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IN THE COURT OF APPEALS OF NORTH CAROLINA

2021-NCCOA-505

No. COA20-856

Filed 21 September 2021

Macon County, No. 20 CVD 478

KELSEY HAHN, Plaintiff

v.

AUSTIN LEE HAHN, Defendant

Appeal by Defendant from Order entered 8 September 2020 by Judge Thomas G. Foster, Jr., in Macon County District Court. Heard in the Court of Appeals 12 May 2021.

McKinney Law Firm, P.A., by Zeyland G. McKinney, Jr., for defendant-appellant.

No brief filed on behalf of plaintiff-appellee.

HAMPSON, Judge.

Factual and Procedural Background

¶ 1 Austin Lee Hahn (Defendant) appeals from a Domestic Violence Protective Order (DVPO) entered against him in Macon County District Court, which ordered Defendant not to commit or threaten to commit any further acts of domestic violence

and to have no contact with Kelsey Hahn (Plaintiff) effective until 3 September 2021.[1] We note that it appears when the trial court heard this case it was tasked with deciding two separate matters in two separate files: (1) the file with the DVPO case presently before us; and (2) a separate child custody file in which Plaintiff asked the trial court to invoke its temporary emergency jurisdiction under N.C. Gen. Stat. § 50A-204 to award her temporary emergency custody of the parties' minor children pending further litigation between the parties either in North Carolina or Georgia, where the parties and their children were residing prior to the events giving rise to this case. It further appears at the conclusion of the hearing, the trial court directed entry of two separate orders: the DVPO and a separate order addressing child custody. Indeed, the DVPO itself makes no provision whatsoever for custody of the children.[2] Moreover, the Record before us contains none of the child custody file–including specifically any child custody orders. Finally, in this appeal, Defendant has not appealed from or presented any argument related to any child custody orders.

¶ 2 As such, we limit our focus solely to the Record of the DVPO proceeding before us as it relates to these two parties and the specific arguments raised by Defendant,

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[1] Any expiration of the DVPO during the pendency of an appeal, however, does not render this appeal moot. *Rudder v. Rudder*, 234 N.C. App. 173, 177, 759 S.E.2d 321, 325 (2014).

[2] For example, there are no findings, conclusions, or orders in the "Temporary Child Custody Addendum to Domestic Violence Protective Order" addended to the DVPO form and the DVPO does not expressly bar Defendant from contact with the children.

and refrain from addressing the merits of any invocation of the trial court's emergency temporary jurisdiction to decide child custody issues. Thus, with respect to the DVPO only, the Record on appeal tends to reflect the following:

¶ 3 On 24 August 2020, Plaintiff filed a Complaint and Motion for Domestic Violence Protective Order alleging Defendant—her spouse—placed Plaintiff and members of Plaintiff's family in fear of imminent serious bodily injury or in fear of continued harassment rising to the level as to inflict substantial emotional distress, and, further, had placed the parties' children in fear of substantial bodily injury or in fear of continued harassment rising to the level as to inflict substantial emotional distress. On 26 August 2020, the trial court entered an *Ex Parte* Domestic Violence Protective Order effective until 2 September 2020.

¶ 4 On 3 September 2020, the matter returned for a full hearing before the trial court on issuance of the DVPO. At this hearing, the trial court heard testimony from Plaintiff; Plaintiff's cousin, Olivia Rowland (Rowland); Plaintiff's grandfather, George Andrew Shields (Shields); and Defendant.

Plaintiff's Testimony

¶ 5 Plaintiff testified on 21 August 2020, Plaintiff drove from the home she shared with Defendant in Alto, Georgia, to attend her sister's wedding at "Cat Creek Lodge" in Franklin, North Carolina. Plaintiff brought the couple's two very young children—aged 3 and 1 at the time—along to the wedding, while Defendant chose to stay at

home. Plaintiff "made the decision to separate" from Defendant that day, seeing "[her] sister's wedding []as a good opportunity for [her] to leave." Plaintiff explained she "was done" with her marriage "[b]ecause of actions that [she] ha[d] endured [from Defendant], especially during the week leading up to [her] sister's wedding." Plaintiff testified that between 17 and 21 August 2020,

> [Defendant] would have acts of anger daily towards me and the children through verbal profanities, screaming at them in our faces and slamming doors in our faces, and throwing objects around the house, and his bouts of anger.
>
> . . . .
>
> He would scream at the kids for being upset. If they were tired and whiney, he would scream at them for being too loud and hurting his head and making him uneasy.

