THIRD DIVISION
September 30, 2019

No. 1-18-0779

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF	)	
	)	Appeal from the
JOHN KOEPKE,	)	Circuit Court of
	)	Cook County
Petitioner-Appellant,	)	
	)	11 D 9851
and	)	
	)	Honorable
TAMARA KOEPKE,	)	Raul Vega,
	)	Judge Presiding
Respondent-Appellee.	)	

PRESIDING JUSTICE ELLIS delivered the judgment of the court.
Justices McBride and Howse concurred in the judgment.

ORDER

¶ 1 *Held*: Affirmed. Court did not err by allowing certain testimony into evidence. Finding appellant in indirect civil contempt was not against manifest weight of evidence. Contempt order contained appropriate purge provision.

¶ 2 As part of their divorce, petitioner John Koepke got primary custody of the couples' children, while respondent Tamara Koepke was allowed visitation rights. Tamara filed a rule to show cause claiming that John was interfering with those rights. The court found John in indirect civil contempt. John appeals. We find no error and affirm.

¶ 3 BACKGROUND

¶ 4 In 2016, after a protracted proceeding, John and Tamara agreed to custody and visitation for their minor children—Jack (17), Jillian (13), and Peter (12). They also have an adult child, Greta (19).The parental allocation judgment provides Tamara with initial supervised visitation, additional summer visitation, and limited unsupervised overnight visitations. In order to qualify for unsupervised overnight visitation, Tamara was required to provide proof of compliance with certain psychiatric treatment obligations. Initially, Tamara's treating physician refused to provide adequate proof of compliance. So in May 2017, the circuit court modified the allocation judgment and eased Tamara's obligations to prove compliance.

¶ 5 Shortly after the modification, in late June or early July 2017—the record is unclear on this point—Tamara became eligible for unsupervised overnight visitation. Almost immediately, Tamara filed a petition for rule to show cause. The petition alleged that John was interfering with her right to summer and overnight visitation. The petition requested "[t]hat upon finding [John] guilty of indirect civil contempt," the court should allow Tamara "adequate make-up parenting time." John denied the allegations.

¶ 6 In August, the circuit court found "a *prima facie* case of indirect civil contempt" and issued a rule "to show cause why [John] should not be held in contempt of Court for failure to comply with the parenting time Schedule(s) set forth in the Allocation Judgment." The court conducted an evidentiary hearing, which took place over three months. At the hearing, John, Tamara, and the supervisor Kate Wilson testified.

¶ 7 John and Tamara have not communicated since 2011. They live about half a mile from each other, but the kids do not typically go directly to Tamara's house for visitation. Instead, they meet at the library, as provided by the allocation judgment. Almost always, one of the older

children will drive the other children to the library for visitation. From the library, Wilson drives the kids to Tamara's house. When visitation ends, Wilson and Tamara typically drive the kids back to the library. There was some testimony that occasionally, the older children will take the younger ones directly to and from visitation.

¶ 8 The allocation judgment entitled Tamara to parenting time on Wednesdays from 4:00 to 6:00 p.m. She is also scheduled for regular visitation on Saturdays from 10:00 a.m. to 5 p.m., with alternating Saturdays being extended overnight to 1:00 p.m. on Sunday. Finally, she gets additional visitation during the summer—two weekdays from 9:00 a.m. to 5:00 p.m., while John is at work. The Wednesday visitations, Saturday visitations, and summer visitations are all supervised by Wilson. Tamara's only unsupervised parenting time is from 10 p.m. Saturday to 1 p.m. Sunday during overnight visitations.

¶ 9 Tamara was receiving her Wednesday visitation. All three witnesses agreed that, save a few exceptions, the Saturday visitations—including dates which were supposed to be overnight—only last from 10:00 a.m. to approximately 3:00 p.m. Saturday. That is, not only is the *regular* Saturday visitation cut short by two hours but, for the most part, she has not received her *unsupervised* overnight visitation. There was no dispute as to these facts; it was the reason *why* Tamara did not receive all of this visitation time that was hotly contested.

