

STATE OF WYOMING)
) ss.
COUNTY OF PARK)

IN THE DISTRICT COURT
FIFTH JUDICIAL DISTRICT

RANDALL T. BAILEY,)
)
Appellant.)
)
vs.)
)
SARA E. BAILEY,)
)
Appellee.)

Civil No. 30620

ORDER AFFIRMING THE CIRCUIT COURT’S ORDER OF PROTECTION

THIS MATTER having come before the Court on appeal from Park County Circuit Court Case No. CV-2023-01. The Appellant filed his *Opening Brief of Appellant* and *Amended Opening Brief of Appellant* on April 6, 2023, and April 13, 2023, respectively. The Appellee filed her *Brief of Appellee* on May 23, 2023. The Appellant did not file a reply brief. After reviewing the record before the Court and the parties’ respective arguments, the Circuit Court’s order is hereby **AFFIRMED**.

RELEVANT FACTS AND PROCEDURE

Ms. Bailey filed a *Petition for Stalking Protection Order Under W.S. 7-3-507 et seq.* on January 6, 2023. In the petition, Ms. Bailey alleged that she had recently been separated from Mr. Bailey and had discovered a tracking device on her vehicle. She argued that Mr. Bailey was the only person to have had access to her vehicle to place a tracking device on it. Ms. Bailey also exercises at the rec center and alleged that Mr. Bailey had suddenly altered his historical routine to be there at the same time. She felt threatened and surveilled by his presence. The circuit court held two hearings on the issue on January 19 and 26, 2023. The Court ultimately issued a *Stalking Order of Protection* on January 26, 2023, for a term of six months. Mr. Bailey appeals.

ISSUES

Mr. Bailey raises two issues:

1. The court erred by failing to utilize a proper standard of proof.
2. The court erred in its analysis of the evidence.

Ms. Bailey frames the issues:

1. Whether the circuit court used the proper burden of proof when deciding the merits of the protection order.
2. Whether the evidence was sufficient to issue a stalking protection order.
3. Whether a summary affirmance and sanctions are proper.

For reasons discussed below, the Court adopts or reframes the issues, and addresses the merits of each in the following order:

1. Whether the circuit court erred by failing to utilize the proper standard of proof.
2. Whether the circuit court abused its discretion in granting the protection order.
3. Whether the circuit court erred in making its findings of fact.
4. Whether a summary affirmance and sanctions are proper.

STANDARD OF REVIEW

The parties agree that the first issue is a question of law and, therefore, the standard of review is *de novo*.

As to the parties' second issues, the parties state two separate and discrete issues. As a result, the parties are not in agreement about the appropriate standard of review. Mr. Bailey's second issue essentially challenges the circuit court's findings of fact, and it should be reviewed under the "clearly erroneous" standard. Ms. Bailey states the appropriate standard of review for sufficiency of evidence is "abuse of discretion." The Court attempts to sort through the confusion.

There is a scarcity of protection order cases that is likely due to the short expiration dates of protection orders, preventing them from being appropriately reviewed by the Wyoming Supreme Court.¹ But in at least one instance it has stated that protection orders are "generally" reviewed for abuse of discretion. *Sandstrom v. Sandstrom*, 880 P.2d 103, 108 (Wyo. 1994).

