

MEMORANDUM DECISION

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ATTORNEY FOR APPELLANT

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IN THE COURT OF APPEALS OF INDIANA

D.H.,
Appellant,

v.

B.W.,
Appellee.

February 25, 2021

Court of Appeals Case No.
20A-PO-1849

Appeal from the Washington
Circuit Court

The Honorable Larry Medlock,
Judge

Trial Court Cause No.
88C01-2008-PO-415

Brown, Judge.

[1] D.H. appeals the trial court’s protective order. We affirm.

Facts and Procedural History

[2] D.H. and B.W. were married in 2002 and have four minor children. On April 16, 2020, the Madison Circuit Court in Kentucky entered a decree of dissolution and awarded the parties joint custody of their minor children with B.W. as the primary residential parent.

[3] On August 26, 2020, B.W. filed a Petition for an Order for Protection and Request for a Hearing in the Washington Circuit Court in Indiana.

[4] On September 10, 2020, the court held a hearing at which D.H. and B.W. appeared pro se. B.W. testified that the first incident occurred on August 16, 2020, and she asked D.H. to text her only about the children. She stated that the second incident occurred on August 24, 2020, when D.H. stated that he would not return their daughter to her as long as she had her boyfriend in her life. She testified that D.H. continued to text her “about stuff that has nothing to do with the children” and “will not stop harassing [her] about [her] personal life.” Transcript Volume II at 3. She stated that “[a]ll this has started since I got a new boyfriend . . . who is now my husband” and that D.H. “went as far” as to ask for a copy of his identification. *Id.*

[5] She stated that she moved to Indiana in January and D.H. had “recently moved here.” *Id.* at 4. She testified she was fearful for her own safety and her children’s safety because D.H. continued to text her about her personal life after she had repeatedly asked him to stop. She stated that she feared for her safety

and the safety of her children when they were in D.H.'s care. She also stated that her children felt comfortable at her home with the exception of her daughter whose issues were caused by a lack of undivided attention from her.

[6] D.H. testified that he texted B.W. only regarding the children and their safety and well-being. He stated that he notified B.W. on August 16th that their eleven-year-old daughter was “crying her eyes out and afraid to be in her mother’s house with a strange man.” *Id.* at 10. He testified that he had a text message from his daughter to B.W. “where she is afraid that [B.W.’s] new boyfriend, who apparently is now her husband, after about three weeks, could rape her and has already harassed her at [B.W.’s] residence.” *Id.* He stated: “I would gladly give back my daughter to her during [the] week but unfortunately she is afraid to go back to her mother’s residence because it is an unstable environment.” *Id.*

[7] Trent White, B.W.’s husband, testified that D.H. continued to harass B.W. after she repeatedly asked him to talk only about the children. He referenced the text messages and stated that D.H. would assert that he was a charged drug dealer and felon and that “numerous times that we’ve stated would you like my credentials from the river. Would you like my credentials from Fort Knox? Would you like all these securities that I have?” *Id.* at 13. On cross-examination, White indicated that he had domestic violence charges against him in either Ohio or Kentucky. White stated that he had his “whole criminal history printed off” and “the charges that were against me have been

dismissed.” *Id.* at 14. He indicated that he had drug possession charges against him in the past but they had been dismissed.

- [8] The court admitted numerous text messages from D.H. to B.W. as Petitioner’s Exhibit A and the April 16, 2020 dissolution order from the court in Kentucky as Petitioner’s Exhibit B. The court also admitted a document titled “Verified Motions for Temporary Sole Custody and for the Children to Not be Around a Paramour and Appointment of an FOC,” which D.H. filed in the Kentucky court as Respondent’s Exhibit 1,¹ text messages between the parties and White as Petitioner’s Exhibit 2, and a petition for an order of protection filed by D.H. against White in the Clark Circuit Court in Indiana on September 5, 2020. Exhibits Volume at 20 (capitalization omitted).

- [9] At the end of the hearing, the court stated:

I will make no ruling in regards to enforcing this Kentucky domestic relations order because its – Kentucky has jurisdiction over that and Kentucky is gonna to have to make a ruling as to custody and – of your daughter and/or whether he’s in contempt or whether you’re in contempt or whatever is going to happen so I make no ruling and intend to make no ruling in regards to that issue.

Transcript Volume II at 22.

¹ The words “*FILED ELECTRONICALLY*” appear on the document but the document is not dated. Exhibits Volume at 20.

[10] On September 23, 2020, the court entered an Order for Protection finding that D.H. “represents a credible threat to the safety of [B.W.] or a member of [B.W.’s] household” and that B.W. had shown, by a preponderance of the evidence, that repeated acts of harassment had occurred sufficient to justify the issuance of the order. Appellant’s Appendix Volume II at 11. The order enjoined D.H. from threatening to commit or committing acts of domestic or family violence, stalking, sex offenses, a course of conduct involving repeated or continuing contact with B.W. that is intended to prepare or condition B.W. for sexual activity, or harass B.H and certain household members. The court also prohibited D.H. from harassing, annoying, telephoning, contacting, or directly or indirectly communicating with B.W. except that the parties may have limited contact regarding only the exchange of visitation of the parties’ minor children. The court also ordered D.H. to stay away from B.W.’s residence. The order indicates that it would expire on September 23, 2022.