¶ 10 Wilson expressly and unequivocally testified that John controlled when visitation began and ended, that Tamara has never set the schedule. Until recently, John texted with Wilson about the visitation schedule. However, after the hearing began, John stopped discussing visitation times because Tamara "knew the schedule." John testified that he stopped discussing times because he was frustrated that it was being used against him. As for the visitations ending early, Wilson said, "[i]t's done because the children say that they have to leave." On cross-

examination, Wilson admitted that, besides leaving for a hockey game, the kids do not say why they have to leave early. She has also never been present with John and the kids and does not know what he says to them. Likewise, she has never seen John call the kids and has not seen any texts between them.

¶ 11 John emphatically denied that he was interfering with Tamara's parenting time. His testimony centered around one basic tenet—that what the kids do after they leave his care is between them and Tamara. He denied sending text messages to either Wilson or the kids telling them that they must end the visitations early.

¶ 12 Tamara's testimony primarily focused on the fact that she never wanted her parenting time to end early. She acknowledged that she willingly allowed the kids to leave early when they had other social obligations. Although she agreed to allow them to leave early, "they don't ask me. They tell me" they are leaving early. She agrees they can leave because "[t]hey've received a text from their father." She doesn't object at that point "[s]o that there isn't any punishment *** [t]o the children." But like Wilson, there is no indication that she has seen these text messages.

¶ 13 No text messages between any of the witnesses were entered into evidence. Nor were the specific contents of any text message discussed during the hearing.

¶ 14 As for summer time, John testified that, through their lawyers, the parties agreed on Mondays but were unable to come to an agreement on the second day. On the other hand, Tamara testified that the parties initially agreed to Mondays and Fridays, but Fridays were changed to Wednesdays later in the summer. Regarding the Monday visitation, John testified that Tamara got "just about every Monday throughout the summer." Tamara disagreed, testifying that she only got "some Mondays" even though she wanted all of them; for those other Mondays, "[t]he children weren't brought to the library" (where the handoff usually took place).

¶ 15 After the hearing, the court issued a written order finding John "in indirect civil contempt for failing to comply with the Allocation Judgment entered November 15, 2016 in that he has failed to provide and allow Tammy all of her parenting time pursuant to the Judgment." In its findings, the court specifically "did not find John to be particularly truthful or credible." On the other hand, "[t]he testimony of Kate Wilson crystallized John's refusal to abide by the parenting schedule as required by the Allocation Judgment. Th[e] Court found Ms. Wilson to be impartial, and not biased, and truthful."

¶ 16 The court ordered that "John shall purge himself of the indirect civil contempt by allowing Tammy make-up parenting time beginning upon entry of this order; the make-up parenting time shall be completed by August 31, 2018."

¶ 17 John timely appealed.

¶ 18 ANALYSIS

¶ 19 John makes three arguments on appeal: that the finding of contempt was against the manifest weight of the evidence, that the court erred by allowing in hearsay testimony, and that the purge provision of the contempt order was improper.

¶ 20 I. Evidentiary Errors

¶ 21 Because it will aid in our later discussion, we begin with John's second argument, that the circuit court erred by allowing two hearsay statements into evidence. Evidentiary rulings are within the sound discretion of the trial court and will not be reversed absent an abuse of that discretion—that is, unless the ruling is so arbitrary or irrational that "no reasonable person would take the view adopted by the trial court." *People v. Caffey*, 205 Ill. 2d 52, 89 (2001).

¶ 22 Hearsay is an out-of-court statement offered for the truth of the matter asserted. *Pavlik v. Wal-Mart Stores, Inc.*, 323 Ill. App. 3d 1060, 1064 (2001). As defined by the rules, "[a]

'statement' is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion." Ill. R. Evid. 801(a) (eff. Oct. 15, 2015).

¶ 23 John complains of two statements that he claims were inadmissible hearsay. First, Wilson testified that visitation gets terminated early because "the children say that they have to leave." Second, Tamara testified that she agrees that the kids can leave visitation early because "[t]hey've received a text from their father."

