NOTICE: This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

2012 IL App (3d) 110219-U

Order filed February 15, 2012

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

A.D., 2012

LELA M. McDONALD,	)	Appeal from the Circuit Court
	)	of the 10th Judicial Circuit,
Petitioner-Appellee,	)	Peoria County, Illinois,
	)	
v.	)	Appeal No. 3-11-0219
	)	Circuit No. 11-OP-163
	)	
PATRICK B. WILMINGTON,	)	Honorable
	)	Albert L. Purham, Jr.,
Respondent-Appellant.	)	Judge, Presiding.

PRESIDING JUSTICE SCHMIDT delivered the judgment of the court.
Justice Lytton concurred in the judgment.
Justice McDade concurred in part and dissented in part.

ORDER

¶ 1 *Held*: (1) The trial court's finding of abuse and the resulting entry of a plenary order of protection were not against the manifest weight of the evidence. (2) The trial court did not err in admitting text messages transcribed into a list by petitioner into evidence. (3) The trial court's communications with petitioner during an *ex parte* hearing for an emergency order of protection did not give the appearance of impropriety constituting reversible error. (4) The trial court properly made the requisite findings in writing.

¶ 2 Respondent, Patrick B. Wilmington, appeals from a plenary order of protection

granted upon the petition of his former girlfriend, Lela M. McDonald. On appeal, respondent argues that: (1) there was insufficient evidence to support the trial court's plenary order of protection; (2) the trial court erred in admitting circumstantial evidence; (3) the trial court erred in admitting a list of text messages created by petitioner into evidence; (4) the trial judge committed reversible error by participating in *ex parte* communications with petitioner; (5) the trial court erred in directing respondent to reimburse petitioner $60 for counseling treatment; and (6) the trial court erred in failing to articulate, either orally or in writing, its factual findings as required by section 214 of the Illinois Domestic Violence Act of 1986 (Act) (750 ILCS 60/214) (West 2010)). We affirm.

¶ 3 FACTS

¶ 4 Petitioner and respondent were friends for 17 years and, in 2008, became involved in a dating relationship. On August 13, 2010, the couple purchased a home together. One month later, petitioner moved out of the home but agreed to continue to pay her half of the mortgage and utility payments. She also continued to maintain a key to the house. In October 2010, respondent placed the majority of petitioner's belongings on the side of the house and called her to pick up the items, which she did. On November 26, 2010, petitioner returned to the house to spend Thanksgiving evening with respondent, but left the home later that evening and no longer spoke to respondent. On December 23, 2010, petitioner returned to the home while respondent was not there and retrieved the remainder of her belongings. On February 8, 2011, respondent filed a civil suit against petitioner for her half of the unpaid mortgage and utility payments. Petitioner was served

with the complaint on February 10, 2011.

¶ 5 On February 15, 2011, petitioner filed a verified petition for an emergency order of protection and plenary order of protection against respondent in this case. The trial court initially issued an *ex parte* emergency order of protection and, subsequently, issued a plenary order of protection.

¶ 6 In support of her petition, petitioner claimed that respondent: (1) sexually assaulted her on November 26, 2010; (2) sent her four e-mail messages and 21 text messages from December 5, 2010, to February 8, 2011; (3) kicked in the door of the house on December 8, 2010; and (4) had her served with a complaint at her place of employment on February 10, 2011, even though he knew her place of residence.

¶ 7 At the hearing on the petition for the plenary order of protection, petitioner testified that on November 26, 2010, respondent sexually assaulted her. Petitioner testified that she told respondent that she did not want anything to do with sex but he "continued to talk about sex." Petitioner testified that, while she was lying on the couch watching television, respondent stood with his penis out and rubbed it across her face and ejaculated on her. Petitioner testified that she left the house and did not speak with respondent again after that evening.

¶ 8 Petitioner also testified in regard to the contents of the four e-mails and 21 text messages referenced in her petition. Petitioner entered a transcribed list of the 21 text messages into evidence. Copies of the four e-mails were also entered into evidence.

¶ 9 Petitioner testified that on December 5, 2010, respondent sent her a text message asking if he had done something to her and indicated that he would like to see her. He

also sent a text message about their relationship coming to an end and indicated that petitioner would not have to worry about him bothering her anymore. He attached a picture of himself holding up two fingers giving the peace sign.

