UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2095

September Term, 2014

ANDRE GUICHARD

v.

CASSANDRA GUICHARD

Woodward,
Leahy,
Moylan, Charles E., Jr.
(Retired, Specially Assigned),

JJ.

Opinion by Woodward, J.

Filed: December 31, 2015

Appellee, Cassandra Guichard, filed a petition for a protective order in the Circuit Court for Montgomery County against appellant, Andre Guichard, her ex-husband. After holding a hearing, the court found by clear and convincing evidence that the alleged abuse had occurred and granted a final protective order against appellant.

On appeal, appellant presents two questions for our review, which we have rephrased as follows:[1]

1. Did the circuit court err in issuing the final protective order against appellant?

2. Did the circuit court commit reversible error in its evidentiary rulings?

We answer these questions in the negative and, accordingly, affirm the judgment of the circuit court.

[1] Appellant's questions, as presented in his brief, are as follows:

1. Did the Circuit Court err in granting a protective order on the basis of fear of imminent bodily harm when: i) no testimony was offered to the court that an act of violence (i.e. threat) was committed and ii) the petitioner understood "get you" to mean sending police?

2. Was there an abuse of discretion to allow the petitioner to offer testimony about prior court proceedings and discuss matters relating to parental access and preclude the respondent from rebutting/challenging the petitioner's allegations?

BACKGROUND

The parties were married on November 17, 1998. On September 3, 2002, the Circuit Court of Cook County, Illinois issued an emergency protective order against appellant, ordering him to have no contact with appellee. The parties' child, Miles Guichard, was born on September 13, 2002.

In June 2003, while the parties were separated, appellee called the police after appellant "started hitting [her], and [she] couldn't defend [her]self because [she] was holding [their] son." The police arrived and arrested appellant.

On February 17, 2005, the parties entered into a Joint Custody and Parenting Agreement in the Circuit Court of Cook County, where their divorce proceedings were pending. The parties were divorced on March 11, 2005.

On August 3, 2007, the Circuit Court of Cook County issued a second protective order against appellant, ordering him to stay away from appellee for a period of two years.

In 2008, appellee and Miles moved from Illinois to Smyrna, Georgia. In April 2014, appellee moved to Montgomery County, Maryland; Miles joined her a month later.[2] Appellee informed appellant that she would be moving to Montgomery County, but did not give him her address or the name of Miles's school, because, in her words,

> when I told him I was moving, he told me I couldn't move and just started acting crazy again, so I was afraid to give him my address. I

[2] The record is silent as to why appellee moved to Georgia in 2008 and to Maryland in 2014.

> didn't want him to call my workplace, which is what he had been doing before. I didn't want him to send the police to our home. I didn't want to deal with the harassment any further, but I did tell him where we were moving to.

On August 25, 2014, appellee filed a Petition for Protection from Domestic Violence and Child Abuse on behalf of herself and Miles against appellant in the Circuit Court for Montgomery County. That same day, the court issued a temporary protective order against appellant, ordering appellant to not contact appellee or Miles through September 2, 2014.

On September 2, 2014, the circuit court held a hearing and found that appellant's calls to the police to conduct a safety check of appellee's homes in Georgia and Montgomery County, as well as appellant's prior comments to appellee that she is suicidal, past assault and abusive behavior toward appellee, and unannounced visits to Miles's school, considered together, "does amount to placing [appellee] in fear of imminent serious bodily harm and evidence of [appellant] to remove the child from the school I believe placed her in fear of what behaviors [appellant] was exhibiting towards [appellee] as well as the child." The court issued a final protective order, ordering appellant to (1) not abuse, threaten to abuse, or harass appellee or Miles; (2) not contact appellee; (3) not enter appellee's home; (4) stay away from Miles's school; (5) stay away from appellee's place of employment; and (6) surrender all firearms and refrain from possessing any firearms. The final protective order was effective until September 2, 2015.

On September 12, 2014, appellant filed a Motion to Alter and Vacate Judgment. The circuit court denied appellant's motion on October 6, 2014. Appellant filed a timely notice of appeal on November 5, 2014.

