UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1670

September Term, 2014

ALAN SELDIN

v.

BRENDA SELDIN

Woodward,
Hotten,
Sharer, J. Frederick
(Retired, Specially Assigned),

JJ.

Opinion by Sharer, J.

Filed: November 12, 2015

Alan Seldin, appellant, appeals from the entry of a Final Protective Order granted by the Circuit Court for Montgomery County on September 4, 2014. He asserts that the circuit court erred in granting the protective order. For the reasons discussed herein, we shall vacate the protective order.

BACKGROUND

On August 22, 2014, Brenda Seldin, appellee, filed a petition for a protective order against appellant, her ex-husband, arising out of an incident that occurred on that date. The court granted a temporary protective order and scheduled a review hearing, which occurred on September 4, 2014. Based on the evidence presented at the review hearing, the court granted a final protective order, which was effective through September 4, 2015.

The facts adduced at the review hearing were as follows. The parties were married and had three children together, who were 8-, 7-, and 4-years-old at the time of the review hearing. In June 2012, appellee filed a complaint for limited divorce, and appellant filed a counterclaim for limited divorce, custody and related relief. Appellee testified that when she and appellant first separated, he told her that "he was going to do this divorce and me Jersey style," which she understood to mean he was going to kill her. She also related that appellant had told her that she would "rue the day" that she was "doing all these things to him," and that he had told the children "mom's going to get what's coming to her."

In June 2013, while divorce proceedings were pending, a final protective order ("first protective order") was issued against appellant. The circumstances that led to its issuance

were not put into evidence at the review hearing.[1] The first protective order expired on June 14, 2014. Thereafter, the parties appeared to be getting along, as evidenced by three email messages that were introduced into evidence by appellant. The first was the following email from appellee to appellant dated July 31, 2014, about six weeks after the first protective order had expired:

> Alan,
>
> I wanted to let you know that the children loved the swim banquet last night and all the recognition they received. The evening was a perfect success for them and reinforced that their hard work was worth it. I am glad you could be there to help them celebrate their special event and help make the evening great for them.
>
> Brenda

On the same day, appellant sent the following message to appellee's then-boyfriend, Doug Wilson:

[1]Prior to oral argument appellant filed a Motion to Strike Appellee's Brief and Appendix or in the Alternative to Strike Portions of the Brief and Appendix of Appellee. Appellant asserted that appellee's brief and appendix included papers not admitted into evidence, pleadings from a prior proceeding, and other assertions not part of the record made below.

We agree with appellant generally that appellee's filings in this Court contain matters not in the record. Appellee's counsel explained that those documents were taken from the record of earlier proceedings involving the parties, but conceded that those court files were not moved into evidence in the instant matter. Therefore, under appellate rules of procedure they ought not have been included in appellee's brief or appendix.

On that basis, our determination of the merits of this appeal renders appellant's motion moot.

> Hi Doug,
>
> Thanks for the hospitality and grace you showed me and my children last night at the swim banquet. Hopefully we can carry this into the future. A check is on the way to you.
>
> Thanks again,
> Alan

Wilson responded to appellant as follows:[2]

> Thank you for your note.
> It was a nice evening for all involved.
> Hope to see you soon.
>
> Sincerely,
> Doug

At about the same time as the email exchanges, the parties' attorneys were communicating in order to arrange for appellant to retrieve his personal property from the family home. Appellant's counsel requested a walk-through of the home so that appellant could identify his property that he wanted to remove. Appellee's counsel responded that appellant had already inspected the contents of the house and would not be afforded another walk-through.

A judgment of absolute divorce was entered on August 7, 2014. Appellee was awarded exclusive use and possession of the family home for a period of three years, after

[2]Wilson agreed that he had a "pretty decent" relationship with appellant, and appellant agreed that the relationship was "amicable." At some unspecified time, they had both attended a meeting with the parties' Parent Coordinator and had hugged each other afterward.

which it would be sold, and the proceeds equally distributed. Other property owned by the parties was to be liquidated and distributed equally.[3] The judgment also ordered appellee to deliver appellant's drum set and china to appellant's attorney's office, which she did on August 18, 2014. Appellant's attorney suggested to appellee's attorney in a letter that their clients might work out arrangements for appellant to retrieve the remainder of his belongings themselves, in order to save attorney's fees.

On August 20, 2014, appellee had a conversation with Diane Tillery, who had recently supervised a visitation between appellant and the children. Tillery told appellee that appellant was "super mad about the divorce order . . . felt that he had been screwed . . . that the whole thing was very unfair, and [that] he was really mad."[4]

The next day, appellee received the following email from appellant:

> Hi Brenda,
>
> I would like to arrange for a mover to get my personal belongings from the house. If we can accomplish this without attorneys it would save us money.

