2016 IL App (1st) 151264-U

THIRD DIVISION
June 29, 2016

No. 1-15-1264

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

IN RE: ORDER OF PROTECTION OF:	)	Appeal from the
TIME KRAJA	)	Circuit Court of
	)	Cook County.
Petitioner-Appellant,	)	
	)	No. 2015 L 71432
v.	)	
	)	
FAVAD MIRZA	)	The Honorable
	)	Michael Clancy
Respondent-Appellee	)	Judge, presiding.

JUSTICE LAVIN delivered the judgment of the court.
Presiding Justice Mason and Justice Fitzgerald Smith concurred in the judgment.

ORDER

¶ 1 *Held:* The trial court did not err in denying petitioner's request for a plenary order of protection because petitioner failed to meet her burden by a preponderance of the evidence. Affirmed.

¶ 2 This appeal arises from an emergency order of protection issued to petitioner Time Kraja against respondent Favad Mirza. On appeal, petitioner contends that the trial court erred when it denied her request for a plenary order of protection. We affirm.

¶ 3 BACKGROUND

¶ 4 We recite only those facts necessary to understand the issue raised on appeal. Petitioner and respondent were involved in an intimate relationship, eight months in duration. On March 17, 2015, approximately one month after they ended their relationship, petitioner and respondent, along with their cohorts, engaged in a verbal confrontation a few blocks away from petitioner's home (the incident). The following day, the trial court issued petitioner an ex parte emergency order of protection against respondent. In addition, petitioner filed a civil complaint against respondent seeking reimbursement for money she loaned him as well as demanding his allegedly agreed share of abortion expenses. Respondent then filed a petition to vacate the emergency order of protection and admitted a video of the incident into evidence, contending that petitioner was the instigator. Thereafter, the trial court held a hearing to determine whether a plenary order of protection should be granted. We note that throughout the hearing the trial court continuously needed to remind each witness to answer the specific questions being asked and to refrain from offering unsolicited testimony.

¶ 5 Petitioner testified that she had two children with her ex-husband Senad Kraja. During petitioner's relationship with respondent, petitioner became pregnant twice, but had a miscarriage the first pregnancy and voluntarily terminated the second soon after their relationship ended. Petitioner alleged that she had a volatile relationship with respondent. Specifically, on November 22, 2014, petitioner received the following series of "abusive" text messages from respondent:

"You got something coming to you, mark my words."

"Don't put my child to the baby sitter, or I'll fucking kill you with bare hands."

"You should give your user name gutter, where all the shit and piss goes."

"Hope you wake up dead, die in your sleep, choke on your mouth, an[d] no one around you to help."

"I hope no one is around you to help you survive. And take pictures, so I can see you fucking suffering, whore."

¶ 6 Further, petitioner alleged that respondent physically attacked her on two separate occasions. On November 26, 2014, she was in respondent's garage and he told her that he had nothing to lose if he killed her because as a travel agent he could book a ticket back to Pakistan. He then grabbed petitioner and dragged her on the floor by her hair and ear, which caused her earring to fall off. She then called the police. On February 26, 2015, petitioner showed up at respondent's office and he told her to "[g]et the 'F' out *** or I'm going to kill you now with my bare hands." He then pushed her and she fell on a chair, causing a red mark on her back. She again called the police and was issued an initial order of protection which was dismissed. In addition, petitioner, who shared a communal work parking lot with respondent, alleged that he damaged her vehicle by spilling coffee on it, pulling a ribbon from the passenger side front tire, and slashing the tires. Consequently, petitioner was let go from her job at the bank because of her relationship with respondent. She now felt threatened every day, which caused her anxiety, stress and loss of sleep.

¶ 7 On cross-examination, petitioner testified that in the complaint for her breach of contract case she stated that respondent had asked her to get an abortion and that he would pay for it. She still dated respondent after he sent her threatening text messages. On one occasion, she emailed respondent a photo of an aborted baby because she wanted him to stop threatening her to have an abortion. And although petitioner testified that she had no contact with respondent since their breakup, respondent's counsel produced a March 2, 2015, text message alluding to the

forthcoming abortion. On the night of the incident, she saw respondent outside her home with his ex-girlfriend Sandra Candelaria in a Toyota vehicle. Even though petitioner "was shocked, in fear for her life," after respondent drove off, petitioner followed him in her vehicle, passed the Toyota and blocked it in with her vehicle. Respondent allegedly exited his vehicle, harassed petitioner and spit on her. Petitioner called the police who instructed her to move her vehicle. No one was arrested.

