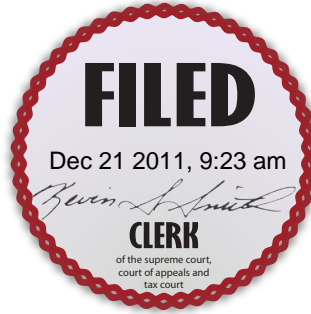


Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

THOMAS AUFIERO,
Appellant-Repondent,

vs.

DANIEL RICKS,
Appellee-Petitioner.

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No. 79A04-1107-PO-350

APPEAL FROM THE TIPPECANOE SUPERIOR COURT
The Honorable Les A. Meade, Judge
Cause No. 79D05-1101-PO-2

December 21, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

KIRSCH, Judge

Thomas Aufiero (“Aufiero”) appeals from the trial court’s denial of a motion to correct error regarding the protective order against him. Aufiero presents the following restated issues for our review:

- I. Whether there is sufficient evidence to support the issuance of the protective order; and
- II. Whether the scope of the protective order is overly broad.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

In January 2011, at the time Daniel Ricks (“Ricks”) filed the petition for protective order, he was married to Jennifer Ricks (“Jennifer”) and they had three minor children, M.R., who was nine years old, E.R., who was seven years old, and T.R. who was five years old. Ricks and Jennifer were in the process of dissolving their marriage and resolving custody issues. Ricks and Jennifer, however, both resided in the marital residence with their three children until other arrangements could be made.

Aufiero and Jennifer had been, and continued to be, involved in an extra-marital relationship. Ricks was aware of the affair between the two. Aufiero is a heart surgeon and Ricks is a perfusionist, which means that during open-heart surgeries he runs a heart-lung bypass machine. Both Aufiero and Ricks had performed work at Lafayette’s two hospitals, IU Clarian Arnett Hospital and St. Elizabeth’s Hospitals for several years prior to the time Ricks sought the protective order. However, at the time of the hearing on Ricks’ petition for a protective order, Aufiero was not employed.

On December 3, 2010, Ricks tried to locate Aufiero's home in an attempt to find Jennifer. During the ensuing, heated conversation among the three inside Aufiero's house, Aufiero pointed a gun at Ricks, and Ricks immediately left Aufiero's house. Approximately one week later, on December 10, 2010, Aufiero placed a call using the land line telephone number for Ricks' house. Ricks answered the telephone, instructed Aufiero not to call the land line telephone number, and told Aufiero that the children were home. Ricks refused to pass the telephone to Jennifer as Aufiero had requested. Aufiero then began to call Ricks names and challenged him to fight. Aufiero told Ricks that he was on his way to Ricks' house and, several times during the conversation, threatened to injure or kill Ricks. Ricks, who was fearful that Aufiero would follow through with his threats, woke up the children and transported them to his mother's home. Ricks then notified law enforcement.

On January 1, 2011, just after midnight, Aufiero again called Ricks' home using the land line telephone number. Ricks answered the telephone and restated his request that Aufiero refrain from calling the home telephone number. Ricks refused to pass the telephone to Jennifer as Aufiero had requested. Aufiero then demanded that Ricks pass the telephone to Jennifer or he would kill him. Ricks notified law enforcement of the threat.

Also in December 2010 and January 2011, Ricks observed a vehicle he believed belonged to Aufiero drive by his house on several occasions. Ricks lives on a very rural road that normally had very little traffic traveling on it. His closest neighbor lived approximately one-half mile away. Ricks recognized Aufiero's vehicle, which was a black Chevrolet Tahoe or Suburban. They had parked their vehicles next to each other at work for nearly two years,

so Ricks was familiar with Aufiero's vehicle. At one point, a vehicle matching that description slowed near the driveway of Ricks' house. Although Ricks could not identify the driver of the vehicle given the distance from the street to Ricks' house, no one living in the area of Ricks' home drove a vehicle similar to that one. Ricks made these observations at approximately the same time as the other incidents.

On January 5, 2011, Ricks filed a petition for a protective order and a request for a hearing. In that petition Ricks sought protection for himself and his three minor children from Aufiero. On February 7, 2011, the trial court held an ex parte hearing on the petition at the conclusion of which the trial court entered a protective order enjoining Aufiero from threatening to commit or committing acts of domestic or family violence, stalking, or a sex offense against Ricks and his children, prohibiting him from harassing, annoying, telephoning, contacting or directly or indirectly communicating with Ricks or his children, ordering him to stay away from Ricks' residence, the children's schools, and places where Ricks worked including IU Clarian Arnett Hospital and the St. Elizabeth Hospitals in Lafayette, Indiana.

On January 25, 2011, Aufiero filed a verified request for a hearing to contest the protective order, and a hearing was held on February 25, 2011 at the conclusion of which the trial court took the matter under advisement. On April 8, 2011, the trial court entered an order reaffirming the entry and terms of the protective order, but amended it to provide that contact by Aufiero by cell phone was not prohibited.

On May 6, 2011, Aufiero filed a motion to correct error, and the trial court held a hearing on the motion. On July 8, 2011, the trial court entered an order denying the motion to correct error. Aufiero now appeals.

