

DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

MICHAEL WERNER,

Appellant,

v.

CARLI JO WERNER,

Appellee.

No. 2D21-1998

June 15, 2022

Appeal from the Circuit Court for Lee County; Lisa S. Porter, Judge.

David W. Holley of Burandt, Adamski, Feichthaler & Sanchez,
PLLC, Cape Coral, for Appellant.

No appearance for Appellee.

ROTHSTEIN-YOUAKIM, Judge.

Michael Werner (the Husband) appeals the final judgment of injunction for protection against domestic violence entered against him, arguing that the evidence was insufficient to support entry of the injunction. We agree and reverse.

In her petition for an injunction, Carli Jo Werner (the Wife) alleged that she had become fearful for her life after informing the Husband that she intended to divorce him. At the hearing on the petition, the Wife testified that she sought an injunction in part because she needed space from the Husband until the divorce proceedings were over.

The Wife testified that on May 23, 2021, she had informed the Husband that she wanted a divorce. Later that day, his mother had appeared in the driveway of the marital home, had pointed her finger at the Wife, and had yelled at her. That same day, the Husband had moved out of the marital home. Between May 23 and May 28, the Husband had texted and called the Wife "all day long," attempting to "guilt trip [her] into feeling sorry for him." On the night of May 28, he had texted her what apparently was a real-time photo of a truck parked in their driveway (a screenshot taken from footage recorded by an exterior home security camera), had told her that she was a bad person, and had threatened to come over to the home. He did not, however, come over.

The Wife also testified that she was fearful of the Husband because in the past he had kicked down a door and had punched a

hole in a bathroom door. One evening after she refused his sexual advances, he had thrown things around the bathroom, shattering his cell phone. She also testified that he had yelled at her after she removed \$10,000 worth of patio furniture from their house. Finally, she testified that she was also afraid of him because he owns guns.

On cross-examination, the Wife admitted that the Husband had never physically harmed her; nor had he ever threatened to do so. The trial court entered the injunction, and this appeal followed.

To obtain an injunction, a petitioner must establish an objectively reasonable fear that "he or she is in imminent danger of becoming the victim of any act of domestic violence." § 741.30(1)(a), Fla. Stat. (2020); *see also Oettmeier v. Oettmeier*, 960 So. 2d 902, 903–04 (Fla. 2d DCA 2007). Domestic violence is defined as "any assault, aggravated assault, battery, aggravated battery, sexual assault, sexual battery, stalking, aggravated stalking, kidnapping, false imprisonment, or any criminal offense resulting in physical injury or death of one family or household member by another family or household member." § 741.28(2). In determining whether the petitioner's fear is objectively reasonable, the trial court considers "the current allegations, the parties' behavior within the

relationship, and the history of the relationship as a whole."

Phillips v. Phillips, 151 So. 3d 58, 59 (Fla. 2d DCA 2014) (quoting *Giallanza v. Giallanza*, 787 So. 2d 162, 164 (Fla. 2d DCA 2001)).

Here, the trial court concluded that the Wife reasonably feared that she was in imminent danger of becoming the victim of domestic violence. In support of that conclusion, the court stated, "Breaking down a door, hitting a door, threatening, being abusive, that's sufficient, in my mind, to put fear of imminent violence."

Contrary to the trial court's conclusion, however, the facts established at the hearing are insufficient as a matter of law to establish an objectively reasonable fear of imminent danger.¹

Rather, they are analogous to those in *Arnold v. Santana*, 122 So. 3d 512 (Fla. 1st DCA 2013). In that case, the petitioner wife alleged that her husband had texted her repeatedly to tell her that he was watching her, and she testified that he had warned her to change

¹ There is no dispute that those facts were established through competent substantial evidence. *See Stallings v. Bernard*, 334 So. 3d 365, 367 (Fla. 2d DCA 2022) ("On appeal of an order granting a permanent injunction for protection against stalking, the trial court's factual findings are reviewed for competent substantial evidence." (citing *Washington v. Brown*, 300 So. 3d 338, 340 (Fla. 2d DCA 2020))).

her passwords because he was tracking everything she was doing and following her. *Id.* at 513. She further testified that after she had locked herself in the bathroom during an argument, he had kicked down the door and that when they were dating three or four years earlier, he had hit her. *Id.* In reversing the injunction order, the First District reasoned that the wife had failed even to allege that the husband had threatened violence against her and that the prior incident was too remote in time and too isolated to establish an objectively reasonable fear of *imminent* danger. *See id.* at 514.

As in *Arnold*, the Wife testified that the Husband had verbally abused her and that he had sent her many text messages. Also as in *Arnold*, none of the Husband's communications threatened violence. But *unlike* in *Arnold*, there was no prior incident of physical violence against the Wife—a fact that supports denial of the injunction. Although the Wife testified that at one point the Husband had kicked down a door and had punched a hole in a bathroom door, she testified that he had never physically hurt her or threatened to hurt her.

Accordingly, the evidence did not support a conclusion that the Wife had an objectively reasonable fear that she was in danger

of imminent violence. *See id.*; *see also Oettmeier*, 960 So. 2d at 903–05 (holding that competent substantial evidence did not support the trial court's "finding"² that the petitioner wife had an objectively reasonable fear of imminent danger where she testified that the husband had "left angry messages on her cell phone," had broken into her home, and had spit in her face and pushed her; that he was a heavy and angry drinker; that he had pounded on the doors and walls of the home and had smashed a trash can; and that he had threatened to make her life miserable "until the end"); *Stone v. Stone*, 128 So. 3d 239, 241–42 (Fla. 4th DCA 2013) (concluding that the evidence was insufficient to establish an objectively reasonable fear of imminent danger where the husband had sent numerous texts and phone calls that caused the petitioner wife mental anguish, had grabbed her to initiate sex and had then abandoned the attempt, and had made a surprise appearance suggesting that he had been following her). We therefore reverse

² Although *Oettmeier* refers to this as a "finding," "the question of whether the evidence is legally sufficient to justify imposing an injunction is a question of law that we review de novo," *Washington*, 300 So. 3d at 340 (quoting *Pickett v. Copeland*, 236 So. 3d 1142, 1143–44 (Fla. 1st DCA 2018)), and is therefore more properly labeled a "conclusion."

the court's final judgment and remand with instructions to dismiss the petition.

Reversed and remanded.

BLACK and LUCAS, JJ., Concur.

Opinion subject to revision prior to official publication.