IN THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA
FIFTH DISTRICT

NOT FINAL UNTIL TIME EXPIRES TO
FILE MOTION FOR REHEARING AND
DISPOSITION THEREOF IF FILED

J.G.G.,

Appellant,

v. Case No. 5D19-3483

M.S.,

Appellee.

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Opinion filed July 2, 2020

Appeal from the Circuit Court
for Orange County,
Alice Blackwell, Judge.

Matthew P. Ferry, of Lindsey & Ferry, P.A.,
Winter Park, for Appellant.

No Appearance for Appellee.

ORFINGER, J.

J.G.G. ("Husband") appeals an injunction against domestic violence issued in favor of M.S. ("Wife"). We reverse.

In her petition for an injunction, Wife alleged two specific acts of domestic violence by Husband, one involving non-consensual sex and the other involving an incident when Husband allegedly pushed a door into her. However, at the final hearing, Wife testified not only about these two incidents, but also about two other incidents, one when Husband

allegedly injured her finger in Argentina and another when Husband allegedly kicked her. Husband properly objected to these new allegations, but his objection was overruled.

On appeal, Husband contends that the trial court erred by allowing Wife to testify, over his objection, about the two alleged incidents not included in her petition for injunction. Husband is correct.

Procedural due process requires that litigants be given proper notice and a full and fair opportunity to be heard. To be sufficient, notice must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. The notice must . . . convey the required information, and it must afford a reasonable time for those interested to make their appearance." Deleon v. Collazo, 178 So. 3d 906, 908 (Fla. 3d DCA 2015) (quoting Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 314 (1950)). Adequate notice must provide "some indication of the witnesses to be called and the evidence to be utilized to prove entitlement to relief." Town of Jupiter v. Andreff, 656 So. 2d 1374, 1377 (Fla. 1st DCA 1995). To that end, section 741.30(3)(a), Florida Statutes (2019), provides that "[t]he sworn petition shall allege the existence of such domestic violence and shall include the specific facts and circumstances upon the basis of which relief is sought."

Here, the petition alleged two specific allegations of domestic violence, but did not include the other two events that Wife described at the hearing. The trial court erred in admitting evidence of the two unpled allegations raised for the first time at the hearing. These were two new material allegations of domestic violence, and their admission deprived Husband of his right to due process as he was given neither proper notice of

these fresh allegations, nor a full and fair opportunity to prepare to rebut them.[1] Sanchez v. Marin, 138 So. 3d 1165, 1168 (Fla. 3d DCA 2014).

When the trial court admits improper evidence over objection, it must expressly state on the record that it did not rely on the erroneously admitted evidence in making its final determination. Petion v. State, 48 So. 3d 726, 737–38 (Fla. 2010). If it does not, the appellate court may not presume the improper evidence was disregarded. E.M. v. State, 61 So. 3d 1255, 1257 (Fla. 3d DCA 2011). Wife, as the beneficiary of any error, has the burden to establish that the trial court did not consider or rely on improperly admitted evidence in granting the petition and issuing the permanent injunction. See DeLeon, 178 So. 3d at 909. Wife has not met this burden. Of the four allegations Wife raised at the final hearing, the trial court placed significance on the Argentina incident that was not alleged in the petition, finding this evidence was credible. At the same time, the trial court had trouble discerning who was telling the truth about the act of alleged non-consensual sex and did not specifically mention the other two incidents. Based on this record, we cannot presume that the trial court disregarded the improperly admitted evidence. As a result, we cannot conclude that the erroneous admission of the evidence did not contribute to the trial court's final determination.

We reverse and remand with directions to vacate the permanent injunction, reissue the temporary injunction, and conduct a new final hearing, either upon the existing petition, or upon any properly amended petition. See Sanchez, 138 So. 3d at 1169.

[1] We recognize that in Gonzalez v. Baez, 250 So. 3d 842 (Fla. 3d DCA 2018) and Faddis v. Luddy, 221 So. 3d 758 (Fla. 3d DCA 2017), the court affirmed injunctions when the petitioner testified to acts of domestic violence not set out in the petition. However, in neither case was a timely objection made. Hence, unlike here, the issue was not preserved for appeal.

REVERSED and REMANDED.

EVANDER, C.J., and EDWARDS, J., concur.