IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA16-586

Filed: 6 December 2016

Wake County, No. 16 CVD 309

DIANA KOEHN, Plaintiff,

v.

LEWIS WAYNE HOLLEY, Defendant.

Appeal by Defendant from order entered 11 January 2016 by Judge Jefferson Griffin in Wake County District Court. Heard in the Court of Appeals 2 November 2016.

Legal Aid of North Carolina, Inc, by Dietrich D. McMillan, Gina R. Reyman, Atiya Mosley, and Celia Pistolis for Plaintiff-appellee.

John M. Kirby, for Defendant-appellant.

HUNTER, JR., Robert N., Judge.

Lewis Wayne Holley ("Defendant") appeals an 11 January 2016 Domestic Violence Protection Order ("DVPO"), contending the trial court erred by denying his motion to continue the hearing until he could secure counsel. Defendant also argues there was insufficient evidence to support entry of a DVPO. We disagree.

I. Facts and Procedural History

On 4 January 2016, Diana Koehn ("Plaintiff") filed a complaint and motion for a DVPO against Defendant in Wake County District Court. She requested Defendant be ordered to vacate their shared residence, have no contact with Plaintiff or her dog, and be barred from entering their residence, her relatives' residences, her workplace, and their church. Based on her complaint, the trial court issued an ex-parte DVPO. The trial court set a hearing for 11 January 2016 and served Defendant with notice on 4 January 2016. Defendant subsequently filed his own complaint and motion for DVPO on 5 January 2016. Defendant's request for an ex-parte DVPO was denied, but a hearing was set for 11 January 2016. On 7 January 2016, Defendant prepared and served several subpoenas requesting witnesses appear at the hearing for Plaintiff's complaint.

On 11 January 2016, both cases were called to trial. At the calendar call, Defendant identified Timothy Blake as his attorney and requested a continuance, claiming he had not had a chance to speak with Mr. Blake. The court continued the calendar call, giving Defendant time to locate his lawyer. Approximately thirty minutes later, Plaintiff's attorney asked the court to inquire when Defendant's attorney would arrive, noting three of the witnesses Defendant had subpoenaed were present in the courtroom. In response to the inquiry, Defendant stated his attorney was "not available to discuss over the weekend, has not had time to prepare," and again moved to continue. When the court asked Defendant when he had hired his

attorney, Defendant responded he had spoken with the attorney "late Friday afternoon." Defendant stated his attorney "already had commitments. We talked probably less than 30 minutes. And I talked to him yesterday on the phone for about 20 minutes." Defendant later testified during the hearing the purpose of at least one of these conversations was to verify he had not violated the ex parte DVPO against him.

Plaintiff asked the court to deny the motion to continue, arguing Defendant had "plenty of time to prepare" and had subpoenaed several witnesses who were present in the courtroom. While the court reviewed the files, Defendant argued that most of his witnesses were not present and agreed to extend the ex parte order. The court denied Defendant's motion to continue.

An hour later, the case was called to trial. Before hearing Plaintiff's complaint, the trial court asked Defendant whether he intended to go forward with his complaint. Defendant voluntarily dismissed his complaint. Defendant then stated "[t]he attorney gave me good advice, so I'm prepared to go ahead."

Plaintiff testified first, telling the court she and Defendant had been domestic partners for the past seven years, living together in her home for the past six years. Plaintiff testified she thought Defendant had begun to exhibit symptoms of a manic episode in July 2015 increasing in intensity through November and December 2015. Defendant began to claim there were viruses in his computers, in his car radio, and

in his cell phone, and stayed up nights trying to fix them. Defendant "would be on the phone for 20-some hours at a time with AOL trying to figure out how to clean up the computers." In November, Defendant hit Plaintiff for the first time in their relationship, giving Plaintiff a "forceful nudge" during an argument.