¹ The protection order in this matter expired on July 26, 2023. If the order is expired or is no longer in effect at the time of review, there is no controversy and by operation of law, the case is moot and "courts will not consume their time dealing with moot questions." *Powder River Basin Res. Council v. Wyoming Dep't of Env't Quality*, 2020 WY 127, ¶ 10, 473 P.3d 294, 297 (Wyo. 2020). But there are exceptions to this rule, including "if the matter is one of great public importance or interest" or "for controversies capable of repetition yet evading review." *Id.* ¶ 11, 473 P.3d at 298. Because this matter is private in nature, it does not qualify as a matter of great public importance or interest. The Court looks to the second exception, specifically "the duration of the challenged action must be too short for completion of litigation prior to its cessation or expiration" and "there must be a reasonable expectation that the same complaining party will be subjected to the same action again." *Operation Save America v. City of Jackson*, 2012 WY 51, ¶ 30, 275 P.3d 438, 450 (Wyo. 2012). Because the protection order expires after only six months and considering the Court's docket, the protection order easily evades review by this Court. The issue then is whether the factual situation underlying this controversy is "capable of repetition." On August 1, 2023, Ms. Bailey filed a *Motion for Relief and Notice to Appellate Court Pursuant to WRCP 62.1(b)*, indicating that she had sought to extend the protection order at the circuit court. The circuit court declined jurisdiction due to this appeal being docketed with this Court but found that the motion raised a substantial issue.

The abuse of discretion standard of review examines whether the circuit court abused its discretion when it granted a party a protection order. Protection orders are governed by W.S. § 7-3-506 to -512. Relating to this case, before the circuit court can grant a protection order, it must find that the petitioner’s conduct constitutes stalking as defined in the criminal stalking statute—W.S. § 6-2-506.² This question involves a review of the evidence produced below, triggering a sufficiency of the evidence analysis. In effect, a sufficiency of the evidence analysis exists within the abuse of discretion analysis. These two standards guide the Court’s review of the circuit court’s order.

Relating to abuse of discretion, “judicial discretion is a composite of many things, among which are conclusions drawn from objective criteria; it means a sound judgment exercised with regard to what is right under the circumstances and without doing so arbitrarily or capriciously.” *E.g., Leners v. State*, 2022 WY 127, ¶ 19, 518 P.3d 686, 694 (Wyo. 2022) (cleaned up). In effect, abuse of discretion “reaches the question of the reasonableness of the [circuit court’s] choice.” *Harris v. State*, 2015 WY 50, ¶ 8, 346 P.3d 944, 945 (Wyo. 2015). This question triggers the necessity to scrutinize the sufficiency of the evidence before the circuit court.

To determine whether a party provided sufficient evidence to warrant a protection order, this Court must “examine and accept as true the evidence of the [prevailing party’s] together with all logical and reasonable inferences to be drawn therefrom.” *Morris v. State*, 2023 WY 4, ¶ 26, 523 P.3d 293, 298 (Wyo. 2023). The Court “disregards conflicting evidence presented by the unsuccessful party.” *In re ZMETS*, 2012 WY 68, ¶ 8, 276 P.3d 392, 395 (Wyo. 2012) (cleaned up).

The Court turns next to the narrower issue raised by Mr. Bailey regarding the circuit court’s findings of fact. Questions of facts are reviewed under the clearly erroneous standard. The Wyoming Supreme Court has elaborated on the clearly erroneous standard:

We do not substitute ourselves for the trial court as a finder of facts; instead, we defer to the trial court’s findings unless they are unsupported by the record or erroneous as a matter of law. Although the factual findings of a trial court are not entitled to the limited review afforded a jury verdict, the findings are presumptively correct.

This Court may examine all of the properly admissible evidence in the record, but we do not reweigh the evidence. Due regard is given to the opportunity of the trial judge

Notably, the protection order at issue on appeal is the same protection order that Ms. Bailey seeks to extend. Ms. Bailey did not petition for a different protection order under a separate set of facts. As such, there is a “reasonable expectation that [Mr. Bailey] will be subjected to the same action again.” The Court finds that this action falls within “the capable of repetition, yet evading review” exception, and decides the issues on the merits.

² The circuit court does not *convict* the respondent under the criminal stalking statute if it enters an order of protection against them. *See Joyner v. State*, 2002 WY 174, ¶ 19, 58 P.3d 331, 337 n.5 (Wyo. 2002). The circuit court makes a *finding* that respondent’s conduct amounted to stalking, as defined in the criminal stalking statute, within the civil context of the order of protection statutes. *See* W.S. §§ 7-3-506(a)(iv), -509(a).

to assess the credibility of the witnesses. We accept the prevailing party's evidence as true and give to that evidence every favorable inference which may fairly and reasonably be drawn from it. Findings may not be set aside because we would have reached a different result. A finding will only be set aside if, although there is evidence to support it, this Court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.

