IN THE COURT OF APPEALS OF THE
STATE OF OREGON

L. M. B.,
Petitioner-Respondent,
v.
Benjamin S. COHN,
Respondent-Appellant.
Washington County Circuit Court
18SK02343; A169440

Theodore E. Sims, Judge.

Submitted May 3, 2019.

Benjamin Cohn filed the brief *pro se*.

Leanna Brennan waived appearance *pro se*.

Before Armstrong, Presiding Judge, and Tookey, Judge, and Shorr, Judge.

TOOKEY, J.

Reversed.

TOOKEY, J.

Respondent appeals from a final stalking protective order (SPO) and judgment under ORS 30.866.[1] Respondent contends that the trial court erred when it entered the final SPO because petitioner did not testify or offer any evidence against respondent to support the entry of the SPO. Petitioner waived appearance on appeal and, because respondent does not request *de novo* review, we "review the facts for any evidence and the legal conclusions based on those facts for errors of law." *Travis v. Strubel*, 238 Or App 254, 256, 242 P3d 690 (2010). We conclude that, in the absence of any evidence in this record from petitioner, the evidence is insufficient to support the trial court's entry of the SPO. Accordingly, we reverse.

Petitioner and respondent were acquaintances. Petitioner filed a petition in the trial court for an SPO against respondent, alleging that she had been subjected to repeated and unwanted contacts by respondent. More specifically, petitioner alleged that respondent had knocked on her apartment door on multiple occasions and left flowers, gifts, and notes on her door with words of praise about her. Petitioner also alleged that respondent had left similar items on the windshield of petitioner's car and that respondent had waited around petitioner's apartment and workplace to contact her. According to the allegations in the petition, petitioner thought that the gifts were "disturbing and invasive" and she was also "alarmed" by respondent's presence at her apartment "because it gave him the opportunity to become violent." After an *ex parte* hearing, at which respondent did not appear, the trial court entered a temporary SPO against respondent.

At a subsequent hearing to determine whether the temporary SPO should be continued for an indefinite period, petitioner and respondent both appeared without counsel. The trial court began by swearing in the parties and stating, "So, from the first appearance, I pretty well have what [petitioner] is saying is going on, so [respondent] tell me your

[1] In civil stalking cases, we ordinarily refer to the parties by their designation in the trial court. *King v. W. T. F.*, 276 Or App 533, 534 n 1, 369 P3d 1181 (2016) (so stating).

side of this." Respondent admitted that he had left several gifts for petitioner at her home and that he had gotten coffee at petitioner's workplace, but respondent argued that the allegations in the petition were duplicative, "misleading, assumptions, and padded." Respondent also testified that petitioner's alleged apprehension about his potential to commit violent or aggressive acts was unfounded because respondent had "no history of any kind of violence." For his part, respondent stated that petitioner had wanted the gifts and that this was really just a matter of miscommunication between respondent and petitioner.

Other than petitioner stating, during respondent's testimony, that she was "not comfortable" with telling respondent the date that she moved in to her apartment, petitioner did not testify or offer any evidence in support of the SPO. After respondent testified for a period, the trial court stated, "I've heard enough," and it ruled that the SPO would become final and it continued the SPO for an indefinite period. When respondent attempted to address the trial court after its ruling, the court told respondent, "No, we're done here."

On appeal, respondent contends, among other things, that there is insufficient evidence in the record to support the SPO because the record is devoid of any evidence that those contacts caused petitioner apprehension for her personal safety or the safety of a member of her immediate family or household. For his argument, respondent relies on *Falkenstein v. Falkenstein*, 236 Or App 445, 449, 236 P3d 798 (2010), in which we held that, unless a respondent admits to a petitioner's allegations, the factual allegations made in an SPO petition are not evidence. We agree with respondent that, on this record, the trial court erred when it ruled that the evidence was sufficient to continue the SPO for an indefinite period.[2]

[2] In this case, we excuse the preservation requirement, because respondent had no opportunity to object to the trial court's ruling. When respondent attempted to get the trial court's attention after it cut off respondent's testimony and ruled, it told respondent, "No, we're done here." *See State v. Barajas*, 247 Or App 247, 252-53, 268 P3d 732 (2011) (principles of preservation did not require further objection when the trial court had ruled and "cut off" the defendant's attempt to argue).