On Christmas Eve 2015, Defendant poured salad dressing into a glass of wine and drank it with his dinner, concerning Plaintiff. Later that evening, Plaintiff, Defendant, and Defendant's mother went out driving to see Christmas lights. At around 9 p.m., while Plaintiff was driving on Cary Parkway, Defendant told her he wanted to stop and see his son, daughter, and baby grandson. Plaintiff felt it was too late in the evening to visit and continued driving home. Defendant then "yanked the steering wheel" from Plaintiff, running the car into the median. Plaintiff, feeling "very fearful," got out of the car and walked the last mile home.

Plaintiff testified Defendant had previously exhibited similar behavior in 2009 and 2010. Defendant began to think people were following him, their house was bugged with listening devices, and the family dogs "had something implanted in them." Out of concern for the dogs, Plaintiff "got them out to a safe place" away from Defendant. Defendant would also speed and was "careless in his driving . . . go[ing] places where we weren't intending to go because he was thinking people were following us." While Defendant was not then physically abusive with Plaintiff, he "acted like he wanted to [hit Plaintiff], but he would put his arms behind his back

and restrained himself." After Defendant "pulled out" Plaintiff's surround sound system, Plaintiff asked Defendant to leave the home. The Cary Police Department subsequently detained Defendant and took him to Holly Hill Hospital for treatment of "his manic and psychotic state." After a week at Holly Hill, Defendant returned home, but lost his job and lapsed into depression. Defendant then shot himself in the face with a shotgun. However, since that incident, Defendant "sees a psychiatrist regularly and he takes his medicines."

Because Plaintiff was "afraid [Defendant] was going to get to that point again," she left her home on 30 December 2015. Plaintiff testified she was "fearful of [Defendant's] actions and thinking; fearful for myself and my . . . dog." Plaintiff informed Defendant by text message she would not return home. Defendant answered, telling her "I'm not surprised. I just left a detailed message with my doctor [describing] your extreme paranoia . . . you need serious [psychological] help." Later that night, Defendant again texted Plaintiff, claiming that Plaintiff's reactions to his behavior were only "paranoia," and suggesting that Plaintiff's boss, Greg Byrd ("Mr. Byrd"), had sent her home because she needed mental health care.

Early in the morning on 3 January 2016, Defendant texted Plaintiff, telling her he believed she had left her dog with one of her coworkers. Defendant stated he would come to Plaintiff's workplace that day to talk to her coworkers unless Plaintiff brought her dog home. Defendant indicated he thought Plaintiff was in a mental

hospital, saying "[t]he doctor is glad to know your [sic] in [the] hospital." Later that morning, Defendant again texted Plaintiff, sharing his experiences from his hospitalization and telling her what to expect. That afternoon, Defendant sent Plaintiff a final text message:

> Good afternoon. Hope you saw the pictures. I'm going to restore your access to [the] bank account, put the keys back, and restore any other items. Instead I have an alternate plan. I have plans to as many legal actions as necessary to locate Cody [Plaintiff's dog]. This could become very embarrassing and very expensive for whoever has him. You will likely be interviewed by a police officer or an attorney or a police officer. At this time I do not plan to take legal action against you. That my change if other actions fail. I will talk to the same attorney I am getting help from on at no charge from tomorrow. I will also talk with the magistrate at the [Wake] County Courthouse tomorrow. As you know, [I'm] quite familiar with the legal system so I won't need to hire an attorney. But just as a sign of my appreciation I will probably send a check for 100 dollars. I hope you will reconsider your decision about returning Cody to me. Tomorrow will be a busy day…..talks with attorney, magistrate, and Greg. I will get advice from my doctor. By the way, [I've] never told you, but I have an IQ above 140. When I set my mind to something, I rarely fail. I am 100% committed to this. I will get Cody back regardless of what it takes. [I] would take this very seriously. This is not a bluff. Love, Wayne.

In regard to these text messages, Plaintiff testified she had never experienced paranoid behavior and had never needed or undergone treatment for mental or emotional problems. Mr. Byrd had not sent her home on 30 December. Plaintiff was

concerned Defendant would come to her workplace, because he had already called and left several voicemails with Mr. Byrd, for reasons unknown to her.