¶ 24 Taking them in that order, we agree with the trial court that Wilson's testimony that visitation gets terminated early because "the children say that they have to leave" was hearsay. Wilson was testifying about the children's out-of-court statement, and it was offered to prove the truth of that statement—that the children were required to leave visitation early, as opposed to leaving of their own accord. Tamara's theory, of course, was that it was *John* who was directing them to leave early, and Wilson's testimony was offered to support that theory.

¶ 25 Properly finding this testimony as eliciting hearsay, the trial court initially sustained John's objection. But Tamara's counsel argued that the statement was reliable and thus admissible under controlling case law. The trial court ultimately allowed Wilson's hearsay testimony because the court found it to be "reliable."

¶ 26 Before the adoption of the Illinois Rules of Evidence, hearsay regarding the declarant's state of mind was admissible "when the declarant is unavailable to testify, there is a reasonable probability that the proffered hearsay statements are truthful, and the statements are relevant to a material issue in the case." *Caffey*, 205 Ill. 2d at 91.

¶ 27 But the Illinois Rules of Evidence eliminated the requirements of witness unavailability and reasonable probability of truthfulness. See Ill. R. Evid. 803(c) Committee Commentary ("Rule 803(3) eliminates the requirements currently existing in Illinois law, that do not exist in

any other jurisdiction, with respect to statements of then existing mental, emotional, or physical condition, that the statement be made by a declarant found unavailable to testify, and that the trial court find that there is a 'reasonable probability' that the statement is truthful."). Instead, under the Illinois Rules of Evidence, "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plant, motive, design, mental feeling, pain, and bodily health)" is not excluded by the hearsay rule, regardless of witness availability or the reliability of the out-of-court statement. Ill. R. Evid. 803(3) (eff. Apr. 26, 2012).

¶ 28 So the court's finding that the statement was "reliable," and John's argument on appeal to contrary, are beside the point. Still, we may uphold a trial court's evidentiary ruling on any ground in the record, even if we disagree with the trial court's stated basis. *Kimble v. Earle M. Jorgenson Co.*, 358 Ill. App. 3d 400, 408 (2005). So the question is whether the challenged statement was properly admitted under Illinois Rule of Evidence 803(3) (eff. Apr. 26, 2012) as a state-of-mind exception to the hearsay prohibition.

¶ 29 We find no abuse of discretion in admitting this testimony. The children's statement that "they have to leave" could reasonably be construed as an explanation of their current state of mind, their "motivation[] at the time of the utterance." *People v. Munoz*, 398 Ill. App. 3d 455, 479 (2010). The children weren't leaving because they were bored or unhappy or because of some voluntary decision, but because they believed that they "had" to. We cannot say that no reasonable person would agree with the admission of this testimony under the state-of-mind exception to the hearsay rule, and thus no abuse of discretion occurred.

¶ 30 The other testimony that John cites as inadmissible hearsay took place during the examination of Tamara:

MR. ROSENFELD [Tamara's attorney]: Tammy, why do you agree that they can leave?

TAMARA: They've received a text from their father.

MR. KAFOGLIS [John's attorney]: Objection. Hearsay.

¶ 31 The court overruled the objection because "[s]he hasn't testified about what's in it, the content."

¶ 32 We agree with the trial court and Tamara that this testimony did not elicit hearsay in the first instance. Tamara did not testify to any out-of-court "statement," any "oral or written assertion." Ill. R. Evid. 801(a) (eff. Oct. 15, 2015) (defining "hearsay"). She merely testified to a sequence of events that happened routinely during visitation—the children receive a text from their father, so she lets them leave. Was there an inference there, as John argues, that the text message contained some direction to the children to leave? Certainly. But that doesn't make it hearsay. No oral or written assertion was introduced for the purpose of proving the truth of that assertion. No hearsay was elicited.

¶ 33 John also argues that Tamara couldn't have known that the text came from John unless she had relied on the children's hearsay statement telling her so (presumably something along the lines of "I just got a text from Dad"). Again, that may be true, but it doesn't convert anything Tamara said into hearsay. If anything, that would speak to the foundation for Tamara's testimony—how it was that she knew the text messages came from John. But John did not object on foundational grounds in the trial court. He only objected that it was hearsay. And it was not, because no out-of-court statement was elicited.

