No. 2011 IL App (3d) 100779–U

Order filed August 17, 2011

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2011

TRACEY BROWNELL,	) Appeal from the Circuit Court
	) of the 10th Judicial Circuit,
Petitioner-Appellee,	) Peoria County, Illinois,
	)
v.	) Appeal No. 3–10–0779
	) Circuit No. 10–OP–647
	)
MICHAEL KINDRED,	) Honorable
	) Richard D. McCoy,
Respondent-Appellant.	) Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice McDade concurred in the judgment.
Justice Holdridge dissented.

ORDER

¶ 1 *Held:* The trial court's finding of harassment and resulting entry of a plenary order of protection were against the manifest weight of the evidence.

¶ 2 The respondent, Michael Kindred, appeals from a plenary order of protection granted upon the petition of his former girlfriend, Tracey Brownell. The respondent appeals, arguing that there was insufficient evidence of abuse to support the trial court's

issuance of the plenary order of protection. We reverse.

¶ 3 FACTS

¶ 4 Brownell and Kindred had a brief dating relationship and had one child together in 2002. On January 5, 2009, the State filed an amended juvenile petition, alleging that the parties' minor son was neglected due to an injurious environment because the parties "ha[d] been involved in a long and continuous custody battle *** [that resulted] in emotional harm to the minor. "

¶ 5 On June 30, 2010, while the juvenile case was pending, Brownell obtained an emergency order of protection against Kindred. In the verified petition for the order, Brownell indicated that: (1) Kindred had been driving past her home "at all hours" for years; (2) three of her tires had been slashed; (3) her boyfriend's tires had been slashed; (4) Kindred threatened to "bust" her boyfriend's brakes; (5) a "a window [was] unscrewed (storm) on [her] house in May 2010"; (6) on June 18, 2010, "telephone harassment, came to house w[ith] letter- neighbor [] witnessed him"; and (7) on June 21, 2010, the respondent left at least an hour of "rambling, incoherent harassing voice mails" on the voice mail of the caseworker handling their son's juvenile case. The petitioner alleged that in the voice-mail messages Kindred made the following statements: (1) " I am afraid of the police like a cat is afraid of a mouse... I have no fear of them"; (2) "You want me to take a breathalyzer...how about you stop my son's mother from having her vagina f*** guys...can you stop mom's vagina"; (3) "Can you please put a hold on my son's mother's vagina"; (4) "You all protect her...protect her, please do...I [have] been to jail four times already, I don't give a sh**"; (5) "If you wanted to meet [the minor's mother] and you all

can be in each others vaginas together that would be fine"; and (6) "You played into her had [*sic*] 100%...leave me the f*** alone."

¶ 6 On September 8, 2010, the trial court held an evidentiary hearing on Brownell's petition for a plenary order of protection. Audio recordings of the messages Kindred left for caseworker Adrian Mann were entered into evidence. Mostly, the messages consisted of Kindred complaining of Mann's negative comments about him in her report to the court in his son's juvenile case. In large part, Kindred was conveying his despair and disagreement with Mann's recommendation to the court that his son be returned to Brownell's custody and that Kindred should be found dispostionally unfit to care for his son.

¶ 7 The full context of Kindred's messages to Mann did not include any overt threats toward Brownell. The context of Kindred's statement, "I am afraid of the police like a cat is afraid of a mouse...I have no fear of them" was Kindred attempting to explain that he was upset because the case supervisor in his son's juvenile case had threatened to call the police if he did not leave the building as he was walking toward the door. In the message, he explained that he had become numb to the threat of police involvement due to his past history with Brownell having him repeatedly arrested on unfounded allegations. The overall message was a rambling request that caseworkers call police if they believed his behavior warranted police involvement without making repeated threats of calling the police. Kindred's tone in the message was matter-of-fact, informative, and non-threatening.

¶ 8 In the context of another message referenced in the petition, Kindred was

responding to Mann's request that he take a breathalyzer test. In the message Kindred stated, "I am more than happy to [take a breathalyzer]" and asked, "How about you stop my son's mother from having her vagina *** f*** guys." Kindred went on to explain that all he wanted was for his son "to have a healthy place" and requested that Mann tell Brownell to refrain from exposing his son to various men "until they know that it is going to work out." In the message, Kindred's speech was severely slurred and he used vulgar and offensive language. Kindred's tone in the message was matter-of-fact and nonthreatening.

