thr[ew] objects that were in his proximity” during the incident. (*Ibid.*) He even tried to take the parties’ infant children “against [Joselin’s] will” and “tried to push [her] out of his way.” (*Ibid.*)

Finally, Joselin explained that she was filing the DVRO Request because she only recently learned that she could lose her CPO protections depending on the outcome of Joseph’s criminal case. (*Ibid.* [“I am nervous to lose the [CPO] that the criminal court has given me in case he wins.”].) Joseph had reached out to Joselin, “pressuring [her] and trying to mak[e] [her] feel guilty due to the criminal case.” (*Id.* at 26.) He also “accuse[d] [her] of lying to the police, that [she] [was] destroying the family, etc.” (*Ibid.*)

D. The Trial Court Issued a TRO to Protect Joselin Until the Hearing on Her DVRO Request.

Based on the information in Joselin’s DVRO Request, the trial court found good cause to issue a TRO until it held a hearing on her Request. (*Id.* at 33–36.) The TRO included stay-away and personal-conduct orders to protect Joselin. (*Ibid.*) The personal-

conduct order stated that Joseph “must not ... [c]ontact [Joselin], either directly or indirectly, in any way, including but not limited to, by telephone, mail, email or other electronic means.” (*Id.* at 34.) The TRO provided a narrow exception for “brief [and] peaceful contact [with Joselin] with regards to the kids.” (*Ibid.*)

The hearing on Joselin’s DVRO Request was set for September 6, 2019, but the trial court ordered several continuances because Joseph’s criminal case was still pending and then the COVID-19 pandemic caused emergency court closures. (See *id.* at 16, 55–56, 58–59, 71–72, 75, 91, 95–96, 120–123, 124–127, 128, 129–132 [continuances due to pending criminal case]; 108–113, 114 [continuances due to COVID-19 pandemic].)

Over the next year and a half, the TRO remained in full force and effect. (*Id.* at 95, 111, 114, 120, 124, 128.) During this time, Joseph was still prohibited from contacting Joselin, “either directly or indirectly, in any way,” except for “[b]rief and peaceful contact . . . as required for court-ordered visitation of children.” (*Id.* at 45, 79.)

The TRO was slightly amended to reflect the court’s subsequent orders on child custody and visitation. (*Id.* at 44–54 [First Amended TRO], 78–90 [Second Amended TRO].) The parties stipulated, and the court ordered, that Joselin would receive sole physical and legal custody of the children. (*Id.* at 86–89.) In addition, the parties stipulated to a visitation schedule that required Joseph to be supervised by his mother or an agreed-

upon, trusted adult. (*Id.* at 86–89; see also *id.* at 67 [identifying Deborah Oliver Gonzalez as Joseph’s mother].)

E. Despite His Restrictions Under the TRO and CPO, Joseph Repeatedly Contacted Joselin via Text Message Before the Hearing on Her DVRO Request.

While both the TRO and CPO were in effect, on October 27, 2020, Joseph sent text messages to Joselin in which he blamed her for the possible repercussions of his ongoing criminal case:

8:39AM: Joss we really need to talk about everything with the courts. They talking about probation multiple classes. Community service fines and restrictions on my movment and ability to own wepons. Pleas this has gone on long enough. I did nothing to deserve this. You used me for citizenship you never loved me. I have been nice to you and given you everything you asked for . please i want to get on with my life i live without having legal resrtictions on my life . just because you were maad I was excited to go alone to my moms withthe babies that halloween .

8:53AM: We have been co parenting the last two years. You violated your own restraining order multiple times. Just tell what you want from me. You alteady have the boys yoy already took away my home. You really want me to be in jail? To be unable to travel , why because you thought i have a Girl friend in canada?

(MTA, Ex. 2 [emphases added].)³

On December 18, 2020, Joseph texted Joselin again, but this time to express his feelings for her and his desire to reconcile:

³ This brief contains a reproduction of Joseph’s text messages in their original form whenever possible, with typographical errors included, to avoid excessive corrections. This is not intended to disparage Joseph. (See MTA Exs. 2–5.)

1:19PM: *Joslin i love you . please let me come back and be the man to raise our sons. Ill stop smoking. Ill get a good job and be there for the boys. Ill do whatever you want me too. I just want to be loved by you and no one else. I dont wanna be at my moms no more. I wanna grow old with you. Live with you. Die next to you at my bed. I care for no one else more then for you and our sons*

(*Id.* at Ex. 3 [emphases added].)

About a week later, on December 27, 2020, Joseph sent several messages in which he blamed Joselin for his problems:

12:21PM: Like really *what is wrong with you. How do you feel that anything you have done so far the past 2 years is right or good for our sons in any way. You decided to work more rather then spend time with them.*

12:29PM: I didnt do anything wrong to you. I married you for you dam citizenship. And you wouldnt even use my last name..... *Joss you need to wake up and see whats happening*

12:47PM: *Im sorry joss im just frustrated and miss our sons. I love you still. My emotions hurt*

1:51PM: Well do every other weekend then they spend the night. But i can still get them for the day the week they are not staying over right?

2:32PM: *Please forgive me for that outburst of hurtful statements. It just things that still bother me from our past*

(*Id.* at Exs. 5, 4 [emphases added].) The trial court admitted these text messages into evidence, without objection, during the hearing on Joselin's DVRO Request. (See RT at 17:12–18:5, 19:26–20:11.)

F. The Trial Court Denied Joselin’s DVRO Request.

On March 10, 2021, Joseph pleaded guilty to the lesser charge of disturbing the peace/fighting, and his charge for spousal battery was dismissed. (See RJN, Exs. A–B, RT at 33:2–3; compare Pen. Code, § 243, subd. (e)(1) with *id.* § 415, subd. (1).) The CPO protecting Joselin was also dissolved on this date. (See RJN at Ex. A.)

On May 6, 2021, the trial court held a hearing on Joselin’s DVRO Request, at which both parties were present and represented by counsel. (RT at 1:10–16.) The court began by asking if the parties had considered stipulating to extend the TRO “out for some period of time up to a year.” (*Id.* at 2:6–8.) The trial court explained that this is “sort of a standard thing [the court] discuss[es] and offer[s] to parties and counsel in a DV hearing before [it] actually start[s] to make findings.” (*Id.* at 2:20–23.) The trial court then informed the parties that “[o]bviously, the benefit of extending the TRO is that there is no permanent record of it,” and “[i]t provides the same protections during its pendency as a restraining order after hearing would

provide to the protected party.” (*Id.* at 2:10–16 [emphasis added].)⁴

However, Joselin declined to stipulate to a TRO extension because Joseph had already repeatedly violated the TRO. (*Id.* at 3:6–10 [Joselin’s Counsel: “it doesn’t make sense to continue out a [TRO] that is simply going to be violated.”].) The court therefore proceeded with the hearing on Joselin’s DVRO Request.