Lawrence v. City of Rawlins, 2010 WY 7, ¶ 13, 224 P.3d 862, 868 (Wyo. 2010) (cleaned up).

DISCUSSION

I. Because there is not a known standard of proof and the circuit court did not address using any standard of proof, the circuit court could not err in applying an incorrect standard.

Mr. Bailey argues that the standard of proof used by the circuit court was “improper” and that a “preponderance of the evidence” standard is the most appropriate to be applied to the issuance of a protection order. Examining the order of protection statutes, it does not expressly delineate a standard of proof for the circuit court to apply in making its finding. Mr. Bailey acknowledges as much, although he still contends that the circuit court applied an “improper” standard. This is so, argues Mr. Bailey, despite there being no existing applicable standard of proof and the circuit court never stating what standard of proof it applied. That logic prompts this Court to take pause.

Mr. Bailey's counsel has not provided any caselaw directly on point as it relates to the standard of proof applicable to protection orders. The Court and Ms. Bailey's counsel have not found any either. It is also clear that the legislature has not spoken on the issue. Without a known standard of proof, the circuit court cannot err in applying an incorrect standard, and though it seems that the preponderance of evidence standard seems most logical, this Court declines to declare the “proper” standard of proof to be applied to the protection order statute. What is apparent is that the circuit court exercised judicial discretion in granting the protection order. Whether the circuit court abused that discretion is addressed next.

II. Because the Court finds that sufficient evidence supports the circuit court's decision and its decision is reasonable, the circuit court did not abuse its discretion when it granted the protection order.

A victim of stalking may file a petition for a protection order and a hearing is held before the circuit court. W.S. §§ 7-3-506(a)(i), -507(a), -508(a) (2023). If the circuit court finds that “conduct constituting stalking . . . has been committed, it shall enter an order of protection ordering the

respondent to refrain from any further acts of stalking . . . involving the victim or any other person.”

Id. § 7-3-509(a). “Stalking” as it is used in the protection order statute is defined as:

- (b) . . . a person commits the crime of stalking if, with intent to harass another person, the person engages in a course of conduct reasonably likely to harass that person, including but not limited to any combination of the following:
 - (i) Communicating, anonymously or otherwise, or causing a communication with another person by verbal, electronic, mechanical, telegraphic, telephonic or written means in a manner that harasses;
 - (ii) Following a person, other than within the residence of the defendant;
 - (iii) Placing a person under surveillance by remaining present outside his or her school, place of employment, vehicle, other place occupied by the person, or residence other than the residence of the defendant;
 - (iv) Using any electronic, digital or global positioning system device or other electronic means to place another person under surveillance or to surveil another person’s internet or wireless activity without authorization from the other person; or
 - (v) Otherwise engaging in a course of conduct that harasses another person.

W.S. § 6-2-506(b); § 7-3-506(a)(iv) (“Stalking” means conduct as defined by W.S. 6-2-506(b)).

For there to be a finding of stalking there must be “proof that a defendant, with the intent to harass, engaged in a course of conduct reasonably likely to harass.” *Beeson v. State*, 2022 WY 86, ¶ 13, 512 P.3d 986, 991 (Wyo. 2022). The petitioner has the burden to prove the respondent’s specific intent through “his acts, his conduct, his words and the reasonable inferences which may be drawn from the circumstances of the case.” *Bittleston v. State*, 2019 WY 64, ¶ 25, 442 P.3d 1287, 1294 (Wyo. 2019). “To hold otherwise would create an impossible burden in a case requiring a finding of specific intent.” *Id.* The petitioner may prove “conduct reasonably likely to harass” by showing the existence of conduct that falls within the delineated subparagraphs above; that list is not exclusive. *Dean v. State*, 2014 WY 158, ¶ 32, 339 P.3d 509, 516–17 (Wyo. 2014).

