



ATTORNEY FOR APPELLANT

Alexander N. Moseley
Ciyou and Dixon, P.C.
Indianapolis, Indiana

APPELLEE PRO SE

G.D.
North Judson, Indiana

IN THE
COURT OF APPEALS OF INDIANA

S.D.,
Appellant,

v.

G.D.,
Appellee.

September 21, 2022

Court of Appeals Case No.
22A-PO-521

Appeal from the Starke Circuit
Court

The Honorable Micah P. Cox,
Magistrate

Trial Court Cause No.
75C01-2201-PO-1

Brown, Judge.

[1] S.D. appeals from the trial court’s order of protection and claims the evidence is insufficient to support the order. We agree that the evidence is insufficient to find that S.D. is a present, credible threat, and that the trial court erred in not balancing any need for protection against the burden imposed by the protective order.

Facts and Procedural History

[2] On January 6, 2022, G.D. filed a petition for an order for protection against S.D. in Starke Circuit Court. G.D. alleged that she had been a victim of domestic or family violence, S.D. used to be her spouse, she and S.D. have a child in common, she lived in Starke County, and S.D. caused physical harm to her daughter, H.D. G.D. alleged that, on December 26, 2021, she was in South Haven, Michigan, at the house of S.D.’s mother for S.D. to have supervised parenting time with H.D. from 1:00 p.m. to 4:00 p.m., at about 2:30 p.m. S.D. informed her that he was leaving with H.D., she “told him no” and that his parenting time was almost over, and S.D. screamed at her and “snatched [H.D.] up by her arm digging his nails into her arm.” Appellant’s Appendix Volume II at 16. She stated that she wedged herself between S.D. and H.D., S.D. grabbed H.D. by the ribcage to take her, she grabbed S.D. by the throat to make him release H.D., and S.D. smacked H.D. in the mouth and “let[] [H.D.] go when I choked him.” *Id.* at 18.

[3] On January 7, 2022, the court issued an ex parte order for protection against S.D. S.D. submitted a letter to the court requesting a hearing and stating that

G.D.'s allegations were false and that G.D. had been charged with domestic violence as a result of the incident in Allegan County, Michigan.

[4] On February 9, 2022, the court held a hearing at which G.D. and S.D. appeared pro se. G.D. indicated the factual scenario in her petition was true. She testified “on that day [S.D.] tried to take [H.D.] and he is not allowed to go -- he was for supervised visitation,” he “grabbed her by the arm to take her and picked her up by the arm and he dug his nail into her,” “I tried to wedge myself in between him and her, and he still was trying to grab her, then grabbed her by the ribs, and he did pick her up,” and “I did choke him to let her go, and I grabbed [H.D.] and then we left.” Transcript Volume II at 6. She indicated that she called the police, S.D. filed a report with child services, “it’s been a mess, all because he can’t keep his hands to himself and decides that he’s going to put his hands on my child,” “[t]his isn’t the first angry outburst that he has had, so I just -- I mean, he cusses me out almost every single time in front of my daughter and tells me to get the f--- out of his house,” and “[s]ince the incident, he only saw her once, and that was before the protection order was put in place.” *Id.* at 7. She stated that S.D. lived in Michigan, she and S.D. were divorced, she was charged with domestic violence as a result of the incident, a hearing was scheduled in the divorce case for the end of March, and S.D. had supervised visits with H.D.¹

¹ G.D. testified the supervised visits were “with his mother” and “I asked for a guardian-ad-litem or a CASA, and the Judge wouldn’t do it.” Transcript Volume II at 8.