Joselin testified in detail about Joseph’s abusive conduct on October 30, 2018. (See *ante* Part II.A.) In contrast to Joselin’s testimony, Joseph admitted that Joselin did not yell at him or throw objects during this incident, and that she has never hit him. (RT at 47:17–18, 54:17–20, 56:1–3.)

In addition to testifying about the October 2018 incident, Joselin also presented evidence that Joseph violated the TRO’s personal-conduct order by communicating with her beyond brief and peaceful contact regarding child visitation. (See *ante* Part II.E.) She testified that Joseph contacted her at least seven times while the TRO was in effect about subjects not related to

⁴ Although Joselin does not rely on this error as a basis for reversal, the trial court misinformed the parties about the protections afforded under a TRO versus a DVRO. Several forms of relief are available to the victim under a DVRO, but not a TRO. (See Fam. Code, §§ 6341(a) [child support], 6341(c) [spousal support], 6343 [52-week batterer intervention program], 6344 [attorney’s fees and costs].) In addition, a DVRO creates a rebuttable presumption that awarding child custody to an abuser is detrimental to the best interest of the child, but a TRO does not. (See *id.* at § 3044(a).) Finally, a victim can renew a DVRO before it expires, but when a TRO expires, the victim must raise new allegations of abuse to receive another TRO. (See *id.* at §§ 6345, subd. (a), 6300.)

visitation. (RT at 16:23–17:11.) The trial court also admitted into evidence, without objection, several samples of Joseph’s 2020 text messages to Joselin. (*Id.* at 17:12–18:5, 19:26–20:11; MTA, Exs. 2–5.) In these text messages, Joseph blamed Joselin for his problems and emotionally berated her. (See *ante* Part II.E.)

Joseph testified that he understood the TRO’s personal-conduct order. (RT at 33:12–15) In addition, he admitted: (1) he texted Joselin in October 2020 to say, “I did nothing to deserve this,” (*Id.* at 35:5–18), (2) he texted Joselin that she used him for his citizenship, (*Id.* at 35:26–36:2), (3) he texted Joselin that he would have to perform community service because of his criminal case, (*Id.* at 36:3–6), and (4) he texted Joselin, “I love you,” which is something he wrote “almost after every message [he] sent her.” (*Id.* at 40:14–18.)

The trial court was aware that, before Joseph’s criminal case had been resolved, the CPO contained a personal conduct order that prohibited the same conduct as the TRO. (*Id.* at 1:25–2:4; 37:1–26 [court noted, “you had stated earlier they both essentially prohibited the same conduct.”].) However, when Joselin’s Counsel tried to elicit testimony that Joseph also violated the CPO, the court barred this line of questioning. (*Id.* at 15:8–16:15 [court concluded, “*I’m really mostly concerned about violations of this court’s TRO*”] [emphasis added]; see also *id.* at 36:10–18 [court reiterated, “we’re staying with the family law TRO” when Joselin’s Counsel inquired about the CPO], 38:15–39:15.)

Finally, the trial court allowed Joseph's Counsel to elicit testimony about new developments in the parties' co-parenting arrangement, which included the parties' agreed-upon changes so that Joseph could spend more time with their infant twins. (*Id.* at 24:6–24.) Beginning in December 2020, Joselin agreed that the children could stay overnight with Joseph on the weekends. (*Id.* at 24:25–25:3.) Joselin went with the children and Joseph to the beach one time. (*Id.* at 27:10–15.) She also went with them to the park because “there were times when it was just him and he didn't have his mother's help and so [she] would go.” (*Id.* at 28:2–12.)

In addition, Joselin testified that, on occasion, she dropped off the children at Joseph's mother's house, and during that time, she ate dinner with the children and Joseph's mother. (*Id.* at 26:9–14, 29:17–30:17.) On some of those nights, Joseph arrived home while Joselin was still eating dinner, and she would finish her dinner in about twenty to thirty minutes and then leave. (*Id.* at 29:17–30:17.)

Joseph testified that Joselin allowed him to visit the children for about two to three hours at her home when he is “in town close by and has some time to see the boys.” (*Id.* at 44:21–45:1.) On a few occasions, Joseph visited and “it'd just be [him], [Joselin], and the boys,” but other times “[Joselin's] mom would be there or her sisters would be there.” (*Id.* at 45:2–6.)

During closing statements, Joselin's Counsel argued that Joselin had “testified credibly to suffering abuse, pursuant to 6203 and 6320.” (*Id.* at 61:1–2.) This testimony included

Joseph's actions during the October 2018 incident, and his more recent TRO violations in October and December 2020. (*Id.* at 61:2–6, 62:6–8.) Joselin's Counsel also reminded the trial court about Joseph's criminal charges from the October 2018 incident—for spousal battery and disturbing the peace/fighting—and his guilty plea to disturbing the peace/fighting. (*Id.* at 61:7–10.)

The trial court issued its ruling from the bench and denied Joselin's DVRO Request as follows:

[T]he Court cannot determine—not conclude that domestic violence occurred. And on this record, the request for a permanent restraining order is denied.

... The Court also finds that *while some circumstances may have involved 6203 offending conduct. [sic] Nevertheless, the circumstances seem very situational. It was over almost three years ago—not over, but almost three years ago and it's not likely to reoccur.* There appears to be bi-directional conflict. Both parties—there was testimony both parties broke things, raised their voices and were, you know, yelling or raised their voices at each other.

The parties do not generally appear to be fearful of each other. Ms. Gonzalez testified she has dinner, at least partial dinners with Mr. Gonzalez present for up to a couple of hours. She has gone to the beach with Mr. Gonzalez and the children. She has gone to parks with Mr. Gonzalez and the children.

Mr. Gonzalez testified without rebuttal that she allows him into the home by herself with just him and the children present, although sometimes other members of her family are present, sometimes they are not.

The conflict appears to be related to an emotional outburst with poor impulse control. Again, this was Halloween 2018, was the last incident.

And again, there is little to no risk to—that these circumstances will reoccur and the moving party does not entertain a reasonable apprehension of future abusive conduct.

So based on the totality of all of the circumstances, the issuance of a domestic violence restraining order is not appropriate and, therefore, the request is denied.