Additional facts will be set forth as necessary to resolve the questions presented.

STANDARD OF REVIEW

In *Piper v. Layman*, this Court set forth the following standard of review for the issuance of domestic violence protective orders:

> The burden is on the petitioner to show by clear and convincing evidence that the alleged abuse has occurred. If the court finds that the petitioner has met the burden, it may issue a protective order tailored to fit particular needs that the petitioner has demonstrated are necessary to provide relief from abuse. When conflicting evidence is presented, we accept the facts as found by the hearing court unless it is shown that its findings are clearly erroneous. As to the ultimate conclusion, however, we must make our own independent appraisal by reviewing the law and applying it to the facts of the case.

125 Md. App. 745, 754 (1999) (citations and internal quotation marks omitted).

Evidence is "clear and convincing" when it sustains "a degree of belief greater than . . . a fair preponderance of the evidence, but less than the burden of proof beyond a reasonable doubt." *Berkey v. Delia*, 287 Md. 302, 318 (1980) (citations and internal quotation marks omitted). "It has been said that [such] proof must be 'strong, positive and clear from doubt' and 'full, clear and decisive.'" *Id*. (citations omitted); *see also Coleman v. Anne Arundel Cty. Police Dep't.*, 369 Md. 108, 127 n.16 (2002) ("To be clear and convincing, evidence should be 'clear' in the sense that it is certain, plain to the

understanding, and unambiguous and 'convincing' in the sense that it is so reasonable and persuasive as to cause you to believe it.").

DISCUSSION

I. Mootness

As an initial matter, appellee argues that the appeal is moot, because the final protective order expired on September 2, 2015, and thus there is no justiciable controversy. Appellant responds that this Court should address the merits of his appeal, given the collateral consequences of a protective order.

Appellee is correct that this case is technically moot, because the final protective order has already expired. "A case is moot when there is no longer an existing controversy between the parties at the time it is before the court so that the court cannot provide an effective remedy." *Coburn v. Coburn*, 342 Md. 244, 250 (1996). Although a moot case is usually dismissed without deciding the merits, this Court, on rare occasions, will address the merits if the matter is likely to re-occur, but evade review. *See id*.

Moreover,

> [i]n light of the stigma that is likely to attach to a person judicially determined to have committed abuse subject to protection under the Domestic Violence Act, we think that the expiration of the protective order does not automatically render the matter moot. The review of such finding on appeal, and the potential for vacation of the order, thereby removing the stigma, gives substance to the appeal.

Piper, 125 Md. App. at 753 (citations and internal quotation marks omitted). Accordingly, we will address the merits of the instant appeal.

II. Clear & Convincing Evidence of Imminent Serious Bodily Harm

The Domestic Violence Act provides that, "if the judge finds by clear and convincing evidence that the alleged abuse has occurred, . . . the judge may grant a final protective order to protect any person eligible for relief from abuse."[3] Md. Code (1984, 2012 Repl. Vol., 2013 Cum. Supp.), § 4-506(c)(1)(ii) of the Family Law Article ("FL"). Abuse includes, among other things, "an act that places a person eligible for relief *in fear of imminent serious bodily harm*." FL § 4-501(b)(1)(ii) (emphasis added). A "person eligible for relief" includes a current or former spouse, as well as an individual who has a child in common with the respondent. FL § 4-501(m)(1), (6).

The Court of Appeals has explained the standard for "fear of imminent serious bodily harm" as

> **an individualized objective one—one that looks at the situation in the light of the circumstances as would be perceived by a reasonable person in the petitioner's position** . . . . We dealt with this kind of issue recently in *State v. Marr*, 362 Md. 467, 765 A.2d 645 (2001), involving the standard to be applied in determining whether a criminal defendant offering the defense of self-defense had reasonable grounds to believe himself or herself in apparent or immediate danger of death or serious bodily harm. We held that an objective standard was to be applied in determining the