¶ 10 On December 8, 2010, respondent sent two text messages to petitioner indicating that he was locked out of his car, and he needed to use petitioner's house key so he could retrieve his extra set of car keys from the house. After petitioner did not reply, respondent sent another text message asking, "Are you f*** serious!" Petitioner testified that she was not residing in the house or present in the house at the time respondent kicked in the door to retrieve his keys on December 8, 2010.

¶ 11 On December 31, 2010, respondent sent a lengthy text message to petitioner indicating that petitioner chose to "ruin" him and that he would probably never be able to forgive her, but he tried every day. He also indicated that they were both "finally free" and that he wanted to be the first to wish her well for 2011.

¶ 12 On January 4, 2011, respondent sent petitioner a text message indicating that he had done something stupid to hurt her because he could not deal with the pain of her leaving again.[1] The message also indicated that respondent still loved petitioner and that he had to "fuel this hatred for [petitioner] to survive." On January 6, 2011, respondent sent a text message to petitioner telling her not to expect an apology from him and that he was getting married. On January 10, 2011, respondent sent an e-mail to petitioner

[1] Respondent was referring to an e-mail that he had sent numerous people on December 23, 2010, in which he wrote negative comments about the petitioner. The e-mail was excluded from evidence as hearsay.

entitled "Foreclosure" discussing petitioner's missed mortgage and utility payments. Respondent also stated that he prayed that God would have mercy on petitioner's "cheating soul" and that "[m]aybe one day [petitioner] will use the brain that [she] ha[d] and stop acting so stupid." On January 10, 2011, respondent sent petitioner an e-mail entitled "Mortgage," in which he indicated that he was trying to move on with his life and requested that petitioner pay her half of the mortgage. Respondent also explained that he had become upset when he came home to an empty house on December 23, 2010, and petitioner had left a package "telling [him] basically it's over, [him] not knowing why, and now [she was] with another dude." Respondent sent another text message indicating that he missed petitioner and a text message stating, "Good night."

¶ 13 On January 14, 2011, respondent sent a text message asking if petitioner wanted to adopt a baby with him. On January 15, 2011, respondent sent an e-mail to the petitioner entitled "Pregnancy," with an attached picture of the petitioner and respondent with a toddler. (Petitioner testified they had met the toddler in the park.) In the e-mail, respondent wrote that: (1) he was still hurt about petitioner leaving him; (2) he had loved petitioner "more than any man should of loved one woman;" (3) he had wanted petitioner to be his wife and wanted to father all her children; (4) he had begged her to let him be a father and then she "randomly me[t] someone and let him cum inside [her] and have a child by him;" (5) the search for the mother of his children was not going well; (6) a child was one thing they could have gotten right; and (7) he was thinking about adopting a child but he could not do it alone with a felony on his record.

¶ 14 Additionally, on January 15, 2011, respondent also sent six text messages to

petitioner indicating that he still loved her. One message indicated that one of them was "gonna end up with a child out here then any chance of sav[ing] [their relationship] is gonna be over" and asked if petitioner really wanted to deal with a "baby daddy." Another message suggested that their relationship could work if they left Peoria. One message indicated that respondent had to stop sending messages to petitioner because petitioner had obviously found someone else. In his last message for that day, respondent asked petitioner if it was possible to have peace between them and if he was her enemy.

¶ 15 On January 19, 2011, respondent sent a text message to petitioner indicating that he ordered a vitamin supplement to increase his sperm count because he was serious about "getting a baby in 2011." On January 23, 2011, respondent sent a text message to petitioner that appeared to be written to someone else that explained that petitioner had another man and did not want to have children.

¶ 16 On February 4, 2011, respondent sent petitioner an e-mail entitled "We Reap What You Sow" that was a story about honesty and friendship. At the end of the e-mail, respondent asked petitioner, "were we ever friends?" On February 8, 2011, respondent sent an e-mail to numerous people, including petitioner, about a fictitious woman who was emotionally cheating on her husband by speaking with other men on the internet. The e-mail described two people meeting, marrying, growing apart, and ending their relationship. The woman began a relationship with another man, which also ended. The e-mail indicated that the woman "found herself back on dating web sites and looking for greener pastures." Petitioner testified that the e-mail was about her relationship with her former husband and her seeing respondent while respondent was incarcerated.

