2019 IL App (3d) 180022-U

Order filed January 3, 2019

IN THE

APPELLATE COURT OF ILLINOIS

THIRD DISTRICT

2019

GABRIELA BENWAY,	)	Appeal from the Circuit Court
	)	of the 14th Judicial Circuit,
Petitioner-Appellee,	)	Rock Island County, Illinois.
	)	
v.	)	Appeal No. 3-18-0022
	)	Circuit No. 17-OP-983
	)	
IDA McRAE,	)	Honorable
	)	Gregory G. Chickris,
Respondent-Appellant.	)	Judge, Presiding.

JUSTICE O'BRIEN delivered the judgment of the court.
Justice Carter concurred in the judgment,
Justice Holdridge specially concurred.

ORDER

¶ 1 *Held*: A trial court order granting the petitioner a two-year plenary Stalking No Contact Order was upheld on appeal because the trial court's decision was not against the manifest weight of the evidence and there was no denial of due process.

¶ 2 The respondent, Ida McRae, appealed a two-year plenary order of protection that was granted in favor of the petitioner, Gabriela Benway.

¶ 3 FACTS

¶ 4 The petitioner filed a verified petition on October 13, 2017, seeking a Stalking No Contact Order against the respondent. The petition alleged that the respondent had been calling the petitioner on different days and from different numbers, was stalking the petitioner at work and following her after work, and had used her position as an employee for the government to obtain the petitioner's new telephone number. The petition further alleged that the respondent had called and said that she would have people come to shoot the petitioner's kids, house, and car. The trial court entered an emergency Stalking No Contact Order.

¶ 5 On October 26, 2017, the parties appeared *pro se* for a hearing on the entry of a plenary order of protection. The petitioner testified that the respondent was constantly calling her, following her on Facebook, stalking her, harassing her, and threatening her kids if she did not stop talking to the father of one of the respondent's children, Earnest Bea. The petitioner testified that it first started in April 2016, when the respondent called the petitioner and told the petitioner to stop having contact with Bea or something would happen to the petitioner's children. The respondent had been constantly contacting her since then and two weeks before the hearing, had threatened to have the petitioner's children shot. The petitioner and Bea worked together, and the respondent had threatened the petitioner 5 to 10 times while dropping Bea off at work. The petitioner testified that she had been seeing Bea on her days off. Once, the petitioner reported her problem with the respondent to security at her place of employment. The petitioner played a phone recording for the court, testifying that it was the respondent calling from a restricted number the prior week. The respondent objected to the recording, arguing that it was not her voice on the recording.

¶ 6 Bea accompanied the respondent to court for the hearing, and the trial court called him as a witness. Bea testified that he and the respondent had a three-year old child and that he lived

between his parents' home and the respondent's home. Bea testified that he would go out for drinks with the petitioner and had sex with her a handful of times. Bea had observed the respondent harassing the petitioner on two occasions. One of two incidents was when the respondent came to the petitioner's job and harassed her, and the petitioner contacted security. Bea was notified by security. Bea testified that the respondent had never threatened the petitioner in front of him.

¶ 7 The respondent testified that the petitioner called the respondent's place of employment in May 2016 and the respondent was placed on desk duty while the complaint was investigated. In September 2016, the petitioner called the respondent's employer again.

¶ 8 The trial court granted the plenary order of protection. The court found that Bea had corroborated the testimony of the petitioner concerning at least two incidents of harassment by the respondent to the petitioner. The court also found that the voice on the petitioner's recording, threatening the petitioner, was the respondent. The court weighed the credibility of the parties and found that the petitioner was telling the truth. The respondent's motion for reconsideration was denied, and she appealed.

¶ 9 ANALYSIS

¶ 10 The respondent alleges that the trial court committed prejudicial error by *sua sponte* calling Bea as its own witness and relying upon Bea's testimony in granting the plenary order of protection. The respondent acknowledges that she did not object at trial and seeks review pursuant to the plain error doctrine.

¶ 11 Generally, an issue that was not objected to during trial or raised in a posttrial motion is forfeited on appeal. *In re Tamesha T.*, 2014 IL App (1st) 132986, ¶ 25. However, application of the forfeiture rule is less rigid when the basis of the objection is the trial court's conduct. *Id.*; see

also *People v. Davis*, 185 Ill. 2d 317 (1998); *In re Maher*, 314 Ill. App. 3d 1088 (2000). Thus, in light of the fact that the petitioner did not file a responsive brief, we will find that there was no forfeiture and review the issue on its merits.