(*Id.* at 64:18–66:4 [emphases added]; see also CT at 133.)⁵

Joselin now appeals the trial court’s order denying her DVRO Request.

III. STATEMENT OF APPEALABILITY

An appeal may be taken “[f]rom an order ... refusing to grant ... an injunction.” (Code Civ. Proc., § 904.1(a)(6).) This includes an order denying a DVRO. (See *In re Marriage of Nadkarni* (2009) 173 Cal.App.4th 1483, 1495.)

IV. STANDARD OF REVIEW

The trial court’s decision denying a DVRO is reviewed for abuse of discretion. (See *Rodriguez v. Menjivar* (2015) 243

⁵ Because the trial court explained the basis for its ruling and the evidence it relied upon, and it did not articulate any other reasoning behind the ruling, this Court should not presume that the court denied Joselin’s DVRO Request on any other basis. (See *Border Bus. Park, Inc. v. City of San Diego* (2006) 142 Cal.App.4th 1538, 1550 [“When the record clearly demonstrates what the trial court did, we will not presume it did something different.”].)

Cal.App.4th 816, 820 (*Rodriguez*.) “However, ‘*the exercise of discretion is not unfettered.*’” (*Ibid.* [citing *Nakamura v. Parker* (2007) 156 Cal.App.4th 327, 337] [emphasis added].) “In reviewing the denial of a DVRO request, [this Court] determine[s] whether the trial court ‘applied the correct legal standard to the issue in exercising its discretion,’” which is a question of law requiring de novo review. (*Gou v. Xiao* (2014) 228 Cal.App.4th 812, 817 [internal citation omitted]; see also *Rodriguez, supra*, 243 Cal.App.4th at pp. 820–21.) “If the court’s decision is influenced by an erroneous understanding of applicable law or reflects an unawareness of the full scope of its discretion, the court has not properly exercised its discretion under the law.” (*Rodriguez, supra*, 243 Cal.App.4th at pp. 820–21.) “Therefore, a discretionary order based on an application of improper criteria or incorrect legal assumptions is not an exercise of informed discretion and is subject to reversal.” (*Ibid.*) Factual findings by the trial court are reviewed for substantial evidence. (See *J.J. v. M.F.* (2014) 223 Cal.App.4th 968, 975.)

V. ARGUMENT

The trial court abused its discretion, and reversal is warranted, for three reasons.

First, the trial court committed reversible legal error by failing to find that Joseph’s TRO violations qualified as abuse under the DVPA. The court issued a TRO prohibiting Joseph from having any contact with Joselin, except for the narrow purpose of “brief and peaceful” communication about their children to facilitate the visitation schedule. Joseph knowingly

violated the TRO by repeatedly texting Joselin in October and December 2020: he blamed her for his problems, berated her for seeking relief from the courts, and antagonized her about issues wholly unrelated to child visitation.

The law is clear: Joseph’s TRO violations constitute abuse under the DVPA. (See *N.T.*, *supra*, 34 Cal.App.5th at pp. 602–603 [citing Fam. Code, §§ 6203, subd. (a)(4) and 6320].) However, the trial court failed to follow this Division’s precedent and disregarded Joseph’s TRO violations in denying the DVRO Request. This failure warrants reversal. Moreover, because Joseph’s TRO violations were undisputed, this Court should remand with instructions to issue a DVRO on this basis. (See *id.* at p. 603 [“If all material evidence were undisputed, [this Court] ... would order the trial court to enter the DVRO as requested.”].)

Second, the trial court committed reversible legal errors by improperly applying the standard for renewing an existing DVRO, and thus failing to apply the standard for issuing a DVRO in the first instance. Because of these compounding errors, the court focused its analysis on whether Joselin had reasonable apprehension of *future* abuse (the renewal standard), instead of whether there was reasonable proof of *past* abuse by Joseph (the issuance standard). This flawed analysis contravened Court of Appeal precedent and justifies reversal. (See *Nevarez v. Tonna* (2014) 227 Cal.App.4th 774, 784 [holding the DVPA *does not* require a victim to show a likelihood of future abuse to obtain a DVRO] (*Nevarez*); *Rodriguez*, *supra*, 243 Cal.App.4th at p. 821

[holding the same and reversing denial of DVRO in part on this basis].)

Third, the trial court committed reversible legal error by denying the DVRO Request because three years had passed since the October 2018 incident and, in the court's view, there had been no additional abuse in the intervening period. While the TRO and CPO might have protected Joselin from further physical abuse, Joseph's abuse continued in the form of harassing communications prohibited under the TRO. Moreover, the trial court's reasoning has already been rejected by the Court of Appeal in *Rodriguez v. Menjivar*. (See *supra*, 243 Cal.App.4th at p. 824.) *Rodriguez* instructs that a hiatus in abuse preceding the hearing is not a basis to deny a DVRO, especially where, as here, Joselin was protected by a TRO and CPO during that time. (*Ibid.*) This is another legal error that provides a separate basis for this Court to reverse.

A. The Trial Court Committed Reversible Legal Error by Failing to Find that Joseph's TRO Violations Qualified as Abuse Under the DVPA.

The trial court failed to make "necessary factual findings" regarding whether Joseph violated the TRO, which would have required the court to find abuse and grant Joselin's DVRO Request. (See *N.T.*, *supra*, 34 Cal.App.5th at p. 603.) This legal error warrants reversal under binding precedent from this Division. (*Ibid.*) And because Joseph's TRO violations were undisputed, this Court should remand with instructions to issue a DVRO. (*Ibid.*)

1. In Ruling on a DVRO Request, Trial Courts Must Determine Whether There Is Reasonable Proof of Past Abuse, Which Includes a Restrained Party's TRO Violations.

The DVPA authorizes the trial court to issue a DVRO, after notice and a hearing, “to prevent acts of domestic violence” and “to provide for a separation of the persons involved ... for a period sufficient to enable [them] to seek a resolution of the causes of the violence.” (Fam. Code, §§ 6220, 6340, subd. (a).) The DVPA’s protective purpose is “broad both in its stated intent and its breadth of persons protected.” (*N.T.*, *supra*, 34 Cal.App.5th at p. 602 [internal citation omitted].) So long as there is “reasonable proof of a past act or acts of abuse,” a court can issue a DVRO. (Fam. Code, § 6300.)

The Court of Appeal has recognized that “abuse” is “broadly defined” under the DVPA. (*Gou v. Xiao* (2014) 228 Cal.App.4th 812, 817.) Indeed, abuse “*is not* limited to the actual infliction of physical injury or assault.” (Fam. Code, § 6203, subd. (b) [emphasis added]; see also *id.* § 6320, subd. (a) [identifying several forms of non-physical abuse, such as threatening the victim or disturbing their peace].)