¶ 6 According to Plaintiff, Defendant "would talk about punting [their] son across the room as if he were a football and throat punching [the children] if they would not stop crying[,]" which Plaintiff asserted was not said in jest. Plaintiff testified Defendant had consistently behaved this way previously, and that because of Defendant's behavior, their son would cry while "[their] daughter would cower away from [Defendant] and try to hide behind furniture." Defendant "ha[d] [also] said . . . that whenever he hears the children screaming and crying, it makes him want to kill himself[,]" and would "threaten to smack the s--t out of [the children] if they would not quiet down and if they would not stop screaming and crying and running around."

¶ 7 Plaintiff testified Defendant, in addition to "com[ing] at the children, screaming profanities[,] . . . would [also] come at [her] because[,]" she claimed, of her parenting style. Defendant would argue with her over "the way that [Plaintiff] care[d] for the children[,] [t]hat [she] [was] not forcible with them[,]" and "[t]hat she [was] a bad wife and mom." Defendant's actions made her feel "[a]fraid that he would get so angry to a point of acting on the anger in a more physical manner[,]" and she had had reason to believe Defendant "would act in that manner[.]"

¶ 8 Plaintiff testified Defendant at the time owned eighteen firearms and would carry a firearm "[i]n his truck" and on his person; to Plaintiff's knowledge, Defendant did not have a "carry concealed permit." Nonetheless, Plaintiff testified Defendant had never threatened to use a firearm against her or the children, had never laid his hands on her or had committed "any act of physical violence against [her] or th[e] children[,]" or, during the timeframe at issue, had ever made Plaintiff feel like he would assault her. When asked, on cross-examination, whether Defendant had been good to her and their children, Plaintiff replied: "No . . . . [He] manipulates the way . . . I think and feel about myself, and the job that I do as a mom[,] . . . [a]nd he scares my children."

¶ 9 On 21 August 2020, once Plaintiff arrived at Cat Creek Lodge for her sister's wedding, she was given a unique code to get in and out of the building. According to Plaintiff, after she left Georgia, she and Defendant communicated via phone calls and

text messages on Plaintiff's phone. During these communications, Defendant "[d]emand[ed] that [she] bring the kids home and threaten[ed] that he would come and take them." At some point, Defendant, via phone call, "demand[ed] for [Plaintiff] to come home with the children, and [Plaintiff] told him [she] was not." Defendant had apparently tried calling Plaintiff multiple times on 21 August 2020, and Plaintiff answered after "a couple of times" because Plaintiff had been asleep. At some other point, Defendant also told Plaintiff "he hope[d] that [she] would enjoy [her] life because [she] ha[d] ended his." According to Plaintiff, this comment made her fear "[Defendant] would end his life."

¶ 10 On Saturday, 22 August 2020, the day of Plaintiff's sister's wedding, Defendant sent Plaintiff "[a] text demanding that [she] would have the children and [her]self home by 7:00 that night." There were no further communications that day between Plaintiff and Defendant.

¶ 11 At "about midnight" the evening of 22 August 2020, Defendant "showed up" at Cat Creek Lodge and, according to Plaintiff, "somehow gained access through the locked doors . . . ." When Defendant arrived, Plaintiff was in her sister's room, and she could hear Defendant enter another room, reserved under Plaintiff's name, and "bang[] on doors." At that moment, the children were not at Cat Creek Lodge, but were with Plaintiff's aunt and uncle. At Cat Creek Lodge, Plaintiff's brother-in-law walked out into the hallway "to see what all the commotion was[.]"

¶ 12 According to Plaintiff's testimony, after Plaintiff's sister and brother-in-law "left to see where possibly [Defendant] was going[,]" Plaintiff stayed behind with her cousin, Rowland, and then "loaded up in [Rowland's] car, and . . . went to where [the] children were staying" because Plaintiff "was afraid [Defendant] was going to try to take them." Plaintiff was also concerned Defendant "would harm any persons that was [sic] in his way of getting to [the] children[,]" particularly her aunt and uncle, "who had [the] children for the night," and "[t]hat in his rage and anger . . . [Defendant] would take [the children] to where [Plaintiff] would not be able to find them, and they would possibly be hurt in his craze." When asked if she was afraid for her own welfare at that moment, Plaintiff replied: "No."