¶ 34 We find no error in either evidentiary ruling.

¶ 35 II. Sufficiency of Evidence

¶ 36 John challenges the trial court's finding of indirect civil contempt. Generally, a party commits indirect civil contempt when he or she violates a court order through conduct outside

the court's presence. *In re Marriage of Knoll and Coyne*, 2016 IL App (1st) 152494, ¶ 50. The burden initially falls on the petitioner to show, by a preponderance of the evidence, that the alleged contemnor has violated the court order. *Id*. If so established, the burden shifts to the contemnor to show that the violation was not willful. *Id*. Ultimately, a finding of " 'willful disobedience of a court order' " is necessary to a finding of indirect civil contempt. *Id*. (quoting *In re Marriage of McCormick*, 2013 IL App (2d) 120100, ¶ 17).

¶ 37 John argues that the court's finding of contempt is against the manifest weight of the evidence. Whether a party is guilty of contempt is a question of fact for the trial court, and we will not disturb the trial court's determination "unless it is against the manifest weight of the evidence or the record reflects an abuse of discretion." *Marriage of McCormick*, 2013 IL App (2d) 120100, ¶ 17. A decision is against the manifest weight of the evidence if "the opposite conclusion is clearly evident" or the court's findings are "unreasonable, arbitrary, and not based on any of the evidence." *In re Marriage of Demaret*, 2012 IL App (1st) 111916, ¶ 43.

¶ 38 The trial court made two findings critical to its decision to find John in indirect civil contempt: John terminated parenting time early, and John failed to allow Tamara her summer parenting time. Specifically:

> "John has violated the parties' Allocation Judgment that was entered on November 15, 2016 in that he failed and by his actions refused to allow Tammy her regular and summer parenting time since June 2017 to date of hearing with the exception of two overnights, and even during her regular parenting time failed to allow her to have the complete time required by the Judgment."

¶ 39 Either of these findings, alone, is sufficient to support a contempt finding, as either would constitute a violation of the allocation judgment alleged in Tamara's petition for a rule to show cause.

¶ 40 We first note that John does not make any argument with respect to the court's finding that he denied Tamara summer visitation time. As such, any claimed error on this finding of fact is forfeited. Ill. S. Ct. R. 341(h)(7) (eff. May 25, 2018) (points not raised on appeal are deemed forfeited). In any event, the trial court's finding on this issue was not against the manifest weight of the evidence. At a minimum, the parties agreed that Monday was supposed to be a summer visitation day. John said she got the children on Mondays; she said she got "some Mondays" but not the bulk of them. The trial court believed Tamara. That finding, alone, would be sufficient to support the trial court's finding of indirect civil contempt.

¶ 41 John does, however, challenge the first finding—that he controlled the start and end times for the visitation. He begins by arguing that "there was no evidence or testimony as to the specific dates and times that the visitation was cut short, nor was there any evidence or testimony as to the number of hours it was shortened."

¶ 42 True, no one testified to every single date, every precise hour. But the evidence showed that nearly every Saturday visitation—regular or overnight—was terminated at 3 p.m. There was some testimony about specific dates. For example, Tamara testified that on certain dates, she did allow the kids to leave early. While not exactly precise, every witness testified that Saturday visitations ended at around 3 p.m. We believe that sufficient evidence was introduced about those dates and times when visitation was cut short.

¶ 43 In his brief, John says his "argument can be summed up in one concept: John cannot be held in contempt of court for the actions or inactions, of Tamara or the children." John's problem

is the trial court found that the children left early because John controlled when visitation ended, not because of Tamara or the children's actions. Both parties acknowledge that a custodial parent cannot deny the other their visitation rights "merely because his or her children do not desire to visit the noncustodial parent." *In re Marriage of Charous*, 368 Ill. App. 3d 99, 111 (2006). "Where a dissolution judgment places the ultimate responsibility for compliance with the visitation provisions upon the custodial parent, the custodial parent cannot escape his or her duty to comply with the visitation provisions by 'attempting to shift this burden to the discretion of [his or] her children.' " *Id*. at 111-12 (quoting *Doggett v. Doggett*, 51 Ill. App. 3d 868, 872 (1977)).