As this Division recently confirmed, conduct that violates a TRO constitutes abuse for purposes of the DVPA, and a trial court’s failure to find such abuse is reversible error. (See *N.T.*, *supra*, 34 Cal.App.5th at p. 603.) In *N.T.*, the wife filed a DVRO Request that was “based entirely” on the husband’s alleged TRO violations. (*Ibid.*) The trial court denied the request, reasoning that although there were “technical violations of the TRO,” the

court was “not aware of the authority that says a violation of a TRO is in and of itself domestic violence.” (*Id.* at p. 601.)

This Division reversed, holding that TRO violations *do* constitute acts of abuse under of the DVPA. (*Id.* at pp. 602–603.) This Court explained that Section 6203(a)(4) defines “abuse” as “engag[ing] in any behavior *that has been or could be enjoined* pursuant to Section 6320.” (*Ibid.* [citing (Fam. Code, § 6203, subd. (a)(4)] [emphasis added].) And Section 6320 allows courts to enjoin both physical and non-physical abuse, including harassing or contacting the victim, either directly or indirectly—which was the conduct prohibited by the TRO at issue in *N.T.* (*Ibid.* [citing Fam. Code, § 6320, subd. (a)].) This Division held that the trial court failed to follow these provisions of the DVPA, and thereby “used an incorrect legal standard in denying the DVRO.” (*Ibid.*) For these reasons, reversal was warranted because the trial court “failed to make the necessary factual findings regarding the issuance of a DVRO.” (*Id.* at p. 603.)

In addition, this Division held that the husband’s TRO violations were not “technical violations, as suggested by the trial court.” (*Ibid.*) The husband violated the TRO on multiple occasions. (*Ibid.*) Similar to Joseph’s TRO violations, the husband repeatedly contacted the wife in excess of the TRO’s no-contact provision, which only permitted “brief and peaceful contact ... as required for court-ordered visitation of children.” (*Id.* at p. 597.) For example, the husband (1) engaged the wife in discussing their relationship and pending divorce; (2) implied that if she did not cooperate with him, he would fight for child

custody; and (3) referred to her as “my love” and asked her to kiss him. (*Id.* at p. 598–599.)⁶

This Division reasoned that the communications “were lengthy and not limited to ... [child] visitation” and that “[a] knowing violation of a DVRO cannot be characterized ‘as a de minimis and technical violation.’” (*Ibid.* [citing *Lister v. Bowen* (2013) 215 Cal.App.4th 319, 334–335].)

N.T. is directly on point here, and for the reasons discussed in the following sections, dictates reversal.

2. Joseph Violated the TRO by Sending Numerous Prohibited Text Messages to Joselin.

The trial court issued a TRO to restrain Joseph’s personal conduct, which included a broad prohibition on contacting Joselin. (See CT at 33–36 [TRO], 44–54 [First Amended TRO], 78–90 [Second Amended TRO].) The plain language of the TRO—allowing “brief” and “peaceful” contact for visitation—is not complex legal jargon; it is self-explanatory to a lay person. (Cf. *Malcom v. Farmers New World Life Ins. Co.* (1992) 4 Cal.App.4th 296, 301 [enforcing exclusion in life insurance contract where clause was unambiguous and none of its words were “beyond the working vocabulary of lay persons”]; *People v. Hagedorn* (2005) 127 Cal.App.4th 734, 747–48 [applying the principle that “ignorance of the law is no excuse” where “no

⁶ The husband’s TRO violations also included, among other things, obtaining the wife’s address and stalking her, and refusing to return the child at exchanges unless the wife would interact with him. (*N.T., supra*, 34 Cal.App.5th at pp. 598–603.)

person of ordinary intelligence would be left guessing as to the meaning of” the statutory language at issue].)

At the hearing below, Joseph admitted to understanding the TRO and admitted to violating it:

[Joselin’s Counsel]: Well, the family court also issued a temporary restraining order against you ... correct?

[Joseph]: I believe so, yes.

[Joselin’s Counsel]: *And that temporary restraining order prevented you from contacting Ms. Gonzalez except for communicating about exchanging the children, correct?*

[Joseph]: *Correct.*

[Joselin’s Counsel]: *But you did communicate with Ms. Gonzalez about other things besides exchanging the children, correct?*

[Joseph]: *Yes.* I reciprocated to her responses as well and I figured we were in a good place to talk, so I decided to talk to her.

(RT at 33:8–21 [emphasis added].)

Joseph then admitted that he texted Joselin (1) “I did nothing to deserve this,” (2) about performing community service as part of his criminal case, (3) to say that she used him for his citizenship, and (4) “I love you’ almost after every message [he] sent her.” (*Id.* at 35:5–36:6, 40:14–18.) Joseph’s admissions are consistent with Joselin’s testimony that he contacted her approximately seven times about issues that were “not related to exchanging the children.” (*Id.* at 16:23–17:11.)

The trial court also admitted into evidence, without objection, several text messages that Joseph sent to Joselin while the TRO was in effect. (See *ante* Part II.E.) Joseph’s text messages were prohibited by the TRO in the following ways:

First, Joseph texted Joselin about his ongoing criminal case and blamed her for the potential restrictions he might endure. (See MTA, Ex. 2.) He began one text: “Joss we really need to talk about everything with the courts.” (*Ibid.*) He said the prosecution was asking for “multiple classes” as part of probation, “[c]ommunity service fines,” and “restrictions on [his] movement and ability to own [weapons].” (*Ibid.*; see also RT at 36:3–6.) It is particularly troubling that Joseph was haranguing Joselin about his ability to own weapons. During the October 2018 incident, Joselin feared for her personal safety because she knew Joseph stored guns and other weapons in their home. (See *ante* Part II.A; see also CT at 25–26 [Joselin’s DVRO affidavit stated that she feared Joseph would hurt her or their children in part because of his access to weapons].)

After listing his problems with “the courts,” Joseph then expressed his frustration and blamed Joselin for his predicament:

Pleas this has gone on long enough. I did nothing to deserve this ... I have been nice to you and given you everything you asked for . please i want to get on with my life i live without having legal resrtictions on my life .

(MTA, Ex. 2.) When Joselin did not respond, Joseph sent a follow-up text about fifteen minutes later about the criminal case:

... Just tell what you want from me. You already have the boys you already took away my home. You really want me to be in jail? To be unable to travel ... ?

