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IN THE  
APPELLATE COURT OF ILLINOIS  
SECOND DISTRICT

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CYNTHIA DONEEN SUITS	)	Appeal from the Circuit Court
	)	of Du Page County.
Petitioner-Appellee,	)	
	)	
v.	)	No. 09—OP—1530
	)	
KENNETH S. HINZ,	)	Honorable
	)	Liam C. Brennan,
Respondent-Appellant.	)	Judge, Presiding.

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JUSTICE BURKE delivered the judgment of the court.  
Justices Bowman and Zenoff concurred in the judgment.

**ORDER**

*Held:* The trial court did not abuse its discretion in admitting a certain email message and excluding a telephone call summary; and the finding of harassment and resulting plenary order of protection were not against the manifest weight of the evidence.

On January 13, 2010, the trial court granted a two-year plenary order of protection for petitioner, Cynthia Doneen Suits, and other protected persons against her former boyfriend, respondent Kenneth S. Hinz. Kenneth appeals *pro se*, arguing that we must reverse the order of protection because (1) he did not receive adequate service; (2) the court erroneously admitted an exhibit showing an email message that he allegedly sent to Cynthia; (3) the court erroneously excluded a document he had prepared to show that, during the months following the breakup,

Cynthia originated at least half of the parties' phone calls that were at least 10 minutes long; and (4) the remaining evidence does not support the order of protection. We affirm.

#### FACTS

On November 3, 2009, Cynthia petitioned for an order of protection against Kenneth. In addition to herself, Cynthia sought protection for her sister, Annette, and brother-in-law, Tom. Also named were Cynthia's adult children, their spouses, and her grandchildren. The petition alleged that Cynthia and Kenneth previously had a dating relationship and that Cynthia had obtained an order of protection against Kenneth in Kane County in December 2007. Cynthia asserted that Kenneth should be ordered to stay away from her and be prohibited from committing acts of abuse, including harassment. In Kenneth's absence, the trial court declined to issue an emergency order of protection based on a finding that service was required because there was no immediate and present danger of abuse.

On November 23, 2009, Kenneth's counsel entered a special appearance, challenging service of process. Cynthia showed evidence that Kenneth was served by registered mail. The trial court entered an interim order of protection to be effective from November 23, 2009, to December 16, 2009, to allow for formal service. On December 16, 2009, the trial court determined that multiple attempts at service had been unsuccessful, and the court extended the interim order based on the evidence that Kenneth had received by registered mail notice of the previous hearing.

On December 18, 2009, Kenneth filed a written appearance in the trial court. Also on that date, the Sheriff's Office of Du Page County personally served Kenneth with the interim order of protection.

On January 13, 2010, Kenneth and Cynthia appeared for a hearing on the petition for the plenary order of protection. Cynthia testified that she met Kenneth online in November 2005 and that they dated from December 2005 to August 2009. The parties lived together from August 2007 to December 2007. Cynthia had obtained an order of protection in Kane County in 2007, but it was vacated in exchange for a “mutual restraining order.” The parties’ relationship continued off and on, and the restraining order essentially was discarded. The trial court determined that the 2007 order of protection was, in fact, an “agreed restraining order” between the parties that lacked a statutory foundation and therefore, the order did not deprive the trial court of jurisdiction over the current proceedings.

Cynthia testified that, from September 27, 2009, to November 2, 2009, Kenneth sent her 45 text messages and voice mail messages. Cynthia stated that she had asked Kenneth not to send her messages and she denied originating any communications with him. Cynthia offered to show the court the messages on her phone, and the court responded, “[i]f you believe you have texts that are relevant and admissible, then you should try to introduce them because I’ll take a look at them.”

On September 28, 2009, Kenneth sent a text message stating “if I don’t make it through the night, you get to live with it the rest of your life knowing you created the pain that caused the action. As long as I’m going to hell for my perversion, what does it matter? Enjoy the rest of your life.” Cynthia interpreted the message as a threat of suicide. On October 4, 2009, Kenneth sent a text message stating “[t]hreaten the police one more time and I’ll file against you. This time it will not be small claims either. Quit playing the role of the bitch.” On October 19, 2009, Kenneth sent a text message stating “I will make it easier for you. You never want to hear from me again, \$5,000 cash, the same offer you made before the OP.” Cynthia testified that, in November 2007, she had offered

Kenneth \$5,000 to move out, but she revoked the offer and he left anyway. Cynthia believed that the new message was Kenneth's attempt to extort money from her.

