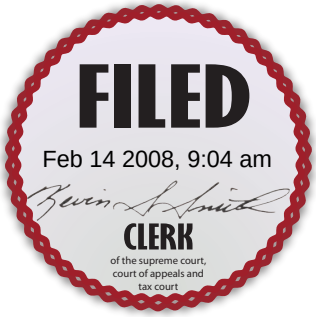

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IN THE
COURT OF APPEALS OF INDIANA

MATTHEW SPATIG,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 22A01-0709-CV-432
	)	
KRISTY BROYLES,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE FLOYD SUPERIOR COURT
The Honorable Daniel B. Burke, Jr., Magistrate
Cause No. 22D01-0609-PO-362

February 14, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Matthew Spatig ("Matthew") appeals the trial court's order granting the petition of Kristy Broyles ("Kristy") for a protective order.

We affirm.

ISSUES

1. Whether the evidence is insufficient to support the trial court's order.

2. Whether the order unconstitutionally restrains Matthew's free speech rights.

FACTS

On September 10, 2006, Kristy filed a petition for protective order, alleging that she was a "victim of stalking" by Matthew, with whom she had been "engaged in a sexual relationship." (App. 4). Kristy asked that the court prohibit Matthew from "harassing, annoying, telephoning, contacting, or directly or indirectly communicating with" her, *id.*, and order him to stay away from her residence and place of employment. On September 21, 2006, the trial court issued an ex parte order for protection. On October 5, 2006, the trial court received a lengthy letter from Matthew detailing the history of his relationship with Kristy, to "show this order is unwarranted and unjustified." (App. 12). The trial court considered it a request for hearing.

On February 15, 2007, the trial court heard evidence as to the following. Kristy and Matthew had known each other for approximately six years. They had been close friends. Despite the fact that Kristy had married Jeremy Broyles ("Jeremy") in November of 2001, she and Matthew began a special telephonic relationship in March of

2006. On April 8, 2006, the relationship between Kristy and Matthew became sexual; their last sexual contact was on June 12, 2006. In late June, Kristy "asked [Matthew] to stop contacting [her]." (Tr. 10).

Nevertheless, shortly thereafter, Matthew went to her house uninvited, and they talked on the front porch of her residence, with Matthew declaring his continuing love. As Matthew drove away, Kristy's husband Jeremy saw him, and Jeremy then received a call from Kristy – who was "extremely" upset and crying about his having come to the house. (Tr. 94). On July 14th, Matthew learned that Kristy was pregnant, and immediately thereafter Kristy's phone showed eleven calls from Matthew. Jeremy and Matthew met on July 17th, with two mutual friends, and Matthew agreed that he would have no direct contact with Kristy.

On September 1st, Kristy's cell phone showed four calls from Matthew, and he left several voicemail messages. On September 2nd, Matthew left a note on the Broyles' car at a motel parking lot in Indianapolis. On September 4th, Matthew left a voicemail message on the telephone at Kristy's workplace seeking to talk to her. That same day, he went to her workplace and tried to talk with her. Kristy felt intimidated and fearful, and she "threaten[] to call security twice" before Matthew finally left. (Tr. 31). On September 17th, Matthew left another voicemail message on Kristy's telephone at work. On September 19th, Matthew left two items of baby clothing on the windshield of Kristy's vehicle at her workplace. An attached note stated, "If you don't want to talk to me, you leave me no choice . . . ." (Kristy's Ex. 2).

Kristy testified that she considered the telephone calls to be harassment, because they were made after she had told him "not to contact [her]," (Tr. 30), and the calls intimidated her and made her feel threatened. She testified that the September 2nd note on her car made her feel intimidated, threatened and emotionally terrorized, and it caused her emotional distress. Kristy further testified that she felt emotional distress after having "asked him to leave [her] alone . . . he wouldn't respect that." (Tr. 23). She further testified that she had sought the protective order because Matthew's behavior caused her to feel "a threat to [her] marriage, a threat to [her] emotional well-being while being pregnant and [her] right to be left alone." (Tr. 24). Finally, Kristy testified that she felt harassed by Matthew's "continuing to call, and come to [her] work, threaten [her] job, threaten [her] marriage, threaten [her] well being and [her] health" and "the health of [her] baby." (Tr. 88). Kristy and Jeremy both testified that they were committed to maintaining their marriage and that Matthew's repeated interference and contacts threatened their efforts in that regard.

Matthew testified that he believed he was the father of Kristy's baby and that on December 15, 2006, he had filed a petition seeking a paternity determination.[1] Matthew admitted that he had left "angry voicemail" messages, (Tr. 158), and that he was aware that Kristy wanted no contact from him. However, Matthew testified that he had never intended any of his contacts or communications to annoy, harass or alarm Kristy.