¶ 13 When she drove away, Plaintiff "left [her] phone at Cat Creek [Lodge] in [her] haste to get to where [her] children were." Plaintiff retrieved her phone the next day to find "multiple missed calls" from Defendant, as well as three or more voicemails. In these voicemails, Defendant "would be pleading with [Plaintiff] to give him the kids, to let him see the kids, and there [wa]s a lot that [she] could not make out because of his frantic state." Defendant was "hyperventilating, hard breathing, [and] sobbing" in these voicemails.

¶ 14 On 23 August 2020, Plaintiff told Defendant she was leaving him. It was only then that Plaintiff also informed her family members of her intentions to leave Defendant. Plaintiff expressed concern over the possibility of Defendant learning

where she was residing at the time of the hearing, fearing Defendant "would show up and forcibly try to take [the children]," and "[t]hat [Plaintiff] or [her] family members who would stand in his way be harmed . . . in his advance to take the children."

Rowland's Testimony

¶ 15 Rowland—Plaintiff's 21-year-old cousin—also testified to what happened at Cat Creek Lodge on the evening of 22 August 2020. According to Rowland, when Defendant arrived at Cat Creek Lodge, he entered Rowland's room, which she shared with Plaintiff. At that moment, Rowland was alone and getting ready for bed after having showered. Defendant was able to access her room because she "had left it open not thinking that anyone was going to barge in other than [Plaintiff]." Upon Defendant's entrance, Rowland became "very taken aback and freaked out because of his state[.]" Rowland further testified:

> Q. Describe [Defendant]'s appearance when you first saw him.
>
> A. He was wide-eyed and shaking -- his voice was shaking. He was shaking. He had a stone in his hand.
>
> Q. Okay. Can you describe his demeanor, such as did he seem happy, sad, angry, whatever?
>
> A. He seemed very angry and upset.
>
> Q. And what drew you to believe he was angry?
>
> A. When he started speaking to me, he was cussing, raising his voice. His voice was shaky, like I said. It was quite obvious that he was upset.
>
> Q. When he first entered the room, how far apart were the two of you from each other?
>
> A. I would say about three f[ee]t.

¶ 16 Defendant asked Rowland where Plaintiff and the children were, to which Rowland replied, "I don't know." Defendant asked Rowland again and noted "that all of [Plaintiff]'s stuff was around the room, so he knew that [Rowland] knew where [Plaintiff] was." Throughout this encounter, Rowland claimed Defendant was "[y]elling" at her, which made her feel "[a]fraid" due to "his temper." "I was just scared," she claimed, "and that's why I also kept saying I didn't know where [Plaintiff] was because I was afraid if he found her, that it would go downhill." According to Rowland, this was the first time she had witnessed Defendant behave this way. Rowland also did not know at that time that Plaintiff intended to separate from Defendant.

¶ 17 Shortly thereafter, Defendant "walked out of the room to go look for [Plaintiff][.]" While Defendant was out of her room, Rowland sent Plaintiff a text message, but did not receive a reply. Then Rowland called Plaintiff's sister "[t]o let them know that [Defendant] had somehow gotten into Cat Creek and heads up that he was pissed." Defendant returned to Rowland's room a few minutes later, where his demeanor was "[t]he same thing, very upset, shaking voice, hands shaking, still on the phone, yelling, repeating the same questions -- where is [Plaintiff], where are the kids?" Defendant "shoved past [Rowland] to look into the bathroom, and then he left out a second time[.]" Rowland described this physical altercation as follows:

> A. He walked closer to me than the three feet [Defendant had previously maintained during] the initial interaction, and then, you know, enough to get me out of the way, knocked me towards the bed.
>
> Q. He put his hands on you?
>
> A. Yeah. Yes.
>
> . . . .
>
> A. . . . . It was enough to move me out of the way and knock me back onto the bed.