[3] The Domestic Violence Act was amended in 2014; effective October 1, 2014, the "clear and convincing evidence" standard was replaced with a "preponderance of the evidence" standard. *See* 2014 Md. Laws, Chap. 111. For purposes of this opinion, we continue to employ the "clear and convincing evidence" standard, because such standard was in effect on September 2, 2014, the date of the hearing in the instant case. *See* Md. Code (1984, 2012 Repl. Vol., 2013 Cum. Supp.), § 4-506(c)(1)(ii) of the Family Law Article.

reasonableness of the defendant's asserted belief, but we made clear as well:

> "The objective standard does not require the jury to ignore the defendant's perceptions in determining the reasonableness of his or her conduct. In making that determination, the facts or circumstances *must* be taken as perceived by the defendant, even if they were not the true facts or circumstances, *so long as a reasonable person in the defendant's position could also reasonably perceive the facts or circumstances in that way*."

Id. at 480, 765 A.2d at 652 (emphasis in original).

We added in *Marr* that a belief as to imminent danger "is necessarily founded upon the defendant's sensory and ideational perception of the situation that he or she confronts, often shaded by knowledge or perceptions of ancillary or antecedent events." *Id.* at 481, 765 A.2d at 652. The issue, we said, was not whether those perceptions were right or wrong, but whether a reasonable person with that background could perceive the situation in the same way.

We believe that to be the proper test to be applied in this context as well. **A person who has been subjected to the kind of abuse defined in § 4-501(b) may well be sensitive to non-verbal signals or code words that have proved threatening in the past to that victim but which someone else, not having that experience, would not perceive to be threatening. The reasonableness of an asserted fear emanating from that kind of conduct or communication must be viewed from the perspective of the particular victim.** Any special vulnerability or dependence by the victim, by virtue of physical, mental, or emotional condition or impairment, also must be taken into account.

Katsenelenbogen v. Katsenelenbogen, 365 Md. 122, 138-39 (2001) (bold emphasis added).

In *Coburn*, the Court of Appeals held that evidence of past abuse was admissible in a protective order hearing, given its relevance to the likelihood of future abuse. 342 Md. at 257. The Court explained:

> The purpose of the final protective order hearing is to determine whether a final protective order should be issued, not solely to prove that a single act of abuse occurred. **In determining whether to issue a protective order, the judge should consider not only evidence of the most recent incident of abuse, but prior incidents which may tend to show a pattern of abuse.** Allegations of past abuse provide the court with additional evidence that may be relevant in assessing the seriousness of the abuse and determining appropriate remedies. The legislature expressly recognized this by including the history of abuse between the parties as a factor in ordering at least one remedy, vacation of the home. *See* § 4-506(e)(5). Admitting prior acts of abuse aids in assessing the need for immediate and future protection. **The fact that there is a history of prior abusive acts implies that there is a stronger likelihood of future abuse.** *See Cruz-Foster v. Foster*, 597 A.2d 927, 930 (D.C. App. 1991) ("[A] defendant's past conduct is important evidence—perhaps the most important—in predicting his probable future conduct."); *Providing Legal Protection For Battered Women*, 21 Hofstra L. Rev. at 900 ("Due to the cyclical nature of domestic violence, introduction of evidence of the relationship's history of abuse . . . is vital in allowing a court to fully comprehend the risk posed to a particular petitioner.") (footnote omitted). Thus, there is a corresponding need for more severe remedies.
>
> One act of abuse may not warrant the same remedy as if there is a pattern of abuse between the parties. Different remedies are required when there has been an isolated act of abuse that is unlikely to recur, as compared to an egregious act of abuse preceded by a pattern of abuse. The more abuse that occurred in the past, the higher the likelihood that future acts of abuse will occur and thus, the need for greater protective measures. Thus, the statute appropriately gives discretion to the trial judge to choose from a wide variety of available remedies in order to determine what is appropriate and necessary according to the particular facts of that case. *See* § 4-506(d).

> Evidence of prior incidents of abuse is therefore highly relevant both in assessing whether or not to issue a protective order and in determining what type of remedies are appropriate under the circumstances. *See Providing Legal Protection For Battered Women*, 21 Hofstra L. Rev. at 901.
>
> We believe that excluding evidence of past abuse would violate the fundamental purpose of the statute, which is to prevent future abuse. The statute was not intended to be punitive. Its primary aim is to protect victims, not punish abusers. **Whether a respondent has previously abused a petitioner is important and probative evidence in determining the appropriate remedies. Protective orders are based on the premise that a person who has abused before is likely to do so again, and the state should offer the victim protection from further violence.**

Id. at 257-59 (bold emphasis added) (alternations in original).