¶ 9 In the third message referenced in Brownell's petition Kindred expressed his disagreement with Mann's recommendation that Brownell be found fit. He also stated, "I could really give a crap about you. Call the police. Have me arrested. Call the police. You know what? Let's do even better Adrian. Let's call the police and let's have them put me in handcuffs, again, for the fifth time. I am willing to go. I'll go to jail. *** I actually had a conversation with [Brownell]. And it was actually a good conversation. *** But you all protect her, protect her, protect her. Oh goodness, protect her, please do. I've been to jail four times already. I don't give a sh***. *** So, you can call me and you say, oh well, you need to go, you need to go, you need to go and go do this drop, you need to go to, you know, you need to go breathe into a tube or something. *** You can call and call the police *** and have me arrested, and make up your own story. Make it up because they'll arrest me, I assure you. *** When the police come I'll tell them, 'I threw a right cross.' I'll play with you. I'll do it with you. What solitude does my son have? *** Give me a situation in which my son is okay. *** I don't care about being

called and told, 'Oh, well, I am going to call the police against you.' *** I am not afraid of anything other than my son's well-being. That's all I care about."

¶ 10 In the fourth message referenced in Brownell's petition Kindred, with slurred speech, stated that he was going to an AA meeting and that, "If [Mann] wanted to meet [Brownell] and [they] wanted to be in each other's vaginas together that would be fine." He also repeated that he was going to an AA meeting because he was "a recovering alcoholic[,]" he had "no problem with hiding the vagina condition[,]" and Mann had played into Brownell's hand "100 %." He also asked Mann if she wanted to attend the meeting with him. He told Mann that he did not like her, care about her feelings, or want to get along with her and that all he wanted was "to get along with [his] son" and "get along with [his] son's mother."

¶ 11 Mann testified that Kindred was in counseling and was continuing to work on his anger management and communication skills. Mann testified that there were no problems with Kindred's parenting or his relationship with his son. Mann testified that she was the recipient of Kindred's rambling phone messages and she felt threatened when he asked her "to intertwine [her] vagina with Mrs. Brownell's vagina." In response to the question of whether Kindred had threatened physical violence, Mann testified, "he had made the comment that if he wanted to hurt us, you know, he could of, but he, you know, did not."

¶ 12 Kindred testified he could not recall making the phone calls due to the side effects of the prescription sleep medication he had been taking at the time he placed the calls. Kindred denied harassing or threatening Brownell. He testified that he "pretty much

avoid[s] her." Kindred testified that he did not leave any messages for Brownell that he could recall. He denied driving by Brownell's home in order to stalk her. He also denied slashing Brownell's tires, inflicting damage on Brownell's property or inflicting damage upon the property of her boyfriend. Kindred testified that he discontinued the use of sleep medications.

¶ 13 The trial court found that Kindred harassed Brownell by leaving messages for caseworkers and entered a two-year plenary order of protection against Kindred, which named Brownell and E.K-B. as protected parties. Kindred appealed.

¶ 14 ANALYSIS

¶ 15 Initially, we note that Brownell did not file an appellee's brief. However, we find that we may reach the merits of the case because the record is simple and the claimed errors can be easily decided without the aid of an appellee's brief. *First Capitol Mortgage Corp. v. Talandis Construction Corp.,* 63 Ill. 2d 128 (1976). In this appeal, Kindred argues that there was insufficient evidence to support the trial court's issuance of the plenary order of protection. We agree.

¶ 16 Pursuant to section 214(a) of the Domestic Violence Act (Act), if the court finds that the petitioner has been abused by a family or household member, "an order of protection prohibiting the abuse *** shall issue[.]" 750 ILCS 60/214(a) (West 2010). Under the Act, "family or household members" include persons who have a child in common. 750 ILCS 60/103(6) (West 2010). The Act defines "abuse" as "physical abuse, harassment, intimidation of a dependant, interference with personal liberty or willful deprivation." 750 ILCS 60/103(1) (West 2010). Under section 103(7) of the Act,

"harassment" is defined as "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 2010). Conduct that is presumed to cause emotional distress includes repeatedly telephoning petitioner's place of employment, home or residence. 750 ILCS 60/103(7)(ii) (West 2008).