[5] S.D. testified:

I do have court-ordered visitation with my daughter, it is supposed to be supervised by my mother, due to the fact that I was deployed for a full year, which was most of [H.D.'s], you know, learning who I was supposed to be type of timeframe, and [G.D.] and my daughter lived with my mother during this time. So the Court ordered my mother to be the common ground between me and my daughter, because she had spent so much time living with my mom that I would slowly be integrated back into [H.D.'s] life, four hours a week for a few months, and then working into two days a week over a few months, and then working into overnights as time progressed and the relationship was built between me and [H.D.]. The issue that we have continued to have the entire time with [G.D.] is that these are supposed -- she's not supposed to be on the premises or allowed to be physically present during the visitations, which doesn't happen. She just stays present during the visitation, so on this day in December, my mother and I were going to take [H.D.] from the house to go see my mom's fiancé at his work, and we were going to go get something to eat, and [G.D.] said we could not leave the house with [H.D.], even though I have my hours that I can do whatever, you know, I want to with my daughter as long as I bring her back at exit time. I never grabbed my daughter by the arm. I did pick her up and [G.D.] took her from me to not let us leave. She pushed me once and choked me twice. The police report that was cited, . . . I talked to the deputy, and he wrote me in the report as the victim of domestic violence. I am in contact with (inaudible) prosecuting office, and they are pressing charges -- criminal charges against her for domestic violence, and out of the blue I get this, you know, PPO against me in a completely different state that all of our cases are involved in with [H.D.]. On the 25th of March, [G.D.] is facing contempt of court charges for all the -- not following the parenting time thing set up in the divorce decree.

Id. at 12-13. S.D. also testified “with this PPO thing in place, if [G.D.] does go to jail for either or any of the contempt of court charges, the domestic violence,

this court order will -- is preventing me from having custody of [H.D.], and also with me being in the military and the box here is checked that I am prohibited from using or possessing a firearm is more or less a career ender for me in my military career.” *Id.* at 16.

[6] The trial court stated:

So I guess here’s how I kind of see it. . . . [Y]ou’ve created a very unusual situation here.

I think it’s very clear to me, one, that you’re both engaging in acts of domestic violence as it’s defined in the protective order statute. [G.D.], you’re the one that applied for the order of protection here, and you live here, so that gives me the authority to issue it. You know, [S.D.] seems to present this version of events that says you just strangled him for no reason, that doesn’t make any sense. Everyone that’s ever been in a fight knows you strangle and hit people in reaction to something else. I mean, it’s pretty clear I think [G.D.] owned up to what was going on and admitted to strangling him. She has more credibility than [S.D.].

. . . I’ll reaffirm the order of protection. I’ll find that [S.D.] is a credible threat. You technically would probably both qualify as credible threats, but [G.D.] is the only person I really have in my jurisdiction to worry about.

That doesn’t mean that this can’t be modified later on

Id. at 18-19.

[7] That same day, the trial court issued an order for protection. The court found that S.D. represents a credible threat to the safety of G.D. or a member of her household and that G.D. has shown by a preponderance of the evidence that domestic or family violence has occurred sufficient to justify the issuance of the

order. The order enjoined S.D. from threatening to commit or committing acts of domestic or family violence against G.D. and H.D. and prohibited him from harassing, annoying, telephoning, contacting, and directly or indirectly communicating with G.D. The cover sheet to the court's order contains an address for S.D. in Michigan and a checkmark in the box next to the phrase "Weapon Present on the property." Appellant's Appendix Volume II at 4.

Discussion

- [8] Protective orders are similar to injunctions and therefore in granting an order the trial court must make special findings of fact and conclusions thereon. *R.H. v. S.W.*, 142 N.E.3d 1010, 1014 (Ind. Ct. App. 2020). We apply a two-tiered standard of review: we first determine whether the evidence supports the findings, and then we determine whether the findings support the order. *Id.*
- [9] S.D. argues that G.D.'s testimony that he picked H.D. up by the arm and dug his nail into her is not evidence of probative value, the only evidence presented by G.D. was her self-serving testimony, he adamantly denied physically harming H.D., and G.D. was the individual charged with domestic violence. He argues there was no evidence that he represents a current, credible threat to G.D. or H.D. and that he saw H.D. once without any problems after the December 2021 incident.
- [10] G.D. asserts the evidence is sufficient to support the protective order. In her statement of facts, she points to S.D.'s statement that the prohibition from using or possessing a firearm could end his military career. She argues S.D.

committed domestic violence against her and H.D. and cites to the trial court's statements. In reply, S.D. argues the trial court's comments are not evidence, G.D. never alleged that he committed acts of domestic violence against her, and G.D. had the burden of proving the allegation in her petition.

