Circuit Court for Anne Arundel County
Case No. C-02-FM-20-808330

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 0625

September Term, 2020

JEFFREY REICHERT

v.

SARAH HORNBECK

Leahy,
Reed,
Wilner,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Reed, J.

Filed: March 18, 2022

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

This case comes as an appeal from a Final Protective Order, granted to Appellee (Sarah Hornbeck) against Appellant (Jeffrey Reichert). Appellee received a temporary protective order on July 12, 2020, which was set to expire on July 28, 2020. Following a hearing on July 28, 2020, the Circuit Court for Anne Arundel County granted the Final Protective Order ("Protective Order"). Appellee received the Protective Order in response to a series of to a series of lewd, threatening, and harassing text messages and emails sent by Appellant. Appellant's messages were primarily directed at Appellee. However, Appellant also sent a series of hostile emails to Appellee's attorney, with Appellee cc'ed. Appellant now challenges the Protective Order on appeal, arguing that his messages did not meet the standard for issuance of a Protective Order.

In bringing his appeal, Appellant presents one (1) question for appellate review, which we have rephrased for clarity:[1]

I. Did the trial court err in granting the Protective Order upon a finding that Appellee had demonstrated, by preponderance of the evidence, that she was in fear of imminent serious bodily harm from Appellant?

Given the escalating and combative nature of Appellant's communications, we affirm the decision of the circuit court.

FACTUAL & PROCEDURAL BACKGROUND

[1] In his brief, Appellant posed the issue as follows:

> Did Appellee prove by a preponderance of the evidence that the alleged abuse constituted "fear of imminent serious bodily harm," as required by §§ 4-501 and 4-506 of the Family Law Article?

Appellant and Appellee are former spouses who are now divorced. The parties have a 10-year-old child ("G") who lives with Appellant under a custody consent order which allows Appellee to have the child every other weekend. There is currently a separate open custody case between the parties concerning violation of that custody consent order. Notably, both parties to the dispute are attorneys.

The Circuit Court of Anne Arundel County held a final protective order hearing on July 28, 2020. At that hearing, Appellee was represented by counsel, Appellant appeared *pro se*. Appearing as a witness during the hearing, Appellee testified regarding the nature of the communications she received from Appellant as follows:

> **[Appellee Counsel]:** . . . [W]hat do these constitute? Are they emails? Are they text messages, things of that nature?
>
> **[Appellee]:** Yes. This packet constitutes emails received from [Appellant] to myself. These also constitute text messages from [Appellant] to myself and others, very often with others on the text messages like group texts involving additional individuals. These messages also include some messages from the Our Family Wizard program which is required for communication between [Appellant] and myself. And there are -- there have been numerous additional communications . . . .

Appellee proceeded to enter an index of messages from Appellant into evidence. Included in these messages were messages from Appellant to Appellee on June 28, 2020, which read:

> I love you so much I pee blood sometimes.
>
> . . . .
>
> Dear Sarah, kindly go f— yourself.
>
> . . . .

> We already did trial prep for [G] to stand up in court and represent himself against you. That's where he is and you just tacked onto it today. You want to talk about great parenting, shove that up your A**.

In response to a message from Appellee – stating "[l]ooking forward to seeing [G] at 6pm thx so much" – Appellant responded

> Listen to the voicemail I just left you very very very very carefully and take it very very very very seriously. I am not kidding any more. You will go to prison. Certainly, you will be in Shepherd Pratt [v]ery shortly.

In an apparent group text message with Appellee and G, Appellant wrote the following:

> G. — mom wants to drive you to the police station. Elle and our "Village". . . Including the police and Uncle Fred are ready [i]f anything goes wrong. I may even make it. Your mom is doing this for attention and to try to distract me.