¶ 12 A court may, on its own motion, call witnesses, and it may interrogate witnesses, whether called by itself or by a party. Ill. R. Evid. 614(b) (eff. Jan. 1, 2011). A trial court may question witnesses to elicit truth, clarify ambiguities in the witnesses' testimony, or shed light on material issues. *In re N.T.*, 2015 IL App (1st) 142391, ¶ 42. In a bench trial, where the trial judge is the fact-finder, a trial judge is given wider latitude in examining witnesses. *In re Tamesha T.*, 2014 IL App (1st) 132986, ¶ 26. However, the trial court must still function as the judge and be careful not to become an advocate for either party. *Id.* We review the propriety of the trial court's calling Bea as a witness and questioning him for an abuse of discretion. *In re N.T.*, 2015 IL App (1st) 142391, ¶ 41.

¶ 13 In this case, while it may have been unusual for Bea to be present in the courtroom, we find no abuse of discretion in the trial court calling him as a witness and questioning him. Since he was in court with the respondent, she cannot claim any surprise. In addition, Bea was sworn as a witness, questioned by the court, and both parties were given the opportunity to cross-examine him. The trial judge was functioning as a judge and was not an advocate for either party.

¶ 14 The respondent also contends that the trial court erred in considering the phone recording offered by the petitioner. A determination of the admissibility of evidence is in the sound discretion of the trial court and will not be reversed on appeal absent an abuse of discretion. *People v. Pikes*, 2013 IL 115171, ¶ 12.

¶ 15 The foundation for admission of an audio recording may be provided one of two ways: a witness can authenticate the contents of the recording based on what she personally saw or heard or authenticate the workings of the device and process that produced the recording. *People v. Dennis*, 2011 IL App (5th) 090346, ¶ 22; see also Ill. R. Evid. 901 (eff. Jan. 1, 2011) (Authentication of a voice recording can be by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker). In this case, the petitioner testified that the audio recording was made on her cell phone the prior week and opined that the voice was the respondent's voice, thereby authenticating the recording. The respondent did not object to the contents of the recording; she only objected that it was not her voice on the recording. The trial court made the finding that the voice on the recording was the respondent's voice. We find no abuse of discretion in the admission of the audio recording.

¶ 16 Lastly, the respondent argues that there was not credible evidence to support the plenary order of protection and that the trial court showed a bias toward her such that she was denied due process. The Stalking No Contact Order Act allows a victim of stalking to seek a civil remedy requiring a person to stay away from the victim and protected third parties. 740 ILCS 21/5 (West 2016). "Stalking" is defined as "engaging in a course of conduct directed at a specific person, and [the stalker] knows or should know that this course of conduct would cause a reasonable person to fear for his or her safety *** or suffer emotional distress." *Id.* § 10. A course of conduct requires there to be two or more acts. *Id.* A petitioner is required to prove stalking by a preponderance of the evidence. *Id.* § 30. The focus is on whether the stalker's behavior would cause a reasonable person to be fearful for her safety or to suffer emotional distress. *Piester v. Escobar*, 2015 IL App (3d) 140457, ¶ 12. We will not reverse a trial court's decision to issue a Stalking No Contact Order unless it is against the manifest weight of the evidence. *Id.*

¶ 17 After reviewing the record, we find that the trial court's decision was not against the manifest weight of the evidence, nor was there a denial of due process. The trial court listened to the testimony and determined that the petitioner was more credible and that she proved stalking by a preponderance of the evidence. See *In re Marriage of Marshall*, 278 Ill. App. 3d 1071, 1078-79 (1996) (credibility determinations, the weight to be given to testimony, and the reasonable inferences to be drawn from the evidence are for the trier of fact).

¶ 18 CONCLUSION

¶ 19 The judgment of the circuit court of Rock Island County is affirmed.

¶ 20 Affirmed.

¶ 21 JUSTICE HOLDRIDGE, specially concurring:

¶ 22 I concur in the result in this case. However, I take issue with the majority's analysis. The appellant argues in her brief that this court should conduct a plain-error analysis in regard to her forfeited claim. I agree. The fact that the appellee did not file a responsive brief in this case does not alleviate this court from deciding the issue presented by the appellant. As the United States Supreme Court explained:

> "In our adversary system, in both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decision and assign to courts the role of neutral arbiter of matters the parties present. *** [A]s a general rule, our adversary system is designed around the premise that the parties know what is best for them, and are responsible for advancing the facts and arguments entitling them to relief." (Internal quotation marks omitted.) Greenlaw v. United States, 544 U.S. 237, 243-44 (2008).

¶ 23 Thus, I believe the better practice would be to decide this case under a plain-error analysis. Nonetheless, I would conclude that no error occurred, as explained by the majority.