[11] The Indiana Supreme Court, in considering Indiana's Civil Protection Order Act (the "Act"), has stated, "[b]ecause of the potentially severe limitations on a restrained person's liberty, the petitioner must prove the respondent is a present, credible threat to the petitioner or someone in the petitioner's household." *R.H.*, 142 N.E.3d at 1014 (quoting *S.H. v. D.W.*, 139 N.E.3d 214, 217 (Ind. 2020)). The Court held:

Aimed at combating the scourge of domestic and family violence, the Act protects both past and present victims and their children: "[A] person who is or has been a victim of domestic or family violence may file a petition for an order of protection."^[2] [Ind. Code] § 34-26-5-2(a).

* * * * *

[A] court faced with a request for protective order must balance, on the one hand, the need to protect actual and threatened victims against, on the other, the onerous burden borne by those erroneously subject to such an order.

Indeed, as our court of appeals has observed, "an improperly granted protective order may pose a considerable threat to the respondent's liberty." *Barger v. Barger*, 887 N.E.2d 990, 994 (Ind. Ct. App. 2008).

² Ind. Code § 34-6-2-34.5 provides in part that "Domestic or family violence" means, "except for an act of self-defense, the occurrence of at least one (1) of the following acts committed by a family or household member: (1) Attempting to cause, threatening to cause, or causing physical harm to another family or household member. (2) Placing a family or household member in fear of physical harm. . . ."

For example, under state law, violating a protective order is punishable by confinement in jail, prison, or a fine, I.C. § 34-26-5-3(c), and subjects the offender to criminal prosecution for criminal stalking and invasion of privacy. *Id.* §§ 35-45-10-5 (criminal stalking), 35-46-1-15.1 (invasion of privacy). And, under federal law, once a protective order has been entered against the respondent, he may commit a crime if he buys, receives, or possesses a firearm. *Id.* § 34-26-5-3(c) (citing 18 U.S.C. §§ 922(g), 2261, 2262).

* * * * *

To obtain a protective order, the petitioner must show the respondent “represents” – present tense – “a credible threat to the safety of a petitioner or a member of a petitioner’s household.” *Id.* § 34-26-5-9(f).³ Thus, the respondent must pose a threat to a protected person’s safety when the petitioner seeks relief. If the petitioner meets this burden, “the court shall grant relief necessary to bring about a cessation of the violence or the threat of violence.”⁴ *Id.* See also *Costello v. Zollman*, 51 N.E.3d 361, 365 (Ind. Ct. App. 2016). . . .

In addition to focusing on the parties’ present situation, the Act requires that the threat posed by the respondent be viewed objectively. Not only must there be a present threat, but the threat must be credible – meaning plausible or believable. Thus, the petitioner must prove, by a preponderance of the evidence, that there are reasonable grounds to believe that the respondent presently intends to harm the petitioner or the petitioner’s family. By focusing on the parties’ present situation, the Act not only allows courts to intervene as the parties’

³ This language is now found in subsection (h) of the statute.

⁴ Ind. Code § 34-26-5-9(h) also provides:

The relief may include an order directing a respondent to surrender to a law enforcement officer or agency all firearms, ammunition, and deadly weapons:

- (1) in the control, ownership, or possession of a respondent; or
- (2) in the control or possession of another person on behalf of a respondent;

for the duration of the order for protection unless another date is ordered by the court.

circumstances warrant, but also contemplates that the parties' relationship can change over time.

S.H., 139 N.E.3d at 219-220.

[12] Here, the record reveals that G.D. testified that S.D. attempted to leave with H.D. during his supervised visit, he “grabbed [H.D.] by the arm to take her and picked her up by the arm and he dug his nail into her,” she choked S.D. so that he would release H.D., and she was charged with domestic violence.