To obtain an SPO against a person under ORS 30.866(1), a petitioner must demonstrate the following by a preponderance of the evidence:

> "(a) The person intentionally, knowingly or recklessly engages in repeated and unwanted contact with the other person or a member of that person's immediate family or household thereby alarming or coercing the other person;
>
> "(b) It is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact; and
>
> "(c) The repeated and unwanted contact causes the victim reasonable apprehension regarding the personal safety of the victim or a member of the victim's immediate family or household."

As we have explained,

> "ORS 30.866(1) has both subjective and objective components. To satisfy the subjective component, the petitioner must show that he or she was alarmed or coerced by the contacts, and that the contacts caused apprehension regarding his or her personal safety or the personal safety of a member of his or her immediate family or household. To satisfy the objective component, the contacted person's alarm or coercion must be objectively reasonable and that person's apprehension for his or her personal safety must also be objectively reasonable.
>
> "ORS 30.866(1) also requires that the petitioner establish that the contacts that are the basis for the petition were repeated and unwanted."

McGinnis-Aitken v. Bronson, 235 Or App 189, 191-92, 230 P3d 935 (2010) (internal quotation marks and citations omitted).

Additionally, we have held on multiple occasions that, "unless a respondent admits a petitioner's allegations at the SPO hearing, the allegations in a petitioner's petition are not in evidence." *Campola v. Zekan*, 275 Or App 38, 42-43, 362 P3d 1205 (2015) (*citing Falkenstein*, 236 Or App at 450-51, and *Jones v. Lindsey*, 193 Or App 674, 678, 91 P3d 781 (2004)); *see also Miley v. Miley*, 264 Or App 719, 720 n 1, 335 P3d 853 (2014) (we "review the sufficiency of the evidence supporting the SPO on the evidentiary record

created in the trial court, and do not consider documents or testimony not entered into evidence"). Thus, "to the extent that the trial court relied on the allegations in petitioner's petition as a basis to support the entry of the SPO, other than those admitted to by respondent at the hearing, the trial court erred." *Campola*, 275 Or App at 43.

In this case, petitioner did not testify about any of the contacts, and there is no evidence in this record about any response that petitioner may have had to respondent's alleged conduct, including whether respondent's contacts caused her apprehension for her personal safety or the safety of a family member. The allegations in her petition that petitioner was "alarmed" because the contacts gave respondent "the opportunity to become violent" are not evidence, *id.*, at 42-43, and neither is any of the testimony that petitioner may have given to the trial court in the *ex parte* hearing because it was not entered into evidence and is not a part of this record, *Miley*, 264 Or App at 720 n 1. Thus, the only evidence in this record comes from respondent's testimony at the subsequent hearing when the trial court determined that the temporary SPO should be continued for an indefinite period.

Considering the evidence received at that SPO hearing, we conclude that "there is no evidence in the record from which *** subjective *** apprehension could be inferred." *Campola*, 275 Or App at 44.[3] *See also McGinnis-Aitken*, 235 Or App at 194 (reversing SPO and observing that "there is no evidence in the record that petitioner was alarmed or concerned by the door knocking—or by anything else respondent did—so as to cause her alarm or concern for her safety or the safety of her family"); *Swarringim v. Olson*, 234 Or App 309, 313-15, 227 P3d 818 (2010) (concluding that the respondent's conduct of pulling his vehicle in and out of the petitioner's driveway late at night, revving the

[3] As noted above, petitioner bears the burden of proving all of the requirements listed under ORS 30.866(1) to obtain an SPO. *McGinnis-Aitken*, 235 Or App at 191-92. Thus, we need not decide whether the contacts were "unwanted," or whether the contacts caused petitioner to be "alarmed or coerced," because we conclude that petitioner failed to meet her burden to prove the requirement under ORS 30.866(1)(c)—*viz*, that the contacts caused her apprehension regarding her personal safety or the safety of a family member.

engine, honking the horn, and putting the "bright lights" on the petitioner's house, and driving past the petitioner's husband while "screaming obscenities" and simulating "a gun firing motion," was insufficient to support the entry of an SPO because the "petitioner did not testify that either she or family members actually feared for their personal safety as a result of [the respondent's] conduct, and there [wa]s no evidence from which that finding c[ould] be inferred").

In light of the absence of any evidence in the record that respondent's contacts caused petitioner apprehension for her or anyone else's personal safety, we conclude that the evidence is legally insufficient to support the entry of an SPO. Therefore, the trial court erred when it continued the SPO for an indefinite period.

Reversed.