Additionally, Appellant sent a series of emails to Appellee's attorney, with Appellee cc'ed. Among those emails were communications in which Appellant wrote the following:

> You gutted my family out of the blue with a BUCK knife. I tossed a little paper clip at you and you think I'm being rude? You haven't seen anything yet. Act like a lawyer- get treated like a lawyer. Act like a criminal sociopath- get treated like a criminal sociopath. . . .
>
> . . . .
>
> G. was ready to shoot [Appellee] with a BB gun if she came back to HIS house.

Finally, during a series of inappropriate messages to Appellee's counsel within a group text message – which included Appellee – Appellant sent the following message to Appellee's counsel:

> I tell you what SEAL TEAM 1 [ostensibly referring to Appellee's counsel]... I won't sue you…and you get the 1st 4 shots at me. After that it's fair game? In my trampoline MMA style except you can wear a shirt to cover up your stretch marks.

After admitting Appellant's communications with Appellee into evidence, Appellee's counsel asked Appellee about the impact of these messages:

> **[Appellee Counsel]:** Have [these communications] caused . . . serious emotional distress to you and . . . the people around you?
>
> **[Appellee]:** Absolutely, very much so. To a level that it's hard to put into words.
>
> **[Appellee Counsel]:** Okay. And are you scared of bodily injury in the event that [the] Court does not take some action to stop [Appellant] from escalating this sort of behavior?
>
> **[Appellee]:** I'm terrified.

Thereafter, Appellant was given time for a closing statement, during which he spent little time addressing the subject matter of the Protective Order. Instead, Appellant lodged a series of allegations against Appellee and Appellee's counsel, without spending much time addressing the content of his communications. Appellant did, at one juncture address the BB gun message he sent to Appellee's counsel: "[W]hen [G] said, 'I want to shoot my mom with a BB gun,' I was like he's listening to all this because he sees the cops show up all the time." Appellant then curiously characterized his communications with Appellee in a positive light:

> She's the mother of my son. And I was trying to build her up in these text messages. I hope you read them, where I was trying to tell her, hey, I'm writing a book. I'm running a company. You can spend more time with him.

After Appellant's closing argument, the circuit court announced its ruling from the bench.

In granting Appellee's request for a final protective order, the circuit court noted the escalating nature of Appellant's communication, as well as Appellant's angry and aggressive demeanor during the hearing. The circuit court explained as follows:

> I had an opportunity to review everything and listen to the testimony of the witnesses and looking at assessing their credibility and their demeanor in court as well.
>
> So let me get to the preliminary findings. After the appearance of the [Appellee], [Appellee]'s counsel and [Appellant], I make the finding [that] the person eligible for relief is [Appellee]. . . .
>
> So I do find that there is a preponderance of the evidence to believe that the [Appellant] committed the following acts of abuse . . . that is placing [Appellee] in fear of imminent serious bodily harm. In looking at the messages — and this is where I'm going to talk to you, [Appellant].
>
> Looking at the messages, looking over the exhibits — and you made a comment . . . saying that being angry is not a crime. And even though that's technically true, sir, you have to look at your actions and the impact on [Appellee].
>
> . . . .
>
> [H]ere there are a number of messages and they're escalating, they're angry, they're aggressive; even your demeanor in court was all of those things.
>
> And it's to the point now that Ms. Hornbeck is in fear for her safety. So I do believe that there was a preponderance, she met her burden of proof that you placed her in fear of imminent serious bodily injury.

Thus, the circuit court found that Appellee met the requisite standard for issuance of a protective order under FL § 4-506(c), because she was placed in fear of imminent serious bodily injury by Appellant.

Following issuance of the Protective Order, Appellant timely filed a notice of appeal.