Finally, Plaintiff testified Defendant's behavior had made her "fearful, very cautious, it's hard to sleep, not trusting." She told the court that she wanted the DVPO to "get back into my house and feel safe, and . . . continue my life," and was concerned without a protective order, "[Defendant] would be harassing and stalking; trying to take the dog."

Mr. Byrd then testified. Plaintiff had been his employee for the past eight years. Mr. Byrd told the court Defendant had "left a couple of voice messages on my business phone talking a little bit about the situation [between Defendant and Plaintiff]." He returned one of Defendant's calls, in which Defendant expressed concern about Plaintiff's "erratic behavior," and stated his intention to "come over to our business and confront one of our employees about where the dog was." Mr. Byrd told him not to come because "we didn't know where the dog was." He thought Defendant sounded "erratic and didn't make much sense. I wasn't even sure why he even called me."

Holly Menard ("Ms. Menard") testified next. Ms. Menard knew Plaintiff through their church. She told the court Defendant came to her home on 1 January 2016, looking for Plaintiff's dog. When she told him she didn't know where the dog was, Defendant did not search the house or act aggressively, but sat down and began

to "ramble." Ms. Menard testified Defendant "wanted me to know that he knew where [Plaintiff] was . . . in Holly Hill." Nevertheless, she testified Plaintiff had never been hospitalized to her knowledge. Ms. Menard testified it was her impression Defendant was "unstable" and "exhibiting paranoid behavior." However, on cross examination, Ms. Menard admitted she had never seen Defendant argue with Plaintiff and had never seen Defendant mistreat Plaintiff's dog. After Ms. Menard's testimony, Plaintiff rested.

Defendant called Plaintiff's cousin, Lois Nixon ("Ms. Nixon") as his first witness. She testified she had known Defendant for eight or nine years, since he and Plaintiff began dating. She told the court she was concerned Defendant might have harmed or neglected Plaintiff's dog, because of his behavior toward Plaintiff's dogs during his previous manic episode. On cross examination, Ms. Nixon testified she knew Defendant could "be normal for a while and then a little erratic." Because she felt Defendant was "in the period of an erratic time," Ms. Nixon referred Plaintiff to a women's support group for help.

Finally, Defendant testified on his own behalf. He stated he had experienced a "minor manic episode" caused by the "stress related to the [DVPO]," but he had contacted his doctor and adjusted his medication accordingly. Defendant stated there were viruses on his computer and phone for which he had sought the assistance of

AOL and AT&T, respectively. He told the court he had been advised by AT&T his car had probably been infected by a virus from his phone.

Speaking about his prior manic episode, Defendant testified he did not damage anything when he removed Plaintiff's surround sound system and had purchased but not yet installed a new system. He also stated his gunshot wound was accidental, noting he had spoken to a "psychologist numerous times and I was not committed. . . . I would have been involuntarily committed had [the psychiatrist] reached the decision it wasn't an accident."

When asked by the court why he continually claimed Plaintiff had been hospitalized at Holly Hill, Defendant testified he spoke with Plaintiff by phone after she left him. He asked her where she was, listing several friends and relatives she might be staying with. Plaintiff responded "I can't tell you" to each. Defendant then asked her if she was at Holly Hill or Durham Regional Hospital, and "there was a 20 second hesitation. And knowing [Plaintiff] as well as I know her, I believed, based on that, that she just didn't know how to respond and it took her that long to decide to say 'I can't tell you.'"

Defendant also testified he was a safe driver, telling the court his last ticket was in 2009 and his last accident in 2003. He claimed to never have had an accident going more than 10 miles per hour. After testifying, Defendant rested.

After the close of evidence, the trial court heard closing arguments from each of the parties. Defendant stated he was neither erratic nor unstable and was receiving good medical treatment. He accused Plaintiff of perjury and malicious prosecution. Finally, he told the court he thought Plaintiff "needs some medical assistance because I did observe a number of very bizarre behaviors." Plaintiff stated she was concerned about Defendant's behavior, citing his conduct in court as "giv[ing] credence to her concerns."