Appellant argues that the circuit court erred in granting a final protective order, because appellee did not prove by clear and convincing evidence that abuse had occurred. According to appellant, appellee did not testify or submit any evidence "that indicated [that she] was in fear of imminent serious bodily harm as required by the statute." On the contrary, appellant contends that appellee "explicitly indicated to th[e] court that she is not in fear of imminent serious bodily harm." Further, appellant argues that the two prior protective orders cannot be the basis of the final protective order, because the last such order was issued seven years ago, and "the parties had been in contact with each other numerous times" since then. Also, according to appellant, his statement that "I'm going to get you" cannot serve as the basis of a protective order, because appellee testified that she had "come

to learn that [this statement] meant sending the police to the house," and sending the police cannot "be interpreted or perceived as a threat of serious bodily harm."

Appellee responds that the circuit court did not err in granting the final protective order on the basis of appellee's fear of imminent serious bodily harm, because appellant did not dispute that (1) there were two prior protective orders; (2) appellant has physically abused appellee in the past; (3) appellant has a history of drug abuse; and (4) appellant has threatened appellee "on several prior occasions." In addition, according to appellee, her testimony that appellant "had threatened to kill her and make it look like a suicide" amounted to clear and convincing evidence that she was in fear of imminent serious bodily harm.

The circuit court issued the following findings of fact and conclusions of law in its oral ruling at the conclusion of the protective order hearing:

> In this matter, **the testimony that I have heard that has not been refuted in any way, shape or form is that** during the marriage and during [the parties'] separation but prior to the divorce that **[appellant] engaged in conduct that was assaultive and led to the issuance of a protective offered [sic] in the State of Illinois.**
>
> Cook County is the jurisdiction that was testified to by [appellee], that **she had had two protective orders issued.** The first one was shorter in duration and is approximately six months. It expired and after that [appellee] felt the need to return to the Court for relief to seek a further protective order which was granted and was in three years of duration.[4]
>
> ***

[4] The second protective order was actually two years in duration.

The evidence I've also heard indicates that [appellant] and this is also uncontroverted before this court has assaulted [appellee] in the past by shaking her and made over [sic] threats to her that have caused her concern for her safety.

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In this matter, **there is testimony on the record that is also uncontradicted that [appellee] has in the past in her relationship with [appellant] had instances where he has repeatedly discussed with her the phrase well, you know, you are suicidal** and other comments such as that relating to his commenting to her as to her suicidal tendencies.

I asked the question what does that mean because it didn't—I wanted to make sure I understood who was announcing the suicidal tendencies, [appellee] or [appellant].

[Appellee] has testified that this is the repeated comment that [appellant] has made to her throughout their relationship at times prior to his becoming abusive during times when he has been assaultive or argumentative with her, and also the manner of his speaking that has placed her in the past in fear for her safety and has been what she described as a sign in his speech pattern, the things he would say such as:

Well, remember, you are suicidal, which she has explained was a threat he made to her that if she turned up dead, he would be the one responsible, and he would make it look as if it were a suicide. So that phrase, remember, you are suicidal, she has interpreted as a code word for a threat that he has generated to her, and in her dealings with him over the last number of months, she has had the same concerns for her safety as she has exhibited in the past.

[Appellee] sought this protective order on behalf of herself as well as the minor child because of the—what she testified to as being **the repeated efforts of [appellant] to have the police in different jurisdictions come to [her] residence in an effort to have welfare checks on the minor child. Most of these welfare checks taking**

place late in the evening when any 11-year old would normally be asleep.

And [appellant] takes a position that this is a call that the police undertake at the end of their day when they have no other pressing responsibilities. I don't know whether that is that a law enforcement officer doesn't always have a pressing issue to deal with or how they write or advertise that and there's no evidence presented here to me other than ***there have been several calls to her placed by the police to her home in Georgia, as well as here in Montgomery County leading up to her seeking this protective order, so that behavior coupled with the comments about suicide, the past assaultive behavior, and the respondent showing up unannounced at the school***, I don't know how many states away Illinois is from Georgia, but I'm not commenting on his right to see his child at all.