¶ 44 John attempts to distinguish *Charous* because here, the allocation judgment did not specifically place the ultimate responsibility for compliance on him. In *Charous*, the allocation judgment required the mother "to have the 'children prepared [for visitation] with the appropriate clothing and times the children will need to take with them' and to have the children 'ready to leave promptly at the scheduled time.' " *Id*. at 112. The court found the mother failed to meet those obligations. *Id*. In contrast, here, John notes, the allocation judgment does not contain these specific obligations.

¶ 45 But we do not find this holding in *Charous* particularly pertinent to this case. There was conflicting testimony about whether John properly prepared the children for visitation, but that was *not* the basis of the court's ruling. Instead, the court premised its finding on the fact that "[p]arenting time terminates because the children say they have to leave. They say they have to leave because John dictates the end time for parenting time with Tammy."

¶ 46 This finding of fact is entitled to great deference under our standard of review. *Hoxha v. LaSalle Nat. Bank*, 365 Ill. App. 3d 80, 84 (2006). We must be "mindful that '[a] reviewing court

may not overturn a judgment merely because the reviewing court might disagree with the judgment, or, had the reviewing court been the trier of fact, might have come to a different conclusion.' " *In re Marriage of Matchen*, 372 Ill. App. 3d 937, 946 (2007) (quoting *People v. A Parcel of Property Commonly Known as 1945 North 31st Street, Decatur, Macon County, Illinois*, 217 Ill. 2d 481, 510 (2005)).

¶ 47 While we wouldn't say that the evidence supporting the trial court's finding was overwhelming, there is no question that there was sufficient evidence to support the court's finding. Most of it came from Wilson, who had supervised the visits for over five years and whom the trial court found to be "to be impartial and not biased, and truthful." Wilson clearly testified that John, not Tamara (or Wilson herself), was in control of the visitation schedule:

> "MR. ROSENFELD: Okay. Now, Kate, are you aware of the schedule in which the children are supposed to be with their mother?
>
> KATE WILSON: Yes.
>
> Q: And has that schedule been followed?
>
> A: No.
>
> Q: Kate, who sets up the dates for the times that the children come and go?
>
> A: John.
>
> Q: John Koepke?
>
> A: Yes.
>
> Q: And he sets them up with you how?
>
> A: Through text messages.
>
> Q: Any other way?
>
> A: No.

***

MR. ROSENFELD: Now, Kate, has Tammy ever set the schedule for the children?

KATE WILSON: No.

Q: Have you seen the children come for visitation time with their mom and parenting time and leave early?

A: Yes.

Q: Is that because Tammy wants them to leave early?

A: No."

¶ 48 We couple that, of course, with the testimony we discussed above, which John challenged on hearsay grounds but which we found was properly admitted. Wilson said that the children would simply announce that they had to leave, and Tamara testified that they left when they received text messages from their father, and she let them go so John wouldn't punish them.

¶ 49 And while John claimed that he had nothing to do with his children leaving visitations early, the trial court did not believe him. The court found John "evasive and combative" and not "particularly truthful or credible." We must defer to these credibility findings by the trial court, which is in a far superior position to make such determinations. *In re Marriage of Petraitis*, 263 Ill. App. 3d 1022, 1035 (1993). Between Wilson's and Tamara's testimony, the court was left with the distinct impression that John dictated the visitation schedule, that John was responsible for the children cutting their visitations short, and thus that John willfully violated the allocation judgment. The evidence supported that determination.

¶ 50 The principal point of contention on appeal is those text messages that John supposedly sent to his children, instructing them to cut visitation short. Neither Wilson nor Tamara claimed to have read those text messages. And the court and the parties, at least initially, were strongly

opposed to hauling in the children to testify on this question. (Later, John's counsel seemed to change his tune on that point, after the challenged hearsay testimony was admitted.)