¶ 18 Rowland then told Defendant the children "had gone to stay with Aunt Katherine and Uncle Tyler." Throughout this second encounter, Rowland had remained on the phone with Plaintiff's sister. After Defendant exited a second time, Plaintiff's sister told Rowland to "shut the door and lock it." When Rowland went to close the door, she "felt force on the other side, but [she] caught it and . . . shut it. Then [Defendant] said don't you close this GD door."

¶ 19 Rowland testified that at that moment she felt "[s]cared" about "[Defendant] making it back into the room or making it into some[one] else's room." After that, Rowland could hear "banging on doors . . . ." She deduced it was Defendant making the noise, as opposed to anyone else at Cat Creek Lodge, because "[e]veryone else was tucked away in their rooms ready for bed. This was all occurring around midnight, so [they] had all had a long day." There were no further interactions between Defendant and Rowland.

¶ 20 Rowland shared this experience—that Defendant "came in and was very upset, angry, yelling, asking where [Plaintiff and the children] were[,] [w]alked out, came back in, asking the same questions, shoved me out of the way to look around the room, walked back out, I locked the door"—with Plaintiff, Rowland's stepmother, Rowland's father, and Rowland's grandmother. On cross-examination, Rowland testified Defendant did not "threaten [her] in any way to do [her] harm or assault [her] or threaten [her] in any way[.]"

Shields's Testimony

¶ 21 At "[a]pproximately[] 1:30 in the morning" on Sunday, 23 August 2020, Shields, Plaintiff's grandfather and Chief Deputy with the Macon County Sheriff's Office, "observed a vehicle pulling into [his] driveway." Shields "went outside immediately and confronted the individual that turned out to be [Defendant]." According to Shields, Defendant "was crying[,] . . . ranting, and . . . got down on the ground." Shields further testified: "[Defendant] was upset. He said that he had lost his wife, and that she wouldn't talk to him. Basically, repeated that narrative back and forth . . . . He was just very upset. He couldn't find his wife, and he said he had lost his wife." Shields claimed he had never before witnessed Defendant acting in this manner. Although Shields was not expecting Defendant in the early morning hours of 23 August 2020, he had been made aware of the events that had taken place at Cat Creek Lodge a few hours prior.

¶ 22 Shields testified Defendant said Shields's home was "the only place [Defendant] knew to go[,]" which Shields understood to mean "he came to [his] house looking for his wife . . . ." In Shields's words: "I don't think he came just to visit at 1:30 in the morning. So I think he came to my house thinking that [Plaintiff] would be there. I don't know that for a fact."

¶ 23 During his interaction with Defendant, Shields was concerned Defendant was armed, because "[Defendant] ha[d] come to [Shields's] house armed before[,] [s]o there [wa]s always that possibility that [Defendant] could come armed again." Shields did not feel threatened by Defendant but was also "not happy" about the situation. Shields then "encouraged [Defendant] that he needed to go home. That driving around Macon County at 1:30 in the morning and going up to people's houses [wa]s not going to help anybody." Eventually, Defendant left.

Defendant's Testimony

¶ 24 Defendant testified about his home life:

> Q. There's been some allegations here made about mistreatment of your children by you. Have you ever mistreated your children?
>
> A. I mean, I've scolded them for doing something. I've come inside and seen them standing on tables, slinging stuff around, and, you know, discipline them accordingly.
>
> Q. Have you ever physically abused any one of your children?
>
> A. If you call popping them on the butt abuse, maybe.
>
> Q. That's all you've ever done?
>
> A. Yes. I've only popped them on the butt.

> Q. What does your wife do to discipline the children?
> A. She -- it depends on how mad she is or who it is. [Our daughter], she spanks a lot. [Our son], I don't think that I really -- I mean, I've seen her pop him a couple of times. But the timeout thing, we tried for a little while, and all they do is just jump out of the chair. They're pretty wild kids.

¶ 25 Next, Defendant addressed the allegation that he had threatened to "throat punch" his children, claiming his statement was said to his 3-year-old daughter "in a jokingly manner [sic]" and that "[they] were all laughing and joking." Defendant recollected:

> There was one time whenever my daughter was jumping from couch to chair to chair to chair, and I looked at her, and I said, girl, if you don't stop doing that, I'm going to throat punch you, just like that . . . . After I said that, she goes, Daddy, but that would kill me. I said, baby girl, you don't ever have to worry about me hitting you.