(*Ibid.* [emphases added])

Joseph's texts had nothing to do with the children's visitation schedule, and therefore violated the TRO.⁷

Second, Joseph texted Joselin to vent his frustrations about aspects of their relationship. When Joseph texted Joselin about his criminal case, he accused her of seeking relief from the courts in retaliation for him being unfaithful. (MTA, Ex. 2 [Joseph asked if Joselin wanted him to receive jail time and/or face travel restrictions "because [she] thought [he] ha[d] a Girl friend in canada?"].)

In addition, Joseph sent two texts, one in October and one in December 2020, accusing Joselin of using him to obtain U.S. citizenship:

October 27, 2020 at 8:39AM: ... *You used me for citizenship you never loved me.*

⁷ Joseph's text messages pressuring Joselin about the criminal case also constitute "disturbing the peace" and are therefore an additional form of abuse. (See Fam. Code, §§ 6203(a)(4), 6320(a) ["disturbing the peace of the other party" is abuse under the DVPA].) Indeed, Joselin filed her DVRO Request in part because Joseph recently "pressure[ed] [her] and tr[ie]d to mak[e] [her] feel guilty due to the criminal case." (CT at 26 [Joseph also "accus[ed] [Joselin] of lying to the police ..."].) In addition, Joseph's conduct could rise to the level of criminal behavior, as an attempt to intimidate or tamper with a witness. (See Pen. Code § 136.1 [prohibiting knowing and malicious attempts to prevent a victim or witness from testifying at a proceeding; prohibiting attempts to dissuade victims from reporting crimes or assisting in the prosecution thereof].)

December 27, 2020 at 12:29PM: I didnt do anything wrong to you. *I married you for you dam citizenship. And you wouldnt even use my last name ... Joss you need to wake up and see whats happening*

(MTA, Exs. 2, 4 [emphasis added].)

Joseph also messaged Joselin about the October 2018 incident. (*Id.* at Ex. 2 [“... just because you were maad I was excited to go alone to my moms withthe babies that Halloween .”].) Joseph’s communications had nothing to do with the peaceful exchange of children and were prohibited under the TRO.

Third, Joseph texted Joselin in a manner that contravened the TRO’s requirement of “brief and peaceful contact” regarding visitation. On December 27, 2020, Joseph texted Joselin to blame her for being a bad parent:

12:21PM: Like really what is wrong with you. *How do you feel that anything you have done so far the past 2 years is right or good for our sons in any way. You decided to work more rather then spend time with them*
....

(MTA, Ex. 5 [emphasis added].) When Joselin did not respond, Joseph immediately became apologetic for his “outburst” and sent several texts in which he acknowledged his wrongdoing and also requested more time with the children:

12:47PM: Im sorry joss im just frustrated and miss our sons. ... My emotions hurt

1:51PM: Well do evey other weekend then they spend the night. But i cam still get them for the day the week they are not staying over right?

2:32PM: Please forgive me for that outburst of hurtful statements. It just things that still bother me from our past

(MTA, Ex. 4; see also *id.* [12/28/20 12:39PM: “So can i have the boys one day this week not overnight?”])

In Joseph’s own words, these communications were an “outburst of hurtful statements” and merited an apology—they were not brief and peaceful contact. (See *N.T.*, *supra*, 34 Cal.App.5th at p. 603 [finding that “communicating with [protected party] about issues in excess of those necessary to [child] custody exchanges ... *would constitute violations of the TRO, and would justify issuance of the DVRO as requested.*”] [emphasis added].)

Fourth, Joseph texted Joselin to express his desire to reconcile:

1:19PM: *Joslin i love you . pease let me come back and be the man to taise our sons. Ill stop smoking. Ill get a good job and be there for the boys. Ill do whatever you want me too. I just want to be loved by you and no one else. I dont wanna be at my moms no more. I wanna grow old with you. Live with you. Die next to you at my bed. I care for no one else more then for you and our sons*

(MTA, Ex. 3 [emphasis added].) This text message was another prohibited communication. (See *N.T.*, *supra*, 34 Cal.App.5th at p. 603 [finding that husband’s conduct, including “continuing to seek reconciliation” with his wife “would constitute violations of the TRO, and would justify issuance of the DVRO as requested.”].)

For these reasons, the trial court received un rebutted evidence that Joseph violated the TRO and thereby committed abuse under the DVPA.⁸ (See *In re Marriage of F.M. & M.M.* (2021) 65 Cal.App.5th 106, 117, as modified (June 3, 2021) [“Evidence of recent abuse or violation of a TRO is plainly relevant to whether a petitioner should be granted a protective order.”].)

3. The Trial Court Failed to Find that Joseph’s TRO Violations Constituted Abuse Under the DVPA, Which Was Reversible Legal Error.

Joselin properly presented the issue of Joseph’s TRO violations, and her counsel referred to this issue throughout the hearing. (RT at 3:7–8 [“There are allegations of violations of the [TRO] so it doesn’t make sense to continue out a [TRO] that is simply going to be violated.”]; 56:16–19 [“[T]he [TRO] violations [] are the text message communications”]; 62:6–8 [“[V]iolating the [TRO]” was one of Joseph’s acts of abuse].) The court acknowledged the contents of Joseph’s texts, was aware that TRO violations constitute abuse under the DVPA, and even expressed

⁸ Joseph’s text messages also violated the CPO, which prohibited the same conduct as the TRO. (See *ante* Parts II.B, D, F.) The texts therefore constitute abuse for this reason as well. (See Fam. Code, Section 6203(a)(4) [defining abuse to include behavior that “has been or *could be* enjoined pursuant to Section 6320”] [emphasis added]; *N.T., supra*, 34 Cal.App.5th at p. 602 [construing Sections 6203 and 6320 and holding that a TRO violation constitutes abuse under the DVPA].) As a result, the trial court abused its discretion by excluding testimony about Joseph’s violations of the CPO, which was relevant to whether he engaged in abuse.

that it was “concerned about violations of [its] TRO.” (*Id.* at 35:23–24 [“I think the [text] speaks for itself.”]; 40:25–41:1 [“They’re in evidence. They speak for themselves. I see the words ‘I love you’ in there.”]; see also *id.* at 15:8–16:15, 36:10–18, 39:10–14.)