¶ 51 So it is true, as John points out, that we don't have definitive proof as to what those text messages said. But does the absence of that evidence fall on the trial court's shoulders or on John's? After all, as we noted above and as even John acknowledges, once the court found that Tamara had proven a violation of the court order by a preponderance of the evidence and issued a rule to show cause against John, it was *John's* burden to prove that he did not willfully violate the court's order. See *Marriage of Knoll and Coyne*, 2016 IL App (1st) 152494, ¶ 50; *Marriage of McCormick*, 2013 IL App (2d) 120100, ¶ 17.

¶ 52 Yes, John's counsel did broach the subject of bringing in the children to testify, which the court strongly opposed for the children's sake. But John could have introduced his *own* text messages as part of his case-in-chief or even in rebuttal; he could have disclosed any and all text communications with his children on the relevant dates. Or in lieu of calling the children to testify, he could have produced his *children's* text messages. One would think that if a party were accused of sending text messages that directed his children to violate a visitation schedule, the easiest way in the world to disprove that assertion would be to show those text messages (or prove the lack thereof) to the court. John did not do that.

¶ 53 We thus have no basis to overturn the trial court's finding of a willful violation of the court's allocation judgment. We can't say that the "the opposite conclusion is clearly evident" or that the court's finding on this point was "unreasonable, arbitrary, and not based on any of the evidence." *Demaret*, 2012 IL App (1st) 111916, ¶ 43.

¶ 54 III. Purge Provision

¶ 55 John's final argument is that the order contains an improper purge provision. "Because [civil contempt] is intended to compel the contemnor to comply with the underlying court order in the future, the contemnor must be able to avoid or purge himself by complying with the terms of the underlying order." *In re Marriage of Pavlovich*, 2019 IL App (1st) 172859, ¶ 29. John likens this case to *Marriage of Knoll and Coyne*, 2016 IL App (1st) 152494. There, the trial court held the non-custodial parent in contempt for failure to allow visitation and required "the parties [to] immediately determine a make-up parenting time schedule" for the missed parenting time. *Id*. ¶ 40.

¶ 56 On appeal, this court found the purge provision improper, as it required the ex-husband's participation in order for the ex-wife to purge contempt. *Id*. ¶ 58. Because the other party could single-handedly prevent purging contempt, the court found that the purge was not proper because it did not give the contemnor "the keys to [her] cell." *Id*.; see *Bank of America, N.A. v. Freed*, 2012 IL App (1st) 113178, ¶ 44 (requiring third party to make recommendation appeared to "take the keys out of the defendants' hands and give them to the receiver, for even if defendants cooperate with the receiver, the contempt will not be purged until the receiver determines that his investigation is complete and makes a report and recommendation to the court").

¶ 57 The order in this case does not suffer from the same defect. Here, the order simply provides: "John shall purge himself of the indirect civil contempt by allowing Tammy make-up parenting time beginning upon the entry of this order; the make-up parenting time shall be completed by August 31, 2018." All John has to do is provide make-up time by August 31, 2018. But according to John, Tamara's "participation is a necessary prerequisite to establishing a

make-up parenting time schedule." We do not agree and, in fact, this brings us to the distinction between this case and *Knoll*.

¶ 58 In *Knoll*, 2016 IL App (1st) 152494, ¶ 57, the purge provision left it entirely up to the parties—both the contemnor and her ex-husband—to work out a schedule for make-up parenting time, placing the ex-husband in a position to frustrate the contemnor's attempt to purge. Here, in contrast, the contempt order provides that "this matter is set for status of the make-up parenting time schedule on a future date agreed by all parties by separate order." So it is not solely up to the parties here to figure out the make-up schedule. The court gave them the *first* opportunity to figure out a schedule, which strikes us as a perfectly sensible initial step; John and Tamara are in a far better position than the trial court to work out a schedule that the court would then approve. But the obvious point of the status hearing is to ensure that a schedule has been put in place and, if it has not—if the parties can't agree on a schedule—the trial court would have to intervene to set the schedule.

¶ 59 And once that schedule is in place, John truly will hold the keys to his cell. He will simply be required to comply with a court-approved visitation schedule. *Knoll* is thus distinguishable and does not compel a different result. We find nothing improper in this purge provision.

¶ 60 CONCLUSION

¶ 61 For the reasons stated, we affirm the circuit court's judgment.

¶ 62 Affirmed.