Defendant's testimony continued:

> Q. Have you ever hit one of your children in anger?
> A. No.
> Q. Have you ever hit your wife in anger?
> A. No, sir.
> Q. Have you ever hit your wife at all?
> A. No, sir.
> Q. Have you ever threatened to hit your wife?
> A. No, sir.
> Q. Have you ever threatened to harm your wife in any way?
> A. No, sir.
> Q. Have you ever threatened to smack the s--t out of either one of your children?
> A. I don't recall ever saying that.

¶ 26 Discussing the events that occurred between 21 and 23 August 2020, Defendant admitted he chose to stay home while Plaintiff and the children traveled to attend his sister-in-law's wedding. According to Defendant, he had declined to attend the wedding because "[his] family at home ha[d] been kind of in shambles for quite some time[,]" referring to "[his] relationship with . . . his two kids[,]" but "[m]ostly, just [his] wife." He also commented: "[my family]'s been in shambles because of the way we all treat each other." However, Defendant denied ever telling Plaintiff she was a bad wife.

¶ 27 Defendant testified that on 21 August 2020, Plaintiff had not brought "a thing" with her when she left Georgia with the children, and that he did not know Plaintiff had decided to leave him. Defendant tried to contact Plaintiff "[a]ll day long" via calls and text messages, claiming he received no response. Then, he "finally g[o]t to talk to [Plaintiff] on Friday[,]" and said: "I don't know that my kids are safe. I want them back home . . . . If you can't give me the, you know, the respect to call me and say, hey, we're safe somewhere, I want them home because it's like that every time they go out of the house." Defendant claimed Plaintiff said "[n]othing" in response and had no further conversation with her the following day, despite Defendant trying to contact her "[m]ultiple times and multiple family members multiple times, and nobody would answer."

¶ 28 Defendant explained that because no one answered his calls, he "went to find [his] kids and [his] family to make sure they were safe." Defendant, however, also denied he had come to North Carolina to retrieve his children, but rather "to find out where [his] kids were because nobody was answering."

¶ 29 When Defendant arrived at Cat Creek Lodge, he looked into Plaintiff's car and observed there were no child car seats in it. Then he "walked around to the screen door where [his and Plaintiff's] room was supposed to be and opened it and walked in and s[aw] no kids or wife." Defendant then testified:

> A. . . . Rowland, I s[aw] shortly after I stepped in the room and s[aw] that there was nobody. She was on the other side of, at least a queen-sized bed. She walked out of the bathroom. I said where is [Plaintiff]? Where's my kids? She was like, well, they're not here. I was like, well, where are they? She wouldn't answer me, so I went out to the hallway.
>
> Q. Were you screaming and yelling?
>
> A. No.
>
> Q. Were you cursing?
>
> A. No, sir. I was distraught because I couldn't find my family. I didn't know my family was safe, and I felt like something was going on. You know, I didn't know what, but something was going on.
>
> Q. So you walked out of the room?
>
> A. So I walked out of the room and heard her say, they're at Aunt Katherine's. So I went and knocked on a door to see if [Plaintiff] was in with her sister and got no answer. So I walked immediately to my car and drove to . . . Shields.
>
> . . . .
>
> Q. Did you push [Rowland] with your hands?

> A. No. The only thing she said is -- she told me or she said -- I did say, don't close the door on me. I thought that was my only way out, but instead, I was able to get out the front door.
>
> Q. Okay. But you didn't shove her, didn't assault her?
>
> A. No, sir.
>
> . . . .
>
> Q. Okay. And so after you left, which room did you go to?
>
> . . . .
>
> A. I went straight back and knocked on the first room that I had seen, knocked on it, heard her say, they're at Aunt Katherine's. Then I knew something was up. So I went straight to . . . Shield[s]'s house . . . because I knew that [his wife] stays up late.

Defendant then claimed Shields "just told [him] that [he] needed to leave" and Defendant drove "[s]traight home" after that.

DVPO

¶ 30 At the conclusion of the 3 September 2020 hearing, the trial court announced:

> The issue about attempting to cause or intentionally causing bodily injury to the plaintiff or the children, the jury would say, no. Him placing fear of serious bodily injury to the plaintiff, the jury would say, yes.
>
> More specifically and more importantly, placing fear and continued harassment, it rises to a level to inflict serious or substantial emotional distress to the plaintiff, the jury would say, yes.