He certainly has that right and there is an order in place that deals with that, but coming to the school in the middle of the school day to remove the child from the school is certainly, coupled with everything else, an issue that I believe [appellee] was placed in fear due to these behaviors by [appellant] and based on her past knowledge of his assaultive behavior in the past.

So I do find that [appellant] has placed [appellee] in fear of imminent serious bodily harm, and that he has engaged in conduct to that end.

***

I am going to make a finding, though, as I've just indicated that this behavior does amount to placing [appellee] in fear of imminent serious bodily harm and evidence of the respondent to remove the child from the school I believe placed her in fear of what behaviors [appellant] was exhibiting towards [appellee] as well as the child.

I am going to order that a protective order be issued. It will be in effect for one year from today's date.

(Emphasis added).

In sum, the circuit court based its finding that appellee was in fear of imminent serious bodily harm on five factors: (1) previous incidents of domestic violence, (2) appellant's comments regarding appellee's alleged suicidal tendencies, (3) appellant's unannounced visits to Miles's school, (4) appellant's calls to police to perform welfare checks at appellee's home, and (5) events leading up to appellee seeking a protective order. We will examine each factor in turn, accepting the facts as found by the circuit court unless clearly erroneous. *See Piper*, 125 Md. App. at 754.

(1) Previous Incidents of Domestic Violence

At the hearing, appellee testified that appellant threatened her during and after the marriage and physically assaulted her in 2003 when the parties were separated; as stated earlier, appellee called the police during that assault, and appellant was arrested. Appellee testified, and appellant concedes, that two protective orders were issued against him in Illinois as a result of other abusive events.[5] In the first protective order, appellant was ordered to have "no contact at all [with appellee] by any means" for six months. In the second protective order, which was for two years, appellant was prohibited from physically abusing or harassing appellee, and ordered to stay away from appellee, except in the case of a medical emergency or injury regarding Miles.

The Court of Appeals has stated: "The fact that there is a history of prior abusive acts implies that there is a stronger likelihood of future abuse." *Coburn*, 342 Md. at 258. As a

[5] The record is silent as to the details of these events.

result, appellant's history of prior violence and abusive behavior against appellee provides strong evidence that appellee's fear of future violence was reasonable.

(2) "You Are Suicidal" Comments

Appellee testified that "in the past," most recently in April 2014, appellant threatened her by saying, "Remember, you're suicidal." Appellee explained that this comment is appellant's "veiled threat" that appellant is "going to kill [appellee] and make it look like a suicide."

As the Court of Appeals stated in *Katsenelenbogen*, "[a] person who has been subjected to the kind of abuse defined in § 4-501(b) may well be sensitive to . . . code words that have proved threatening in the past to that victim but which someone else, not having that experience, would not perceive to be threatening." 365 Md. at 139. Appellee established through her testimony and the two prior protective orders that she previously had been subjected to domestic violence by appellant in the form of physical assault and threats, including the threat that appellant was "suicidal." As a result, it was not clearly erroneous for the circuit court to find that appellant's statement in April 2014 that appellee was suicidal constituted a threat that appellant was going to kill appellee and make it look like a suicide. *See id.* ("The reasonableness of an asserted fear emanating from that kind of conduct or communication must be viewed from the perspective of the particular victim."). Nor was it an error for the court to conclude from appellee's testimony that this threat, coming from a person who had abused appellee on multiple prior occasions, would place appellee in fear

of serious bodily harm. *See* FL § 4-501(b)(1)(ii). Contrary to appellant's contention in his brief, appellee never "explicitly indicated to [the] court that she [wa]s not in fear of imminent serious bodily harm when she said 'he tries to threaten me.'"

(3) Unannounced Visits to Miles's School

Appellee testified that, although she told appellant that she and Miles were moving to Montgomery County in April 2014, she did not tell appellant the name of Miles's new school, because, when appellee and Miles lived in Georgia, appellant "had been sending the police to the school. He had tried to take [Miles] from the school without my knowledge."