DISCUSSION

I. Fear of imminent bodily harm under FL § 4-501 (b)(1)(ii).

A. Parties' Contentions

Appellant argues that, based on the preponderance of the evidence presented at trial, his messages were not sufficient to place Appellee in fear of imminent serious bodily injury within the meaning of FL § 4-501(b)(1)(ii). Appellant argues that, although his messages were inappropriate, none of them threatened bodily harm. Appellant urges that in his "BB gun" message, he was merely relaying to Appellee what G had said. Moreover, he argues that threatening Appellee with legal pursuits and involuntary commitment to a psychiatric institution does not amount to a threat of bodily harm. Appellant notes that some of his messages were sent to Appellee's attorney, and that Appellee "was only copied with the message." Appellant further contends that Appellee could not have been in fear of *imminent* bodily harm because he was not in Appellee's presence when he sent the communications. Finally, Appellant asserts that, while Appellee testified that she was in fear of imminent bodily harm, his communications would not place a reasonable person in Appellant's position in fear of imminent bodily harm. Accordingly, Appellant argues that the circuit court erred in granting the Protective Order.

Appellee initially argues that the appeal should be dismissed because Appellant acquiesced to the trial court's judgment by presenting no evidence in his defense and stating on the record that "if [the trial court] want[s] to issue a protective order against me, that's fine, but I don't need it." Alternatively, Appellee argues that Appellant's constant barrage of lewd, aggressive, and inappropriate messages were sufficient to establish, by a

preponderance of the evidence, that an individual in Appellee's position would be in fear of imminent bodily harm. Thus, Appellee contends that the circuit court did not err in granting the Protective Order.

B. Standard of Review

In reviewing the issuance of a final protective order, "we accept the facts as found by the hearing court unless it is shown that its findings are clearly erroneous." *Barton v. Hirschberg*, 137 Md. App. 1, 21 (2001) (*quoting Piper v. Layman*, 125 Md. App. 745, 754 (1999)). In doing so, "[w]e leave the determination of credibility to the trial court, who has 'the opportunity to gauge and observe the witnesses' behavior and testimony during the trial.'" *Barton*, 137 Md. App.at 21 (*quoting Ricker v. Ricker*, 114 Md. App. 583, 592 (1997)).

C. Analysis

As an initial matter, we address Appellee's contention that Appellant acquiesced to the circuit court's ruling. While it is true that Appellant did make a few statements, which indicated his apathy towards the issuance of a protective order, it is clear from the record that the circuit court did not issue the Order by consent. Accordingly, we proceed to determine whether Appellee met her burden in demonstrating that she feared imminent bodily harm as a result of Appellant's communications.

In this case, Appellee needed to present sufficient evidence to persuade the trier of fact that it was more likely than not that she was in imminent fear of bodily harm within

the meaning of FL § 4-501 (b)(1)(ii).[2] Moreover, Appellant needed to provide sufficient evidence to the trier of fact that her fear of imminent bodily harm was reasonable under the

[2] Prior to October 2014, the requisite showing for issuance of a final protective order was the more demanding clear and convincing standard. Prior to October 2014, FL § 4-506(c) read, in part, as follows:

> (c)(1) If the respondent appears before the court at a protective order hearing or has been served with an interim or temporary protective order, or the court otherwise has personal jurisdiction over the respondent, the judge:
>
> (i) may proceed with the final protective order hearing; and
>
> (ii) if the judge finds by ***clear and convincing evidence*** that the alleged abuse has occurred, or if the respondent consents to the entry of a protective order, the judge may grant a final protective order to protect any person eligible for relief from abuse.

(Emphasis added) (Effective: April 8, 2014 to September 30, 2014). However, in 2014, the Maryland legislature amended FL § 4-506(c), which now reads:

> (c)(1) If the respondent appears before the court at a protective order hearing or has been served with an interim or temporary protective order, or the court otherwise has personal jurisdiction over the respondent, the judge:
>
> (i) may proceed with the final protective order hearing; and
>
> (ii) if the judge finds by a ***preponderance of the evidence*** that the alleged abuse has occurred, or if the respondent consents to the entry of a protective order, the judge may grant a final protective order to protect any person eligible for relief from abuse.

