ATTORNEY FOR APPELLANT:

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IN THE
COURT OF APPEALS OF INDIANA

IN RE: The Protective Order of DONALD L. CAMPBELL,	)	
Appellant-Respondent,	)	
vs.	)	No. 45A03-0803-CV-127
D.S., b/n/f CHARLES W. SCOTT,	)	
Appellee-Petitioner.	)	

APPEAL FROM THE LAKE CIRCUIT COURT
The Honorable Lorenzo Arredondo, Judge
The Honorable Richard F. McDevitt, Magistrate
Cause No. 45C01-0711-PO-729

October 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Chief Judge

Appellant-respondent Donald L. Campbell appeals the trial court's issuance of a protective order against him. Specifically, Campbell argues that the trial court erred in granting the protective order in favor of appellee-petitioner, Charles Scott—the seventeen-year-old victim's father—because the victim did not testify at the hearing. Campbell also argues that the trial court erred in considering the allegations against him that were contained in a police report that was not admitted into evidence and that the evidence was insufficient to support the trial court's determination that Campbell had stalked or harassed the victim. Finally, Campbell argues that even if the protective order was validly issued, the trial court abused its discretion in extending the protective order beyond two years from the issuance of the original order. Finding no error, we affirm the judgment of the trial court.

FACTS

On November 9, 2007, Charles Scott, the father of seventeen-year-old D.S., filed a petition for a protective order against Campbell. At an ex parte hearing that was conducted that same day, the trial court reviewed a letter that D.S. had received from fifty-six-year-old Campbell the previous day. A police report that Scott had made regarding the letter and card that D.S. received was also attached to the petition. The police report stated, among other things, that although Campbell attends nearly all of D.S.'s school volleyball games and practices, he has no friends or relatives on the team. The report also contained an allegation that Campbell had made an obscene telephone call to D.S. and that he had parked his van in front of her residence on at least one occasion. Finally, the report contained allegations that Campbell had previously attempted to entice other young girls into his residence after

informing them that he had a batting cage in the basement.

The card that D.S. received began with a handwritten note from Campbell that stated, "I'm thinking about you, maybe you'd like to work with me this Christmas or next summer. I pay ten ($10.00) dollars per hour. Please let me know if your [sic] interested." Tr. p. 8. Enclosed in the envelope were three $100 bills and Campbell's business card from "D. C. Cabinetry" and a cell phone number. Campbell signed the card, "The Sausage King." Appellant's App. p. 11, 21; Tr.p. 24, 29-30.

Following the ex parte hearing, the trial court issued a protective order against Campbell. Thereafter, on December 11, 2007, Campbell requested a hearing with regard to the order. At the hearing, which commenced on December 28, D.S.'s mother, Susan Scott, testified that her daughter plays volleyball on the Lowell High School team. Susan testified that Campbell enters the gymnasium on occasion during volleyball practices and games wearing a shirt that reads, "Sausage King, You Can't Beat My Meat." Tr. p. 27. Susan further testified that D.S., the other girls, and their parents "get very uptight" when Campbell appears at the school. Id. at 28.

At some point during the hearing, Campbell's counsel handed the police report to Charles and questioned him about specific portions of it, which included the prior contacts that Campbell had had with D.S. Additionally, Susan testified about an incident where D.S. had asked her to return home early from a Christmas party because a white van had been sitting in front of the Scotts' residence. Id. at 25. Susan also testified that after she read the card that Campbell had sent to D.S., she contacted the police. The police officers

interviewed D.S. and her parents when preparing the report. D.S. was not present and did not testify at the hearing.[1]

Following the hearing, the trial court entered findings of fact and conclusions of law on January 3, 2008, and determined that the protective order that was originally issued on November 9, 2007, "will remain in effect for two years from today's date." Appellant's App. p. 21. In relevant part, the trial court's findings and order provided as follows:

FINDINGS OF FACT

5. The respondent did not testify, so the Court is left to ponder the following questions:

   A. Why a fifty-six (year old man would send a seventeen (17) year old child three hundred ($300.00) dollars, and what he expected in return for the money;
   B. Why is he the "Sausage King,"
   C. What kind of work he wanted the child to do;
   D. Whether he owns a white van and/or called the minor child while her parents were gone, stating "I was doing boner pushups and I was thinking about you;" and/or
   E. How Respondent knew the child's private address or how he knew she was looking for a job at the time he sent her the letter.