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[1] Matthew's letter to the trial court and his testimony was that Kristy had told him Jeremy had had a vasectomy years earlier. Jeremy confirmed this at trial.

Eight days after Matthew initiated his paternity action, Kristy gave birth to a son.

On May 7, 2007, the trial court issued its order, with findings of fact and conclusions of law as requested by Matthew. The trial court's findings reflect the evidence summarized above. The trial court then concluded that Matthew's "telephone, written and personal contacts with [Kristy] after she had told him not to have individual contact with her, constituted impermissible contacts"; that "such telephone, written and personal contacts of [Kristy] by [Matthew] would cause a reasonable person to suffer emotional stress [sic] and did cause [Kristy] to suffer emotional distress." (App. 56). Accordingly, the trial court ordered the protective order to remain in effect.

DECISION

1. Evidence to Support Order

Here, at Matthew's request, the trial court entered findings of fact and conclusions of law. Accordingly, our standard of review is "two-tiered: we determine whether the evidence supports the trial court's findings, and whether the findings support the judgment." *Weiss v. Harper*, 803 N.E.2d 201, 205 (Ind. Ct. App. 2003). We will not disturb the trial court's findings unless they are clearly erroneous. *Id.* Findings of fact are clearly erroneous when the record lacks any reasonable inference from the evidence to support them. *Id.* Further, in our review of the trial court's findings, we give due regard to the opportunity of the trial court to judge the credibility of witnesses. *Augspurger v. Hudson*, 802 N.E.2d 503, 508 (Ind. Ct. App. 2004). Thus, when reviewing the trial court's entry of findings, we neither reweigh the evidence nor reassess the credibility of witnesses. *Id.* at 509. A judgment is clearly erroneous when a review of

the record leaves us with a firm conviction that a mistake has been made. *Weiss*, 803 N.E.2d at 205.

Indiana's legislature has directed courts to "construe" the Civil Protection Order Act ("CPA") so as "to promote the (1) protection and safety of all victims of domestic or family violence in a fair, prompt, and effective manner; and (2) prevention of future domestic and family violence." Ind. Code § 34-26-5-1. The statute authorizes "a person who is or has been a victim of domestic or family violence" to file "a petition for an order of protection against," *inter alia*, "a . . . person who has committed stalking under I.C. 35-45-10-5 . . . ." I.C. § 34-26-5-2. The legislature has also expressly defined "domestic or family violence" as "includ[ing] . . . stalking" as defined in Indiana Code section 35-45-10-5 "for purposes of" the CPA. I.C. § 31-9-2-42.

Hence, we turn to the definition of "stalking" in Indiana Code section 35-45-10-5. Therein, "stalk" is defined to mean

> a knowing or an intentional course of conduct involving repeated or continuing *harassment* of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened. The term does not include statutorily or constitutionally protected activity.

I.C. § 35-45-10-1 (emphasis added). The statute further defines "harassment" as

> conduct directed toward a victim that includes but is not limited to repeated or continuing *impermissible contact* that would cause a reasonable person to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include statutorily or constitutionally protected activity . . . .

I.C. § 35-45-10-2 (emphasis added). "Impermissible contact" is then defined as including "but not limited to knowingly or intentionally following or pursuing the victim." I.C. § 35-45-10-3.

The CPA provides for the trial court to issue "without notice and hearing" an ex parte order for protection to "prohibit . . . harassing, annoying, telephone, contacting, or directly or indirectly communicating with" the petitioner. I.C. § 34-26-5-9(b). However, if (within thirty days) the respondent seeks a hearing, the trial court then sets the matter for hearing. I.C. § 34-26-5-10. Thereafter, the same relief may be ordered.

Here, the evidence established the reasonable inference that Matthew's calls and other actions directed at Kristy after he was aware that she desired them to cease were "acts of "knowingly or intentionally . . . pursuing" her, *i.e.,* "impermissible contact" as defined by Indiana Code section 35-45-10-3. Further, the evidence supports the reasonable inference that these "impermissible contact[s]" were "repeated or continuing" acts "that would cause a reasonable person to suffer emotional distress and that actually cause[d] [Kristy] to suffer emotional distress," *i.e.*, that his actions constituted "harassment" pursuant to Indiana Code section 35-45-10-1. By law, these actions constitute "stalking" for purposes of the CPA. *See* I.C. §§ 34-26-5-2, 31-9-2-42, 35-45-10-5, 1 and 2. Kristy unequivocally testified that his actions caused her emotional distress. Therefore, the trial court's conclusion that Matthew's "telephone, written and personal contacts with [Kristy] after she had told him not to have individual contact with

her" were "impermissible contacts"[2] that "would cause a reasonable person to suffer emotional stress [sic] and did cause [her] to suffer emotional distress" are supported by the evidence. (App. 56).