Cynthia further testified that, since the relationship ended, Kenneth had called Cynthia's sister, Annette, and Cynthia's daughter, Melissa, to get information about Cynthia. On October 8, 2009, Kenneth called Melissa, to get information about a vacation Cynthia had just taken. On November 1, 2009, Kenneth called Annette, and she hung up when she recognized his voice. Kenneth called back immediately, and Annette did not answer. On November 2, 2009, Kenneth called Annette again and left a phone number, requesting that certain rare compact discs be returned.

During a less tumultuous period of the relationship, Annette told Cynthia something in confidence about her marriage to Tom, and Cynthia shared the secret with Kenneth. On September 28, 2009, Kenneth sent Cynthia an email message stating "maybe I should have a conversation with Tom. Then the two of us will have something to talk about when we go to Hell." Cynthia believed that the threat to disclose the information was intended to force Cynthia to communicate with Kenneth. On November 4, 2009, Kenneth sent Annette an email message threatening to disclose the secret to Tom. Cynthia believed that Kenneth was harassing Annette to manipulate and harass Cynthia. Cynthia testified that, since she obtained the interim order of protection, Kenneth had contacted her twice. Kenneth called Cynthia at work, and he sent her a package, which she refused.

At the hearing, Kenneth admitted that he left Annette a voice message on November 1, 2009, but he denied threatening her. Kenneth also admitted calling Annette and Cynthia the next day, but only to inquire about the compact discs. Cynthia sent the CDs via registered mail a few days later.

Kenneth asked the trial court to view a document that he had prepared for the hearing. He pointed out that, after the breakup, the parties spoke on the phone several times for at least 10

minutes. Kenneth intended to show that Cynthia had originated more than half of those calls, and therefore, she had not been harassed. Kenneth told the trial court that he prepared the document from his phone records. The court told Kenneth that he could testify to the communications, but the court sustained Cynthia's objection to the document that Kenneth had prepared because he did not have the records that served as its basis. Kenneth testified that Cynthia called him 36 times from September to November 2009 and that each call lasted at least 10 minutes. Kenneth admitted that he contacted Melissa about Cynthia's vacation, but only to "journal information to try to go through the breakup." Kenneth argued that Cynthia had shown a pattern of using orders of protection "as a sword rather than a shield," such as when she forced Kenneth to move out in 2007. Kenneth believed that Cynthia filed the current petition because she felt he was threatening Annette, not because Kenneth was actually contacting Cynthia. Kenneth explained that he had contacted Cynthia because he was "attempting to reconcile a relationship that [the parties] had pulled together once before." Kenneth acknowledged that the relationship was over. Kenneth insisted that he had not contacted Cynthia since October 19, 2009, and that he had no interest in contacting Cynthia again. Kenneth told the court that he works full time as a hospice chaplain and is a student in the Chicago Theological Seminary. Kenneth said he was in his last year of school and had not yet been ordained.

In rebuttal, Cynthia showed the court a "screen shot" of an email that Kenneth allegedly sent on October 23, 2009. A screen shot is an image taken by a computer to record the visible items displayed on the monitor. The trial court asked Cynthia whether she wanted the document introduced into evidence, and she said "yes." Cynthia explained that Kenneth had not called her since October 19, 2009, because she had changed her phone number on that date. The email message states "I am willing to bet that Tom will give me your number." Cynthia construed the

message as a reference to Kenneth's previous threat to disclose Annette's confidential statement to her husband.

The trial court found that Kenneth had engaged in a pattern of harassment that required an order of protection. In particular, the court found that the October 23, 2009, email message was the "deciding factor" in determining the parties' credibility. The court found that the email message belied Kenneth's testimony that he had not contacted Cynthia after October 19, 2009. The court also pointed out that, in the email message, Kenneth threatened to contact Tom, which Kenneth had denied. The court recounted Cynthia's testimony that Kenneth had threatened to disclose certain information to Tom, which would have damaged his marriage to Annette. The court ordered Kenneth to not have any direct or indirect contact with Cynthia, her sister, or her brother-in-law. The written order identifies Cynthia's three grandchildren as protected persons as well. Kenneth does not contest the inclusion of these individuals as protected persons.