However, the court failed to find that Joseph’s TRO violations constituted abuse. In fact, the court said *nothing* about the text messages in its ruling, and instead focused exclusively on the parties’ 2018 incident as the sole allegation of abuse:

The Court also finds that while some circumstances may have involved 6203 offending conduct. [sic] *Nevertheless, the circumstances seem very situational. It was over almost three years ago—not over, but almost three years ago and it’s not likely to reoccur.*

(*Id.* at 64:25-65:8 [emphasis added].) The “circumstances” that occurred “almost three years ago” is a reference to the October 2018 incident during which Joseph yelled at Joselin, threatened her, and hit her arm. The court confirmed that the 2018 incident was the focal point of its analysis when it described “Halloween 2018” as the “last incident.” (RT at 66:20–22.) This narrow focus caused the court to disregard the TRO violations and fail to recognize Joseph’s continuous pattern of abuse through his numerous harassing texts to Joselin in 2020.

The trial court’s failure to make “necessary factual findings”—i.e., that Joseph violated the TRO, and that this constituted abuse—warrants reversal under *N.T.* (See *N.T.*, *supra*, 34 Cal.App.5th at p. 603.)

Moreover, this Division’s decision *N.T.*, discussed above, instructs that this case should be remanded with instructions to issue the DVRO because the evidence of Joseph’s TRO violations is undisputed. (*Ibid.* [“If all material evidence were undisputed, we would be able to determine this as a matter of law, and would order the trial court to enter the DVRO as requested.”].) There is ample, undisputed evidence in the record that Joseph knowingly violated the TRO: Joseph admitted that he texted Joselin about issues other than child visitation, that he understood this would violate the TRO, and the court admitted Joseph’s texts into evidence without objection. (See *ante* Part V.A.2; RT at 40:21–24 [Joseph’s Counsel acknowledged, “we haven’t objected to [the texts] coming in. They say what they say”].)

Joseph tried to minimize his TRO violations by testifying that Joselin initiated their communications—but this is unsupported by the record. (Compare RT at 33:8–21, 41:3–7 with *ante* Part II.E [texts showed that Joseph initiated contact, and Joselin did not respond].) And while Joselin testified that she “sometimes” contacted Joseph, she made clear it was *only* “[t]o make an agreement for the kids ... It was always regarding the kids.” (RT at 22:4–17.) Regardless, Joseph was the restrained party under the TRO, not Joselin, and it was his obligation to comply with the TRO, which he failed to do.

For these reasons, this court should reverse and remand with instructions to issue the DVRO. (See *N.T.*, *supra*, 34 Cal.App.5th at p. 603.)

B. Reversal Is Further Warranted Because the Trial Court Wrongly Applied the Legal Standard for Renewing an Existing DVRO, and Failed to Apply the Standard for Issuing a DVRO in the First Instance.

The trial court failed to follow the DVPA’s governing framework for issuing a DVRO in the first instance. The inquiry for DVRO issuance requires the court to determine whether there was reasonable proof of *past* abuse. Rather than applying this legal standard, the court instead relied on the standard for renewing an existing DVRO. As a result, the court denied the DVRO because it determined that Joselin lacked reasonable apprehension of *future* abuse. This determination was an improper basis to deny the DVRO Request and was also factually incorrect. The court’s errors warrant reversal.

1. Trial Courts Consider the Victim’s Reasonable Apprehension of Future Abuse During DVRO Renewal Proceedings, but Not in the Initial Inquiry of Whether to Issue a DVRO.

As discussed above, the inquiry for issuing a DVRO turns on “reasonable proof of a *past* act or acts of abuse” and requires a trial court to make factual findings regarding whether there was past abuse. (See *ante* Part V.A.1 [quoting Fam. Code, § 6300] [emphasis added]; *N.T., supra*, 34 Cal.App.5th at pp. 602–603.)

In contrast, the inquiry for renewing an existing DVRO requires the court to find that the victim has “reasonable apprehension of *future* abuse.” (*Eneaji v. Ubboe* (2014) 229 Cal.App.4th 1457, 1463–1464 [emphasis added].) Thus, the DVRO issuance standard requires trial courts to engage in an

entirely different analysis—focusing on different key facts—than the DVRO renewal standard.

The Court of Appeal has recognized that this distinction is critical for ensuring proper adjudication of DVRO proceedings. Indeed, the Court of Appeal has routinely refused to read into the DVPA a requirement that the victim show some reasonable apprehension of *future* abusive conduct to obtain a DVRO. (See *Nevarez, supra*, 227 Cal.App.4th at p. 782–783; *Rodriguez, supra*, 243 Cal.App.4th at p. 821.) In *Nevarez*, the trial court granted the victim’s DVRO Request based on evidence that her ex-boyfriend (1) grabbed her wrist and then pushed her; (2) repeatedly contacted her, even after she told him to stop; and (3) banged on her car window and insisted she talk to him. (*Id.* at p. 778.) The ex-boyfriend appealed, arguing that the trial court could not issue a DVRO unless it found “not only that he had committed past acts of abuse *but also that [the victim] feared future abuse.*” (*Id.* at p. 782 [emphasis added].)

The Court of Appeal rejected this argument, holding that although the victim must show a probability of future abuse to renew an existing DVRO, this showing is not required to issue a DVRO in the first instance. (*Id.* at p. 782–783.) The Court reasoned that Section 6300 permits a DVRO based only on “a past act or acts of abuse,” and declined to read into the DVPA “an additional requirement for obtaining a restraining order.” (*Ibid.*) Therefore, the Court concluded that “the trial court was not required to find a probability that [the ex-boyfriend] would commit future abuse before issuing a restraining order.” (*Ibid.*)

Building on *Nevarez*, the Court of Appeal in *Rodriguez* held that the trial court committed “an error of law” warranting reversal when it denied a DVRO because the victim failed to show a probability of future abuse. (*Rodriguez, supra*, 243 Cal.App.4th at p. 821.) The Court of Appeal reiterated that “[n]o showing of the probability of future abuse is required to issue a DVPA restraining order,” and therefore reversed the trial court with instructions to issue the DVRO. (*Id.* at p. 816.)

Applying the proper standard for issuing a DVRO is important for any subsequent renewal proceedings. The Court of Appeal has expressed that, in applying the DVRO renewal standard, the trial court “ordinarily should consider the evidence and findings on which [the] initial order was based.” (*Eneaji, supra*, 229 Cal.App.4th at pp. 1463–1464 [internal citation omitted].) The existence of the DVRO, and its underlying factual findings, “often will be enough in themselves to provide the necessary proof to satisfy that test.” (*Ibid.* [internal citation omitted].) Thus, it is essential for the trial court to apply the proper standard for issuing a DVRO in the first instance, to ensure that any future renewal proceedings have a clear, accurate record to review.

Here, the court’s application of the renewal standard, instead of the issuance standard, caused it to (a) fail to determine whether prior abuse occurred, and (b) wrongly deny the DVRO on the basis that Joselin lacked reasonable apprehension of future abuse. These errors warrant reversal.