6. During the hearing, [Campbell's counsel] handed the [police] report to the witness, Charles Scott, and questioned him about specific portions of the report. The fact that the police report was introduced into the hearing by the Respondent's attorney and used during questioning of a witness "opened the door" to the use of that police report for consideration as evidence by this Court. The Court therefore considers the allegations contained in the police report as evidence in this cause. . . .

CONCLUSIONS OF LAW

The Court finds that Respondent's attending the volleyball games wearing a shirt with a sexually suggestive message, thereby placing the minor Petitioner child in fear for her safety, as well as the fact that Respondent sent a letter

[1] The trial court commented, "in this Court, I typically am not going to allow minors to testify." Tr. p. 10.

> containing three hundred ($300.00) dollars to the minor Petitioner at her private residence, and information contained in the police report indicating that minor child believes it was Respondent who was parked in front of her house and later called and told her he was " . . . thinking about you" as he had written in his letter containing the three hundred ($300.00) dollars, constitutes a course of conduct involving impermissible contact as those terms are defined by Indiana law.
>
> Respondent is to have absolutely no contact of any kind with the minor Petitioner. Violation of this Order constitutes a criminal offense. Additionally, Respondent is Ordered to stay away from Lowell High School while minor Petitioner is a student there.

Appellant's App. p. 21.[2] Campbell now appeals.

DISCUSSION AND DECISION

I. Standard of Review

We initially observe that the trial court sua sponte entered special findings of fact and conclusions pursuant to Trial Rule 52. In reviewing the trial court's judgment, "we consider whether the evidence supports the findings and whether the findings support the judgment." Berkel & Co. Contractors, Inc. v. Palm & Assoc., Inc., 814 N.E.2d 649, 658 (Ind. Ct. App. 2004). Findings are clearly erroneous only when the record contains no facts to support them either directly or by inference. Id. A judgment is clearly erroneous if it applies the wrong legal standard to properly found facts. Id.

We also note that the Scotts did not file an appellate brief in this case. And we need not undertake the burden of developing arguments for them. Butrum v. Roman, 803 N.E.2d 1139, 1142 (Ind. Ct. App. 2004). When an appellee fails to file a brief, we may reverse the trial court's decision based on a showing of prima facie error. Prima facie error means error

[2] Campbell also filed a motion to correct error that the trial court subsequently denied.

at first sight, on first appearance, or on the face of it. Morequity, Inc. v. Keybank, N.A., 773 N.E.2d 308, 311-312 (Ind. Ct. App. 2002).

II. Campbell's Claims

A. Absence of D.S.'s Testimony and Hearsay Evidence

Campbell contends that the protective order must be set aside because D.S. did not testify at the hearing and the police report that set forth other instances of Campbell's conduct toward D.S. had not been admitted into evidence. Therefore, Campbell maintains that no evidence was presented as to whether his actions frightened or intimidated D.S.

In resolving this issue, we first note the relevant provisions of Indiana Code section 34-26-5-2:

> (b) A parent, a guardian, or another representative may file a petition for an order for protection on behalf of a child against a:
>
> (1) family or household member who commits an act of domestic or family violence; or
>
> (2) person who has committed stalking under 35-45-10-5 or a sex offense under IC 35-42-4 against the child.
>
> . . .
>
> (d) If a petitioner seeks relief against an unemancipated minor, the case may originate in any court of record and, if it is an emergency matter, be processed the same as an ex parte petition. When a hearing is set, the matter may be transferred to a court with juvenile jurisdiction.

