



On November 5, 2011, according to Mike, Mike was chisel plowing some of his farm ground when Jerry approached in his pickup truck. Jerry drove the truck onto land that Mike believed was Mike's and Jerry believed was Jerry's and parked it in a field about 100 feet away from where Mike was working. Jerry got out and "walk[ed] around his truck shaking his fist at [Mike] and giving [him] the finger." Mike left to work on a different field.

¶ 5 About 15 minutes later, Mike received a phone call from the police department. The caller indicated that Jerry "want[ed Mike] arrested for trespassing and destruction of property." Mike explained that Jerry was, in fact, trespassing on Mike's property. A police officer who was sent to look into the dispute spoke separately with each brother. Mike approached as the officer spoke with Jerry and observed Jerry curse at the officer and call Mike a liar. After Jerry left, the officer believed the incident was settled and prepared to go. Before he left, he recommended that Mike get an order of protection.

¶ 6 After the police officer left, Jerry approached in a tractor. Mike was in his tractor near the boundary between their land. Mike stopped his tractor and called the police. Jerry backed onto what Mike thought was Mike's property, made contact with Mike's tractor a couple times, and dragged dirt from the disputed land onto Jerry's land. The same police officer from earlier arrived. He spoke first with Jerry. Jerry claimed Mike turned his tractor into Jerry's tractor. The officer observed the tire tracks and concluded that Jerry's story was fabricated. Jerry disobeyed the officer's order not to restart his tractor, so the officer arrested him. The officer asked Mike to sign a complaint against Jerry and reiterated his recommendation that Mike seek an order of protection.

¶ 7 On November 8, 2011, Mike filed for an order of protection against Jerry. On

November 9, 2011, the trial court, Judge David W. Lewis, entered an emergency order of protection and set a hearing date. Jerry was later served with process and entered his appearance through counsel.

¶ 8 On January 9, 2012, the trial court, Judge Millard Scott Everhart, held a hearing on Mike's petition. Mike testified to the events as above. Jerry testified that the land he was on belonged to him, not Mike. He denied using profane language toward the police officer. He denied ever having threatened Mike or his family or having entered Mike's land. He stated he would never harm Mike or his family. Jerry testified to some health issues that arose following the incident. He indicated an order of protection against him would affect his ability to retain his job, which required a security clearance and a commercial driver's license.

¶ 9 The trial court entered a plenary order of protection barring Jerry from having any contact with Mike for two years. The court specifically found that Jerry harassed Mike by disturbing Mike in his workplace and by making gestures that threatened physical force. The court found that the evidence that Jerry shook his fist and gestured at Mike with his middle finger was undisputed, and found that those actions warranted an order of protection.

¶ 10 This appeal followed.

¶ 11 II. ANALYSIS

¶ 12 On appeal, Jerry argues the trial court erred in finding that Jerry never denied making the gestures alleged in the petition. He also asserts that the gestures were protected speech.

¶ 13 We note that Mike did not file a response brief in this court. Accordingly, we consider the merits of Jerry's appeal on his brief alone, pursuant to the principles set forth in *First*

*Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133, 345 N.E.2d 493, 495 (1976). Under that case, a reviewing court should decide the merits of an appeal where the record and the claimed errors are sufficiently straightforward that a decision can be made without the aid of an appellee's brief. *Id.* Further, if the appellant's brief demonstrates *prima facie* reversible error and the contentions are supported by the record, then the trial court's judgment may be reversed. *Id.* We conclude from our review of Jerry's arguments and the record on appeal that the trial court's judgment should be affirmed.

¶ 14 Jerry first contends that, at trial, he denied making the alleged gestures toward Mike. A review of his testimony refutes this claim. In relevant part, Jerry testified, "I have never made a threat against [Mike or his family]. And I have never set one foot on their property with the exception of one time." Jerry did not dispute Mike's specific claim that he shook his fist at Mike and gestured at him with his middle finger.

¶ 15 Even if Jerry's testimony can be understood as a denial of the alleged actions, moreover, the trial court would not have erred by accepting Mike's version of events. See *In re Marriage of Sturm*, 2012 IL App (4th) 110559, ¶ 6, 970 N.E.2d 117, 120 ("Questions of witness credibility and conflicting evidence are matters for the trial judge to resolve as the trier of fact. Because he sees and hears the witnesses, he is in a position superior to a reviewing court for assessing their demeanor, judging their credibility, and weighing the evidence."). The actions and gestures that the court found Jerry made constitute harassment—and, in turn, abuse—in that he unreasonably disturbed Mike at work and, despite Jerry's claim otherwise, threatened physical harm. 750 ILCS 60/103(1), (7)(i), (7)(vi) (West 2010). Thus, the court was justified in entering the plenary order of protection. 750 ILCS 60/214(a) (West 2010).

¶ 16 Jerry further asserts that the gestures—shaking his fist at Mike and giving him the finger—are speech protected under the first amendment. While that may be so in some circumstances, we note the first amendment is directed at governmental action, not private action. We also note not all speech is protected. Thus, falsely yelling "Fire" in a crowded theater is not speech protected by the first amendment and neither is threatening or harassing speech. Accordingly, this point does not merit reversal.

¶ 17 III. CONCLUSION

¶ 18 For the foregoing reasons, we affirm the trial court's judgment.

¶ 19 Affirmed.