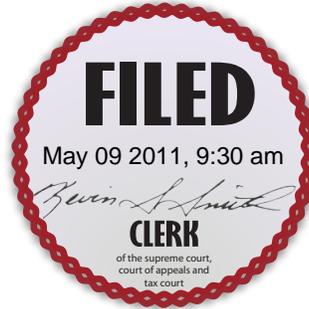


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

RICHARD CUNNINGHAM,)
)
Appellant-Respondent,)
)
vs.) No. 24A01-1011-PO-628
)
SANDRA RAINS,)
)
Appellee-Petitioner.)

APPEAL FROM THE FRANKLIN CIRCUIT COURT
The Honorable Clay M. Kellerman, Judge
Cause No. 24C02-1009-PO-32

May 9, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

Appellant-respondent Richard Cunningham (“Cunningham”) appeals the trial court’s issuance of a protective order in favor of appellee-petitioner Sandra Rains (“Rains”), raising the single issue of whether sufficient evidence supports the order. We affirm.

Facts and Procedural History

Rains is an employee at First Financial Bank where Cunningham had his bank account. The two started speaking on the phone in January of 2009, and first met in March of 2009. They developed a friendly relationship, and in October of 2009, Rains bought a piece of property from Cunningham. Around that time, Cunningham also moved in with Rains, although the two “didn’t really have a relationship” and instead remained friends. Tr. 5-6.

At some point the friendship ended. In January 2010, Cunningham threatened Rains by telling her that he was going to have someone come rape her. He also told her that he would throw acid in her face and run her over with his truck. At that point, Rains attempted to get Cunningham to move out of her house, which he eventually did.

However, Cunningham’s threats persisted. He continually called and visited Rains’s place of employment, and told her that he was going to make her lose her job. On one occasion while at her place of work, Cunningham told Rains that he would slice her head open with a machete. On another occasion, he spoke with Rains’s assistant manager and demanded that only Rains help him with banking business. Eventually, First Financial Bank called a guard in for a week for extra protection.

On September 3, 2010, Rains filed a petition seeking a protective order, alleging that she was the victim of domestic or family violence and that Cunningham was a household or family member (but did not describe the specific nature of their relationship). She also alleged that Cunningham had stalked her. The trial court issued an ex parte order for protection on September 8, 2010, but stated in the order that it did not protect an intimate partner. Cunningham requested a hearing on the matter, which the trial court conducted on November 15, 2010. After considering the evidence, the court reaffirmed its previously issued protective order. Cunningham now appeals.

Discussion and Decision

Standard of Review

Cunningham challenges the sufficiency of the evidence supporting the trial court's protective order. When reviewing the sufficiency of the evidence supporting an order for protection, we neither reweigh the evidence nor judge the credibility of witnesses. Tisdial v. Young, 925 N.E.2d 783, 785 (Ind. Ct. App. 2010). We consider only the probative evidence and the reasonable inferences supporting the trial court's order. Id.

We also note that Rains did not submit an appellee's brief. When the appellee does not submit a brief, we need not undertake the burden of developing an argument for her. Id. at 784. Rather, we will reverse the trial court's judgment if the appellant presents a case of prima facie error. Id. at 784-85. "Prima facie error in this context is defined as, at first sight, on first appearance, or on the face of it." Id. at 785 (quoting Trinity Homes, LLC v. Fang, 848 N.E.2d 1065, 1068 (Ind. 2006)). If the appellant does not meet this burden, then we will

affirm. Id.

Sufficiency of the Evidence

The trial court entered its order pursuant to its authority under the Indiana Civil Protection Order Act (“CPOA”), codified at Indiana Code chapter 34-26-5. Under the CPOA,

[a] person who has been a victim of domestic or family violence may file a petition for an order of protection against a:

(1) family or household member who commits an act of domestic or family violence; or

(2) person who has committed stalking under I.C. § 35-45-10-5 or a sex offense under I.C. 35-42-4 against the petitioner.

I.C. § 34-26-5-2(a).