[11] That same day, the court entered an Entry on Hearing, which stated:

Comes now Petitioner, [B.W.], in person and *pro se*, and [D.H.] in person and *pro se*. Hearing is held, testimony is heard and the Court being duly advised now finds:

1. That the Protective Order is granted pending the outcome of the Kentucky Domestic Relations case.
2. That the parties may contact each other only to arrange visitations with the children.
3. That the Court directs both parties to notify this Court of any ruling in the Kentucky Domestic Relations case by filing its ruling into this cause number with the Clerk of Court.

4. That this Court upon receiving Kentucky's ruling may modify, dismiss or continue the protective order.

Id. at 14.

Discussion

- [12] Before addressing D.H.'s arguments, we note that B.W. did not file an appellee's brief. When an appellee fails to submit a brief, we do not undertake the burden of developing arguments, and we apply a less stringent standard of review, that is, we may reverse if the appellant establishes *prima facie* error. *Zoller v. Zoller*, 858 N.E.2d 124, 126 (Ind. Ct. App. 2006). This rule was established so that we might be relieved of the burden of controverting the arguments advanced in favor of reversal where that burden properly rests with the appellee. *Wright v. Wright*, 782 N.E.2d 363, 366 (Ind. Ct. App. 2002).
- [13] D.H. asserts that his text messages were legitimate communications related to the safety of the parties' minor children and not the type of impermissible contact prohibited by Indiana's Civil Protection Order Act. He argues that the communications failed to indicate a present credible threat to B.W. He asserts the only threats included in the text messages were made to him by White. He contends that, while B.W. testified that she felt harassed, the substance of the communications reveals that he was expressing a legitimate concern for the safety of his children. He also asserts that his right to make decisions about his children's upbringing includes the right to be informed about individuals who will come into contact with them and his communications were protected by

the Due Process Clause of the Fourteenth Amendment and cannot be considered harassment or impermissible contact under Indiana's Civil Protection Order Act.

[14] Indiana's Civil Protection Order Act has the express purpose of promoting the: "(1) protection and safety of all victims of domestic or family violence in a fair, prompt, and effective manner; (2) protection and safety of all victims of harassment in a fair, prompt, and effective manner; and (3) prevention of future domestic violence, family violence, and harassment." Ind. Code § 34-26-5-1. Ind. Code § 34-26-5-2(b) provides that "[a] person who is or has been subjected to harassment may file a petition for an order for protection against a person who has committed repeated acts of harassment against the petitioner." Ind. Code § 34-6-2-51.5 defines harassment for purposes of Ind. Code §§ 34-26-5 as "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." It also provides that harassment "does not include statutorily or constitutionally protected activity, such as lawful picketing pursuant to labor disputes or lawful employer-related activities pursuant to labor disputes." Ind. Code § 34-6-2-51.5(b).

[15] Ind. Code § 34-26-5-9(g) provides that "[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" and that "[u]pon

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.”

[16] “Under our traditional two-tiered standard of review, *see* Ind. Trial Rule 52(A), 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, 220-221 (Ind. 2020). In deference to the trial court’s proximity to the issues, we disturb the order only where there is no evidence supporting the findings or the findings fail to support the order. *Fox v. Bonam*, 45 N.E.3d 794, 798 (Ind. Ct. App. 2015); *Mysliwy v. Mysliwy*, 953 N.E.2d 1072, 1076 (Ind. Ct. App. 2011), *trans. denied*. We do not reweigh evidence or reassess witness credibility, and we consider only the evidence favorable to the trial court’s order. *Fox*, 45 N.E.3d at 798.

[17] At the hearing, B.W. testified she asked D.H. to text her only about the children, and he continued to text her “about stuff that has nothing to do with the children” and would not stop harassing her about her personal life. Transcript Volume II at 3. She stated she was fearful for her own safety and her children’s safety because D.H. continued texting her about her personal life after she had repeatedly asked him to stop.

[18] To the extent D.H. asserts that his communications are protected by the Due Process Clause of the Fourteenth Amendment and cannot be considered harassment or impermissible contact under Indiana’s Civil Protection Order Act, we note that, while some of the text messages from D.H. referenced his

concern regarding his children, multiple messages did not appear to focus on that concern. The text messages include the following comments from D.H.: “Oh my lord. So you’re getting married after just one weekend with a guy?”; “If this is the guy he won’t be around too long”; “You’re so petty and insecure”; “Have your boyfriend stop harassing me and being childish”; “You’re a sick person”; and “Woah your [sic] a great mom.” Exhibits Volume at 3-4, 7-8. He also referred to B.W.’s house as dysfunctional “[o]r crazy” and repeatedly asked if the person he was texting was B.W. or White. *Id.* at 7. We also note that the court’s September 23, 2020 order stated that the parties may have limited contact regarding the exchange of visitation of their minor children.

[19] Based upon the record, we conclude that B.W. presented evidence of probative value to establish by a preponderance of the evidence that D.H.’s conduct directed at her consisted of repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and actually caused B.W. to suffer emotional distress, which supported the issuance of the protective order.

[20] For the foregoing reasons, we affirm the trial court’s order.

[21] Affirmed.

Vaidik, J., and Pyle, J., concur.