¶ 17 Petitioner testified that she had verbally told respondent to stop communicating with her, and she had never replied to any of his text messages. Respondent testified that, prior to their final breakup, he and petitioner had broken up on seven or eight previous occasions in the 2½ years they had dated. Respondent testified that after a breakup, petitioner or respondent would send the other person e-mails or text messages and they would eventually get back together. Respondent testified that between November 26, 2010, and February 10, 2011, petitioner had never told him not to communicate with her anymore. Respondent testified he would send a couple text messages to petitioner and wait a few days and send something else because he was trying to figure out what was going on with petitioner because she had "just disappeared." Respondent testified that if petitioner had asked him to stop sending her messages, he would have done so. Respondent testified that after petitioner removed the remainder of her belongings from the home on December 23, 2010, he knew that "[i]t [was] over with."

¶ 18 The trial court granted the plenary order of protection. In ruling, the trial court found that respondent knew his relationship with petitioner was over. The trial judge stated:

"She says that she told him that she didn't want to talk to him no more. *** He knew then that the relationship was over.

In October she had to come pick up her stuff *** in front of the garage door. *** He knew it was over when he put the stuff by the garage[.] ***

On December 23 when he comes home, and *** her furniture is gone. He knows it's over.

* * *

*** And whether or not [respondent] had sexual contact with [petitioner] against her will, she says that [he] put [his] penis in her face, and I'm satisfied so I'm granting the order of protection. I know [respondent] den[ies] it, but it's about the preponderance of the evidence, and I'm satisfied."

¶ 19 Additionally, petitioner testified that as a result of the abuse she suffered from respondent, she incurred a $63 counseling bill. Respondent did not dispute the counseling bill. Petitioner agreed to accept $60. The respondent paid the petitioner the $60 in open court on the record. Respondent appealed.

¶ 20 ANALYSIS

¶ 21 Initially, we note that petitioner 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).

¶ 22 I. Sufficiency of the Evidence to Issue the Plenary Order of Protection

¶ 23 In this appeal, respondent argues that there was insufficient evidence to support the trial court's issuance of the plenary order of protection. We disagree.

¶ 24 In any proceeding to obtain an order of protection, the central inquiry is whether petitioner has been abused. *Best v. Best,* 223 Ill. 2d 342 (2006). Pursuant to section 214(a) of the Act, if the court finds that 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 or have had a dating or engagement relationship[.]" 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).

¶ 25 In a proceeding to obtain an order of protection, the standard of proof is by a preponderance of the evidence. 750 ILCS 60/205(a) (West 2010); *Best,* 223 Ill. 2d 342. When a trial court makes a finding by a preponderance of the evidence, that finding will only be reversed if it is against the manifest weight of the evidence. *Id.* 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. *Id*. Under the manifest weight standard, we give deference to the trial court because it was in the best position to observe the conduct and demeanor of the parties and witnesses. *Id*.

¶ 26 Here, petitioner testified that respondent rubbed his penis across her face and ejaculated on her after she had told him that she did not want to engage in sexual activities. The trial court found that, in light of petitioner no longer speaking with respondent again after that evening, petitioner's allegations of abuse were more likely true than not, and sufficiently met the preponderance of the evidence standard. Further, the trial court found that respondent knew his relationship with petitioner was over as early as October 2010. Despite knowing the relationship had ended, respondent continued to repeatedly send petitioner messages regarding personal matters. The trial court's conclusion of abuse was neither against the manifest weight of the evidence, nor was it

unreasonable or arbitrary.