A trial court may issue a protective order only upon a finding “that domestic or family violence has occurred.” I.C. §§ 34-26-5-9(a), (f); Tisdial, 925 N.E.2d at 785. The definition of “domestic or family violence” for this purpose also includes stalking as defined in section 35-45-10-1, whether or not the stalking offense is committed by a family or household member. Id.; see also Parkhurst v. Van Wrinkle, 786 N.E.2d 1159, 1161 (Ind. Ct. App. 2003). “A finding that domestic or family violence has occurred to justify the issuance of an order . . . means that a respondent represents a credible threat to the safety of a petitioner.” I.C. § 34-26-5-9(f). Thus, the CPOA authorizes issuance of an order for protection when the petitioner shows, by a preponderance of the evidence, that stalking has occurred and that it represents a “credible threat” to the respondent. Id.; Tisdial, 925 N.E.2d at 785.

Cunningham’s challenge to the sufficiency is two-fold¹: he maintains that his conduct did not rise to the level of stalking, and that Rains failed to show that he was a “credible threat” to her because she did not file her petition in January 2010. We disagree with both arguments.

Stalking

In order to establish the necessity of a protective order based on stalking, Rains had to show by a preponderance of the evidence that Cunningham (1) knowingly or intentionally; (2) engaged in a course of conduct involving repeated or continuing harassment of her; (3) that would cause a reasonable person to feel terrorized, frightened, intimidated or threatened; and (4) that actually caused her to feel terrorized, frightened, intimidated, or threatened. See I.C. § 35-45-10-1 (defining “stalk”). “Harassment” means “conduct directed toward a victim that includes but is not limited to repeated or continuing impermissible contact that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress.” I.C. § 35-45-10-2. “Repeated” means more than once. Johnson v. State, 721 N.E.2d 327, 332-33 (Ind. Ct. App. 1999), trans. denied. “Impermissible contact” includes but is not limited to knowingly or intentionally following or pursuing the victim. I.C. § 35-45-10-3.

The evidence supporting the order reveals that Cunningham threatened Rains several

¹ Cunningham also advances a third argument in his brief: because he and Rains were only friends and roommates, he is not a “family or household member” for the purposes of section 34-26-5-2. We need not reach this issue because we find that Rains met her burden as to the stalking allegations, which sufficiently establishes the need for a protective order whether or not she and Cunningham were household members.

times in 2010.² The threats began in January with comments made to Rains while at Rains's house or in a vehicle together. After Cunningham moved out, he "continually came into [Rains's] place of employment" and "continually called and . . . threatened Rains at work." Tr. 3. When Cunningham called, he would not let anyone else at the bank speak to him except for Rains, and he told her supervisor that Rains was the only person who was to help him with banking business. Her employer eventually arranged for extra security.

Cunningham's threats included telling Rains that he would throw acid in her face, have someone sexually assault her, cut open her face with a machete, hit her with his truck, and make her lose her job. He also told her that she had ruined his life, that she would have to pay for it, and that one day he will just lose his temper and he is going to act on all his threats. As a result of his threats, she called the police and filed for the protective order. She also testified that "I believe he's really trying to make me lose my job." Tr. 4. Thus, Rains introduced sufficient evidence such that the trial court could have concluded that Cunningham stalked Rains.

Credible Threat

Cunningham also maintains that he was not a credible threat to Rains, arguing that because she did not file her petition after he first threatened her in January 2010, she must not have found his threats credible. "A court may not deny a petitioner relief . . . solely because of a lapse of time between an act of domestic or family violence and the filing of the petition." I.C. § 34-26-5-13. However, we may consider the lapse of time between the threat

² Rains's petition lists only three incidents, but her testimony indicates that there were additional incidents of contact.

and the filing of the petition. Tons v. Bley, 815 N.E.2d 508, 511 (Ind. Ct. App. 2004).

Even though Rains did not file for a protective order after the initial threat, Rains did file a police report. Regardless, Cunningham made additional threats after January, which prompted her petition. He continually called and visited her place of employment, and threatened her at work. Her employer also added extra security. After Cunningham confronted her supervisor, Rains immediately filed her petition. We therefore think that Rains sufficiently showed that Cunningham was a credible threat. His other arguments to the contrary, criticizing Rains for not introducing additional evidence to corroborate her testimony, amount to an invitation to reweigh the evidence and judge witness credibility, which we will not do. Tisdial, 925 N.E.2d at 785.

Conclusion

There was sufficient evidence for the trial court to conclude that Cunningham represented a credible threat to Rains, and that he stalked her. Cunningham has not demonstrated prima facie error, and we therefore affirm the trial court's decision to reaffirm its previously-issued protective order.

Affirmed.

FRIEDLANDER, J., and BROWN, J., concur.