Specifically, appellee testified that appellant appeared at Miles's school in Georgia on April 15, 2014. Appellant's trial attorney, however, showed appellee a custody order from the Cook County Circuit Court stating that appellant would have visitation with Miles after school on April 15 through April 17, 2014; appellee responded that she had no notice and was not represented at the hearing that produced such order, nor had she been served or seen the custody order. Appellee testified that, once she learned of the proceedings, she obtained counsel in Illinois to represent her in the matter.

We agree with the circuit court that appellant had the right to exercise his visitation with Miles, but that unilaterally attempting to remove Miles from school in April 2014 without appellee's knowledge is an act that raises safety concerns when considered in conjunction with appellant's history of domestic violence and his reminder to appellee that

she was suicidal. Under the individualized objective standard, such safety concerns are reasonable. *See Katsenelenbogen*, 365 Md. at 138-39.

(4) Threats that Appellant Would "Get" Appellee & Police Safety Checks

Appellee testified that "in the past," most recently in April 2014, appellant had told appellee that he would "get" her. Appellee stated that initially she did not know what appellant meant when he made such threat, but that she had "come to learn that [it] meant sending the police to the house and harassing us. And he also said that he was trying to get [appellee] arrested." Appellee testified, and appellant conceded, that he sent the police to appellee's home in Georgia three times, the last time in April 2014. Appellee also testified that appellant sent the police to her home in Montgomery County during the evenings of August 23 and August 25, 2014. The police officers told appellee that appellant "didn't know where [appellee] was and that he didn't know where his son was, and that he wanted him—them to check on him at midnight." Appellee responded that Miles

> is afraid of his father. He didn't want to speak to him, so now that they email or he has emailed him and Miles has not responded, Miles did not want to give him his new phone number when we moved here. He's—after the incident at the school where he tried to take him, he hasn't wanted to talk to him since.

(5) Events Leading Up to Application for Protective Order

After the first appearance by the Montgomery County police on August 23, 2014, appellee filed her petition for a protective order on August 25, 2014, noting in her petition that

> [appellant] obtained my new address and sent the police to my apartment. In the past, he has done this to harass and intimidate me and our child. He wants me to know that he is aware of where we are. . . . In April or May 2014, [appellant] told me that he would send police to my house, that there would be consequences, and that he would get me.

In finding that appellee was in fear of imminent serious bodily harm, the trial court focused on the events "leading up to her seeking this protective order" on August 25, 2014. Specifically, the court stated that "there have been several calls to her placed by the police to her home in Georgia, as well as here in Montgomery County . . . coupled with the comments about suicide, the past assaultive behavior, and [appellant] showing up unannounced at the school." Thus, in finding abuse under the Domestic Violence Act, the court considered appellant's actions and statements as a whole, as well as their timing.

As previously indicated, appellant's past assaultive behavior, coupled with his comments in April 2014 about appellee's "suicidal" tendencies, his sending the police to appellee's home, and his unannounced attempt to remove Miles from school reasonably led appellee to fear serious bodily harm. After April 2014, appellee moved to Montgomery County, but did not give appellant her address or the name of Miles's school. Nevertheless, appellant obtained appellee's new address, and on August 23, 2014, appellant resumed his pattern of behavior by sending the police to appellee's home, ostensibly to check on Miles's welfare.

In our view, the circuit court did not err in finding that appellee's fear of serious bodily harm was "imminent." Appellee filed her petition two days after appellant sent the

Montgomery County police to her home. The last time that appellant threatened appellee with physical violence by telling her that she was suicidal was in April 2014, which was also the last time that appellant sent the police to appellee's home in Georgia. Because belief as to imminent danger is "often shaded by knowledge or perceptions of ancillary or antecedent events," it was reasonable for appellee, under the individualized objective standard, to fear that appellant's renewed action of sending police to her home in Montgomery County revived the threat of physical violence that appellant made the last time he sent police to her home in Georgia. *See Katsenelenbogen*, 365 Md. at 138 (quoting *Marr*, 362 Md. at 481).

