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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001571-ME

EMILY MCKINNEY — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE CYNTHIA E. SANDERSON, JUDGE
ACTION NO. 15-D-00132

KARA PETTERSON AND
A.W., a minor child — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, STUMBO AND VANMETER, JUDGES.

VANMETER, JUDGE: Emily McKinney appeals the Domestic Violence Order ("DVO") entered against her by the McCracken Family Court. For the following reasons, we affirm.[1]

[1] We note Petterson did not file a brief with this court. Under these circumstances, the provisions of Kentucky Rules of Civil Procedure (CR) 76.12(8)(c) permits that we may (i) accept McKinney's statement of the facts and issues as correct; (ii) reverse the judgment if McKinney's brief reasonably appears to sustain such action; or (iii) regard Petterson's failure as a confession of error and reverse the judgment without considering the merits of the issue. Because the record does not reasonably appear to support McKinney's arguments as set forth herein, we affirm.

I. Factual and Procedural Background

McKinney is the girlfriend of Jacob Wissinger, the father of the minor child, A.W. Wissinger and A.W.'s mother, Kara Petterson, are currently in divorce proceedings.[2] While A.W. was staying with Wissinger on visitation, she sustained a circular burn on the outside of her left wrist. Neither Wissinger nor McKinney mentioned the burn to Petterson when returning the child to her primary residence about two weeks after the burn occurred. After Petterson noticed the burn, she took A.W. to the emergency room for treatment.

In her DVO Petition, Petterson alleged that McKinney burnt the child on the wrist with a lit cigarette. McKinney has acknowledged that the burn was caused by a cigarette, but claims that A.W. accidentally ran into the cigarette while playing near McKinney while she was smoking.

The trial court granted an Emergency Order of Protection (EPO) on August 6, 2015. A hearing was held on September 9, 2015, at which Petterson, McKinney, and Wissinger were present. Matthew O'Connor, an investigative caseworker for the Cabinet for Health and Family Services (CHFS) assigned to investigate the cigarette burn, testified that he concluded the burn was purposefully inflicted. He testified to the following evidence:

> On July 27, 2015, I received the report of abuse, and met with A.W. on July 28, 2015 to photograph the injury and take her statement. This photograph was provided at the first hearing for this DVO.

[2] A formal visitation schedule has not yet been devised by the court, however Petterson is the primary residential custodian.

A.W. stated that McKinney inflicted the burn, and demonstrated a twisting motion to me, which is consistent with the certified medical records.

On July 29, 2015, I met with Petterson, who stated that neither McKinney nor Wissinger disclosed the burn or admitted any knowledge of what had happened until confronted, when both said the incident was accidental.

By all accounts, McKinney was watching A.W. and her daughter[3] alone when the burn occurred. According to McKinney, while A.W. was playing outside, she ran into the lit end of McKinney's cigarette.

On August 4, 2015, I interviewed McKinney's daughter, who stated that she did not know about how A.W. got the burn on her hand, but that she knew A.W.'s hand was injured and that Wissinger and McKinney sprayed ointment on it.

Also on August 4, 2015, I received A.W.'s medical records from the hospital visit for her burn, which indicated a one half centimeter circular pink area with central thickening on A.W.'s left wrist.

The records further stated that A.W. told medical personnel that she was burned with cigarette, and concluded this type of injury is inconsistent with an accidental burn.

On August 17, 2015, I followed up with the Kentucky State Police after their interview with A.W.'s treating physician. The physician stated that the injury was not conclusively a cigarette burn, however, under oath on August 19, he stated that the injury was in fact a cigarette burn.

On August 19, 2015, I interviewed Wissinger and McKinney. I also attempted to conduct a home visit, but Wissinger would not respond. I noted that Wissinger's nonresponsiveness was consistent with the past official

[3] McKinney's daughter is not related to either A.W. or Wissinger.

record from October 2014, which was the first DVO petition. During the interview, McKinney denied that the burn was intentional, however confirmed that she was the only adult present at the time of the injury.

Additionally, medical treatment was not sought following the injury. Even though the physician reported the wound was in good shape and almost healed, nearly two weeks had passed between the time of the injury and treatment. This delay was apparently due to Wissinger having A.W. for visitation. Medical treatment was sought only when Wissinger returned A.W. to Petterson, who promptly took A.W. to the hospital and reported the abuse. The medical records and interviews confirm this delay: the injury reportedly took place on June 14, and I did not receive the report until June 27, which was one or two days following the hospital visit.

Several factors led me, and the treating physician, to believe the burn was intentional: the burn had central thickening, which is indicative of at least a partial thickness burn, which meaning that the cigarette was present for more than a second; the location of the burn was on a "protected area" on the outside of A.W.'s wrist (where a watch face would be), which is not consistent with a glancing blow or playing child; the wound was perfectly symmetrical in shape, which is inconsistent if the child was running and moving. Typically, a flexed wrist would result in movement of the skin on the wrist, which would create a glancing pattern or burn with an elongated shape.

In response to Wissinger's question during the hearing about which factors would be most important to determine an intentional burn, shape and thickening are especially determinative in ascertaining whether a cigarette burn is accidental; depth is only determinative if the burn is recent, unlike in this case, therefore the healing pattern was considered.