2. The Trial Court Wrongly Applied the DVRO Renewal Standard, Which was Reversible Legal Error.

The hearing transcript leaves no doubt that the trial court reviewed the evidence under the renewal standard. The court explained on the record that it was denying the DVRO because, in its view, “the moving party does not entertain a reasonable apprehension of future abusive conduct.” (*Id.* at 65:23–26.)⁹ The court also emphasized that the October 2018 incident “[is] not likely to reoccur” and “[t]he parties do not generally appear to be fearful of each other” at this time. (*Id.* at 65:4, 65:9–10; see also *id.* at 65:23-24 [reiterating that “there is little to no risk ... that these circumstances will reoccur”].)

Nevarez dictates that the trial court committed a legal error in denying the DVRO on these grounds. (See 227 Cal.App.4th 774, 782–783; see also *Rodriguez, supra*, 243 Cal.App.4th at p. 823 [holding this legal error warrants reversal].) As explained above, the Court of Appeal in *Nevarez* held that victims are not required to show a probability of future abuse to receive a DVRO. (*Ibid.*) Therefore, it was a reversible legal error for the trial court here to focus on whether Joselin had reasonable apprehension of future abuse, and whether abuse was likely to reoccur.

⁹ The Family Code defines abuse to include “reasonable apprehension of imminent serious bodily injury.” (See § 6203 subd. (a)(3) [emphasis added].) This statutory definition of abuse is different from the renewal standard, which focuses on reasonable apprehension of future abusive conduct. The trial court’s ruling was clearly focused on the renewal standard and the likelihood of future harm, not the definition of abuse under Section 6203(a)(3).

3. The Trial Court Failed to Determine If There Was Past Abuse and Denied Joselin’s DVRO Request on Improper Grounds.

The trial court’s improper focus on the DVRO renewal standard led to a cascade of other legal and factual errors, all of which demonstrate that the court’s analysis and ultimate conclusions were fatally flawed, and therefore warrant reversal. These errors include (1) failing to apply the DVRO issuance standard and determine whether there was past abuse as required by the DVPA, which was a reversible legal error; (2) a flawed finding of bi-directional conflict, which was unsupported by substantial evidence; and (3) an improper focus on the parties’ recent co-parenting practices, which was not indicative of whether a DVRO should issue based on past acts of abuse.

First, the trial court failed to apply the DVRO issuance standard and determine whether there was past abuse, either with regard to the TRO violations (see *ante* Part II.E, V.A) or with regard to the 2018 incident.

Although the trial court’s ruling focused on the 2018 incident, it failed to make clear factual findings, and instead made several contradictory statements about whether that incident constituted abuse. The court initially stated that it “cannot determine—not conclude that domestic violence occurred.” (RT at 64:18–20.) Soon after, however, the court referred to the October 2018 incident and stated that “some circumstances may have involved 6203 offending conduct.” (*Id.* at 64:26–65:1.) The court then described the incident as a

“conflict [that] appears to be related to an emotional outburst with poor impulse control.” (RT at 65:20–21.)

Reading these statements together, the trial court acknowledged that the 2018 incident may have involved abusive conduct, and that Joseph’s behavior could have been enjoined under Family Code section 6203. The court’s recognition that there was abusive conduct in October 2018, but its failure to make clear factual findings as to that conduct, was reversible legal error. (See *N.T.*, *supra* 34 Cal.App.5th at pp. 602–603.)

If the court had applied the DVRO issuance standard instead of the renewal standard, it would have seen that Joseph’s abuse was more than a single incident of misconduct in 2018. In fact, Joseph engaged in a consistent pattern of abusive behavior, beginning in October 2018 and continuing through 2020. This reality conflicts with the court’s reasoning for denying the DVRO—i.e., the court’s perception that Joseph’s abuse was not likely to recur. In fact, abuse had recurred. (See *ante* Part V.A [detailing Joseph’s TRO violations].) In addition to the legal errors discussed above, this further supports reversal.

Second, in discussing the October 2018 incident, the court stated: “There appears to be bi-directional conflict. Both parties—there was testimony both parties broke things, raised their voices and were, you know, yelling or raised their voices at each other.” (RT at 65:4–8.) This finding, as it related to the 2018 incident, is unsupported by the record and lacks substantial evidence. (See *J.J. v. M.F.*, 223 Cal.App.4th 968 (2014).)

Joseph admitted that Joselin did not engage in any of this conduct:

- Joseph testified that Joselin *did not* yell at him during the incident. (RT at 47:17–18 [“Q: Was she yelling at you? A: No.”]; cf. *id.* at 47:18–20 [Joseph conceding that he used “a deep, loud voice” that was “very stern” because Joselin stopped responding and ignored him].)
- Joseph testified that Joselin *did not* throw objects during the incident. (RT at 56:1–3 [“Q: So on October 31st, 2018, during your argument, did she throw objects? A: No, she did not.”].)
- Joseph testified that Joselin *has never* hit him. (RT at 54:18–20 [“Q: Has she ever hit you? ... A: No, she has not.”].)

Although Joseph testified that Joselin had previously broken plates, this did not occur during the 2018 incident:

Q: I thought you said she threw some objects?

A: Oh, but that—in *prior arguments*, she’s broken plates out of anger.

Q: Oh, okay. *Has she thrown them at you ... ?*

A: *No*, she just broke them

(RT at 56:4–9 [emphasis added].) For these reasons, the record does not support the trial court’s finding of bi-directional conflict in October 2018, and rather, shows that Joseph was the only aggressor in that incident.

In addition, the court’s bi-directional conflict finding was improper because it was apparently premised on the legal standard for *mutual* restraining orders, which is not implicated here. Requests for mutual restraining orders require trial courts to make “detailed findings of fact indicating that both parties acted as a primary aggressor and that neither party acted primarily in self-defense.” (Fam. Code, § 6305; *K.L v. R.H.* (2021) 70 Cal.App.5th 965, 984 [reaffirming the requirement under § 6305 to weigh “the acts of the parties . . . against each other”].) But this inquiry did not apply to Joselin’s unilateral DVRO Request, and therefore, the trial court was only required to determine whether Joseph abused Joselin. (Compare Fam. Code, § 6305 with § 6300 [no requirement to balance both parties’ actions].)