In other words, the police check at appellee's home, standing alone, did not constitute "fear of *imminent* serious bodily harm." *See* FL § 4-501(b)(1)(ii) (emphasis added). But, when considered along with appellant's previous violence and threats of violence, particularly the events that occurred around April 2014, the sudden recurrence of a police check of appellee's home in Montgomery County instigated by appellant, who was not given appellee's address, supports the court's finding that appellee's fear of serious bodily harm was "imminent." *See id.*

In sum, when considered together, appellant's prior physical violence and abusive behavior against appellee, his history of threatening appellee by telling her that she was "suicidal," his sending police to her home at least five times in two different states for dubious reasons, and his unannounced attempt to remove Miles from school, amount to clear and convincing evidence that appellee was in fear of imminent serious bodily harm when

she filed her petition for a protective order. As a result, the circuit court did not err in finding that the alleged abuse occurred, warranting a final protective order. *See* FL § 4-506(c)(1)(ii).

III. Appellant's Evidence

Appellant argues that, "[o]nce [appellee] was permitted to 'summarize' other court proceedings, utilize communications transmitted via text message, testify about child support payments, and testify about custody orders over the objections of [appellant,] he should have been permitted to rebut said testimony." (Footnote omitted). According to appellant, appellee's testimony opened the door for appellant to testify about other court proceedings and introduce his own text message correspondence with appellee.

We note that appellant did not raise his "opening the door" argument below with regard to either the text message evidence or his "rebuttal" testimony, and thus such argument was waived for appellate review. *See* Md. Rule 8-131(a) ("Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court . . . ."). Even if this argument was *not* waived, however, we still would not reach it due to procedural obstacles that appellant failed to overcome. We shall explain.

(1) Text Message

We need not reach appellant's "opening the door" argument regarding the text message evidence, because the circuit court ruled that such evidence was inadmissible due

to a lack of proper authentication. This Court explained the common methods of authenticating text message evidence in *Dickens v. State*:

> Maryland Rule 5-901(b) sets forth several ways in which documents can be authenticated. Subparagraphs (1) and (4) describe two frequently used paths to authentication:
>
> > (1) **Testimony of witness with knowledge.** Testimony of a witness with knowledge that the offered evidence is what it is claimed to be . . . .
> >
> > * * *
> >
> > (4) **Circumstantial Evidence.** Circumstantial evidence such as appearance, contents, substance, internal patterns, location, or other distinctive characteristics, that the offered evidence is what it is claimed to be . . . .

175 Md. App. 231, 238 (2007) (alterations in original). In *Dickens*, where photographs of various text messages were introduced as evidence, we noted that "the burden of proof for authentication is slight, and the court need not find that the evidence is necessarily what the proponent claims, but only that there is sufficient evidence that the *jury* ultimately might do so." *Id*. at 239 (emphasis in original) (citations and internal quotation marks omitted); *see also Griffin v. State*, 419 Md. 343, 367 (2011) (citing to *Dickens* for the proposition that "the burden of proof for authentication is slight").

Appellant is correct that the circuit court accepted a text message received by appellee from Bank of America as an exhibit in appellee's case-in-chief. That exhibit was in the form of an enlarged photograph of the text message, which read:

Text Message
Tue, Jul 1, 8:24 PM

> Bank of America: 179717 is your authorization code which expires in 10 minutes. If you didn't request the code, call 1.800.933.6262 for assistance.[6]

At the time that appellee's trial attorney moved to enter the exhibit into evidence, appellant's trial counsel objected on the grounds of relevance only; he did not question the text message's authenticity.

During appellant's counsel's cross-examination of appellee, the following occurred:

THE COURT:	Are you using your phone? What are you doing with your phone?
[APPELLANT'S ATTORNEY]:	Well, she sent a text message of this. It goes to her—
THE COURT:	Wait, wait, wait, wait a minute. Wait a minute. Whose phone is in your hand?
[APPELLANT]:	Mine.