Following summation, the trial court granted the DVPO. The trial court found Defendant had placed Plaintiff in fear of serious bodily injury and in fear of continued harassment that rises to the level of substantial emotional distress. The court further found "Defendant has been physically threatening in the past on numerous occasions. Defendant is constantly harassing Plaintiff and her family and coworkers with frivolous claims. Defendant has been aggressive while both parties [were] in a vehicle."

The court barred Defendant from contacting Plaintiff or her family. Defendant was ordered not to treat any animal in either party's possession cruelly. The court granted possession of the residence to Plaintiff, allowing Defendant to remove his clothes, toiletry, and tools of the trade from the home. Plaintiff was granted care and custody of her dog. Defendant was ordered to stay away from Plaintiff's residence, any place she sought temporary shelter, her workplace, and their church. Defendant

was ordered to remain 500 yards away from plaintiff at all times. Finally, the court prohibited Defendant from possessing, receiving, or purchasing a firearm while the DVPO was in effect. The order was served to Defendant in the courtroom following the hearing.

Defendant filed his notice of appeal to the DVPO on 4 February 2016. The parties settled the record on appeal on 3 June 2016.

II. Jurisdiction

Defendant appeals the final judgment of a district court in a civil action. Jurisdiction in this Court is proper pursuant to N.C. Gen. Stat. §§ 7A-27(b)(2) and 1-277(a) (2015).

III. Standard of Review

"[A] motion to continue is addressed to the discretion of the trial court, and absent a gross abuse of that discretion, the trial court's ruling is not subject to review." *State v. Taylor*, 354 N.C. 28, 33, 550 S.E.2d 141, 146 (2001). Abuse of discretion occurs when the trial court's ruling is "manifestly unsupported by reason or is so arbitrary that it could not have been the result of a reasoned decision." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988).

"When the trial court sits without a jury [regarding a DVPO], the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts.

Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal." *Hensey v. Hennessy*, 201 N.C. App. 56, 59, 685 S.E.2d 541, 544 (2009) (citation omitted).

IV. Analysis

A. Motion to Continue

Under N.C. Gen. Stat. § 50B-2(c)(5), the state legislature directs:

> Upon issuance of an ex parte order under this subsection, a hearing shall be held within 10 days from the date of issuance of the order or within seven days from the date of service of process on the other party, whichever occurs later. A continuance shall be limited to one extension of no more than 10 days unless all parties consent or good cause is shown. The hearing shall have priority on the court calendar.

We have held hearings on ex parte DVPOs "must be conducted quickly in order to ensure that the rights of both parties, the complainant and the respondent, are not infringed." *Henderson v. Henderson*, 234 N.C. App. 129, 134, 758 S.E.2d 671, 684 (2014).

"A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require." N.C. Gen. Stat. § 1A-1(b), Rule 40 (2016). Continuances are not favored, and the party seeking a continuance has the burden of showing good cause. *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976). Before ruling, the trial court should consider all the evidence, including "whether the moving party has acted with diligence and good faith." *Id.* at 483, 223

S.E.2d at 386 (citation omitted). "A denial of the motion is not an abuse of discretion where the evidence introduced . . . is conflicting or insufficient[.]" *Id.* (citation omitted).

In the instant case, Defendant argues the trial court abused its discretion by failing to provide him sufficient time to retain an attorney. We disagree.

The record contains conflicting evidence as to Defendant's desire to retain an attorney prior to the hearing. Defendant sent Plaintiff a text message the day prior to the filing of her complaint, asserting his extensive knowledge of the legal system and stating he "won't need to hire an attorney" to pursue legal action against Plaintiff. After Defendant was served with Plaintiff's complaint, he filed a *pro se* cross complaint, before issuing nine subpoenas. On each subpoena, Defendant filled in the entry for "Name and Address of Applicant or Applicant's Attorney" with "*pro se*." Finally, despite receiving notice of the upcoming hearing a week in advance, Defendant did not speak with an attorney until the "late Friday afternoon" and Sunday before the hearing. Defendant testified the purpose of at least one of these conversations was merely to verify his compliance with the ex parte DVPO.

As a result, we agree Defendant did not show good cause for a continuance and hold the trial court did not abuse its discretion in denying Defendant's motion to continue.

