MEMORANDUM DECISION

APPELLANT PRO SE

D.S.
Velpen, Indiana

IN THE COURT OF APPEALS OF INDIANA

D.S.,
Appellant-Respondent,

v.

A.W.,
Appellee-Plaintiff.

July 30, 2021

Court of Appeals Case No. 20A-PO-2017

Appeal from the Dubois Circuit Court

The Honorable Nathan A. Verkamp, Judge

Trial Court Cause No. 19C01-2009-PO-92

Weissmann, Judge.

[1] D.S. appeals the entry of a protective order against him, arguing that there was insufficient evidence to support the order and that his due process rights were violated. Finding no clear error, we reject D.S.'s arguments and affirm the trial court's order.

Facts

[2] A.W. filed a petition for an order for protection against D.S., alleging he had committed repeated acts of harassment against her, placed her in fear of physical harm, caused her to involuntarily engage in sexual activity, and committed a sex offense against her. App. Vol. II, pp. 8-9.

[3] A.W. described multiple incidents in the petition. The first was a back rub in 2013 that "escalat[ed] to a certain point," culminating in sexual touching. *Id.* at 10. She does not remember anything beyond the backrub but claimed D.S. recently recounted the inappropriate touching to her. *Id.*; Tr. Vol. II, pp. 8-9. A.W. also alleged "[t]here was another morning where . . . I woke up with him over top of me and my pants were halfway down my leg. He told me nothing happened, but I felt very uneasy and like something went on." App. Vol. II, p. 10. She further stated, "He has told me numerous times that I am his dream woman, and he will always hold on to hope that there will be something between us. I just don't want anything to do with (sic)." *Id.*

[4] The final incident alleged in the petition occurred in August 2020 after A.W. spoke to police about D.S.'s drug use. D.S. was arrested as a result. The next day, the Indiana Department of Child Services (DCS) contacted A.W. about a

report of drug use and neglect. A.W. believes D.S. reported her to DCS to retaliate for her police report. A.W. wrote in her petition, "I fear that when he gets out of jail he will try to bring me down with him somehow, and that he is desperate enough to do anything to hurt me in some way." *Id.* She added, "In the past he has paid money . . . to get my phone number and other contact information so that he could get a hold of me." *Id.*

[5] At a hearing on the petition, A.W. also alleged that she had seen D.S. in the parking lot of the gymnastics school her daughter attends. Tr. Vol. II, p. 7. The trial court granted A.W.'s petition. D.S. now appeals.

Discussion and Decision

[6] D.S. argues that there is insufficient evidence to support the trial court's protection order and that he was denied his right to due process. A.W. did not file a brief in this appeal. Accordingly, we will reverse the trial court's judgment if D.S. presents a case of prima facie error, meaning error at first sight, on first appearance, or on the face of it. *Tisdial v. Young*, 925 N.E.2d 783, 784 (Ind. Ct. App. 2010).

I. Sufficiency of the Evidence

[7] In reviewing the sufficiency of the evidence, we do not reweigh evidence or judge the credibility of witnesses. *Id.* at 785. Instead, we ask whether the evidence supports the trial court's findings and whether its findings support the judgment. *S.H. v. D.W.*, 139 N.E.3d 214, 221-22 (Ind. 2020). We only consider the probative evidence and reasonable inferences supporting the trial court's

judgment. *Tisdial*, 925 N.E.2d at 785. The party appealing the order must establish that the findings are clearly erroneous, meaning a review of the record leaves us firmly convinced that a mistake has been made. *R.W. v. J.W.*, 160 N.E.3d 195, 202 (Ind. Ct. App. 2020).

[8] The Indiana Civil Protection Order Act states in relevant part:

> A finding that . . . 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 . . . . Upon a showing of . . . 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). "Harassment" means "conduct directed toward a victim that includes, but is not limited to, repeated or continuing impermissible contact: (1) that would cause a reasonable person to suffer emotional distress; and (2) that actually causes the victim to suffer emotional distress." Ind. Code § 34-6-2-51.5(a). "Impermissible contact" includes following the victim, communicating with them in person, in writing, by telephone, or electronically, and posting at or about them on social media. *K.B. v. B.B.*, 168 N.E.3d 1048, 1051 (Ind. Ct. App. 2021) (citing Indiana Code § 35-45-10-3[1]).

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[1] This definition of "impermissible contact," though part of the criminal code, was added by the same legislative package that added harassment to the Indiana Civil Protection Order Act. It follows that this same definition is what the legislature contemplated in the context of civil protection orders. *See* 2019 Ind. Legis. Serv. P.L. 266-2019 (H.E.A. 1607) (West).