¶ 8 Respondent testified as an adverse witness that he worked as an accountant at a travel agency in the same building as petitioner's employment. He did not send petitioner text messages threatening to kill her with his bare hands. He did, however, admit to calling petitioner derogatory names, making derogatory gestures, and spitting on her during the incident. In January, 2015, respondent accompanied petitioner to the hospital and learned that she was only 21 weeks along in her pregnancy, even though petitioner had told respondent she was pregnant the previous June. She then confessed to having had a miscarriage with the first baby. Respondent was concerned the second baby might be Senad's, because Senad had contacted respondent, claiming to have had sexual relations with petitioner the previous September. Respondent also testified that he never pushed petitioner in his garage or at his office in February. In fact, petitioner came to respondent's office to return a January check that was not deposited. Respondent noted that he had given petitioner the check as repayment for the loan, but she never deposited it because "she wanted the cash."

¶ 9 Senad testified that on the night of the incident, he was waiting for petitioner in her black Range Rover, parked in front of her house, when he saw respondent and Sandra drive up next to petitioner's vehicle, look in and then veer off. Sandra then came back around in her vehicle without headlights on and respondent started yelling out the window. When petitioner got into

her vehicle she drove a block down and petitioner signaled her intention to turn right. Sandra then cut in front of petitioner and made the turn first, pulling over to the left. Petitioner then pulled up next to Sandra's vehicle and asked what they were doing in her neighborhood. Respondent and Sandra then exited the vehicle so Senad did as well. Respondent told Senad "stand back or I'm going to load you up with holes in your body, and then I'll take care of her right after you." Respondent also began to spit all over petitioner and called her "all sorts of names." Senad had the whole encounter which lasted approximately 10 minutes on video, which was admitted into evidence.

¶ 10 On cross-examination, Senad admitted to texting back and forth with respondent in January and telling him that Senad had sexual relations with petitioner in September. He also called petitioner a liar for "playing [them] both." He did not know that petitioner was pregnant until respondent told him. Although respondent believed it was Senad's baby, Senad in fact lied about the sexual encounter with petitioner. He had the trial court issue an order of protection against petitioner during their divorce.

¶ 11 Sandra testified that she has been best friends with respondent for 14 years and dated him for 7 of them. On the night of the incident, she was with respondent near petitioner's home because they were going to initially have dinner at a Pakistani restaurant on Devon, but decided to eat at Maggiano's instead. When she was at the stop sign she saw a vehicle come up from behind at a high speed. She then veered off to the left to let the vehicle pass, but it cut in front of her vehicle and blocked it in. When she realized it was petitioner, Sandra got out of her vehicle and called 911. She did not know petitioner's address or vehicle type, and she did not hear respondent threaten anyone.

¶ 12 Respondent testified on his own behalf that he never physically harmed petitioner in his garage or anytime thereafter. He also never spilled coffee or damaged petitioner's vehicle. Further, he did not ask for a DNA test to determine if he was the baby's biological father and never threatened petitioner to have an abortion or offered to pay for half of it. On February 25, 2015, petitioner allegedly came to respondent's home to return some diamond rings and got upset because Sandra was there. Respondent called the police, but elected not to press charges. Petitioner also threatened respondent over text message telling him "to buy all new locks and change them all at his house." In addition, after respondent gave petitioner cash for the returned January check, she allegedly went to the bank and cashed a Xeroxed copy of the initial check. He never pushed her in his office, nor saw her fall into any chairs. His boss did contact petitioner's HR Department because "it was just getting out of hand" with "too many police coming to the office." He has had no contact with petitioner since March, 2015, and heard about the abortion from the prosecutor at a court date. During his relationship with petitioner, he did file an order of protection against Sandra for harassing petitioner over text message.

¶ 13 Subsequently, the trial court dismissed the petition and terminated the order of protection, noting that "I've heard from all four witnesses. I find all four witnesses to be incredible. Therefore, the petitioner has not met her burden and the order of protection is terminated." Petitioner then filed this timely appeal.