In issuing the plenary order of protection, the trial court found that, under section 214(a) of the Illinois Domestic Violence Act of 1986 (Act), Kenneth had abused Cynthia. See 750 ILCS 60/214(a) (West 2008)). The order of protection prohibited Kenneth from committing further acts of abuse or threats of abuse and ordered him to stay away from Cynthia. Among other things, the court prohibited Kenneth from harassment, interference with personal liberty, physical abuse, or stalking. Kenneth was further ordered to "stay away" from the protected persons, in that he was to "refrain from both physical presence and nonphysical contact with the petitioner whether direct, indirect (including but not limited to, telephone calls, mail, email, faxes, and written notes), or through third parties who may or may not know about the order of protection." The order of protection is set to expire on January 11, 2012.

## ANALYSIS

On appeal, Kenneth argues that we must reverse the order of protection because (1) he did not receive adequate service; (2) the court erroneously admitted the screen shot of his October 23, 2009, email message; (3) the court erroneously excluded a document he had prepared to show that, during the months following the breakup, Cynthia originated at least half of the parties' phone calls that were at least 10 minutes long; and (4) the remaining evidence does not support the order of protection.

Cynthia has failed to file a brief on appeal. “A reviewing court is not compelled to serve as an advocate for the appellee and is not required to search the record for the purpose of sustaining the trial court's judgment.” *Benjamin v. McKinnon*, 379 Ill. App. 3d 1013, 1019 (2008). “However, if the record is simple and the claimed errors are such that the \*\*\* court can easily decide them without the aid of an appellee's brief, [the] court should decide the merits of the appeal.” *Benjamin*, 379 Ill. App. 3d at 1019. On the other hand, if the appellant's brief demonstrates *prima facie* reversible error and the contentions in the brief find support in the record, the trial court's judgment may be reversed. *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976).

The Illinois Domestic Violence Act of 1986 (Act) is to be construed liberally to promote its purposes, which include supporting the victims of domestic violence to avoid further abuse and “reduce the abuser's access to the victim \*\*\* so that victims are not trapped in abusive situations” (750 ILCS 60/102(4) (West 2008)) and to expand the victim's civil and criminal remedies to effect physical separation from the abuser (750 ILCS 60/102(6) (West 2008)).

Section 214(a) of the Act provides that an order of protection shall be issued “[i]f the court finds that petitioner has been abused by a family or household member or that petitioner is a

high-risk adult who has been abused, neglected, or exploited, as defined in this Act.” 750 ILCS 60/214(a) (West 2008). Section 203(a) requires that the petition allege abuse by the respondent. 750 ILCS 60/203(a) (West 2008). Abuse is defined as “physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation.” 750 ILCS 60/103(1) (West 2008). “ ‘Harassment’ means knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner.” 750 ILCS 60/103(7) (West 2008). Unless the presumption is rebutted by a preponderance of the evidence, repeatedly telephoning the petitioner's home or residence is among the conduct presumed to cause emotional distress. 750 ILCS 60/103(7)(ii) (West 2008).

#### A. Service

Kenneth initially argues that he received inadequate service of several documents, including the petition for the order of protection, the two interim orders of protection, and the plenary order of protection. Any action for an order of protection, whether commenced alone or in conjunction with another proceeding, is a distinct cause of action and requires that a separate summons be issued and served. 750 ILCS 60/210 (West 2008). Asserting that Cynthia possessed keys to his home and had spent many nights there, Kenneth implies that Cynthia intentionally omitted the apartment number from his address to interfere with service. However, Kenneth admits that he became aware of the proceedings in time to fully participate. On December 18, 2009, he filed an appearance in the trial court and was served with the November 23, 2009, interim order of protection. The interim order of protection gave Kenneth notice of the January 13, 2010, hearing date, and the record indicates that Kenneth appeared on that date and fully participated in the hearing. Aside from the

minor inconvenience from the initial, unsuccessful attempts at service, Kenneth does not allege how he was prejudiced by any error. Because Kenneth made a general appearance and process was served on him, his claim of inadequate service is not a basis for vacating the plenary order of protection. See 750 ILCS 60/219(3) (West 2008) (a general appearance by the respondent or process served on the respondent is necessary for issuance of plenary order of protection).