[9] The trial court found that D.S. "represents a credible threat to the safety of the Petitioner or a member of the Petitioner's household." App. Vol. II, p. 5. It also found that A.W. had shown, "by a preponderance of evidence, that repeated acts of harassment has (sic) occurred sufficient to justify the issuance of this Order." *Id.* D.S. challenges both of these findings, arguing that "there was no credible threat to the safety of the petitioner in that there was (sic) no repeated acts of harassment, no testimony of a sex offense, no testimony of involuntary sexual activity . . . no testimony of impermissible contact of any kind . . . ." Appellant's Br., p. 12. He also argues there is no support for A.W.'s claim that he called DCS.

[10] We agree that there is insufficient evidence to support A.W's belief that D.S. called DCS. Ignoring that call, the following evidence of harassment remains: D.S. recently told A.W. that he sexually battered her in 2013; A.W. suspects he did so again at another, undated time; D.S. obtained A.W.'s contact information without her permission; and D.S. appeared in the parking lot of the gym A.W.'s child attends. All of this happened in the context of D.S. pining after A.W.

[11] Looking at this evidence as a whole, we cannot say that the trial court's grant of a protective order was clearly erroneous. It appears the trial court believed A.W. was in a state of emotional distress when she testified that D.S.'s actions had placed her in fear. Tr. Vol. II, p. 3. We will not re-evaluate this credibility determination. *Tisdial*, 925 N.E.2d at 784.

[12] We also cannot say that A.W.'s distress was unreasonable. Although the sexual battery occurred seven years before she filed her petition, A.W. learned of it only months prior. Importantly, "[a] court may not deny a petitioner relief under section 9 of this chapter solely because of a lapse of time between an act of domestic or family violence or harassment and the filing of a petition," though "we may consider remoteness in determining whether a sufficient threat exists to warrant the issuance of a protective order." Ind. Code § 34-26-5-13; *Tons v. Bley*, 815 N.E.2d 508, 511 (Ind. Ct. App. 2004) (reversing the grant of a protective order because there were no new threats against the petitioners and any violence occurred eight years before). The timing of D.S.'s disclosure renders the battery less remote than it might otherwise have been. A reasonable person would also be distressed by the disclosure itself. Combined with D.S.'s purchase of A.W.'s contact information and his unexpected presence outside her child's gym, we are not firmly convinced a mistake has been made. Accordingly, we affirm the trial court's grant of an order of protection.

II. Due Process

[13] D.S. next argues that the trial court violated his right to due process by inhibiting his right to cross-examine A.W. and denying his attempt to introduce evidence from his cell phone. We disagree.

[14] First, D.S. was plainly permitted to cross-examine A.W. *See* Tr. Vol. II, pp. 7-12. D.S. specifically complains he was unable to cast doubt on A.W.'s account of the sexual assaults; however, D.S. did cross-examine A.W. on that subject,

asking if she objected to the back rub and asking on what grounds she believes she was assaulted. *Id.* at 9-10.

[15] Second, D.S.'s argument with regard to his cell phone evidence amounts to a request to establish different, more lenient rules for pro se litigants. During D.S.'s examination of A.W., he stated, "This is my cellphone . . . . As far as what happened . . . it's all on my phone. I don't know how you'd be able to get that. But you can look at it." Tr. Vol. II, p. 11. From these statements, it was not apparent that D.S. was introducing evidence at all, let alone what that evidence was. On appeal, D.S. asserts that the trial court should have discerned that he wanted to present a Facebook message that explained why he was in the parking lot of A.W.'s daughter's gym, along with other messages that showed he and A.W. had a friendly relationship.

[16] No reasonable person would have made such a cognitive leap. Had the trial court undertaken to introduce the cell phone as evidence and investigate its contents based on D.S.'s statements at the hearing alone, it would have risked combining the roles of judge and advocate, which itself is a violation of due process. *See In re Roberts*, 723 N.E.2d 474, 476 (Ind. 2000). This is so even though D.S. was representing himself. "A pro se litigant is held to the same standards as a trained attorney and is afforded no inherent leniency simply by virtue of being self-represented." *Zavodnik v. Harper*, 17 N.E.3d 259, 266 (Ind. 2014).

[17] Because the trial court's grant of an order of protection was not clearly erroneous, nor did its procedures violate D.S.'s due process rights, we will not disturb the order.

[18] The judgment of the trial court is affirmed.

Kirsch, J., and Altice, J., concur.