DISCUSSION AND DECISION

I. Sufficiency of the Evidence

Aufiero challenges the sufficiency of the evidence to support the issuance of the protective order. When reviewing the sufficiency of the evidence in this context, we do not reweigh the evidence or reassess witness credibility. *Tons v. Bley*, 815 N.E.2d 508, 511 (Ind. Ct. App. 2004). We consider only the evidence of probative value and the reasonable inferences that support the trial court's judgment. *Id.*

We have previously stated as follows about Indiana's Civil Protection Order Act:

Indiana's legislature has directed the courts to "construe" the Civil Protection Order Act ("the Act") 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 Act authorizes "a person who is or has been a victim of domestic . . . violence" to file a petition for an order for protection. I.C. § 34-26-5-2. . . . The petition for protection may be sought against a respondent who has committed (1) an act of domestic violence against the petitioner, or (2) "stalking," as defined in the criminal code. I.C. § 34-26-5-2. Further, "domestic violence" means "the occurrence of" an act by the respondent "attempting to cause, threatening to cause, or causing physical harm" to the petitioner, or placing the petitioner "in fear of physical harm." I.C. § 34-6-2-34.5. Pursuant to the Act, "domestic violence . . . includes stalking (as defined in IC 35-45-10-1)." *Id.* The relevant definition of "stalking" is as follows: a knowing or 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. I.C. § 35-45-10-1. Upon a showing of domestic violence "by a preponderance of the evidence, the trial court 'shall grant the relief necessary to bring about a

cessation of the violence or the threat of violence.’ ” *Moore v. Moore*, 904 N.E.2d 353, 358 (Ind. Ct. App. 2009) (quoting I.C. § 34–26–5–9(4)).

A.S. v. T.H., 920 N.E.2d 803, 806 (Ind. Ct. App. 2010) (internal citation omitted).

“Harassment” means “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,” but does not include “statutorily or constitutionally protected activity.” Ind. Code § 35-45-10-2. “Impermissible contact includes but is not limited to knowingly or intentionally following or pursuing the victim.” Ind. Code § 35-45-10-3.

To obtain the order, Ricks was required to establish by a preponderance of the evidence at least one of the allegations in the petition. *Tons*, 815 N.E.2d at 511. Unlike the facts in *Tisdial v. Young*, 925 N.E.2d 783 (Ind. Ct. App. 2010), a case relied upon by Aufiero, the facts here establish a pattern of behavior that constitutes stalking. Aufiero was asked not to use the Ricks’ home telephone number when trying to reach Jennifer. On each of the occasions when Aufiero did use the telephone number, he threatened to injure or kill Ricks if he did not comply with Aufiero’s demands that he pass the telephone to Jennifer, and Ricks actually felt threatened. Further, there was evidence that Aufiero had been driving by Ricks’ home on numerous occasions and slowing near the end of the driveway.

In *Tisdial*, by contrast, the evidence did not show that Tisdial came looking for Young. 925 N.E.2d at 786. Instead, the evidence showed two fights between the women, occurring roughly three months apart, in a park both women frequented, where Young

verbally initiated each encounter. *Id.* Viewed consistently with our standard of review, the evidence here is sufficient to support the trial court's entry of the protective order.

II. Scope of the Protective Order

Aufiero challenges the scope of the trial court's protective order claiming that the provisions barring his contact with Ricks' children, and prohibiting him from being present at either of the hospitals where Ricks works is overly broad. Upon review, we find the protective order provision barring contact with Ricks' children to be appropriate in scope, but find the restrictions regarding Aufiero's presence at the hospitals to be overly broad.

Indiana Code section 34-26-5-9 allows a trial court to grant relief to the petitioner for a protective order. The statute also permits the trial court to enjoin the respondent from threatening the petitioner and each designated family or household member. Ind. Code § 34-26-5-9. The trial court may order the respondent to stay away from a residence, school, or place of employment of the designated family or household members subject to the protection of that order. *Id.*

The protective order's scope in relation to Ricks' children is appropriate. Although no threats were directed toward the children, threats were made against Ricks by use of the home telephone, Aufiero mentioned his intention of confronting Ricks' at his home, and Aufiero drove past Ricks' home on several occasions. The young children were at home when the threats were made by telephone, and Ricks removed the children from the home and took them to his mother's house on one occasion. We held in *A.S. v. T.H.*, 920 N.E.2d 803, 807-08 (Ind. Ct. App. 2010) that multiple acts directed toward the petitioner's household

justified extending the scope of the protective order to other members of the household in addition to the petitioner. The trial court did not err by extending the scope of the protection here to include Ricks' children.

Aufiero contends that the scope of the protective order as it relates to Ricks' places of employment is overly broad. We agree. Aufiero is a heart surgeon. Preventing him from entering the two hospitals in Lafayette, Ricks' places of employment, restricts Aufiero's ability to pursue employment in his profession. We acknowledge that, during the hearing on Aufiero's motion to correct error, the trial court inquired if Aufiero was seeking a modification of that portion of the order. *Tr.* at 46-47. The trial court asked Aufiero if he had current employment opportunities at either hospital, to which Aufiero's counsel replied that he did not.

We reverse the trial court's order with respect to the provision limiting Aufiero from being present on the premises of Ricks' places of employment, and remand the matter for reconsideration regarding that provision's scope. The trial court may grant relief that would prevent Aufiero from having contact with Ricks at the hospitals where Ricks is employed, but should tailor such restriction in a manner that allows Aufiero to seek employment and to be present on the premises of those places for professional purposes.

Affirmed in part, reversed in part, and remanded with instructions.

BARNES, J., and BRADFORD, J., concur.