¶ 27 II. Circumstantial Evidence

¶ 28 Respondent also complains on appeal that petitioner should not have been permitted to present "circumstantial evidence that had no independent corroboration from the [respondent] or any other source other than the [petitioner]." We are unclear exactly to which evidence respondent refers. Respondent appears to be referring to the text messages that petitioner had testified came from respondent's phone, and that respondent argued were circumstantial in that "anyone could [have been] using his phone." Circumstantial evidence involves evidence offered to establish a fact of consequence where an inference in addition to the truth of the matter stated needs to be made. *Maffett v. Bliss*, 329 Ill. App. 3d 562 (2002). Evidence may be either direct or circumstantial. See *People v. Sherman*, 110 Ill. App. 3d 854 (1982). Respondent does not deny sending the text messages. The trial court did not err in allowing circumstantial evidence to be presented.

¶ 29 III. Admissibility of Petitioner's List of Text Messages

¶ 30 Respondent also argues on appeal that the trial court erred in admitting petitioner's "photo-copied hand typed exhibit of alleged te[x]t messages she claims were sent from the [respondent]" because her cell phone was not used to authenticate the text messages. The admissibility of evidence at trial is a matter within the sound discretion of the trial court, and the court's decision will not be overturned absent a clear abuse of discretion. *People v. Adkins*, 239 Ill. 2d 1 (2010). Pursuant to Illinois Rules of Evidence 901(a), the requirement of authentication as a condition precedent to admissibility is satisfied by

evidence sufficient to support a finding that the matter in question is what the proponent claims it to be. Ill. R. Evid. 901(a) (eff. Jan. 1, 2011). A finding of authentication is merely a finding that there is sufficient evidence to justify presentation of the offered evidence, but does not preclude the opponent from contesting the genuineness of the writing after the basic authentication requirements are satisfied. *People v. Downin*, 357 Ill. App. 3d 193 (2005).

¶ 31 Here, petitioner indicated that she had her cell phone in court with her to authenticate the messages. The trial court allowed the list of text messages into evidence without requiring petitioner to use her cellular phone to authenticate the messages. Petitioner had testified that the messages came from a cellular phone number that she recognized as respondent's cellular phone number. Petitioner had known respondent for 17 years and dated him for 2½ years and was undoubtedly familiar with his cellular phone number. Therefore, petitioner's testimony was sufficient for the trial court to determine that the messages copied onto petitioner's list were what petitioner claimed them to be. See generally *People v. Caffey,* 205 Ill. 2d 52 (2001). Additionally, petitioner testified as to the content of the messages, and respondent did not deny sending any of the messages or contest the genuineness of the messages' content. Consequently, the trial court did not abuse its discretion in admitting the list of text messages into evidence.

¶ 32 IV. *Ex Parte* Communication

¶ 33 Respondent also argues that the trial judge committed reversible error by engaging in an *ex parte* communication with petitioner and "gave [her] legal advice as to what [she] should or should not add in her petitioner for the Order of Protection[.]" In support

of his argument, respondent referred to a statement that the trial judge made during questioning of petitioner by her attorney about whether she intended to withdraw her allegation of being served at her place of employment. The trial judge stated:

"Okay. Let's put this in context. All right. I do the emergency orders of protection. She came to me. I read them. But see I am aware of how these orders of protections get served. I did not know what the paper was that she got served with, but I know with the ladies I work will serve somebody at work. Okay? And so I said I might consider that as one of your allegations. So let's move on.

I understand it might be humiliating, but they're entitled to find you where they can find you to serve you the proper legal paperwork even though it may be humiliating or embarrassing."

¶ 34 Generally, issues that were not raised in the trial court will not be considered on appeal. *Chandler v. Doherty*, 299 Ill. App. 3d 797 (1998). Nonetheless, we will address respondent's claim of judicial impropriety because the application of the waiver rule is less rigid where the basis for the objection is the trial judge's conduct. See *People v. Williams*, 173 Ill. 2d 48 (1996).

¶ 35 Canon 3 of the Code of Judicial Conduct provides that a judge "shall not initiate, permit, or consider *ex parte* communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." Ill. S. Ct. R. 63(A)(4)(a) (eff. Apr. 16, 2007). Based on the record and respondent's argument, we reject his contention that Judge Purham participated in an improper *ex parte* conversation with petitioner.