(Emphasis added). Notably, in the time since the legislature's amendment in 2014, there have been no reported cases in Maryland addressing a challenge under FL § 4-506(c). This poses no problem because the preponderance of the evidence standard is well-delineated in Maryland case law. To meet one's burden by a preponderance of the evidence, one must simply present sufficient evidence to persuade a trier of fact that something is more likely than not. *See Weisman v. Connors*, 76 Md. App. 488, 502 (1988) ("To prove by a preponderance of the evidence means to prove that something is more likely so than not so."); *see also Coleman v. Anne Arundel County Police Dept.*, 369 Md. 108, 127 n. 16 (2002) (same).

circumstances. *See Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122 (2001). We hold that the Appellee met her burden. We explain.

The circuit court issued the Protective Order after finding that Appellant's acts constituted abuse under FL § 4-501 (b)(1)(ii).

MD Code, Family Law, § 4-501

* * *

(b)(1) "Abuse" means any of the following acts:

. . . .

(ii) an act that places a person eligible for relief in fear of imminent serious bodily harm[.]

The circuit court found Appellee's testimony, that she was "terrified," to be credible. Thus, because we leave the determination of credibility to the trial court, we need only determine whether Appellee's fear was reasonable. *Accord Barton*, 137 Md. App. at 21 ("[w]e leave the determination of credibility to the trial court, who has 'the opportunity to gauge and observe the witnesses' behavior and testimony during the trial.'") (*quoting Ricker*, 114 Md. App. at 592).

The Court of Appeals, in *Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122 (2001), enunciated the proper standard for deciding whether fear is reasonable under FL § 4-501 (b)(1)(ii). The Court explained that "the proper standard is an individualized objective one—one that looks at the situation in the light of the circumstances as would be perceived by a reasonable person in the petitioner's position." *Id*. at 138. The Court then likened the FL § 4-501 (b)(1)(ii) standard to the standard applied in "determining whether a criminal defendant offering the defense of self-defense had reasonable grounds to believe

himself or herself in apparent or immediate danger of death or serious bodily harm." *Id*. at 139 (*citing State v. Marr*, 362 Md. 467 (2001)). The Court provided a quote from *Marr*:

> The objective standard does not require the jury to ignore the defendant's perceptions in determining the reasonableness of his or her conduct. In making that determination, the facts or circumstances *must* be taken as perceived by the defendant, even if they were not the true facts or circumstances, *so long as a reasonable person in the defendant's position could also reasonably perceive the facts or circumstances in that way*.

Katsenelenbogen, 365 Md. at 139 (*quoting Marr*, 362 Md. at 480) (emphasis in original).

The *Katsenelenbogen* court continued to explain that:

> We added in *Marr* that a belief as to imminent danger 'is necessarily founded upon the defendant's sensory and ideational perception of the situation that he or she confronts, often shaded by knowledge or perceptions of ancillary or antecedent events.' The issue, we said, was not whether those perceptions were right or wrong, but whether a reasonable person with that background could perceive the situation in the same way.
>
> We believe that to be the proper test to be applied in this context as well. 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. Any special vulnerability or dependence by the victim, by virtue of physical, mental, or emotional condition or impairment, also must be taken into account.

Katsenelenbogen, 365 Md. at 139 (*quoting Marr*, 362 Md. at 481).

In the present case, the circuit court was properly focused on the reasonableness of Appellee's fear, and how Appellee's perception of Appellant's communications would be shaded by the escalating nature of Appellant's antecedent communications. Given the escalating nature of Appellant's text messages and emails directed at Appellee and her counsel, we see no issue with the circuit court's finding that Appellee's fear was

reasonable. Contrary to Appellant's contention that threatening emails directed at Appellee's counsel should not be considered; we view such brazen conduct as further support for the circuit court's decision. Appellant is an attorney. As such, Appellant should understand how exceedingly inappropriate it is to attempt to threaten or intimidate an opposing counsel with physical violence. Moreover, Appellant knew that Appellee would see the messages, which included at least one threat of physical violence to Appellee – that G was ready to "shoot [Appellee] with a BB gun." Although Appellant argues that he was only communicating G's statement, that does not make Appellee's fear of Appellant any less reasonable. Someone in Appellee's position could have understood that to be a threat from Appellant. Appellant's intent in communicating the threat has no bearing on the issue. As the circuit court explained, Appellant's communications were escalating in nature and we cannot say that Appellee's fear was unreasonable given Appellant's brazen and escalating conduct.