¶ 14 ANALYSIS

¶ 15 The Illinois Domestic Violence Act of 1986 (the Act) (750 ILCS 60/101 *et seq.* (West 2014)), begins with a directive that adopts a liberal construction of the Act to "promote its underlying purposes," such as protecting domestic violence victims from further abuse. 750 ILCS 60/102 (West 2014); *Sanchez v. Torres*, 2016 IL App (1st) 151189, ¶ 15. Proceedings to

obtain an order of protection are governed by a preponderance of the evidence standard, thus, a reviewing court will reverse a trial court's finding only if it is against the manifest weight of the evidence. *Best v. Best*, 223 Ill. 2d 342, 348-49 (2006); see 750 ILCS 60/205(a) (West 2014). "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." *Robinson v. Reif*, 2014 IL App (4th) 140244, ¶ 80. Under the manifest weight of the evidence standard, "we give deference 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." *Tamraz v. Tamraz*, 2016 IL App (1st) 151854, ¶ 19. Therefore, we will not substitute our judgment for that of the trier of fact "regarding the credibility of witnesses, the weight to be given the evidence, or the inferences to be drawn therefrom." *Id.*

¶ 16 In a proceeding to obtain an order of protection under the Act, the central question is whether the petitioner has been abused. *Best*, 223 Ill. 2d at 348. The Act broadly defines "abuse" as involving physical abuse, harassment, interference with personal liberty or willful deprivation. 750 ILCS 60/103(1) (West 2014). "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 2014). Thus, once a finding of abuse has been made, the trial court is compelled, under the express language of the Act, to enter an order of protection. 750 ILCS 60/214(a) (West 2014); *Best*, 223 Ill. 2d at 348.

¶ 17 We initially observe that respondent has not filed a response brief. Thus, our review is governed by *First Capitol Mortgage Corp. v. Talandis Construction Corp.*, 63 Ill. 2d 128, 133 (1976), in which our supreme court "set forth three distinct, discretionary options a reviewing

court may exercise in the absence of an appellee's brief: (1) it may serve as an advocate for the appellee and decide the case when the court determines justice so requires; (2) it may decide the merits of the case if the record is simple and the issues can be easily decided without the aid of an appellee's brief; or (3) it may reverse the trial court when the appellant's brief demonstrates *prima facie* reversible error that is supported by the record." *Tamraz*, 2016 IL App (1st) 151854, ¶ 16 (citing *Thomas v. Koe*, 395 Ill. App. 3d 570, 577 (2009). We choose to address the issue here because it falls under the second category and can be decided without the aid of respondent's brief.

¶ 18 Here, we cannot say the trial court's determination was against the manifest weight of the evidence. Contrary to petitioner's assertion, the record demonstrates that the trial court reviewed and considered the video evidence as well as the hearing testimony and admitted documents in reaching its ruling. In addition, the trial court expressly found both petitioner and respondent "to be incredible" witnesses and the record before us suggests that both parties were inconsistent in their testimony. For instance, petitioner claimed that she did not contact respondent after their February breakup, but March text messages from her to respondent were admitted into evidence. In turn, respondent denied sending several text messages to petitioner which were admitted into evidence. Further, the hearing testimony played out as a "he said, she said," and coupled with the video evidence, it is unclear what transpired throughout their relationship and on the night of the incident from which the underlying order stems. As the reviewing court, it is not within our purview to substitute our judgment for that of the trier of fact regarding the credibility of witnesses and weight to be given to the evidence. See *In re D.F.*, 201 Ill. 2d 476, 499 (2002) ("we give deference 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 the witnesses and has a degree of

familiarity with the evidence that a reviewing court cannot possibly obtain"); *In re A.P.*, 179 Ill. 2d 184, 204 (1997) ("[a] reviewing court, therefore, must 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"). Therefore, we cannot say that the trial court's credibility determinations were unreasonable.

¶ 18 Furthermore, we find petitioner's reliance on *People v. Zarebski*, 186 Ill. App. 3d 285 (1989), misplaced. In *Zarebski*, following a jury trial, the defendant was convicted of violating an order of protection. Subsequently, the reviewing court upheld the verdict because the "[d]efendant knew the order of protection barring him from harassing [the victim] was in place" at the time he engaged in abusive behavior. *Id.* 295. In the case *sub judice*, however, the trial court was not determining whether respondent violated an order of protection, but whether petitioner was being abused, and thus, a plenary order of protection should issue. Accordingly, we find no error in the trial court's determination that a plenary order of protection should not issue.

¶ 19 CONCLUSION

¶ 20 Based on the foregoing, we affirm the judgment of the circuit court of Cook County.