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ARKANSAS COURT OF APPEALS

DIVISION III
No. CA12-430

RICHARD CLAY GRAY, JR. APPELLANT V. JENNIFER JUNE GRAY APPELLEE	**Opinion Delivered** April 10, 2013 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NOS. DR-2010-2066-6; DR-2011-1203-6] HONORABLE MARK LINDSAY, JUDGE AFFIRMED

JOHN MAUZY PITTMAN, Judge

This is an appeal from an order denying appellant's request for modification of a protective order, denying appellant's contempt petition, and awarding attorney's fees to appellee. Appellant argues that all of these rulings were erroneous. We affirm.

Appellant and appellee were divorced on July 7, 2011. The divorce decree provided for the division of specific personal property. The issue of appellant's visitation with the parties' seven-year-old daughter was reserved because appellant had pending criminal charges arising out of his alleged sexual assault upon his ten-year-old stepdaughter and was subject to an ex parte protective order that forbade him from contacting either of the girls. After a bench trial, a final protective order was issued on August 1, 2011, enjoining appellant from initiating any contact with either girl based on a finding that the girls were in immediate and present danger of domestic abuse.

In October 2011, appellant appeared for a hearing on the sexual-assault charge and pled guilty to the lesser charge of harassment, a Class "A" misdemeanor. On December 22, 2011, appellant filed a petition to modify the order of protection to permit visitation with his daughter. On December 28, 2011, appellant filed a petition to modify the divorce decree so as to grant him primary custody of his daughter. He also filed a contempt petition based on allegations that appellee failed to give him all of the personal property listed in the divorce decree. After a hearing, the trial court entered an order on April 3, 2012, denying modification of the protective order, the change-of-custody petition, and the contempt petition. That order also awarded appellee attorney's fees in the amount of $3,018.75.

Appellant first argues that the trial court erred in denying his petition to modify the protective order because the criminal charge against him was reduced from sexual assault to harassment after the victim recanted her testimony and, thus, there is nothing to support the trial court's finding that he failed to meet his burden of showing that there had been a material change of circumstances since entry of the protective order. We disagree. A person commits sexual assault in the second degree if he engages in sexual contact with a minor and is in a position of trust or authority over the minor. Ark. Code Ann. § 5-14-125(a)(4) (Supp. 2011). "Sexual contact" includes any act of sexual gratification involving the touching, directly or through clothing, of the breast of a female. Ark. Code Ann. § 5-14-101(10) (Supp. 2011). At the hearing, appellant expressly admitted that he intentionally touched both girls' breasts on many occasions, and the trial court was not required to believe his testimony that his motive in doing so was innocent horseplay rather than sexual gratification. Under these

circumstances, we cannot say that the trial court erred in finding that appellant failed to prove that there had been a material change in circumstances since the entry of the protective order.

Appellant next argues that the trial court erred in finding that he failed to prove that removal of the protective order was in the best interest of his daughter. We do not agree. The protective order in this case was not appealed and became final. Given that we have already held that the trial court could reasonably have found that appellant failed to offer proof sufficient to modify the protective order, it necessarily follows that the trial court did not clearly err in finding that it would not be in the child's best interest to dissolve an order protecting her from contact with a parent who has been found to pose her an "immediate and present danger of domestic abuse."

Nor do we agree with appellant's contention that the trial court erred in denying his motion to hold appellee in contempt for failing to give him all of the property to which he was entitled by virtue of the divorce decree. To establish civil contempt, there must be willful disobedience of a valid order of the court. *Applegate v. Applegate*, 101 Ark. App. 289, 275 S.W.3d 682 (2008). On appeal, our duty is to decide whether the trial court's finding regarding willful disobedience is clearly against the preponderance of the evidence. *See id.* Appellant asserts that appellee must either have misrepresented that she had the property in her possession or failed without excuse to return it to appellant. Appellant would have us conclude that, under either alternative, appellee must have intentionally and willfully violated the property-division order. We do not agree that failure to comply with a court order is *ipso facto* an intentional act.

Here, appellant was entitled by the decree to receive a considerable amount of personal property that was in the possession of appellee. The record shows that appellee and her uncle loaded a large trailer with appellant's personal property and that appellant discovered upon unloading the trailer that one out of seven sets of subwoofers and "lots of wires" to which he was entitled were not on the trailer. Appellant admitted that all of the missing items except for the subwoofers were small and could easily be overlooked. Appellee testified that she did not know how to connect the many electrical components included on the list and that there might have been a few wires missing, but that she gave appellant the opportunity to inspect the property before taking it and that appellant received everything on the list. On this record, we cannot say that the trial court clearly erred in finding that appellee did not intentionally and willfully violate the property-division provisions of the divorce decree.

Finally, appellant argues that the trial court erred in awarding attorney's fees to appellee. Appellant does not contest the amount of fees but simply argues that they were improperly awarded because the trial court's rulings on the merits of the case were erroneous and that appellee, therefore, was not the prevailing party. However, given that we have upheld the trial court's rulings on the merits, appellant has failed to demonstrate that appellee was not the prevailing party at trial.

Affirmed.

GLOVER and WOOD, JJ., agree.

Taylor Law Partners, LLP, by: *William B. Putman*, for appellant.

Dana Dean Watson, for appellee.