[6] The circuit court, however, did not rely on the text message in its ruling, stating:

> I don't have the evidence before me to make a finding that this conduct amounts to stalking though. I can't make that finding because the bank account text message is certainly odd and certainly a strange set of circumstances, but I have no way of knowing if that was someone trying to hack into her account that has nothing to do with this family or not.
>
> The text message . . . I have no idea what the origin of that was or the purpose. But so I can't make that finding.

THE COURT:	Okay. So if you're going to try to use a phone, you need to ask my permission before you just turn on a telephone and start whipping it around the courtroom; okay?
[APPELLANT'S ATTORNEY]:	My apologies.
THE COURT:	So I don't know what is on his phone, but I'm not receiving anything in this courtroom on the telephone; okay?
[APPELLANT'S ATTORNEY]:	Yes.
THE COURT:	So I don't know what your next question is, but if it has to do with whatever is on that phone in your hand, first thing you're going to do is turn that off. That is not admissible evidence. **I don't know where it came from. It's not authenticated in any way, and it's not appropriate to just start flinging phones around and asking questions about information on a cell phone. I have no idea where that information came from.**

(Emphasis added).

We agree with appellee that the circuit court did not abuse its discretion by not allowing appellant to admit the text message in question, because that message was physically located on appellant's cell phone and thus could not be entered into evidence in such form. If appellant had printed out a photograph of the text message and attempted to

introduce it through a witness's testimony, as appellee had done with her text message, such text message would have been admissible, assuming that a witness could testify with knowledge that the text messages were what appellant claimed them to be. *See* Md. Rule 5-901(b)(1); *Dickens*, 175 Md. App. at 237-39. Appellant, however, made no attempt to introduce the text message in proper form after the circuit court told appellant's counsel to put away appellant's phone. In other words, whether appellee opened the door when she introduced her text message is irrelevant, because appellant had no properly authenticated text message to enter as evidence, and appellant does not argue before us that his text message evidence was properly authenticated. Accordingly, the trial court did not abuse its discretion by precluding appellant from introducing into evidence a text message located on appellant's cell phone.

(2) Opening the Door to Child Custody & Support Matters

Appellant points to two instances in appellee's testimony that he argues "opened the door" for him to testify regarding other matters: other court proceedings regarding the parties' custody arrangement and appellant's child support obligations. He fails, however, to articulate his argument regarding how his testimony, if offered, would have been relevant or how the exclusion of such testimony was prejudicial.

Regarding other court proceedings, appellee testified that she was able to have appellant drug tested as part of the custody order in place in Illinois, but that such order had expired and, because she was living in Georgia, she was not able to get a new order in

Illinois. Appellee testified that she went to court in Georgia to enroll the Illinois custody order and to suspend visitation until appellant could be tested for drugs. Appellee explained that the custody order was separate from any protective order. The trial court solicited appellee's testimony for clarification purposes, and appellant did not object.

As for child support, appellee testified that she believed appellant was trying to break into her bank account, because he was the only other person who had the account number, which she had given to him to deposit child support payments. The circuit court asked appellee whether appellant deposited child support checks into the account, and appellee replied that "[h]e was supposed to, but he does not." Appellant did not object to this testimony.

In the instant appeal, appellant argues that the court refused to allow him the "very same opportunity" "to testify about other court proceedings," but does not point this Court to any specific part of the transcript where he was denied this opportunity, nor does he explain what his testimony would have been, how it would have been relevant to his defense to appellee's allegations of abuse, or how he was prejudiced by such denial. Maryland Rule 8-504(a)(6) requires appellant's brief to include argument in support of his position on each issue; we have previously held that "arguments not presented with particularity will not be considered on appeal." *Hopkins v. Silber*, 141 Md. App. 319, 338 (2001); *see also Fed. Land Bank of Balt., Inc. v. Esham*, 43 Md. App. 446, 457 (1979) ("These provisions are mandatory and, therefore, it is necessary for the appellant to present and argue all points of appeal in his

initial brief. *As we have indicated in the past, our function is not to scour the record for error once a party notes an appeal and files a brief*." (emphasis added)). Because appellant has not presented adequate argument on this issue, we need not consider it further.

JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AFFIRMED; APPELLANT TO PAY COSTS.