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IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA22-1071

Filed 15 August 2023

Mecklenburg County, No. 22 CVD 600957

JOANNA MONELL, Plaintiff,

v.

MARLON HUBBARD, Defendant.

Appeal by Defendant from Order entered 12 May 2022 by Judge Michael J. Stading in Mecklenburg County District Court. Heard in the Court of Appeals 6 June 2023.

*Plumides, Romano & Johnson, P.C., by Richard B. Johnson, for Plaintiff-Appellee.*

*Offit Kurman P.A., by Kyle A. Frost and Elizabeth J. James, for Defendant-Appellant.*

RIGGS, Judge.

Defendant Marlon Hubbard appeals the grant of a domestic violence protective order. On appeal, Defendant argues that the trial court's findings of fact were not supported by competent evidence and the court's conclusions of law was not supported by the findings of facts. Additionally, Defendant argues that the trial court erred

when it entered the domestic violence order of protection before closing arguments concluded. After careful review, we affirm the order of the trial court.

## **I. FACTS AND PROCEDURAL HISTORY**

On 27 April 2022, a domestic dispute took place between Plaintiff and Defendant. Plaintiff testified that Defendant pushed her after she attempted to grab his computer monitor. In his testimony, Defendant characterized the interaction by saying he put his arm out and “swiped” the Plaintiff, which caused her to fall back. When Plaintiff’s son heard both parties yelling, he came into the room and witnessed Defendant push Plaintiff. Plaintiff’s son tried to protect his mother by hitting Defendant; this led to a physical altercation between Defendant and Plaintiff’s son. Plaintiff testified that when she attempted to separate her son and Defendant, Defendant struck her in the face with a closed fist. Defendant testified that he only threw punches to defend himself after both Plaintiff and her son punched him.

During Plaintiff’s direct testimony, photographs of her injuries and a medical report were admitted into evidence. Defendant did not object to these pictures or the medical report. The medical report stated that Plaintiff suffered acute facial pain with bruising around her eye, a facial laceration, and a concussion without loss of consciousness. Plaintiff, acting *pro se*, cross-examined Defendant. During cross-examination, Defendant explained that he tried to “swipe” Plaintiff out of the way and that he did not know whether his actions made contact or caused any injury. Defendant testified that after he “swiped” Plaintiff out of the way, Plaintiff’s son

punched him in the mouth.

During closing argument, defense counsel argued that the court should not grant the protective order because Plaintiff was violent and instigated this incident. Plaintiff gave a closing argument asking that the court grant the protective order. At the conclusion of both parties' closing argument, the trial court stated that it had a thorough understanding of the incident, detailed findings of fact and was going to grant the order.

The trial court entered a domestic violence order on 12 May 2022. The time stamp on the order was 11:33:20 a.m. The time stamp in the transcript shows that closing argument began at 11:33:13 a.m.

Defendant filed timely notice of appeal from the Order of Protection on 10 June 2022.

## **II. ANALYSIS**

On appeal, Defendant challenges the trial court's findings of fact and conclusions of law that grounds existed for the trial court to grant a Domestic Violence Protection Order. Defendant asserts that there was not competent evidence in the record to support the trial court's findings of fact. We disagree.

### **A. Standard of Review**

The standard of review on appeal from a judgment entered after a non-jury trial is whether there is competent evidence to support the trial court's findings of fact and whether the findings support the conclusions of law and ensuing judgment.

*Cartin v. Harrison*, 151 N.C. App. 697, 699, 567 S.E.2d 174, 176 (2002) (internal quotations and citation omitted).

## **B. Competent Evidence in the Record**

This Court has held that when there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal. *Harris v. Harris*, 51 N.C. App. 103, 105, 275 S.E.2d. 273, 275 (1981). "Competent evidence is evidence that a reasonable mind might accept as adequate to support the finding." *Eley v. Mid/East Acceptance Corp. of N.C.*, 171 N.C. App. 368, 369, 614 S.E.2d 555, 558 (2005) (internal quotation and citation omitted). Findings of fact are binding on appeal as long as competent evidence supports them, even where evidence may also support contrary findings. *Asare v. Asare*, 281 N.C. App. 217, 236, 869 S.E.2d 6, 20 (2022).

Here, the trial court's findings of fact were supported by competent evidence and support the conclusion that the trial court should grant a domestic violence protective order. The trial court considered the evidence and testimony of both parties and entered findings of fact that resolved conflicts between the testimony. First, Plaintiff entered photographs of her injuries alongside the medical report of the injuries she suffered. In his testimony, Defendant did not dispute that he caused the injuries sustained by Plaintiff but indicated that the Plaintiff instigated the dispute by throwing a computer monitor at him and punching him and that he only swiped [Plaintiff] out of the way..." The medical report indicated that Plaintiff suffered a

facial laceration, a concussion without loss of consciousness and acute facial pain with bruising around her eye.

