STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of DAWN MARIE KABANUK.

PEOPLE OF THE STATE OF MICHIGAN,

Appellee,

v

DAWN MARIE KABANUK,

Respondent-Appellant.

FOR PUBLICATION
January 19, 2012
9:05 a.m.

No. 301536
Oakland Circuit Court
Family Division
LC No. 2009-763778-PH

Before: JANSEN, P.J., and WILDER and K.F. KELLY, JJ.

K.F. KELLY, J.

Respondent Dawn Marie Kabanuk (Dawn) appeals as of right following her bench trial conviction for criminal contempt after violating a personal protection order (PPO), MCL 600.2950a(23). She was sentenced to 14 days in jail. Because the behavior of a PPO respondent is the only relevant consideration in a contempt proceeding, we affirm.

I. BASIC FACTS

The matter arises out of contentious family relations regarding the custody of Dawn's fourteen-year-old son. Dawn is married to Kenneth David Kabanuk (Kenneth), who, along with Dawn, was found in criminal contempt of court following their joint bench trial.[1] The two were charged with violating PPOs that had been issued on December 17, 2009, in favor of Mary Nordstrom (Mary). Mary is married to Dawn's brother, Ronald Nordstrom (Ronald). Ronald was granted guardianship over Dawn's son as a result of neglect and guardianship proceedings. Kenneth is not the boy's father, but is admittedly involved in all of the proceedings affecting his wife. The trial court judge acknowledged her familiarity with the parties and was aware that PPO's "had been flying around" between the parties for quite some time.

[1] Kenneth has also appealed from his conviction (*In re Kenneth David Kabanuk,* Docket No. 301537). The cases were submitted together for resolution.

On the day in question, Dawn and Kenneth were in court for a show cause hearing against Ronald. Dawn and her ex-husband, Kurt Traskos, claimed that Ronald was in violation of a visitation order and wrongfully denied visitation. Mary went to the courthouse that day with a dual purpose: she wanted to be there to support her husband and also wanted her sister, Jaya Wilson, to serve Kenneth with additional court papers on behalf of Patricia Nordstrom.[2] Both Mary and Jaya testified that they saw Dawn and Kenneth on the main floor of the court building, just after passing through security. Jaya approached Kenneth with the papers, but he refused service. She allowed the papers to drop at his feet. Mary and Jaya were later in the hall outside of the judge's courtroom where a fair number of other people had gathered for motion day. As the two approached the judge's courtroom, they could hear and see Kenneth speaking very loudly with a woman. Dawn was beside him. When Kenneth caught sight of Mary, he called her a "f***ing bitch" and screamed that he could not believe she was doing this to them after they had reached a settlement. Mary testified that he used profanity against her at least ten times. Mary began to look around the hall for a deputy. The woman to whom Kenneth was speaking cautioned him to settle down or she would go into the courtroom and summon a deputy. Kenneth persisted in his verbal assault and the woman disappeared into the courtroom. Mary testified that Dawn lunged forward, pointing her finger at Mary and stated, "I have one thing to say to you. You're a f***ing bitch and I hate you." The judge's law clerk, Laura McLane, heard the commotion outside of the courtroom. A female attorney reported that deputies were needed in the hallway. McLane called for the deputies and then went out into the hallway, hoping to diffuse the situation. She saw Kenneth yelling at Mary. McLane told everyone that deputies had been summoned and suggested that Kenneth "take a walk" and pointed down the hallway.

The testimony of Dawn and Kenneth was in stark contrast to that of Mary, Jaya, and McLane. Dawn and Kenneth testified that at no time did they approach, confront, or use profanity against Mary. Rather, it was Mary who approached the two of them in the hallway, told them they were in violation of the PPO, and threatened to have them arrested. Kenneth merely told Mary to stop talking to them, leave them alone and reminded her that she was also in violation of a PPO they had against her. When McLane came out into the hall and suggested that Kenneth "take a walk," they took her advice and left.

The trial court held both Dawn and Kenneth in criminal contempt of court, finding that they violated the PPOs to the extent that the PPOs prohibited them from approaching or confronting Mary in a public place. Dawn now appeals as of right.

II. SUFFICIENCY OF THE EVIDENCE

Dawn argues that there was insufficient evidence to support the trial court's finding that she violated the PPO where Mary used the PPO as a "sword rather than a shield." We disagree.