#### B. Email Message

Next, Kenneth argues that the trial court erred in admitting the screen shot of the October 23, 2009, email message which states “I am willing to bet that Tom will give me your new number.” Kenneth also argues that the trial court improperly solicited the exhibit into evidence. Kenneth has forfeited the argument for failing to challenge the exhibit at the hearing. Generally, issues not raised in the trial court may not be raised for the first time on appeal. *Village of Lake Villa v. Stokovich*, 211 Ill. 2d 106, 121 (2004). However, the “waiver rule,” or more accurately, procedural default, is an admonition to the parties and not a limitation on the jurisdiction of this court. *Dillon v. Evanston Hospital*, 199 Ill. 2d 483, 504-05 (2002). Regardless of the forfeiture, we conclude that Kenneth’s argument lacks merit.

The determination of the admissibility of evidence in an order of protection proceeding rests in the sound discretion of the trial court, and that determination will not be reversed on appeal absent an abuse of discretion. *Mowen v. Holland*, 336 Ill. App. 3d 368, 372 (2003) (citing *Leonardi v. Loyola University of Chicago*, 168 Ill. 2d 83, 92 (1995)).

Kenneth contends that the screen shot of the message is not authentic because Cynthia could have altered the image. Kenneth suggests that the document is particularly suspicious because printing the screen shot is more laborious than simply clicking the “print message” link on the

screen. Kenneth implies that, because Cynthia has special expertise in computers, she took the extra steps to print the screen shot so she could alter the message. Kenneth also points out that the screen shot does not show the sender's complete email address, which also undermines its reliability.

Kenneth's allegation that Cynthia falsified the email message is speculative. Moreover, the trial court's questioning of Cynthia established independently that Kenneth had contacted her and threatened to disclose sensitive information to her brother-in-law. Even without the screen shot of the email message, Cynthia's testimony was competent evidence that Kenneth used email to harass her. We conclude that the trial court did not abuse its discretion and that any error that may have occurred in admitting the exhibit was harmless. Moreover, the trial court did not improperly solicit the exhibit into evidence. The transcript of the proceeding indicates that the court simply asked whether Cynthia wished to identify the email message as her Exhibit 2.

### C. Telephone Call Summary

Kenneth also argues that the trial court erred in excluding a summary of his telephone communications with Cynthia that he had prepared for the hearing. Kenneth sought to admit the document to show that, during the period in question, Cynthia originated more than half of the calls that were at least 10 minutes long. Kenneth's call summary amounts to inadmissible hearsay, and it is not admissible under the business record exception to the rule. "Hearsay evidence is an out-of-court statement offered to prove the truth of the matter asserted, and is generally inadmissible unless it falls within an exception." *People v. Lawler*, 142 Ill. 2d 548, 557 (1991). Supreme Court Rule 236 provides for a business record exception to the hearsay rule as follows:

"Any writing or record, whether in the form of any entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible

as evidence of the act, transaction, occurrence, or event, if made in the regular course of any business, and if it was the regular course of the business to make such a memorandum or record at the time of such an act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of the writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but shall not affect its admissibility.” Ill. S. Ct. R. 236 (eff. August 1, 1992).

Kenneth admitted that he prepared the document in anticipation of the hearing, not as a memorandum or record of the calls in the regular course of business. Furthermore, Kenneth did not attempt to introduce any actual phone records or make any offer of proof regarding the document he sought to admit. A written summary of documents may be admissible when (1) the originals are voluminous and cannot conveniently be examined to extract the fact to be proved, (2) a competent witness has seen the original documents and is available to testify to the fact, and (3) the summarized documents are available in court or made available to the opponent. *In re Marriage of Westcott*, 163 Ill. App. 3d 168, 176 (1987). Here, Kenneth did not produce the original phone records in court or make them available to Cynthia, and nothing in the record suggests that the records are so voluminous as to require a summary. Despite appropriately finding the call summary to be inadmissible, the trial court permitted Kenneth to testify about the calls; and he stated that Cynthia, in fact, originated more than half of the parties’ calls that lasted at least 10 minutes during the months following the end of the relationship.