At the conclusion of the hearing, the circuit court stated:

Counsel has aptly gone through the statute and their interpretation, and I believe its correct in terms of how the courts have to interpret this. I will also tell you that I cannot and never have a case where you can demonstrate that someone intended to do anything unless they say they do that—that’s never the case. But I can look at the inferences that the evidence established and look at the totality of the circumstances here to infer whether or not there is intent to harass. I do find intent to harass. And let me tell you what I find significant in this case.

My recollection from Ms. Bailey’s testimony is on December 30th, Mr. Bailey showed a new iPhone and she saw an air tag app on it. She files for the divorce and within close proximity of that time period this AirTag shows up . . . I understand Ms.

Kalenak's argument here about the technology—I don't have any evidence as to when this AirTag would have engaged with Ms. Bailey's phone. But what the evidence does show—it does not recognize this AirTag on her phone. That's what the exhibit shows me. There's two different times that I see that, and it is at 5:47 in the morning.

I do also know, although there is no direct proof, Mr. Bailey is a telecommunications engineer and I think that is very significant in this case. This AirTag was placed there elaborately in close proximity to the filing of divorce and him being served, and so the inference is that Mr. Bailey is the one who put that there—that is placing someone under surveillance.

. . . for the life of me I cannot see these children—this was carefully placed there and I don't know if it's cellophane or it's tape, but the picture shows that this was done and it was very well planned. No one has that motivation other than Mr. Bailey to do this.

The other things I will tell you . . . the evidence shows that Mr. Bailey does not go to the rec center in the morning. He has not done that. He had the opportunity. He took the time to bring still images of video tapes in of a couple different [instances] where he's walking—those are in the afternoon.

He had the opportunity to provide evidence to show that he had been there in the morning. He testified to being there in the morning. He also has on his phone, he can track his movements—he calls it a tracking device—he knows every place he moves in that rec center and any place else.

He starts going there in the morning after the divorce is filed and he gets served, and I would take it as an innocent thing for him—the walking off the track, [but] Mr. Bailey has a phone that tracks the distance. He uses that to track that. It doesn't make any sense for him to be walking past her repeatedly. So that may have been innocent enough, but there was an event where [Ms. Bailey] is on the deck of the swimming pool with her swim group . . . and he was standing up there and staring at her from upstairs. And he had to make a point—based on what the evidence is—it wasn't just, it wasn't in passing—he was staring at her.

I have to say I don't find Mr. Bailey's testimony credible . . . when he testified in this case . . . when Mr. Sitz would start to make a point [Mr. Bailey] would divert and testify about something else other than what he would be asked.

The other thing I find here is . . . all of these things in isolation would be considered innocent, but when you look at the totality of the circumstances, Mr. Bailey was making a point of going to the rec center, and he knew Ms. Bailey would be there, and he was going out of his way to do that.

There was also an encounter—I don't necessarily consider this an event—where he talked to one of the witnesses and he had a heated argument. I don't agree that had anything to do with harassment, so I don't put any weight on that in this circumstance.

What I do find very significant is Mr. Bailey said he was trying to get away from Ms. Bailey at this most recent incident at the rec center. Again, Mr. Bailey had a cell phone. He could have seen the time on that phone. At some point I'm assuming

he would have known his clock was not right, knowing—I don't know if he wears a watch—he takes his phone everywhere with him. He knew he was not supposed to be there. And he doesn't look like he's trying to get away in this photograph from Ms. Bailey. He looks like he's trying to hide from her. I'm familiar with the rec center, the area where he is—is behind the counter, there's a gate there. And that is not for the patrons—that is for the workers. I find that significant. I find that he probably understood that he should not have been there.