In accordance with Indiana Code section 35-45-10-5:

> [S]talk means 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.

Finally, harassment has been defined 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.

I.C. § 35-45-10-2.

In this case, Campbell asserts that the absence of D.S.'s testimony at the hearing necessarily precluded the issuance of the protective order because no evidence was presented establishing that D.S. was placed "in fear of physical harm." Appellant's Br. p. 13. Notwithstanding Campbell's claim, the offense of stalking is committed if the evidence demonstrates that the victim became "terrorized, frightened, intimidated, or threatened" by the defendant's conduct. I.C. § 35-45-10-5 (emphasis added). And harassment occurs when the defendant's conduct causes the victim to suffer emotional distress. I.C. § 35-45-10-2.

Pursuant to Indiana Code section 34-26-5-9

> (b) A court may grant the following relief without notice and hearing in an ex parte order for protection or in an ex parte order for protection modification:
>
> (1) Enjoin a respondent from threatening to commit or committing acts of domestic or family violence against a petitioner and each designated family or household member.
>
> (2) Prohibit a respondent from harassing, annoying, telephoning, contacting, or directly or indirectly communicating with a petitioner.
>
> (3) Remove and exclude a respondent from the residence of a petitioner, regardless of ownership of the residence.
>
> (4) Order a respondent to stay away from the residence, school, or place of employment of a petitioner or a specified place frequented by a petitioner and each designated family or household member.
>
> (c) A court may grant the following relief after notice and a hearing, whether or not a respondent appears, in an order for protection or in a modification of an order for protection:
>
> (1) Grant the relief under subsection (b).

(Emphasis added).

At the hearing, Charles testified about the card that contained sexually suggestive language and the cash that D.S. received from Campbell. Tr. p. 19. Susan also testified about the card and cash and described incidents where Campbell attends the school's volleyball games and practices wearing a shirt that says, "The Sausage King, You Can't Beat My Meat." Id. at 27. Susan testified, absent any objection from Campbell, that D.S. and "the other girls get very uptight" when Campbell walks into the school gymnasium. Id. at 28. Susan also testified that D.S. was not in court because "she's scared of [Campbell]." Id.[3]

In light of this evidence, the trial court could reasonably infer from the testimony presented by D.S.'s parents that D.S. was frightened or intimidated by Campbell's actions toward her as required by the stalking and harassment statutes. As a result, Campbell's claim that the protective order must be set aside because D.S. did not testify at the hearing fails.

B. The Police Report and Course of Conduct

Notwithstanding our conclusion above, Campbell maintains that the trial court erred in granting the protective order because the police report that described previous instances of Campbell's contacts with D.S. had not been admitted into evidence. In other words, Campbell argues that the evidence failed to demonstrate that he stalked or harassed D.S. because the only evidence that was properly admitted at the hearing was the testimony of D.S.'s parents regarding the card, note, and money, which amounted to only a single instance of contact. Therefore, Campbell asserts that the evidence failed to establish the "course of

conduct involving repeated or continuing harassment of another person" that is required by the stalking and harassment statutes. Appellant's Br. p. 15.

As discussed above, the plain language of our stalking and harassment statutes requires the defendant to engage in a course of conduct that involves "repeated or continuing harassment of another person." I.C. § 35- 45-10-5. Thus, Campbell correctly posits that only one contact with a victim is not sufficient to establish the offense of stalking.

We also observe that a police report is generally considered inadmissible hearsay evidence. Banks v. State, 567 N.E.2d 1126, 1129 (Ind. 1991); Ind. Evidence Rule 803(8)(a). However, otherwise inadmissible hearsay evidence may be considered for substantive purposes and is sufficient to establish a material fact at issue when the hearsay evidence is admitted without a timely objection at trial. Banks, 567 N.E.2d at 1129. Moreover, otherwise inadmissible evidence may become admissible where the defendant opens the door to questioning on that evidence. Crafton v. State, 821 N.E.2d 907, 910 (Ind. Ct. App. 2005) (citing Jackson v. State, 728 N.E.2d 147, 152 (Ind. 2000)).

