MEMORANDUM DECISION

ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

D.E.,
Appellant-Respondent,

v.

T.E.,
Appellee-Petitioner.

July 29, 2021

Court of Appeals Case No. 20A-PO-2364

Appeal from the Howard Superior Court

The Honorable Hans S. Pate, Judge

Trial Court Cause No. 34D04-2009-PO-2010

Kirsch, Judge.

[1] D.E. appeals the trial court's order that granted T.E.'s petition for an order of protection against D.E. and raises one issue: whether the trial court's entry of the protective order against D.E. was clearly erroneous because there was no evidence D.E. presented a credible threat to T.E.

[2] We affirm.

Facts and Procedural History

[3] T.E. and D.E. have been in a relationship for about twenty years, marrying on an unspecified date. *Tr. Vol. II* at 11. They have two children. *Id.* at 4-5. In 2011, T.E. obtained a protective order against D.E. because D.E. threw T.E. on the floor, held her down, and said he was going to burn her house down. *Id.* at 12. In 2018, T.E. obtained a protective order against D.E. during their pending dissolution proceedings; the order was dissolved once the terms of permissible contact and communication between T.E. and D.E. were set forth in the dissolution decree. *Id*. at 4-6.

[4] On an unspecified date in August of 2020, T.E. drove over to D.E.'s home because their youngest daughter had left her backpack at D.E.'s home. *Id*. at 6. T.E. had earlier told D.E. that she and their daughters would be stopping by his house. *Id*. T.E. pulled her car up to D.E.'s house, stayed in the car, and sent her youngest daughter into D.E's house to get her backpack. *Id*. D.E. came outside his house, and moments later, he opened the door to T.E.'s car and began screaming at T.E. about money.[1] *Id*. T.E. had asked D.E. for half of the money she had spent for the children's cell phones. *Id*. T.E. told the children to get back in her car, but D.E. yelled at the children to go into his house so he

[1] T.E. testified that D.E. struck her, but it is not clear if this occurred during the August 2020 incident at issue in this appeal or during a previous incident. *See Tr. Vol. II* at 14.

could talk to them. *Id*. at 7. T.E. told D.E. to not take the children into his home, urging him to not "torture" the children with a lecture. *Id*. D.E. again ran toward T.E.'s car and yelled, "I oughtta kick your ass!"[2] *Id*. D.E. also said, "if you ever insinuate torture to me again, stupid ass," and "I oughtta kick the shit out of you . . . ." *Id*. at 10, 21.

[5] On September 2, 2020, T.E. filed a pro se ex parte petition for an order of protection and request for a hearing. *Appellant's App. Vol. II* at 10-15. In the petition, T.E. alleged that D.E. had threatened to physically harm her. *Id*. at 12. Among other things, T.E. asked the trial court to order D.E. to not communicate with her, to stay away from her home, and stay in his car when he dropped off the children at T.E.'s home. *Id.* at 13. On the same day, the trial court granted T.E.'s petition, finding that T.E. had proven, by a preponderance of evidence, that domestic or family violence had occurred sufficient to justify issuance of the protective order, and the trial court enjoined D.E. from threatening to commit acts of domestic violence and prohibited D.E. from communicating with T.E., directly or indirectly.[3] The matter was set for final hearing on November 25, 2020.

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[2] At this point, T.E. began recording the confrontation; the recording was played at the hearing on T.E.'s request for an order of protection. *Tr. Vol. II* at 7, 10.

[3] D.E. has not included a copy of the September 2, 2020 protective order, but we were able to locate the order on the Odyssey Case Management system under cause number 34D04-2009-PO-2010.

[6] Both parties testified at the final hearing. D.E. admitted that his emotions get out of hand: "I do become too emotional and overreacted. There is me admitting a weakness and overreacted to sensitive things with respect to my relationship with my girls." *Id*. at 21. T.E. testified that she interpreted D.E.'s statement that he should kick her ass as a threat of physical violence. *Id*. at 16. At the end of the hearing, the trial court left the September 2, 2020, order of protection in place. *Id*. at 33-35. On November 25, 2020, the trial court issued its order, which, like the September 2, 2020 order, found that T.E. had proven by a preponderance of the evidence that domestic or family violence had occurred sufficient to justify issuance of the protective order and enjoined D.E. from threatening to commit acts of domestic violence. *Appellant's App. Vol. II* at 8. The order added additional terms that were absent in the September 2, 2020 order:

> 2. The parties are ordered to stay in their respective home[s] and vehicles when exchanging the children for visitation. The only communication regarding the children shall be by e-mail and text messaging. Parties may go to extracurricular activities but refrain from approaching or staring down each other.
>
> . . . .
>
> 4. [D.E.] is ordered to stay away from the residence and place of employment of [T.E.].

Id. The trial court stated that the protective order would expire on November 25, 2022. *Id*. at 9. D.E. now appeals.