Transcript Volume II at 6. S.D. testified that he had court-ordered visitation with H.D. which was supervised by his mother, his visitation would increase over time as his relationship with H.D. progressed, he did not harm H.D., and G.D. is not supposed to be present for his visitation but she does not leave. He said that, on the day of the altercation, he and his mother were going to take H.D. out of the house, which was permitted during his visitation, and G.D. said that they could not leave the house with H.D. He testified that he picked up H.D. and that G.D. took her from him, pushed him, and choked him. He testified G.D. was charged with domestic violence. He also indicated the protective order “is more or less a career ender for me in my military career.”

Id. at 16.

[13] We are mindful that we do not reweigh evidence. It is undisputed that S.D. had parenting time without incident after the December 26, 2021 incident and before the issuance of the ex parte order of protection. Based on the record, we conclude that the altercation on December 26, 2021, as described by the testimony and for which Mother was charged, is insufficient to establish that

S.D. represents a present, credible threat to her safety or the safety of H.D. There was insufficient evidence of any present intent by S.D. to harm the petitioner or the parties' child. *See S.H.*, 139 N.E.3d at 221 (“[A] trial court may issue a protective order only if presented with enough evidence that the respondent represents a present, credible threat to the petitioner’s safety.”). Further, there was no balancing of any need for protection against the burden imposed by the protective order as required by *S.H.*

[14] For the foregoing reasons, we reverse the trial court’s order of protection.

[15] Reversed.

Tavitas, J., concurs.

Altice, J., dissents with opinion.

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Altice, Judge, dissenting.

[16] While this case presents a close case, I believe the trial court is the one to make that call. Respectfully, I cannot subscribe to the majority's reweighing of the evidence.

[17] The evidence favorable to the judgment reveals that during a supervised visit in Michigan, S.D. (Father) attempted to leave with H.D. (Child), who was under the age of three. G.D. (Mother) stepped in to stop him, as such was not permitted, according to Mother, under the custody order. Father screamed and

cursed at Mother and violently picked Child up by the arm, digging his nails into Child's arm as Child cried for Mother. When Mother tried to wedge herself between Father and Child, Father grabbed Child by the ribcage. He then tried to leave with her, so Mother grabbed Father by the throat to make him release Child. As Child screamed and cried, Father smacked Child in the mouth. Mother continued to choke Father until he finally let go of Child. Mother then ran out of the house with Child and called the police.

Additionally, Mother testified that "he can't keep his hands to himself" and that this was not the first angry outburst that Father has had, as "he cusses [Mother] out almost every single time in front of [Child]." *Transcript at 7.*

[18] Father provided a differing account of the incident and denied grabbing Child by the arm or hitting her during the dispute with Mother, but the trial court expressly found Father's testimony in this regard to lack credibility. Based on the domestic violence, which occurred only about six weeks before the hearing, the trial court found that Father remained a present, credible threat⁵ to Mother and/or Child and, thus, issued the order of protection, at least for the time

⁵ I find *S.H. v. D.W.*, 139 N.E.3d 214 (Ind. 2020), upon which the majority relies, to be distinguishable. In *S.H.*, the Supreme Court found insufficient evidence that the respondent remained a present threat to the petitioner. While he had brutally attacked the petitioner once, *two years prior*, the respondent had abided by the two-year order of protection, which the petitioner sought to renew for another two years. The respondent had relocated more than two hundred miles away and moved on with his life. The two did not share children together and, thus, had no reason for continued involvement in each other's lives. Explaining that the entry of one protective order does not, alone, justify renewing or extending the first order, the Supreme Court held that the two-year renewal of the protective order was improper under the circumstances. *Id.* at 220-21. In our case, Mother and Father's lives will be intertwined for years to come, as parents of Child, and the domestic violence, which arose during Father's supervised parenting time and involved Child, occurred only six weeks before entry of the protective order, not two years.

being.⁶ On this record, I cannot conclude that the trial court abused its discretion. I would, therefore, affirm the trial court.

⁶ The trial court explained that the order could be modified based on what occurs in the dissolution/custody proceedings in Michigan. The court noted the difficulties in addressing these matters in different jurisdictions but indicated a willingness to discuss the matter with the Michigan trial judge. In essence, the trial court simply sought to maintain the status quo until the dissolution court could take up the matter the following month.