On August 20, 2015, I met with the regional Child Protective Services (CPS) specialist, and based on the disclosures from the medical records, A.W.'s statements,

> and other interviews, I was advised to substantiate this abuse.
>
> I did not investigate a different contact burn on the back of A.W.'s hand from where Wissinger allegedly used a washcloth and hot water to try to remove nail polish from A.W.'s skin. Although I had not seen the picture of that injury until the hearing, the judge noted that the injury looked significant.

After hearing the above testimony, the trial judge stated that in light of the evidence, especially that no reasonable explanation exists for this cigarette burn, coupled with the delay in medical care, the abuse was conclusively substantiated. The trial court entered a DVO against McKinney on September 9, 2015, valid for three years.[4] McKinney appeals the entry of this DVO.

II. Standard of Review

In *Commonwealth v. Jones*, 283 S.W.3d 665 (Ky. 2009), the Kentucky Supreme Court discussed the palpable error rule of RCr[5] 10.26, and stated

> an unpreserved error may be noticed on appeal only if the error is "palpable" and "affects the substantial rights of a party," and even then relief is appropriate only "upon a determination that manifest injustice has resulted from the error." An error is "palpable," we have explained, only if it is clear or plain under current law, *Brewer v. Commonwealth,* 206 S.W.3d 343 (Ky. 2006), and in general a palpable error "affects the substantial rights of a

[4] The trial court also entered an order against Wissinger valid for one year that allowed non-violent contact with A.W., when McKinney is not present. The judge chastised Wissinger for the washcloth burn, but did not consider that incident in regards to the DVO against McKinney. The order continued that any contact between Wissinger and A.W. is to be consistent with the case plan as the divorce proceedings with Petterson are finalized. However, Wissinger is not a party to McKinney's current appeal.

[5] Kentucky Rules of Criminal Procedure.

> party" only if "it is more likely than ordinary error to have affected the judgment." *Ernst v. Commonwealth,* 160 S.W.3d 744, 762 (Ky. 2005). *But see United States v. Olano,* 507 U.S. at 735, 113 S.Ct. 1770 (discussing the federal "plain error" standard and noting, without deciding, that there may be forfeited errors so fundamental that they "can be corrected regardless of their effect on the outcome."). An unpreserved error that is both palpable and prejudicial still does not justify relief unless the reviewing court further determines that it has resulted in a manifest injustice, unless, in other words, the error so seriously affected the fairness, integrity, or public reputation of the proceeding as to be "shocking or jurisprudentially intolerable." *Martin v. Commonwealth,* 207 S.W.3d 1, 4 (Ky. 2006).

283 S.W.3d at 668. We recognize that *Jones* involved an interpretation of palpable error under the criminal rules, but the language in CR[6] 61.02 is identical, so no good reason seems to exist for not applying *Jones* to cases involving CR 61.02.

Under the clear holding of *Jones*, palpable error relief is not available unless three conditions are present. The error must have (1) been clear or plain under existing law, (2) been more likely than ordinary error to have affected the judgment, and (3) so seriously affected the fairness, integrity or public reputation of the proceeding to have been jurisdictionally intolerable. *Id.*

With respect to the issue of a DVO, if the court finds "by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur, the court may issue a domestic violence order[.]" KRS[7]

[6] Kentucky Rules of Civil Procedure.

[7] Kentucky Revised Statutes.

403.740(1).[8] "The preponderance of the evidence standard is met when sufficient evidence establishes that the alleged victim was more likely than not to have been a victim of domestic violence." *Baird v. Baird,* 234 S.W.3d 385, 387 (Ky. App. 2007) (internal quotations and citations omitted).

III. Argument

During the hearing, neither McKinney nor Wissinger objected to any evidence presented by O'Connor, or made any objection whatsoever. In this appeal, however, McKinney argues that all parties were unrepresented by counsel, and she should not be penalized for a mere layman's understanding of the Rules of Evidence or the need to preserve an error. McKinney thus argues that O'Connor should not have been permitted to testify to the medical records, statements by the treating physician, and statements by A.W. She contends that the testimony about the contents of A.W.'s certified medical record was inadmissible hearsay not subject to an exception, and that the admission of this hearsay was so egregious as to rise to the level of palpable error.

In the instant case, O'Connor testified to the investigative evidence he used to substantiate the abuse. However, even if an error in admitting impermissible hearsay in the form of the medical records and statements by the treating physician did occur, the record contains sufficient evidence to support the judge's determination that the burn was intentional and to issue the DVO. The trial court carefully considered the additional ample evidence and testimony in its

[8] Previously under KRS 403.750(1), which was effective through January 2016.

determination that A.W. was more likely than not to have been intentionally burned with a cigarette. The trial judge listened to the testimony of McKinney and Wissinger, and she was not required to give credence to McKinney's testimony if she found it to be improbable that the burn was accidental. Any error that occurred would not have been more likely to affect the judgment than ordinary error, nor did it result in manifest injustice. Therefore, the trial court did not commit palpable error, and did not err in granting the DVO.

IV. Conclusion

The order of the McCracken Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Marianne Halicks
Paducah, Kentucky

NO BRIEF FOR APPELLEES