Cite as 2024 Ark. App. 147

ARKANSAS COURT OF APPEALS

DIVISION III
No. CV-23-91

PAUL WILLHITE APPELLANT V. DANITA LYNN WILLHITE APPELLEE	Opinion Delivered February 28, 2024 APPEAL FROM THE WASHINGTON COUNTY CIRCUIT COURT [NO. 72DR-22-1476] HONORABLE DOUG MARTIN, JUDGE AFFIRMED

CINDY GRACE THYER, Judge

Paul Willhite appeals a ten-year order of protection granted by the Washington County Circuit Court, arguing that his ex-wife, Danita Lynn Willhite, failed to present sufficient evidence to support a finding of domestic abuse. He further argues that his due-process rights were violated because (1) he was not served with the final order of protection; (2) the court gave deference to Danita because she was represented by counsel; and (3) the court failed to make a finding of domestic abuse pursuant to the statute. Finding his arguments to be without merit, we affirm.

On October 5, 2022, Danita filed a petition for an order of protection against her ex-husband, Paul, due to a threat of physical violence. At the time of the events described in the accompanying affidavit, Danita lived in Farmington with their adult daughter, Cameron, while Paul lived in Cabot with their adult son, Chase. That same day, Cameron also filed

for an order of protection against her father. The court granted a temporary order of protection to both Danita and Cameron on the basis of the facts alleged in their respective petitions.

The court held a combined hearing on Cameron's and Danita's petitions. Danita and Cameron were represented by counsel at the hearing, and both testified.[1] Paul attended and represented himself at the hearing.

At the hearing, Danita testified that she and Paul divorced in 2006 but reconciled and began dating again sometime thereafter. Danita and Paul's romantic relationship continued until September 2022 when Paul began acting erratically. Danita testified that Paul had called her "ranting and raving" and insisting that she was undermining his relationship with their children. Danita then called Chase to find out why Paul was upset. Chase informed her that Paul had confronted him, too, claiming to hate him. Danita testified that Paul had already alienated Cameron the previous May when he yelled at Cameron and told her to "lose his phone number." Tired of Paul's behavior, Danita ended the relationship.

After they broke up, Paul started to call, email, and text Danita. He demanded that she pay for a wrought iron fence he had installed in her backyard, even though he had previously refused payment. In the text, he demanded over $4,000 for the fence, remarking

[1]The circuit court also granted Cameron's request for an order of protection, which is the subject of a separate appeal decided today. *See Willhite v. Willhite*, 2024 Ark. App. 148.

"You fucking owe me, bitch." Paul threatened to remove the fence if she didn't pay. Danita offered to pay him $1,350—the cost of the fence, plus material and labor, which he refused.

Concerned about the tenor of his texts, Danita contacted the Farmington Police Department and informed them of the situation with the fence. She told them that she did not object to his repossessing the fence but was afraid he would damage something while he was there. She asked if a police officer could be present while Paul was on the property to ensure nothing was damaged in the process.

Paul then texted her to say he would be at her house the following day to get the fence. The next morning, he began to call her incessantly. In texts, he explained that it was not about the money, that he was coming up there, that he was leaving his phone at home, and that he had another "plan." He told her that if she had anything left to say, she needed to let him know and that she should tell Cameron that he was sorry. Danita testified that she interpreted these statements as a threat—that Paul was coming to her house and that he might harm her. She was also afraid he might be suicidal. As a result, she called the police and asked if they would add extra patrols, which they did. The police also conducted a welfare check on Paul.

After the welfare check was completed, Paul texted Danita again, accusing her of having him arrested and complaining that the police were taking his guns. He told her that he needed her to deposit the fence money into his account so that he could get his guns back. Danita did so, then blocked his number.

Danita then testified that, on October 1, Paul used Chase's phone to send the following text:

> U bitch.u better sleep with 1 eye open
>
> When I go u go to.
>
> U fuck with me to long. Deanna and I were happy, u didn't want me u just did want anyone else to want me. Look over u shoulder the rest of your short life.