We review a trial court's findings in a contempt proceeding for clear error and such findings must be affirmed if there is competent evidence to support them. *In re Contempt of Henry*, 282 Mich App 656, 668; 765 NW2d 44 (2009). We may not weigh the evidence or the

[2] Patricia Nordstrom is the mother of Dawn and Ronald and is Mary's mother-in-law.

credibility of the witnesses in determining whether there is competent evidence to support the findings. *Id.* This Court reviews a trial court's issuance of an order of contempt for an abuse of discretion. *Id.* at 671.

Violation of a PPO may result in a finding of criminal contempt and subject a respondent to up to 93 days in jail and a fine of up to $500. MCL 600.2950a(23); MCR 3.708(H)(a). The PPO prohibited Dawn from approaching or confronting Mary in a public place. There was competent evidence to find Dawn violated the PPO by approaching or confronting Mary at the courthouse, a public place. Dawn approached or confronted Mary by lunging toward Mary and saying, "I have one thing to say to you. You're a f***ing bitch and I hate you." Although the testimony of Dawn and Kenneth contradicted the testimony of Mary and Jaya, we are not at liberty to weigh the evidence or the credibility of the witnesses in determining whether there is competent evidence to support the findings. *Henry*, 282 Mich App at 668.

Respondent relies on *People v Freeman*, 240 Mich App 235; 612 NW2d 824 (2000), for the proposition that a petitioner cannot use a PPO as a "sword instead of a shield." In *Freeman*, the defendant was convicted of resisting and obstructing a police officer after officers attempted to handcuff defendant and place him under arrest for violating a PPO. *Id.* at 235-236. On appeal, the defendant argued that the evidence was insufficient to support his conviction because the prosecution failed to prove that the arrest was legal and that the prosecutor's remarks impermissibly shifted the burden of proof to defendant by requiring him to prove that the PPO was invalid. *Id.* at 236-237. We affirmed defendant's conviction, finding that the officers' reliance on the law enforcement information network provided reasonable cause for them to believe that the defendant violated the PPO, subjecting him to immediate arrest. *Id.* We further found that the prosecutor's remarks, when taken in context, did not have the effect of impermissibly shifting the burden of proof to the defendant. *Id.* at 237. In a footnote, we added:

> Although the personal protection order itself is not at issue in this case, we express our concern raised by the facts of this case. This case illustrates the need to draft such orders carefully in order to avoid inconsistencies and confusion. Here, for example, the complainant's residence is listed in the body of the order as 38 N. Riviera Drive. The caption of the order, however, states that the complainant can be reached at 1419 Capital Avenue, # 32. The complainant was at defendant's address at 1419 Capital Avenue, # 32, when defendant was arrested for violating the order. Surely, a defendant must question the wisdom of an order that makes it a violation of a court order to be in his own home, particularly when the complainant has a separate residence and makes the complaint to the police while at the defendant's residence. This would appear to allow personal protection orders to be used as a sword rather than a shield, contrary to the intent of the legislation that was quite properly designed and intended to protect spouses and others from predators. When personal protection orders are allowed to be misused because of careless wording or otherwise, then the law is correspondingly undermined because it loses the respect of citizens that is important to the effective operation of our justice system. [*Id.* at 237 n 1.]

Our discussion in *Freeman* was dicta and is not binding on this Court. See *People v Crockran*, 292 Mich 253; __ NW2d __ (2011) (slip op at 2-3). Nevertheless, we take this opportunity to

distinguish *Freeman* from the case at bar. The "sword/shield" analysis in *Freeman* was in reference to a poorly drafted PPO. *Freeman* does not, as Dawn argues, shift the focus onto the behavior of one who holds a PPO. We clarify that one who holds a PPO is under no obligation to act in a certain way. Instead, a court must look only to the behavior of the individual against whom the PPO is held. Here, Dawn does not argue that the PPO was carelessly worded or incorrectly entered; rather, she argues that by placing herself in the courthouse when Dawn and Kenneth were bound to be there, Mary was inviting a confrontation. We do not find Mary's conduct to be relevant in evaluating whether Dawn was in violation of the PPO. When evaluating whether there has been a violation of a PPO, the proper focus is on the behavior of the individual against whom the PPO is held (Dawn), *not* the behavior of the one who holds the PPO (Mary).