¶ 17 In any proceeding to obtain an order of protection, the standard of proof is proof by a preponderance of the evidence. 750 ILCS 60/205(a) (West 2010). Thus, the central inquiry in proceedings to obtain an order of protection is whether the petitioner's allegation of abuse has been proven by a preponderance of the evidence. *Best v. Best,* 223 Ill. 2d 342 (2006). When a trial court makes a finding by a preponderance of the evidence, this court will reverse that finding only if it is against the manifest weight of the evidence. *Best,* 223 Ill. 2d 342. 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 342.

¶ 18 Here, the trial court found that Brownell was harassed by Kindred's phone calls to Mann. However, Kindred did not repeatedly telephone Brownell's place of employment, home or residence. Kindred's poor judgment in making repetitive, vulgar, and tactless phone calls to the caseworker handling his son's juvenile case, while under the influence of some drug or alcohol, does not equate to harassment of Brownell as defined by section 103(7) of the Act. Albeit done in a rude and profane manner, Kindred's phone calls were made for the reasonable purpose of discussing his son's juvenile case and was not

"knowing conduct" that would reasonably cause emotional distress to Brownell. Additionally, there was no evidence that the telephone calls actually caused emotional distress to Brownell or the minor, or that either of them even heard the telephone calls. Furthermore, there was no evidence regarding the allegations of Kindred stalking Brownell or causing damage to either her vehicle or her boyfriend's vehicle.

¶ 19 Therefore, the trial court's finding of abuse was against the manifest weight of the evidence. We reverse.

¶ 20 CONCLUSION

¶ 21 For the forgoing reasons, we reverse the judgment of the circuit court of Peoria County.

¶ 22 Reversed.

¶ 23 JUSTICE HOLDRIDGE, dissenting:

¶ 24 I respectfully dissent. The central inquiry in a proceeding to obtain an order of protection is whether the petitioner's allegation of abuse has been proven by a preponderance of the evidence, and this court will only reverse such a finding by a trial court if it is against the manifest weight of the evidence. *Best v. Best,* 223 Ill. 2d 342 (2006). 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 upon the evidence presented. *Id.* Unlike the majority, I see nothing in the record to indicate that the trial court's grant of an order of protection was against the manifest weight of the evidence, unreasonable, arbitrary, or not supported by the record.

¶ 25 The record established that the trial court held a single evidentiary hearing covering three separate matters, the People's motion to declare Kindred to be an unfit parent of his and Brownell's child, a permanency review regarding the child's status as an abused or neglected minor, and Brownell's petition for a plenary order of protection against Kindred. On the question of Kindred's unfitness and the permanency goal for the child, the trial court found Kindred "unfit based upon anger, inappropriate communications, consumption of alcohol, probable abuse of other substances, and failure to be truthful and honest with the court." *In re E.K-B.*, (2011 IL App (3d) 100778-U (August 12, 2011). Given the fact that the trial court found that Kindred failed to be truthful and honest with the court, it can reasonably be inferred that the court gave no credence to any of Kindred's testimony regarding his actions toward Brownell. This is particularly relevant given Kindred's testimony that he was found a few blocks away from Brownell's residence, even though he had no apparent reason to be there, because he wished to visit a favorite convenience store. Brownell's verified petition contained an allegation that Kindred had been driving by her home repeatedly at all hours. Since Kindred admitted driving within a few blocks of Brownell's home, but provided an unbelievable explanation for doing so, the court's finding that Brownell had proven by a preponderance of the evidence that Kindred had engaged in conduct constituting harassment (repeatedly keeping the petitioner under surveillance outside her home) was not against the manifest weight of the evidence. Moreover, the entire record amply supports the trial court's finding that Kindred's conduct toward Brownell was abusive and harassing.

¶ 26 For the foregoing reasons, I would affirm the judgment of the trial court.