Regardless, Appellant further contends that Appellee did not provide "any timetable to support her supposition that [Appellant's] statements [were] escalating over time." Appellant argues that without the communications being placed in the context of time and because the communications were not made in Appellee's presence, Appellee's fear could not have been imminent. We disagree. The circuit court found that Appellant's messages were escalating, and Appellant has not provided a basis for us to conclude that the circuit court's finding was clearly erroneous. Therefore, we accept the finding of the circuit court that Appellant's messages and communications were indeed escalating in nature.

Moreover, we disagree with Appellant's contention that Appellee's fear could not have been imminent. The Court of Appeals recently addressed the meaning of "imminent," in a self-defense context, where a defendant must demonstrate "imminent *or* immediate fear of serious bodily harm."[3] In *Porter v. State*, 455 Md. 220, 245 (2017), the Court of Appeals explained:

> We find the temporal distinction between imminent and immediate persuasive—an imminent threat is not dependent on its temporal proximity to the defensive act. Rather, it is one that places the defendant in imminent fear . . .

The Court explained the distinction in the context of battered spouse syndrome:

> Evidence admitted under the battered spouse syndrome statute can be essential to a defendant's claim of imperfect self-defense when she has committed non-confrontational homicide. Expert testimony regarding the cycle of violence in an abusive relationship can explain to the jury how a woman might actually fear imminent danger during a break between violent episodes.

Id. at 246. In other words, the Court of Appeals made clear that imminent does not always imply a present ability to inflict the bodily harm at issue. Rather, it implies that a victim fears that such harm is impending if the victim does not take some action to prevent it. In the present case, the action that Appellee took was to request a protective order to cease Appellant's escalating conduct because Appellee feared that his conduct would result in imminent harm.

[3] Notably, the Court of Appeals' interpretation of the word imminent in a self-defense context would be relevant in this case because, as the *Katsenelenbogen* Court explained, the test for reasonableness under FL § 4-501 (b)(1)(ii) is analogous to the test for reasonableness of fear in a self-defense context. *See Supra* at 10.

Finally, we find no issue with the circuit court's issuance of a protective order in the absence of actual consummated violence on the part of Appellant. As the Court of Appeals explained in *Coburn v. Coburn*:

> The purpose of the domestic abuse statute is to protect and 'aid victims of domestic abuse by providing an immediate and effective' remedy. *Barbee v. Barbee*, 311 Md. 620, 623, 537 A.2d 224, 225 (1988). The statute provides for a wide variety and scope of available remedies designed to separate the parties and avoid future abuse. Thus, the primary goals of the statute are preventive, protective and remedial, not punitive. The legislature did not design the statute as punishment for past conduct; it was instead intended to prevent further harm to the victim.

342 Md. 244, 252. Here, the Protective Order was issued in a manner consistent with the purpose of the statute – to prevent future harm, not to punish any past conduct.

CONCLUSION

We hold that the circuit court did not err in granting the Protective Order because Appellee demonstrated, by a preponderance of the evidence, that she was in fear of imminent serious bodily harm from Appellant. Appellant presented no basis for us to depart from the circuit court's finding that Appellee was credible, and that Appellee feared imminent bodily harm as a result of Appellant's conduct. Further there was sufficient evidence to support the circuit court's finding that Appellee's fear was reasonable given the escalating nature of Appellant's conduct.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.