Based upon this evidence, the trial court made a finding that “[P]laintiff verbally antagonized the [D]efendant and then was assaulted by the [D]efendant.” Further the trial court found that “Plaintiff’s son defended his mother and his level of force was not excessive.” Finally, the trial court found that [D]efendant admitted to “pushing and ‘swiping’ the [P]laintiff.”

Based upon these findings, the trial court concluded that an act of domestic violence had occurred. After review of the record, we hold there is competent evidence to support the trial court’s findings of fact.

### **C. Timing of Entry of the Domestic Violence Order**

Defendant also challenges the timing of the order’s entry, arguing that the trial court erred by entering the order before the conclusion of closing arguments. We disagree.

Under N.C. Gen. Stat. § 50B-3, the trial court is instructed that if it finds an act of domestic violence has occurred, “the court *shall* grant a protective order restraining the defendant from further acts of domestic violence.” N.C. Gen. Stat. § 50B-3(a) (2021) (emphasis added). The General Assembly defines acts qualifying as domestic violence in subsections (a) and (b) of N.C. Gen. Stat. §50B-1 (2021). Upon a finding of an act of domestic violence, the issuance of a domestic violence protection order is mandatory, not discretionary. *See D.C. v. D.C.*, 279 N.C. App. 371, 373-74

n.2, 865 S.E.2d 889, 890 n.2 (2021) (“[I]f a trial court determines that an act qualifying as domestic violence occurred, the trial court is required to issue a DVPO.”).

Of course, the finder of fact must consider all evidence before rendering a decision. *See State v. Salinas*, 214 N.C. App. 408, 410, 715 S.E.2d 262, 264 (2011) (holding that the “judge’s role is to hear the evidence, determine the credibility of witnesses, and determine the weight to be given to the evidence presented.”). “Indeed, the opportunity to be heard and to challenge the truth of the adversary’s assertions is part and parcel of due process.” *State v. Byrd*, 363 N.C. 214, 223, 675 S.E.2d 323, 328 (2009). That does not disturb, though, the rule that judges have inherent authority to ensure that courts are run efficiently and properly and that litigants are treated fairly. *Beard v. N.C. State Bar*, 320 N.C. 126, 129, 357 S.E.2d 694, 696 (1987). “Through its inherent power the court has authority to do all things that are reasonably necessary for the proper administration of justice.” *Id.* “[G]enerally, in the absence of controlling statutory provisions or established rules, all matters relating to the orderly conduct of the trial or which involve the proper administration of justice in the court, are within [the court’s] discretion.” *State v. Smith*, 320 N.C. 404, 415, 358 S.E. 2d 329, 335 (1987) (quoting *State v. Rhodes*, 290 N.C. 16, 23, 224 S.E.2d 631, 635 (1976)).

Defendant challenges the entry of the order before the completion of closing arguments on the grounds that the timing violated his fundamental due process right to be heard and to challenge the truth of his adversary’s assertions. However, there

is no evidence in the record that the order was entered before the close of evidence. Defendant points to the time stamp on the order and compares it with the time stamp on the transcript which shows that closing argument began shortly before the order was entered. Even assuming the timeclock on the transcription equipment was synchronized with the order entry software, the timestamps only show the order was entered *after* the close of evidence.

Defendant goes on to argue that drafting the order during the hearing violates his due process rights. However, Defendant does not cite a specific case and we have not identified case law supporting this proposition. The case law is clear, however, that the trial court is required to hear the evidence and make findings of fact—which the trial court did in this case. Furthermore, “it is axiomatic that the arguments of counsel are not evidence.” *State v. Collins*, 345 N.C. 170, 173, 478 S.E.2d 191, 193 (1996); *see also State v. Hinson*, 341 N.C. 66, 76, 459 S.E.2d 261, 267 (1995) (stating that the arguments of counsel were not evidence). Therefore, the trial court is under no obligation to consider the closing arguments at a bench trial where the judge finds that evidence presented meets the burden of proof.

As discussed *supra*, the finding of facts in the order demonstrate that the trial court considered all evidence presented by both sides and found that an act of domestic violence had occurred. The trial court considered the testimony of Plaintiff and Defendant regarding the catalyst for this physical altercation. The trial court also considered the testimony from the parties regarding the sequence of events,

extent of the injuries, and whether the force used by the son to defend his mother was excessive. The trial court concluded, based upon the evidence, that an act of domestic violence had occurred. And, as we have noted previously, the abuse of discretion threshold becomes insurmountable in this case because N.C. Gen. Stat. § 50B-3 required the entry of the domestic violence protective order once the court found that a domestic violence incident had occurred.

On appeal, Defendant fails to establish that the timing of the order was such that the trial court did not consider all evidence before making appropriate findings of fact, conclusions of law, and entering the order. Thus, the trial court was within its discretion to enter the order of protection at the time in which it did. *See State v. Bare*, 197 N.C. App. 461, 476, 677 S.E.2d 518, 529 (2009).

### **III. CONCLUSION**

After review of the issues presented in this appeal, we affirm the trial court order granting the order of protection.

**AFFIRMED.**

Judges CARPENTER and GORE concur.

Report per Rule 30(e).