¶ 31 The trial court subsequently entered the written DVPO on 8 September 2020 *nunc pro tunc* to 3 September 2020.[3] The DVPO contained the following Findings: that on 22 August 2020, Defendant placed Plaintiff and "a member of the plaintiff's family" "in fear of imminent serious bodily injury"; Defendant placed Plaintiff "in fear of continued harassment that rises to such a level as to inflict substantial emotional distress"; Defendant "is in possession of, owns or has access to firearms"; Defendant "made threats to seriously injure or kill plaintiff" and "the minor child(ren) residing with or in the custody of the plaintiff"; and "made threats to commit suicide[.]"

¶ 32 The DVPO contained further Findings describing Defendant's conduct:

> The Court heard the testimony of Plaintiff, . . . Rowland, . . . Shields, and Defendant. On the week of August 17, 2020, Defendant placed Plaintiff in fear of imminent serious bodily injury for herself and the two children by his threatening and abusive language, by throwing items about the house and slamming doors in close proximity to Plaintiff. This also caused Plaintiff and the children emotional abuse. Plaintiff arrived in Macon County the afternoon of August 21, 2020. On the night of August 21, 2020, Defendant texted to Plaintiff, "I hope you have enjoyed your life, because you have ended mine." Defendant had threatened suicide before and to take the children from Plaintiff, and she interpreted this as his physical threat to himself, and by extension, the children. In the late evening of August 22, 2020, Defendant presented himself at the Cat Creek Lodge, where Plaintiff was staying for a wedding, gained access to the venue,

[3] The copy of the DVPO in the Record bears a file-stamp dated 21 September 2020, but it also appears that this may have been a re-filed certified copy of the DVPO. In the Record, to which Plaintiff did not participate in the settlement thereof, Defendant, through counsel, states the DVPO was in fact entered on 8 September 2020. As such, we deem the DVPO filed and entered on 8 September 2020 based on the Record before us.

encountered, yelled at, and shoved . . . Rowland, Plaintiff's cousin, in the room she was sharing with Plaintiff. During this encounter, Defendant yelled at . . . Rowland to tell him where Plaintiff and the children were. He stepped into the hallway twice, and on the second time when . . . Rowland moved to close and lock the door, he admitted to yelling at her "Don't close that door on me!" Defendant admitted to pounding on at least one other door searching for Plaintiff and the children and that . . . Rowland informed him that the children were at the home of another relative. All of this placed . . . Rowland in fear of injury to herself and imminent serious bodily injury to Plaintiff and the children . . . . Rowland alerted Plaintiff as to Defendant's presence at the venue, his high state of agitation of yelling, screaming, his physically shoving her, and her fear for Plaintiff and the children if Defendant found her or the children. This information caused Plaintiff further fear of imminent serious bodily injury to herself and the two children at the hands of Defendant.

. . . Shields testified, and Defendant corroborated Shields['s] testimony during his testimony, that when he left the Cat Creek Lodge, he presented himself at . . . Shields['s] home around 1:30 a.m., was distraught, and eventually followed . . . Shields['s] repeated advice to go home.

Plaintiff testified that Defendant's words and actions of the week of August 17, 2020, directed towards herself and the children were consistent with the manner in which he routinely acted towards the three of them At these times the children would cry and cower. She described threats of Defendant directed at the children that he would punt the children across the room like a football and throat-punch the children. Defendant admitted the "throat-punch" allegation as to the older child, but categorized it as being said in jest. Defendant has a pattern of conduct, consistent with his acts and words the week of August 17, 2020, through the early morning hours of August 23, 2020, of placing Plaintiff in fear of imminent serious bodily injury to herself and the children and of causing Plaintiff and the children emotional abuse.

¶ 33 Based upon these Findings, the trial court concluded: Defendant "has committed acts of domestic violence against the plaintiff"; Defendant "has committed acts of domestic violence against the minor child(ren)"; Defendant's "conduct requires that he[] surrender all firearms, ammunition[,] and gun permits." Consequently, the trial court ordered Defendant, among other things, to stay away from anywhere Plaintiff is residing, Plaintiff's place of employment, the children's daycare, and the homes of Plaintiff's family members, and also ordered Defendant to surrender all firearms. Defendant gave written Notice of Appeal on 14 September 2020.