At the December 28, 2007, hearing, Campbell's counsel elicited testimony from D.S.'s parents about the other alleged contacts Campbell had with their daughter that were contained in the police report. Specifically, Campbell's counsel asked Charles about "another incident that occurred about three years ago." Tr. p. 20. And Charles acknowledged that D.S. spoke directly with the police officers when the report was filed. Id. at 21.

[3] Although Campbell's counsel objected at this point on the ground of "speculation," the trial court did not rule on the objection and Campbell did not pursue the objection any further. Tr. p. 28.

Additionally, although Campbell's counsel acknowledged that Susan's account of telephone calls and Campbell's white van that was allegedly parked in front of their residence amounted to hearsay, it was Campbell's counsel who initiated the discussion and elicited the testimony regarding those events. Id. at 25-26. Susan also testified about the instances of Campbell's attendance at the school volleyball games and practices. Id. at 27. As a result, it is evident that Campbell opened the door with regard to the contents of the police report and Campbell's prior contacts with D.S. when he questioned the Scotts about them. And we agree with the trial court's conclusion that it could consider the contents of the police report in deciding whether or not to grant the protective order. Banks, 567 N.E.2d at 1129. Therefore, Campbell's contention that the trial court erroneously granted the protective order based on a single instance of contact with D.S. in violation of the stalking and harassment statutes fails.

C. Duration of Protective Order

Finally, Campbell argues that even if the protective order was properly granted, the trial court erred in extending the duration of the order for more than two years. We note that in accordance with Indiana Code section 34-26-5-9(e), "an order for protection issued ex parte or upon notice and a hearing, or a modification of an order for protection issued ex parte or upon notice and a hearing, is effective for two (2) years after the date of issuance unless another date is ordered by the court." (Emphasis added).

In this case, the trial court specifically determined in its order of January 3, 2008, that the protective order against Campbell "will remain in effect for two years from today's date."

Appellant's App. p. 21 (emphasis added). When considering the plain language of the statute, the protective order entered against Campbell was ordered to remain in effect within the two-year period. I.C. § 34-26-5-9(e). Moreover, the trial court could have ordered the protective order to remain in effect past the two-year period set forth in Indiana Code section 34-26-5-9(e). As a result, Campbell's claim fails.

The judgment of the trial court is affirmed.

MATHIAS, J., concurs.

BROWN, J., concurs with opinion.

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BROWN, Judge concurring

I concur in the result reached by the majority but write separately to state my disagreement that the police report could be used as evidence when it had not been admitted as evidence at the hearing. See Mann v. Russell's Trailer Repair, Inc., 787 N.E.2d 922, 929 (Ind. Ct. App. 2003) (holding that the trial court abused its discretion by considering the evidence that was not admitted at the evidentiary hearing), reh'g denied, trans. denied; see also Ind. Evidence Rule 803 (providing that the following are not within the business records

exception to the hearsay rule: (a) investigative reports by police and other law enforcement personnel, except when offered by an accused in a criminal case . . . ."); Martin v. State, 736 N.E.2d 1213, 1215.n.5 (Ind. 2000) (noting that investigative reports by police and other law-enforcement personnel are hearsay). That said, as the testimony elicited by Campbell's counsel concerning the contents of the report, specifically testimony regarding other alleged contacts Campbell had with D.S., was admitted, the trial court's consideration of the police report itself was harmless error. See, e.g., Davenport v. State, 749 N.E.2d 1144, 1149 (Ind. 2001) (holding that the erroneous admission of evidence was harmless where the statement was cumulative of other properly admitted evidence), reh'g denied. Therefore, I respectfully concur in the result reached by the majority.