The Court concludes the circuit court did not abuse its discretion in rendering its decision. The evidence at the hearing established that Mr. and Ms. Bailey had separated. Their separation was contentious. Shortly after the separation Ms. Bailey's iPhone alerted her to an AirTag in her vicinity as she drove her vehicle. She called law enforcement and after an extensive search an AirTag was located underneath her vehicle. It had been attached with an adhesive; it was so thoughtfully placed and camouflaged that it took 15–20 minutes, with the aid of sound from the device, for law enforcement to discover it. Ms. Bailey testified that she was not aware of anyone else who would attach the AirTag to her vehicle. She believed that only Mr. Bailey could have placed the AirTag on her vehicle.

Additionally, Ms. Bailey routinely exercised at the Cody rec center early in the morning. After their separation Mr. Bailey began to exercise at the rec center in the early morning. The evidence showed that this behavior was not in conformance with Mr. Bailey's habit or historical routine. While at the rec center Mr. Bailey walked behind Ms. Bailey as she ran and watched her from a window while she swam. On another occasion, Mr. Bailey attempted to avoid being seen by Ms. Bailey by stepping behind a counterspace at the entrance of the rec center. In that instance, Mr. Bailey was at the rec center early in the morning in apparent violation of the circuit court's temporary order of protection. The circuit court carefully considered the evidence and gave it the weight it did or did not deserve. It stated Mr. Bailey's behavior at the rec center would have been innocent if his acts were considered in isolation. Taken together, however, it established Mr. Bailey's intent to harass. The circuit court also specifically addressed Mr. Bailey's lack of credibility.

As discussed above, when reviewing the circuit court's decision to grant a protection order, Ms. Bailey's evidence and all reasonable inferences are accepted as true and Mr. Bailey's contradictory evidence, if any, is disregarded. *Morris v. State*, 2023 WY 4, ¶ 26, 523 P.3d 293, 298 (Wyo. 2023); *In re ZMETS*, 2012 WY 68, ¶ 8, 276 P.3d 392, 395 (Wyo. 2012). With that in mind and after review of the record, the Court concludes that the evidence is sufficient to establish Mr. Bailey's

intent to harass Ms. Bailey.³ The evidence is also sufficient to establish that Mr. Bailey’s course of conduct was reasonably likely to harass Ms. Bailey. As such, the circuit court reasonably concluded that Mr. Bailey’s behavior constituted stalking and therefore, it did not abuse its discretion in granting the protective order.

III. The circuit court’s findings of fact are not clearly erroneous.

Mr. Bailey argues that he offered testimony and evidence that directly contradicted the circuit court’s findings of fact. While there may be a factual dispute, deference is given to the circuit court’s assessment of the credibility of the witness. *Lawrence v. City of Rawlins*, 2010 WY 7, ¶ 13, 224 P.3d 862, 868 (Wyo. 2010). This Court also does not reweigh the disputed evidence. *Id.* After close review of the entire record, the Court cannot conclude that the circuit court’s findings were clearly erroneous.

IV. This Court declines summary affirmance and sanctions.

Because this matter is of such serious nature, implicating personal safety and individual rights, the Court reviewed the record, law and arguments of both parties. The Court considered Ms. Bailey’s request for sanctions and attorney’s fees and declines to grant either. Each party shall be responsible for their own attorney’s fees.

CONCLUSION

For the foregoing reasons, the Court **AFFIRMS** the order of the circuit court.

So ordered this 13th day of September, 2023.



HONORABLE BOBBI OVERFIELD
District Court Judge

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Bethia Kalenak | Attorney for Defendant

³ Mr. Bailey also argues that the circuit court improperly shifted the burden of proof to Mr. Bailey when it stated that “he had the opportunity to provide evidence to show that he had been [at the rec center] in the morning” on regular basis, and he did not provide it. The Court finds that the circuit court did not improperly shift the burden of proof to Mr. Bailey. The circuit court collected evidence and heard testimony from both parties, though Mr. Bailey was not required to do so. The circuit court thoroughly reviewed all the evidence and weighed the testimony, concluding that Mr. Bailey was not a credible witness and the documentary evidence that Mr. Bailey provided did not disrupt that determination.