Issue

¶ 34 The sole issue raised by Defendant on appeal is whether the trial court's Findings of Fact in the DVPO were supported by the evidence in the Record.

Analysis

¶ 35 Defendant does not challenge the trial court's evidentiary Findings, but rather focuses his argument on five ultimate Findings of Fact made by the trial court in the DVPO and, in turn, contends these ultimate Findings then cannot support the trial court's Conclusions of law that Defendant committed acts of domestic violence against Plaintiff and the children. As such, we review the DVPO to determine "whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts." *Stancill v. Stancill*, 241 N.C. App. 529, 531, 773 S.E.2d 890, 892 (2015) (citation and quotation marks omitted).

"Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Id.* In conducting our review we are mindful: "The trial court's findings turn in large part on the credibility of the witnesses, and must be given great deference by this Court." *Id.* at 532, 773 S.E.2d at 892 (citation omitted).

¶ 36 Defendant first contends the trial court's ultimate Finding Defendant placed Plaintiff in fear of imminent bodily injury is not supported by the evidence. We are constrained to agree. N.C. Gen. Stat. § 50B-1(a)(2) defines domestic violence as "[p]lacing the aggrieved party . . . in fear of imminent serious bodily injury." N.C. Gen. Stat. § 50B-1(a)(2) (2019). "The plain language of section 50B-1(a)(2) imposes only a subjective test, rather than an objective reasonableness test, to determine whether an act of domestic violence has occurred." *Brandon v. Brandon*, 132 N.C. App. 646, 654, 513 S.E.2d 589, 595 (1999) (citation omitted). Thus, even if the evidence establishes threats were made to an aggrieved party, it does not necessarily support a finding the aggrieved party was, in fact, placed in fear of imminent serious bodily injury by those threats. *See id.*

¶ 37 Here, Plaintiff expressly testified that not only did Plaintiff not make any overt threat to assault her in the days leading up to the Cat Creek Lodge incident, she also conceded she did not "feel" threatened during that week. Moreover, she testified on the night of the Cat Creek Lodge incident she did not fear for herself, but rather

feared for her children and her family members. Consequently, no evidence tends to show Plaintiff subjectively feared imminent bodily injury to herself. Thus, this Finding is not supported by competent evidence and does not support the trial court's Conclusions of Law.

¶ 38 Next, Defendant challenges the companion ultimate Finding that Defendant placed a member of Plaintiff's family in fear of imminent bodily injury. Again, we are constrained to agree. Here, the trial court found in its evidentiary Findings the only "family member" that was placed in fear of injury to herself was Rowland, Plaintiff's cousin. The evidence tends to show Defendant did assault Rowland by shoving her out of the way and on to her bed. The evidence also tends to show Rowland was generally scared by Defendant's twice entering into her room and subsequent angry and erratic behavior, and afraid for her cousin and the children. However, there is no evidence she was subjectively in "fear of imminent serious bodily injury" to herself. *See* N.C. Gen. Stat. § 50B-1(a)(2) (2019); *see also Brandon*, 132 N.C. App. at 652-54, 513 S.E.2d at 593-95 (concluding, even though evidence supported the finding that the defendant had threatened the plaintiff, "the trial court made no finding regarding [the] [p]laintiff's subjective fear[,]" and thus did "[]not provide grounds for issuance of the DVPO"). Thus, this Finding is also not supported by competent evidence and does not support the trial court's Conclusion Defendant committed domestic abuse.

¶ 39 Defendant also challenges the trial court's ultimate Finding Defendant placed Plaintiff in fear of continued harassment that rises to such a level as to inflict substantial emotional distress. On this point, we must also agree with Defendant.

¶ 40 N.C. Gen. Stat. § 50B-1(a)(2) includes in the definition of domestic violence: "Placing the aggrieved party . . . in fear of . . . continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]" N.C. Gen. Stat. § 50B-1(a)(2) (2019). In turn, N.C. Gen. Stat. § 14-277.3A defines "harassment" as

> Knowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication, facsimile transmission, pager messages or transmissions, answering machine or voice mail messages or transmissions, and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose.

N.C. Gen. Stat. § 14-277.3A(b)(2) (2019).