Matthew argues that the evidence does not support the trial court's conclusion that his actions were "done with intent to harass, or alarm [Kristy] and . . . without intent of legitimate communication." (App. 56). We do not find such a conclusion necessary to the trial court's issuance of the protective order. As discussed above, whether impermissible contact that constitutes harassment and, thereby, stalking has been shown turns on whether the contact "would cause a reasonable person to suffer emotional distress." I.C. § 35-45-10-1. Therefore, the legal standard is whether the petitioner/victim's subjective experience of suffering emotional distress was objectively reasonable, when viewed from the perspective of the reasonable person.

Matthew reminds us that for an order of protection under the CPA, "a finding that domestic or family violence has occurred . . . means that a respondent represents a credible threat to the safety of a petitioner . . . ." I.C. § 34-26-5-9(f). He notes that there is no finding that he represents a threat to Kristy. However, the statute does not expressly require such a finding. Moreover, the specific definition of "stalking" as a variant of "domestic or family violence" does not include a threat to the victim's safety.

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[2] The trial court's findings states that the contacts "constituted impermissible contacts in violation of her right to privacy . . . ." (App. 56). Matthew argues that Kristy's right to privacy "does not have application" and is "not relevant" to "a protective order based upon stalking." Matthew's Br. at 9. We agree. However, we do not find that this phrase renders the judgment erroneous or requires reversal of the protection order. As discussed, the evidence supports the conclusion that the actions constituted "impermissible contacts" as that term is defined in the context of a protective order for stalking. Therefore, we find the phrase to be surplusage and of no moment.

Nevertheless, Kristy testified that she feared for her health and that of her baby. We find the facts here to support the reasonable inference that repeated, undesired contacts directed toward a pregnant woman/or a woman with a newborn child do pose threats to their health – and, therefore, their safety. Further, the CPA's essential purpose is to not only promote the protection and safety of victims of domestic or family violence – and, by definition, the victims of stalking, but also to promote the "prevention" of domestic and family violence. I.C. § 34-26-5-1. Here, given the facts presented, the circumstances are rife for possible future violence, absent an order of protection.

Matthew also reminds us that "[u]pon a showing of domestic or family violence by a preponderance of the evidence, the trial court shall grant *relief necessary to bring about a cessation of the violence or the threat of violence*." I.C. § 34-26-5-9(f) (emphasis added). He argues the lack of such a showing here, and he cites *Tons v. Bley*, 815 N.E.2d 508 (Ind. Ct. App. 2004), for the proposition that this provision bars the grant of a protective order when there is no evidence "of past violence or threats of violence." Matthew's Br. at 15. In *Tons*, the petitioner (Tons' former wife) sought an order of protection for herself, her current husband, and Tons' and her son. We found evidence that Tons had threatened to beat the son and had done so in the past, but no evidence of any threats or recent violence by Tons directed toward the other two. We affirmed the order of protection as to the son but reversed it as to the others. Clearly, *Tons* did not involve the "stalking" variant of domestic and family violence. Further, as in the discussion above, we find that the circumstances here hold the potential for future violence.

2. Matthew's Free Speech Rights

Matthew also argues that the trial court's order must be reversed because it violates his "right to free speech guaranteed by the First Amendment of the United States Constitution." Matthew's Br. at 33. We disagree.

We addressed a similar argument in *Rzezutek v. Beck*, 649 N.E.2d 673 (Ind. Ct. App. 1995), *trans. denied*. We quoted the discussion of the Seventh Circuit in this regard as follows:

> The purpose of the free-speech clause . . . is to protect the market in ideas, broadly understood as the public expression of ideas, narrative, concepts, imagery, opinions – scientific, political, or aesthetic – to an audience whom the speaker seeks to inform, edify or entertain. Casual chit-chat between two persons or otherwise confined to a small social group is unrelated, or largely so, to that marketplace, and is not protected. Such conversation is important to its participants but not to the advancement of knowledge, the transformation of taste, political change, cultural expression, and the other objectives, values, and consequences of the speech that is protected by the First Amendment.

Id. at 680 (quoting *Swank v. Smart*, 898 F.2d 1247, 1250-51 (7th Cir. 1990) (internal citation omitted), *cert. denied*). We found that because "person to person conversations between" the person protected by the protective order and the respondents were "largely unrelated to the market in ideas," such conversations were "not protected by the first amendment." *Id.* at 681. Accordingly, the protective order did not violate the respondents' free speech rights. *Id.*

We reach the same conclusion here. Matthew's conversations with Kristy were not in the nature of "public expression of ideas, narrative, concepts, imagery, opinions – scientific, political, or aesthetic – to an audience whom" he sought "to inform, edify or

entertain," but were rather "unrelated to the market in ideas." *Id.* at 680. Therefore, the trial court's order that he not communicate with Kristy did not violate Matthew's free speech rights.

Affirmed.

BAKER, C.J., and BRADFORD, J., concur.