#### D. Sufficiency of the Evidence

Finally, Kenneth argues that the evidence does not support the plenary order of protection. We disagree. In any proceeding to obtain an order of protection, the central inquiry is whether the

petitioner has been abused. *Best v. Best*, 223 Ill. 2d 342, 348 (2006). “Indeed, under section 214(a) of the Act, once the trial court finds that the petitioner has been abused, ‘an order of protection \*\*\* shall issue.’ ” (Emphasis in original.) *Best*, 223 Ill. 2d at 348, quoting 750 ILCS 60/214(a) (West 2004). In turn, section 205(a) of the Act provides that proceedings to obtain an order of protection are civil in nature and governed by a preponderance of the evidence standard:

“Any proceeding to obtain, modify, reopen or appeal an order of protection, whether commenced alone or in conjunction with a civil or criminal proceeding, shall be governed by the rules of civil procedure of this State. *The standard of proof in such a proceeding is proof by a preponderance of the evidence*, whether the proceeding is heard in criminal or civil court.” (Emphasis added.) 750 ILCS 60/205(a) (West 2008).

Reading sections 205(a) and 214(a) together establishes two things: (1) whether the petitioner has been abused is the central issue in order-of-protection proceedings, and (2) whether the petitioner has been abused is an issue of fact that must be proved by a preponderance of the evidence. *Best*, 223 Ill. 2d at 348.

When a trial court finds abuse by a preponderance of the evidence, a court of review will reverse that finding only if it is against the manifest weight of the evidence. *Best*, 223 Ill. 2d at 348-49. A finding is against the manifest weight of the evidence only if the opposite conclusion is clearly evident or if the finding itself is unreasonable, arbitrary, or not based on the evidence presented. *Best*, 223 Ill. 2d at 350. Under the manifest-weight standard of review, we defer to the trial court as the finder of fact because it is in the best position to observe the conduct and demeanor of the parties and witnesses. *Best*, 223 Ill. 2d at 350. A reviewing court will not substitute its judgment

for that of the trial court regarding the credibility of witnesses, the weight to be given to the evidence, or the inferences to be drawn. *Best*, 223 Ill. 2d at 350-51.

The trial court weighed the credibility of the witnesses and found that Kenneth had engaged in a pattern of harassment. The court heard evidence that Kenneth sent 45 text messages during a 6- to 8-week period and the messages continued after Cynthia asked Kenneth to stop. In particular, Cynthia placed into evidence, without objection, text messages in which Kenneth threatened to commit suicide, initiate harassing litigation, and extort money, which could be interpreted as harassment. Finally, Cynthia placed into evidence an email message in which Kenneth threatened to contact Cynthia's brother-in-law if she did not reveal her new telephone number.

Abuse is defined as “physical abuse, harassment, intimidation of a dependent, interference with personal liberty or willful deprivation.” 750 ILCS 60/103(1) (West 2008). “ ‘Harassment’ means knowing conduct which is not necessary to accomplish a purpose that is reasonable under the circumstances; would cause a reasonable person emotional distress; and does cause emotional distress to the petitioner.” 750 ILCS 60/103(7) (West 2008). Unless the presumption is rebutted by a preponderance of the evidence, repeatedly telephoning the petitioner's home or residence is among the conduct presumed to cause emotional distress. 750 ILCS 60/103(7)(ii) (West 2008). The communications created a rebuttable presumption that Kenneth caused Cynthia emotional distress. See 750 ILCS 60/103(7)(ii) (West 2008). The trial court was in the best position to observe the conduct and demeanor of the parties and to assess their credibility. We conclude that the court's finding of abuse is not against the manifest weight of the evidence. We reject Kenneth's position that the opposite conclusion is clearly evident and that the finding itself is unreasonable, arbitrary, or not based on the evidence presented. See *Best*, 223 Ill. 2d at 350-51.

No. 2—10—0174

For the preceding reasons, the judgment of the circuit court of Du Page County is affirmed.

Affirmed.