Danita further testified that Paul sent derogatory voicemail messages and texts to her relatives, including her seventy-five-year-old mother and seventy-eight-year-old stepfather. She stated that he also sent a text message to several of her relatives stating that "the real shit happens tomorrow at work." Because of these texts, Danita's brother expressed concern to her that Paul might be threatening to commit some sort of workplace violence, and Danita felt it necessary to contact her supervisor.

Danita testified that on October 5, she received a call from Chase's fiancée, Abby. Abby informed Danita that Paul told her that Chase had five minutes to call him, or he would not have a mother anymore. When Chase called him, Paul told him that he was in Farmington and that Cameron had five minutes to call him or he was going to "bust down the door and beat the living fuck out of her."

Danita testified that because of everything that was happening at the time, she believed that Paul might harm her. She stated that his behavior after their breakup was explosive and vindictive. She believed he might be using illegal substances. She stated that

Paul owned multiple firearms and that she and Cameron both slept with pistols by their beds on October 2.

Cameron also testified at the hearing. She stated that she was a twenty-year-old college student and lived with her mother in Farmington. She testified that the previous May, she had spent a few days helping her brother clean and move out of his home in Pottsville, Arkansas. She stated that her father "blew up" at her several times. He claimed that she was only pretending to clean but had not actually done anything, and it was all just a plot to get money. She stated he cursed at her, and when she tried to leave, he would not allow it. He ordered her to sit down and told her she could not leave until he said she could leave. She testified that she sat on the couch for what felt like hours until he left because she was scared.

She then testified regarding Abby's phone call to her mother. When asked if she believed her father would knock down the door and beat her, she stated that she knew her father was very angry and that there was a chance he would lose control and do something. She testified that she was afraid if she continued to communicate with him, he might harm her.

At that time, the court indicated that it needed to call a quick recess. When court resumed, Paul informed the court that he did not want to cross-examine Cameron and no longer wanted to defend against the petition.

The final order of protection was filed on October 21, 2022,[2] and Paul, through counsel, filed a timely notice of appeal.

On appeal, Paul argues that Danita failed to present sufficient evidence to support a finding of domestic abuse. He further argues that his due-process rights were violated because he was not served with the final order of protection; the court gave deference to Danita because she was represented by counsel; and the court failed to make a finding of domestic abuse pursuant to the statute. We address each of these issues in turn.

Paul first argues that Danita failed to present sufficient evidence to support the entry of a final order of protection. He argues that Danita never proved that he physically harmed her or that she was in fear of imminent harm. Instead, she proved only that she was worried that he would damage her property or harm himself, not that he would injure her. Her main concern was to stop what she perceived to be harassing phone calls, texts, and emails.

The standard of review following a bench trial is whether the circuit court's findings are clearly erroneous or clearly against the preponderance of the evidence. *Hopper v. Hopper*, 2023 Ark. App. 504, 678 S.W.3d 602. A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been made. *Id.* Disputed facts and determinations of the credibility of witnesses are within the province of the fact-finder. *Id.*

[2]The proof-of-service page on the final order is blank.

Here, Danita filed for an order of protection pursuant to Arkansas Code Annotated section 9-15-201 (Repl. 2020) of the Domestic Abuse Act. Under section 9-15-205 (Repl. 2020), when a petition for an order of protection is filed under the Domestic Abuse Act, the circuit court may provide relief to the petitioner upon a finding of domestic abuse. "Domestic abuse" is defined as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury, or assault between family or household members." Ark. Code Ann. § 9-15-103(4)(A) (Repl. 2020).

If an order of protection is granted without sufficient evidence to support a finding of domestic abuse, the order will be reversed. *See Paschal v. Paschal*, 2011 Ark. App. 515, at 7. Where there is no evidence that the respondent committed physical abuse or inflicted imminent fear of physical harm, bodily injury, or assault, it is an abuse of discretion to issue the order of protection. *Claver v. Wilbur*, 102 Ark. App. 53, 59, 280 S.W.3d 570, 573 (2008).