¶ 36 Here, the conversation referred to by respondent took place during the emergency order of protection hearing, which by its very definition is an *ex parte* hearing authorized by statute. See 750 ILCS 60/217(a)(3)(i) (West 2010) (providing that an emergency order of protection can be issued without prior service of process or notice to respondent if the harm that the remedy is intended to prevent would be likely to occur if respondent were given prior notice of petitioner's efforts to obtain judicial relief). Therefore, the trial judge did not act improperly by discussing the allegations of the emergency order of protection or the actions of respondent in determining whether to issue the emergency order of protection.

¶ 37 Additionally, it is not entirely clear what the trial judge meant in his statement referred to by the respondent. Specifically, it is not clear what the trial judge intended when he said, "I might consider that as one of your allegations." Based upon the sole statement referred to by the respondent, we cannot conclude that the trial judge gave the petitioner legal advice or participated in an improper *ex parte* communication.

¶ 38 Further, the record shows that the trial court did not consider any evidence from the *ex parte* hearing--specifically the conversation referred to by respondent--when deciding whether to issue the plenary order of protection at hand. In fact, the allegation referred to in the conversation regarding petitioner being served at her place of employment was never considered by the trial court as a basis for the plenary order of protection. Our review of the record indicates that there was no suggestion of any outside influence and that the trial judge's determination to issue the plenary order of protection was based solely upon the evidence presented at the plenary order of protection hearing.

We conclude that, under the circumstance of this case, there was no appearance of impropriety to warrant a reversal and a new trial.

¶ 39 V. Award for Cost of Petitioner's Counseling

¶ 40 Respondent argues that the trial court abused its discretion by ordering respondent to pay petitioner $60 for the cost of petitioner's counseling that she claimed was necessary due to emotional trauma she suffered as the result of respondent's abuse. Respondent did not raise this issue in the trial court and cannot be raised for the first time on appeal. See *Chandler*, 299 Ill. App. 3d 797. In fact, respondent agreed to pay petitioner the $60 and did so in open court on the record. Therefore, we will not address this issue; it was not properly preserved for appeal.

¶ 41 VI. Factual Findings

¶ 42 Respondent also argues that the trial court failed to articulate, either orally or in writing, specific factual findings as required by section 214(c)(3) of the Act (750 ILCS 60/214(c)(3) (West 2010)). Respondent's failure to raise the issue in the trial court does not preclude this court from addressing it. See *In re Marriage of Henry*, 297 Ill. App. 3d 139 (1998).

¶ 43 Section 214(c) provides that the court shall make its findings in an official record or in writing, and shall at a minimum set forth: (1) that the court has considered the applicable relevant factors in determining whether to grant a specific remedy; (2) whether the conduct or actions of respondent, unless prohibited, will likely cause irreparable harm or continued abuse; and (3) whether it is necessary to grant the requested relief in order to protect petitioner or other alleged abused persons. 750 ILCS 60/214(c) (West 2010).

¶ 44 Here, the order of protection provided the following language:

> "In granting the following remedies, the Court has considered all relevant factors, including, but not limited to the nature, frequency, severity, pattern, and consequences of Respondent's past abuse, neglect, or exploitation of Petitioner *** and the likelihood of danger of future abuse, neglect, or exploitation of the party(ies) to be protected[.]"

The order also indicated that the trial court found: (1) "Respondent has abused the Petitioner"; (2) "The conduct or actions of the Respondent, unless prohibited, will likely cause irreparable harm or continued abuse"; and (3) "It is necessary to grant the requested relief in this order to protect the Petitioner[.]" Consequently, the record is clear that the trial court made the requisite factual findings in writing.

¶ 45 CONCLUSION

¶ 46 For the forgoing reasons, we affirm the judgment of the circuit court of Peoria County.

¶ 47 Affirmed.

¶ 48 JUSTICE McDADE concurring in part, dissenting in part:

¶ 49 I concur with the decision of the majority on all issues raised by respondent in this appeal except that captioned "VI. Factual Findings" appearing above at ¶¶42-44. More specifically there are no factual findings set out in the trial court's order quoted in ¶44.

¶ 50 The order recites (1) the "relevant [statutory] facts" that the court considered and (2) its conclusory determination that: "Respondent has abused the Petitioner." Although the order recites the categories of possible misconduct it considered, there is not a single finding of fact. What is clear from the record is that the court made no factual findings in writing and I

respectfully dissent from the majority's contrary conclusion.