Discussion and Decision

[7] D.E. argues that the trial court's decision to grant T.E.'s request for an order of protection was clearly erroneous. When reviewing the entry of a protective order, we disturb the order only where there is no evidence supporting the findings or the findings fail to support the order. *Koch Dev. Corp. v. Koch*, 996 N.E.2d 358, 369 (Ind. Ct. App. 2013), *trans. denied*. We do not reweigh evidence or reassess witness credibility, and we consider only the evidence favorable to the trial court's order. *Id.* The party appealing the order must establish that the findings are clearly erroneous. *Id.* "Findings are clearly erroneous when a review of the record leaves us firmly convinced that a mistake has been made. We do not defer to conclusions of law, however, and evaluate them de novo." *Mysliwy v. Mysliwy*, 953 N.E.2d 1072, 1076 (Ind. Ct. App. 2011) (citation omitted), *trans. denied*.

> A finding that domestic or family violence or harassment has occurred sufficient to justify the issuance of an order under this section means that a respondent represents a credible threat to the safety of a petitioner or a member of a petitioner's household. Upon a showing of domestic or family violence or harassment by a preponderance of the evidence, the court shall grant relief necessary to bring about a cessation of the violence or the threat of violence.

Ind. Code § 34-26-5-9(g). The definition of "domestic or family violence" includes "(1) Attempting to cause, threatening to cause, or causing physical harm to another family . . . member" or "(2) Placing a family . . . member in fear of physical harm." Ind. Code § 34-6-2-34.5(1), (2).

[8] Before proceeding to the merits of this appeal, we note that T.E. did not file an appellee's brief. When an appellee does not submit a brief, we do not undertake the burden of developing arguments for the appellee. *Spencer v. Spencer*, 990 N.E.2d 496, 497 (Ind. Ct. App. 2013). Instead, we apply a less stringent standard of review and may reverse if the appellant establishes prima facie error. *C.S. v. T.K.*, 118 N.E.3d 78, 81 (Ind. Ct. App. 2019).

[9] In claiming that the entry of the protective order was clearly erroneous, D.E. argues there was no evidence that D.E. presented a credible threat to T.E.: "Merely an utterance of, 'I oughtta kick your ass,' in response to a flippant comment by T.E. alleging that D.E. was torturing the children, is wholly inadequate to show D.E. as a threat." *Appellant's Br.* at 8. D.E. claims that T.E. merely asserted that she was fearful during the "single, solitary inciden[t] where no violence occurred." *Id.*

[10] Even though D.E. is required to only show prima facie error because T.E. failed to file an appellee's brief, he has failed to convince us that the trial court's findings were clearly erroneous or that its decision was contrary to law. *See C.S.*, 118 N.E.3d at 81; *Koch*, 996 N.E.2d at 369; *Mysliwy*, 953 N.E.2d at 1076. D.E. impermissibly asks us to reweigh the evidence and ignores evidence that supports the trial court's decision. For instance, D.E. fails to mention that in addition to yelling at T.E., "I oughtta kick your ass," he also threatened T.E. by shouting I should "kick the shit out of you . . . ." and ""if you ever insinuate torture to me again, stupid ass." *Id.* at 7, 10, 16, 21. D.E. also takes T.E.'s statement that D.E. was going to torture the children out of context. T.E. told

D.E. she did not want the children to enter D.E.'s home because he would "torture" the children with a lecture. *Id.* at 7.

[11] The evidence most favorable to the trial court's decision shows that it did not commit clear error in granting T.E.'s petition for an order of protection. It was reasonable for the trial court to determine that D.E. presented a credible threat to D.E.; it was the trial court's prerogative to credit T.E.'s testimony that D.E.'s threats to "kick your ass" and "kick the shit out of you" were threats to commit physical violence on her. *Tr. Vol. II* at 21; *see also* Ind. Code § 34-26-5-9(g) ("A finding that domestic or family violence . . . has occurred sufficient to justify the issuance of an order . . . means that a respondent represents a credible threat to the safety of a petitioner . . . ."). T.E.'s fear that D.E. might attack her was also credible because when the younger daughter entered D.E.'s house to get her backpack while T.E. stayed in her car, D.E. ran outside, and without provocation, opened T.E.'s car door and began screaming at her about money. *Tr. Vol. II* at 6. D.E. admitted that he has problems controlling his emotions: "I do become too emotional and overreacted." *Id.* at 21. Finally, while the record is not clear, it is possible that D.E. struck T.E. during this incident. *See Tr. Vol. II* at 14. Thus, the trial court reasonably concluded that a protective order was necessary to "bring about a cessation of . . . the threat of violence" because the evidence supported the conclusion that D.E. presented a credible threat to the safety of T.E. *See* Ind. Code § 34-26-5-9(g). Accordingly, the trial court's granting of T.E.'s petition for order of protection was not clearly erroneous.

[12] Affirmed.

May, J., and Vaidik, J., concur.