Paul argues that Danita made no allegation that meets the required statutory definition, nor is there sufficient evidence to support a finding of domestic abuse pursuant to section 9-15-103. He notes that even in cases that involve a past history of physical abuse—not alleged in this matter—we have held that harassing texts and phone calls "do not fall under the legislative definition of domestic abuse." *Paschal*, 2011 Ark. App. 541, at 7.

He further asserts that Danita had an affirmative obligation to present evidence to the circuit court that he committed acts of physical or bodily harm against her or that she was in fear of such harm from him. *See Morales v. Garcia*, 2021 Ark. App. 438, at 6. He maintains that she failed to meet that burden either in her affidavit or in her testimony. He

argues that without evidence of prior physical harm, a prior pattern of harm, or actions that would demonstrate Danita was in fear of imminent physical harm, the circuit court's entry of a ten-year order of protection is clearly erroneous or against the weight of the evidence.

First, it should be noted that before Danita had completed her case-in-chief, Paul indicated that he no longer wanted to defend against the petition. As a result of Paul's statements withdrawing his defense to the allegations, the court entered the order of protection without hearing the remainder of Danita's evidence.[3] We find that Paul's statements can be construed as acquiescence. It is well settled under the doctrine of invited error that an appellant may not complain on appeal that the circuit court erred if the appellant induced, consented to, or acquiesced in that action. *See Hopper*, *supra* (finding acquiescence where appellant stated he had no objection to entry of an order of protection).

Even if Paul's actions were not an acquiescence, we affirm the circuit court's decision to enter the order of protection. Here, there was sufficient evidence of the infliction of fear of imminent physical harm or bodily injury.[4] Paul texted Danita on September 29 stating that, while she might think he will show up while she was sleeping, he wanted to "fuck up"

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[3]Prior to accepting Paul's concession, the court noted that it had interrupted counsel's questioning of Cameron. Counsel remarked that she had not finished her direct examination of Cameron and indicated that Chase was available to provide testimony as well.

[4]Paul argues that much of the evidence against him was based on hearsay; however, the evidence against him was admitted without objection. Evidence admitted without objection may constitute substantial evidence. *See, e.g.*, *Jones v. State*, 332 Ark. 617, 967 S.W.2d 559 (1998); *Libokmeto v. Ark. Dep't of Hum. Servs.*, 2019 Ark. App. 274, 577 S.W.3d 35; *Moseby v. State*, 2010 Ark. App. 5. Thus, his argument that the order of protection was improperly based on hearsay testimony is without merit.

her life, not her dreams. The next day, he texted that he was coming to her house and that he was leaving his phone behind. He told her to tell Cameron that he was sorry, but that she (Danita) had done this. He then called and stated that it wasn't about the money anymore and that he had other plans. Danita indicated that she was afraid he might be suicidal and that this might be a murder/suicide situation. She even called the police to have a welfare check performed.

Moreover, Paul's text message to Danita on October 1 could reasonably be considered a death threat. He told her that she needed to sleep with one eye open; that when he goes, she goes too; and that she needed to look over her shoulder for the rest of her short life. These statements are more than just controlling or harassing; they are, in fact, threatening. And, to the extent Paul asks us to reweigh the evidence in his favor, we will not do so. The circuit court's weighing the evidence differently than Paul wanted it to be weighed is not reversible error. *McCord v. Ark. Dep't of Hum. Servs.*, 2020 Ark. App. 244, 599 S.W.3d 374. We do not act as a super fact-finder nor do we second-guess the circuit court's credibility determinations. *Id.*

As for Paul's due-process arguments, none of those arguments were made below; thus, they are not preserved for our review. We will not consider arguments made for the first time on appeal, even constitutional arguments, because doing so deprives the circuit court of the opportunity to fully develop the issue. *Sutton v. Falci*, 2024 Ark. App. 46, ___ S.W.3d ___.

Affirmed.

GRUBER and BROWN, JJ., agree.

Dodds, Kidd, Ryan & Rowan, by: *Catherine A. Ryan*, for appellant.

Jane Watson Sexton, for appellee.