B. Sufficiency of Evidence

Upon finding an act of domestic violence has occurred, "the court shall grant a protective order restraining the defendant from further acts of domestic violence." N.C. Gen. Stat. § 50B-3(a) (2015). Domestic violence includes:

> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
>
> (2) Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury or continued harassment, as defined in G.S. 14-277.3A, that rises to such a level as to inflict substantial emotional distress.

N.C. Gen. Stat. § 50B-1(a) (2015). Harassment is defined as "[k]nowing conduct, including written or printed communication or transmission, telephone, cellular, or other wireless telephonic communication . . . . and electronic mail messages or other computerized or electronic transmissions directed at a specific person that torments, terrorizes, or terrifies that person and that serves no legitimate purpose." N.C. Gen. Stat. § 14-277.3a(b)(2) (2015).

In order to conclude domestic violence has occurred, a court must find (1) defendant has or has had a personal relationship with plaintiff; (2) defendant committed one or more acts upon plaintiff or plaintiff's minor child; (3) the act or acts placed plaintiff or a member of her family in "fear of imminent serious bodily injury or continued harassment;" and (4) the fear rises to the level of "substantial emotional distress." *Kennedy v. Morgan*, 221 N.C. App. 219, 222, 726 S.E.2d 193, 195 (2012).

Where a plaintiff claims harassment as the act of domestic violence, the court must find defendant's acts were (1) knowing; (2) "directed at a specific person"; (3) tormented, terrorized, or terrified the person, and (4) served no legitimate purpose. *Id*. at 222, 726 S.E.2d at 195-96 (citation omitted).

In the instant case, there is competent evidence to support the trial court's finding Defendant committed an act of domestic violence that placed Plaintiff in fear of imminent bodily injury. There is no dispute Plaintiff and Defendant were in a personal relationship, nor is there any dispute Defendant committed the acts alleged in the complaint.

There is competent evidence showing Defendant's acts placed Plaintiff in fear of imminent serious bodily injury. Plaintiff offered unchallenged evidence at the hearing that Defendant's behavior was unstable and unpredictable. Witnesses for Plaintiff and Defendant described him as "erratic," "unstable," and "paranoid." Defendant himself admitted he had experienced a "minor manic episode." Defendant did not dispute Plaintiff's testimony he had engaged in abusive physical contact when he first gave Plaintiff a "forceful nudge," then later grabbed the steering wheel of Plaintiff's car while she was driving and forced her off the road.

Finally, there was competent evidence Plaintiff experienced substantial emotional distress. She gave undisputed testimony after each incident, she became "fearful" of Defendant, going so far as to walk more than a mile to her home rather

than continue to drive with Defendant after the last incident. Moreover, Plaintiff took the step of leaving her own home for over a week in order to get away from Defendant.

For similar reasons, the court's findings with respect to harassment are supported by competent evidence. The record establishes after Plaintiff left her home, Defendant sent a series of text messages to Plaintiff and a few of her acquaintances asserting Plaintiff had been hospitalized for mental illness and threatening unspecified action to recover Plaintiff's dog. There was no dispute Defendant knowingly sent these messages, and no dispute as to whom they were directed. Further, there is competent evidence Plaintiff was "tormented, terrorized, or terrified" by these messages, which included warnings Defendant would disrupt Plaintiff's place of business and a threat Defendant would do "whatever it takes" to recover Plaintiff's dog. Finally, the record contained competent evidence these messages served no legitimate purpose. Plaintiff testified she had never experienced and had never been treated for a mental disorder. Each witness testified Plaintiff had never been hospitalized to their knowledge. Against this, Defendant asserted only his unsubstantiated intuition Plaintiff had been hospitalized. Further, there was undisputed evidence the dog Defendant sought to recover belonged solely to Plaintiff.

Because there was competent evidence to support the trial court's findings of fact, they are binding on appeal. Consequently, we affirm the entry of the DVPO against Defendant. For the reasons stated above, the trial court is

AFFIRMED

Judges ELMORE and DILLON concur.

Report per Rule 30(e).