[3]The parties were awarded joint legal custody of the children pursuant to the terms of a previous order.

[4]Appellant makes a bald statement that Tillery's statement to appellee was inadmissible hearsay, but as he presents no argument on the issue, we need not address it. *See Klauenberg v. State*, 355 Md. 528, 552 (1999) ("arguments not presented in a brief or not presented with particularity will not be considered on appeal"). We note, however, that the statement was admitted to show appellee's state of mind, and not for the truth of the matter asserted, and was therefore not hearsay. Maryland Rule 5-801(c).

> I would like to do a quick walk through with a mover for an estimate and if you want a third party . . . present please let me know.
>
> * * *
>
> The other option is to place all my belongings in the garage and take pictures for a mover to estimate cost.
>
> It would be best to do this when the children are not at home.
>
> I am hoping we can do this amicably. Please let me know.
>
> Thanks,
> Alan

Appellee did not respond to the email.

It was on the next day, August 22, 2014, that appellee filed the petition for a protective order that is the subject of this appeal. That morning, the parties attended an open house at their children's school. Both parties testified that there were "no problems" between them at the open house. Afterward, appellee went home with the children and appellant left separately. When appellee arrived at the Potomac home, she saw appellant in his vehicle, which was stopped in the road in front of the house. Appellant was taking pictures of the garage, where Wilson was working to clear space for appellee's car to be parked inside. Appellee explained that she was concerned about her safety and wanted to be able to pull her car into the garage and close the garage door behind her. She had asked Wilson to clean up the garage because appellant's belongings were "blocking" her from using the garage.

According to appellee, when appellant saw her, he drove away slowly. She opened her car door and took a picture of him as he was driving away. She testified as to what happened next as follows:

> At this point in time, I am nervous. I don't know why he is in front of my home taking photos. I pull my vehicle into the driveway, I have my two older children in the car with me. We get out of the car . . . and the next thing I know, Alan has circled the block and he's back again. . . . [W]e are standing in the driveway at this point, and Alan then pulls from behind Wilson's vehicle and pulls directly at the bottom of the driveway. So, I at this point am standing at the bottom of the driveway and I make it very obvious to Alan, I hold my arm up with my phone to make it very obvious that I'm taking pictures of him. And at that point in time, he speeds up the street.

Appellee indicated that appellant was in front of the house for "a couple of minutes" each time.

When asked what effect seeing appellant around the house had on her, appellee stated, "It made me very nervous. I don't understand why he's at the house. I don't like having him take photos of me all the time and it upsets my children." She admitted that appellant never got out of his car, and never spoke to her.

Wilson testified that the incident "rattled" appellee, that "she turned . . . white as a sheet," and that she was "really nervous, you know, kind of trembling . . . kind of, very uncomfortable."

A short time later the same day, appellant sent the following email to appellee:

> Hi Brenda,
>
> After leaving the kids[’] school a few blocks away on my way to work I drove by the house. I noticed your boyfriend, Doug carrying a number of things to a van from a large stack/pile of belongings in the garage out to a van parked on the street. I am hoping those were not my personal belongings that were being thrown out.
>
> Please let’s arrange a time for me to get my belongings from the house as I requested in the email last evening. I am hoping that we can work this out amicably.
>
> Thank you,
> Alan

Additional facts will be introduced in the discussion as they become relevant.

DISCUSSION

Maryland Code (2012 Repl. Vol.), Family Law Article ("FL"), § 4-506(c)(ii) authorizes the circuit court to grant a final protective order to protect any person eligible for relief from abuse. "Abuse" is defined by FL § 4-501(b) as:

> (i) an act that causes serious bodily harm;
>
> (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm;
>
> (iii) assault in any degree;
>
> (iv) rape or sexual offense under §§ 3-303 through 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree;
>
> (v) false imprisonment; or
>
> (vi) stalking under § 3-802 of the Criminal Law Article.

The party seeking the protective order bears the burden of proving that the abuse has occurred. *Piper v. Layman*, 125 Md. App. 745, 754 (1999). At the time of the hearing on appellee's petition for protective order, the court was required to find by clear and convincing evidence that the abuse had occurred before granting a final protective order.[5]

Evidence is "clear and convincing" when it sustains "a degree of belief greater than . . . a fair preponderance of the evidence, but less than proof beyond a reasonable doubt . . . ." *Berkey v. Delia*, 287 Md. 302, 318 (1980) (citation and internal quotation marks omitted). "It has been said that [such] proof must be 'strong, positive and clear from doubt' and 'full, clear and decisive.'" *Id*. (citations omitted). *See also, Coleman v. Anne Arundel Police*, 369 Md. 109, 126, n. 16 (2002) ("To be clear and convincing, evidence should be 'clear' in the sense that it is certain, plain to the understanding, and unambiguous, and 'convincing' in the sense that it is so reasonable and persuasive as to cause you to believe it.")

"If the court finds that the petitioner has met the burden, it may issue a protective order tailored to fit particular needs that the petitioner has demonstrated are necessary to provide relief from abuse." *Piper*, 125 Md. App. at 754 (citation and internal quotation marks omitted). We review a court's issuance of a protective order under the following standard:

[5]The standard for granting a final protective order was changed to a preponderance of the evidence effective October 1, 2014. *See* 2014 Md. Laws, Ch. 111.

> When conflicting evidence is presented, we accept the facts as found by the hearing court unless it is shown that its findings are clearly erroneous. As to the ultimate conclusion, however, we must make our own independent appraisal by reviewing the law and applying it to the facts of the case.

Id. (citations and internal quotation marks omitted).

The circuit court issued the protective order after finding, under FL § 4-501(b)(ii), that appellant's actions on August 22, 2014, placed appellee in fear of imminent serious bodily injury. In *Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122 (2001), the Court of Appeals held that the test for determining whether a person has been placed in fear of imminent serious bodily harm is an "individualized objective one – one that looks at the situation in light of the circumstances as would be perceived by a reasonable person in the petitioner's position[.]" *Id*. at 138. The Court explained that:

> [a] person who has been subjected to the kind of abuse defined in § 4-501(b) may well be sensitive to non-verbal signals or code words that have proved threatening in the past to that victim but which someone else, not having that experience, would not perceive to be threatening. The reasonableness of an asserted fear emanating from that kind of conduct or communication must be viewed from the perspective of the particular victim.

Id. at 139.

Appellant contends that the circuit court erred in issuing a final protective order as there was no evidence that appellee had a reasonable fear of imminent serious bodily harm, and therefore, that appellee failed to meet her burden of proving, by clear and convincing evidence, that abuse had occurred.

Appellee responds preliminarily that the issue is moot because the final protective order expired prior to the oral argument on this appeal, and that therefore, there is no longer an existing controversy between the parties, nor is there any other reason for this Court to consider the moot case. Appellee further responds that applying the individualized objective standard set forth in *Katsenelenbogen*, *supra*, the circuit court did not err in its ultimate conclusion that appellee had a reasonable fear of imminent serious bodily harm.

Mootness

First, we address appellee's argument that the issue is moot because the protective order in question has expired. In *Piper, supra*, we held that:

> [i]n light of the stigma that is likely to attach to a person judicially determined to have committed abuse subject to protection under the Domestic Violence Act, we think that the expiration of the protective order does not automatically render the matter moot. The review of such finding on appeal, and the potential for vacation of the order, thereby removing the stigma, gives substance to [the] appeal.

125 Md. App. at 753.

We reject appellee's suggestion that because a protective order was issued previously against appellant, he was already stigmatized, and therefore, that vacating the second protective order that is the subject of this appeal would provide no remedy. It is without question that the issuance of a second protective order would compound any stigma or adverse effect on one's record. We decline to dismiss this appeal on mootness grounds.

Merits

We agree with appellant that appellee failed to satisfy her burden of proving that she was in fear of imminent serious bodily harm. The only conduct appellant displayed was taking pictures of the garage. He was not prohibited from being at or near the family home, and he remained in his car and did not speak to appellee. There was no testimony from appellee that she feared an imminent assault at the hands of appellant, but only that she was "nervous," and that she didn't like him taking pictures of her. Wilson's testimony that appellee appeared to be "uncomfortable" added nothing that would establish that appellee feared imminent serious bodily harm. We cannot conclude that being "nervous" or "uncomfortable" rises to imminent fear of bodily harm under the clear and convincing standard applicable in this case. Nor was there evidence of "non-verbal signals" or "code words" that might have made appellee more sensitive to appellant's actions.

Other than appellant's comments at the time of the parties' separation, which was two years prior to the date in question, that he was going to "do [appellee] and the divorce 'Jersey style,'" and that appellee would "rue the day," there was simply no evidence of threats or abuse that might have placed her in imminent fear of serious bodily harm on the date in question. Moreover, it is significant that appellee took no action to remove herself from the zone of any perceived danger; indeed, she actually approached appellant in his vehicle in order to take his photograph.

Based upon our independent review of the record, we cannot conclude that there was clear and convincing evidence that appellant's actions caused appellee to have a reasonable fear of imminent serious bodily harm.

PROTECTIVE ORDER DATED SEPTEMBER 4, 2014 VACATED; COSTS ASSESSED TO APPELLEE.