> Thus, to support a conclusion of law that an act of domestic violence has occurred due to 'harassment,' . . . there must also be evidence and findings of fact that defendant's acts (1) were knowing, (2) were "directed at a specific person[,]" here, [P]laintiff, (3) tormented, terrorized, or terrified the person, here again, [P]laintiff, and (4) served no legitimate purpose.

Kennedy v. Morgan, 221 N.C. App. 219, 222, 726 S.E.2d 193, 195-96 (2012) (citation omitted; first bracket in original). The statute also defines "substantial emotional distress" as "[s]ignificant mental suffering or distress that may, but does not

necessarily, require medical or other professional treatment or counseling." N.C. Gen. Stat. § 14-277.3A(b)(4) (2019).

¶ 41 Here, the trial court's ultimate Finding relating to "harassment" stems from the totality of the evidence and evidentiary Findings regarding Defendant's behavior in the days prior to the Cat Creek Lodge incident, including abusive language, slamming doors, and threatening to "punt" or "throat punch" the children causing them to cry and cower away from him, in addition to Defendant's intrusion into Cat Creek Lodge and multiple angry and agitated confrontations with Rowland at Cat Creek Lodge, as well as his appearance at the Shields residence in the early morning hours of 23 August 2020. There is also evidence supporting a Finding Plaintiff was in fact placed in fear by the totality of this behavior specifically for her family members and that Defendant would forcibly remove or harm the children.

¶ 42 Presuming Defendant's actions leading up to and during the Cat Creek Lodge incident constitute the sort of conduct encompassed in Section 14-277.3A, and Defendant does not argue otherwise, there is nevertheless no evidence that supports a Finding Plaintiff's fear gave rise to substantial emotional distress beyond a generalized fear Defendant would attempt to take the children back to Georgia. Again, the test is whether Plaintiff, subjectively, was placed in fear of continued harassment giving rise to substantial emotional distress. *Stancill*, 241 N.C. App. at 541, 773 S.E.2d at 898. Here, there is no evidence Plaintiff, herself, suffered from

"substantial emotional distress." That is not to say the evidence of Defendant's action does not represent atrocious, abusive, and deplorable behavior from which it might be deduced that any reasonable person would be placed in such fear that it gives rise to substantial emotional distress. Further, our conclusion does not excuse Defendant's certainly improper, potentially abusive, and possibly criminal behavior towards his wife and children. We simply conclude the evidence in this case ultimately fails to satisfy the statutory definition of harassment. Thus, the evidence does not support the trial court's Findings and, thus, the trial court's ultimate Findings cannot support its Conclusions of Law.

¶ 43 Defendant also challenges the trial court's Findings that he threatened to commit suicide and that he threatened to seriously injure or kill Plaintiff and the minor children. Ultimately, these Findings do not impact our conclusion here. However, we note, there is evidence tending to support the trial court's Finding Defendant threatened to commit suicide. Moreover, while the evidence does not support that he threatened Plaintiff with death or serious bodily injury, it certainly supports the fact he threatened to "punt" and "throat punch" his very young children.

¶ 44 Finally, then, we turn to the question of whether the trial court's Findings of Fact, which are supported by evidence, support its Conclusions of Law that Defendant committed acts of domestic violence. Here, the trial court's Conclusions of Law that Defendant committed domestic violence against Plaintiff and the children rested on

two statutory bases: placing Plaintiff, and her cousin, "in fear of imminent serious bodily injury," and placing Plaintiff in fear of "continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress[.]" Because we conclude the trial court's ultimate Findings on these bases are not supported by competent evidence, the remainder of the trial court's Findings are of no moment. The trial court's ultimate Findings do not support the trial court's Conclusion Defendant committed domestic violence against Plaintiff or the children. *See Brandon*, 132 N.C. App. at 655, 513 S.E.2d at 595. Thus, the trial court erred in concluding Defendant committed acts of domestic violence against Plaintiff and the children. Therefore, the trial court erred in entering the DVPO against Defendant. Consequently, we are compelled to reverse the trial court's entry of the DVPO.

Conclusion

¶ 45 Accordingly, for the foregoing reasons, we reverse the DVPO.

REVERSED.

Judges TYSON and WOOD concur.

Report per Rule 30(e).