Third, the trial court improperly focused on the parties’ recent co-parenting actions, which, in the court’s view, showed Joselin did not fear Joseph. The court noted that Joselin “testified she has dinner, at least partial dinners[,] with [Joseph] present for up to a couple of hours” and that she “has gone to the beach” and “gone to parks” with Joseph and the children. (RT at 65:10–14.) The court also noted that “[Joselin] allows [Joseph] into the home by herself with just him and the children present.” (*Id.* at 65:15–16.)

Even if Joselin’s current fear of Joseph were legally relevant to the issuance of a DVRO in the first instance—and it is not, (see *ante* Part V.B.1.)—the court relied on facts that do not show a lack of fear. Indeed, Joselin attested in her DVRO

affidavit that she *was* afraid that Joseph would hurt her and her kids. (CT at 25.) She also stated that Joseph smoked marijuana, drank energy drinks, and got little sleep. (*Ibid.*) It is therefore reasonable that Joselin was compelled as a parent to accompany Joseph, despite her fear of him, whenever he would be alone with their infant twins. Joselin’s testimony confirms this. As she explained at the hearing: “there were times when it was just him and *he didn’t have his mother’s help* and so I would go” to the park with Joseph and the twins. (RT at 28:5–6 [emphasis added].)

Co-parenting as a domestic violence survivor is difficult and requires a complex balancing of risk exposure versus parental duties. Consistent with this reality, courts have recognized that contact between a victim and abuser after issuance of a TRO does not prove a DVRO is unnecessary. (See *In re Marriage of Fregoso and Hernandez* (2016) 5 Cal.App.5th 698, 703 [affirming DVRO notwithstanding evidence that the victim had consensual sex with the restrained party after she obtained a TRO].)

As the Court of Appeal has explained, “the law affords its protections to all the people described in the statutes, not just those individuals whose choices please the trial court.” (*Quintana v. Guijosa* (2003) 107 Cal.App.4th 1077, 1079; see also *In re I.B.* (2020) 53 Cal.App.5th 133, 155 [“the path to independence from an abusive relationship is neither linear nor the same for everyone”; noting there is no “singular battered woman profile”].) Moreover, this Division has “encourage[d]” trial courts to be sensitive to the danger of implicit bias and

expectations that a victim of domestic violence will be “sweet, kind, blameless, frightened, and helpless.” (*K.L. v. R.H.* (2021) 70 Cal.App.5th 965, 984, fn. 11.)

For these reasons, the trial court’s compounding legal errors resulted in the court improperly denying Joselin’s DVRO Request. If the court had applied the proper standard for issuance of a DVRO, it would have: (1) analyzed whether there was past abuse based on both the October 2018 incident and the TRO violations; (2) acknowledged the clear pattern of Joseph’s abusive conduct, stretching from 2018 through 2020, rather than focus on supposed bi-directional conflict and recent co-parenting actions; and (3) granted Joselin’s DVRO Request.

C. The Trial Court Committed Reversible Legal Error by Denying the DVRO Based on the Length of Time Since the October 2018 Incident.

The trial court denied Joselin’s DVRO Request based on its findings that the October 2018 incident was the last incident of abuse. This was another reversible legal error, and was also factually incorrect, (see *ante* Part V.A.). The court repeatedly emphasized the remoteness of the 2018 incident, which occurred “almost three years ago,” and relied heavily on this point in its ruling. (RT at 65:2–4; see also *id.* at 65:22–24 [“Halloween 2018[] was the last incident.”].)

Rodriguez v. Menjivar instructs that the length of time between an incident of abuse and the hearing on the DVRO is an improper basis for denying the DVRO Request. (See 243 Cal.App.4th at pp. 823–824.) In *Rodriguez*, the trial court declined to issue a DVRO, despite finding that there had been

abuse six months before the hearing, because the abuse was “too remote in time.” (*Id.* at p. 822–24.) The Court of Appeal reversed and remanded, holding that it was improper for the trial court to deny the DVRO based on the length of time since the last incident of abuse. (*Ibid.* [“The court ... appeared to believe that the absence of actual violence in the six month period leading up to the hearing ... was an appropriate basis to deny the protective order. The court erred.”].)

The same is true here. The trial court’s reliance on the length of time since the 2018 incident was an improper ground to deny the DVRO, and directly contravened *Rodriguez*.

Like the abuser in *Rodriguez*, Joseph was restrained by protective orders preceding the hearing. The Court of Appeal reasoned in *Rodriguez* that “the fact that six months had passed, *during almost half of which respondent was subject to a protective order*, does not justify dissolving that order and failing to issue a new order.” (*Ibid.* [emphasis added].) Here, the TRO and CPO—as well as Joseph’s pending criminal charges—may well have deterred further physical abuse, but this should not have undercut Joselin’s ability to receive a DVRO. (Cf. *id.* at p. 823 [“The fact that there had been a six-month hiatus in violence” did not support trial court’s reasoning for denying the DVRO Request].)

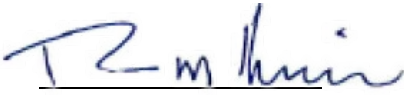
Because the trial court relied on the length of time since the 2018 incident to deny Joselin’s DVRO Request, it committed another legal error that warrants reversal.

VI. CONCLUSION

Joselin respectfully requests this Court reverse the trial court's denial of the DVRO Request, and remand with instructions to issue a DVRO.

Dated: May 3, 2022

Respectfully submitted,
O'MELVENY & MYERS LLP

By: 
Thomas M. Harris
Attorney for Appellant
JOSELIN GONZALEZ

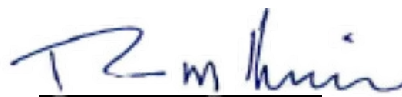
CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rules 8.74(b) and 8.204(c)(1), the undersigned hereby certifies that this brief is produced using 13-point Century Schoolbook typeface, including footnotes, and contains 11,271 words, as counted by the word-processing program used to create this document, excepting the tables, cover information, this certificate, the certificate of interested entities or persons, the signature block, and any attachments.

Dated: May 3, 2022

Respectfully submitted,
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By:



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PROOF OF SERVICE

I am a citizen of the United States and employed in Orange County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 610 Newport Center Dr, 17th Floor, Newport Beach, CA 92651. My electronic address is ralvarez@omm.com. On May 3, 2022, I caused to be served a copy of the following document:

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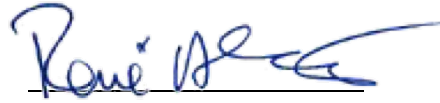
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Hon. Maurice Sanchez
Orange County Superior Court
Lamoreaux Justice Center
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I declare under penalty of perjury under the laws of the
State of California that the above is true and correct.

Executed on May 3, 2022, at Newport Beach, California.


René Alvarez