The trial court accepted Mary's testimony that she was in the courthouse to support her husband at his show cause hearing. It also accepted Mary's testimony that that she never approached Dawn or Kenneth. Thus, the trial court's findings suggest that it did not believe Mary used the PPO as a sword. More importantly, the trial court indicated that it was "not necessarily concerned" about whether Mary and Jaya approached Kenneth and Dawn. Instead, for purposes of the contempt proceedings the relevant consideration was whether Kenneth and/or Dawn violated the PPOs. The focus was properly on their conduct outside of the courtroom that morning. There was sufficient evidence for the trial court to find beyond a reasonable doubt that Dawn violated the PPO when she lunged at Mary with her finger pointed and yelled, "I have one thing to say to you. You're a f***ing bitch and I hate you."

III. 404(B) EVIDENCE

Dawn argues that the trial court improperly relied upon the fact that Kenneth had been loud and disruptive in the courtroom on prior occasions in unrelated proceedings. She claims that the trial court impermissibly relied on Kenneth's prior bad behavior to show that he acted in conformity therewith on the date in question, a violation of MRE 404(b)(1). Dawn failed to raise the issue in the trial court. We, therefore, review for plain error. Under that standard, Dawn must show: (1) that an error occurred, (2) that the error was plain, and (3) that the error affected substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). The third requirement requires a showing of prejudice—that the error affected the outcome of the lower court proceedings. *Id.*

MRE 404(b)(1) provides:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case.

This Court has explained that "[t]o be admissible under MRE 404(b), bad-acts evidence must satisfy three requirements: (1) the evidence must be offered for a proper purpose; (2) the

evidence must be relevant; and (3) the probative value of the evidence must not be substantially outweighed by unfair prejudice." *People v Kahley*, 277 Mich App 182, 184-185; 744 NW2d 194 (2007). Although the rule is most often invoked in connection with criminal defendants, it also applies to witnesses. *People v Rockwell*, 188 Mich App 405, 409-410; 470 NW2d 673 (1991).

In this case, no evidence of Kenneth's past bad behavior was introduced. Instead, the trial court took judicial notice of Kenneth's disruptive behavior at other hearings. The trial court essentially found that because Kenneth had been disruptive in the past, he was likely disruptive in this case, and, therefore, he was lying about the circumstances of the incident. Thus, it appears that the trial court used Kenneth's prior acts to show that Kenneth acted in conformity therewith, a violation of MRE 404(b)(1).

However, we find no basis for reversal, as we do not believe that such a consideration was outcome determinative in Dawn's case. The trial court found Mary's and Jaya's testimony to be credible, even though there were some discrepancies. The trial court noted that Jaya had never been to court on previous matters and seemed reluctant to testify, suggesting that she was a disinterested party worthy of belief. Their testimony was also supported by the trial court's law clerk, who heard the commotion and sought to diffuse the situation. Additionally, the trial court found that Kenneth was not credible for reasons other than his past behavior. Kenneth's testimony and explanations were inconsistent. He went from denying any wrong-doing to admitting that he stepped in to defend Dawn, to admitting that he should have "kept my mouth shut." Reversal is not warranted because there is no indication that the error resulted in the conviction of an innocent defendant or substantially affected the fairness of the trial. Rather, there was overwhelming evidence that Dawn violated the PPO when she lunged at Mary with her finger pointed and yelled, "I have one thing to say to you. You're a f***ing bitch and I hate you."

IV. INEFFECTIVE ASSISTANCE OF COUNSEL

Dawn next argues that trial counsel was ineffective for failing to raise the "PPO is a shield and not a sword" defense. We disagree. Because Dawn failed to move for a *Ginther*[3] hearing, our review is limited to error apparent on the record. *People v Seals*, 285 Mich App 1, 19; 776 NW2d 314 (2009).

As discussed above, we conclude that the "PPO as a shield and not a sword" language in *Freeman* is dicta and, further, confined to extremely narrow circumstances not applicable here. As such, trial counsel was not required to raise a meritless defense. *People v Rodriguez*, 212 Mich App 351, 356, 538 NW2d 42 (1995). Dawn fails to establish that she was denied the effective assistance of counsel.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Affirmed.

/s/ Kirsten Frank Kelly
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder