

**NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37**

JULIA SUTTON

Appellee

v.

ARIANE CZCAR BURRELL

Appellant

IN THE SUPERIOR COURT OF  
PENNSYLVANIA

No. 1019 WDA 2013

Appeal from the Order May 28, 2013  
In the Court of Common Pleas of Fayette County  
Civil Division at No(s): 962 of 2013, GD

BEFORE: PANELLA, DONOHUE and ALLEN, JJ.

MEMORANDUM BY PANELLA, J.:

**FILED JULY 14, 2014**

Appellant, Ariane Czcar Burrell ("Father"), appeals from the protection from abuse ("PFA") order entered in the Court of Common Pleas of Fayette County, prohibiting him from having any contact with the minor child, J.D.F., except as may be permitted through supervised visitation for a period of one year. We affirm.

On May 21, 2013, Julia Sutton ("Mother") filed a PFA petition against Father on behalf of their 11-year-old child, J.D.F. A hearing was held on Mother's petition before the lower court on May 28, 2013. The testimony adduced at the time of the PFA hearing established that, on May 16, 2013, J.D.F. was in Father's custody at his home in Masontown. **See** N.T., PFA Hearing, 5/28/13, at 5. Earlier that week, J.D.F. had sent a text message containing disparaging comments about his stepmother. The text message

was directed to a female classmate; it was, however, inadvertently sent to the stepmother. **See id.**, at 7. This made Father angry. When he arrived home from work that evening the two engaged in a discussion regarding the text message. **See id.**, at 7. Father then instructed J.D.F. to “turn around” after which Father pulled J.D.F.’s pants and underwear down and struck him with what “felt like ... an object.” **Id.**, at 7, 9. According to J.D.F., when Father was hitting him, “it felt like really hard at first” and then “[he] heard something hit the floor” which “sounded like something metal” after which the pressure of the hitting “started getting easier.” **Id.**, at 7, 9. J.D.F. testified that the beating “felt like harsh” and it “hurt a lot.” **Id.**, at 7. Father then directed J.D.F. to go to bed and, perhaps not surprisingly after inflicting this beating, not to tell anyone. **See id.**, at 10, 12.

The next day, while in school, J.D.F. was having difficulty sitting “in homeroom and moving from period to period.” **Id.**, at 10. According to J.D.F., “every time [he] sat down it like hurt a lot.” **Id.** J.D.F. returned to Mother’s custody that afternoon. Mother observed J.D.F. get off the bus at the top of the hill and walk, “kind of creepin, [walking] real stiff” towards the house. **See id.**, at 31. Mother testified that J.D.F. was “up and down mentally,” sore, and started to cry when he arrived home. **See id.** When questioned by Mother, J.D.F. recounted what had transpired the prior evening at his Father’s home. Mother, a registered nurse, looked “at his bottom” and saw “bruises and welts.” **Id.**, at 32. Mother then transported J.D.F. to the hospital. **See id.**, at 33.

J.D.F. was examined in the emergency department of Uniontown Hospital by Bruce Teich, M.D. **See id.**, at 19. Dr. Teich was tendered as an expert in the field of emergency medicine. Dr. Teich testified that, upon examination, he observed “contusions, bruises over the buttocks area’ and “contusion or injury over to the right side of the face.” **Id.**, at 23. An x-ray was performed which unveiled a “low sacral fracture<sup>1</sup>.” **Id.**, at 24. The x-ray was read by a hospital radiologist and re-examined by Dr. Teich in the emergency department to corroborate the radiologist’s findings. **See id.** In his medical opinion, a fracture like J.D.F.’s could be caused by “any *significant force.*” **Id.**, at 26-27 (emphasis added).

At the conclusion of the PFA hearing, the lower court entered a final PFA order, naming, J.D.F., the minor child, as the protected party. This timely appeal followed.

On appeal, Father raises the following issues for our review:

- I. Whether the Trial Court erred in finding that the Appellee had proved by a preponderance of the evidence that abuse had occurred under the 23 Pa.C.S.A. § 6102, sufficient to justify the entry of a Final Protection from Abuse Order?
- II. Whether the Trial Court erred in finding that Appellant’s acts were abuse, as defined under 23 Pa.C.S.A. § 6102, rather than corporal punishment?

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<sup>1</sup> The lower sacral bone, as explained by Dr. Teich at the PFA hearing, is “the bone, the sacral bone, the low backbone [which] comes down as a kind of a triangular shape.” **Id.**, at 24. Dr. Teich reported a “horizontal fracture to the lower section of that bone.” **Id.** In essence, the tailbone.

- III. Whether the Trial Court erred in granting temporary custody of the minor child to the Appellee and requiring the Appellant to have only supervised visits with his minor child?
- IV. Whether the Trial Court erred in preventing the Appellant from questioning the Doctor relative to his experience with x-rays and radiology, when the Court subsequently permitted him to give an opinion on radiology report?
- V. Whether the Trial Court erred in preventing the Appellant from cross-examining the [J.D.F.] relative to text message he sent to another child?
- VI. Whether the Trial Court erred in preventing the Appellant from impeaching the credibility of the minor child?
- VII. Whether the Trial Court erred in preventing the Appellant cross-examining Julia Sutton, relative to the text message sent by the child?
- VIII. Whether the Trial Court erred in preventing the Appellant from impeaching the credibility of Julia Sutton.
- IX. Whether the Trial Court erred in concluding that the Appellant's acts caused substantial injury to [J.D.F.], when the alleged acts occurred the day before the injuries were reported
- X. Whether the Trial Court erred in concluding that the Appellant's acts caused injury to [J.D.F.], when the testifying physician could not and would not make any such conclusions?

Appellant's Brief, at 4.

Our standard of review of a protection from abuse order is as follows:

When a claim is presented on appeal that the evidence was not sufficient to support an order of protection from abuse, we review the evidence in the light most favorable to the petitioner and granting her the benefit of all reasonable inferences, determine whether the evidence was sufficient to sustain the trial court's conclusion by a preponderance of the evidence.

**Miller on Behalf of Walker v. Walker**, 665 A.2d 1252, 1255 (Pa. Super. 1995) (internal citations omitted). This Court defers to the lower court's credibility determinations as to witness credibility. **See Raker v. Raker**, 847 A.2d 720, 724 (Pa. Super. 2004). "If a trial court erred in its application of the law, an appellate court will correct the error." **Viruet ex rel. Velasquez v. Cancel**, 727 A.2d 591, 593 (Pa. Super. 1999) (citation omitted).

In his appellate brief, Father groups his issues as they are inter-related. For ease of disposition, we will address those issues in the manner in which Father raises them.

First, Father avers that Mother provided insufficient evidence to prove by a preponderance of the evidence that Father "abused" J.D.F. under the Protection from Abuse Act ("Act"), 23 PA.CON.S.STAT.ANN. § 6101, *et seq.* Rather, Father maintains that his conduct was permissible corporal punishment. **See** Appellant's Brief, at 7-10. We disagree.

Under the Act, a parent may petition for a PFA order on behalf of an allegedly abused minor. **See** 23 PA.CON.S.STAT.ANN. § 6106(a). The lower court is required to hold a hearing on a PFA petition no more than ten days after it is filed. **See** 23 PA.CON.S.STAT.ANN. § 6107(a). At the PFA hearing, the petitioner has the burden of proving abuse by a preponderance of the evidence. **See id.** The Act defines "abuse" as follows:

**"Abuse."** The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

- (1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, spousal sexual assault or involuntary deviate sexual intercourse with or without a deadly weapon
- (2) Placing another in reasonable fear of imminent serious bodily injury.

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23 PA.CON.S.TAT.ANN. § 6108(a)(1), (2).

Initially, we note “the preponderance of evidence standard is defined as the greater weight of evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence.” **Raker**, 847 A.2d at 724 (citation omitted).

Under the Protection from Abuse Act, “bodily injury” caused “intentionally, knowingly, or recklessly” to a family household member is included within the definition of abuse, as well as “serious bodily injury.”

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The goal of the Protection from Abuse Act is to provide an immediate remedy to victims of domestic abuse, thereby seeking to prevent further instances from occurring. Thus, for a remedy to be available under the Protection from Abuse Act, it is not necessary that the physical harm to the child be as serious as that which is required for a child to be removed from his home and placed in protective custody. The goal of the Protection from Abuse Act is protection and prevention of further abuse by removing the perpetrator of the abuse from the household and/or from the victim for a period of time.

**Miller on Behalf of Walker**, 665 A.2d at 1258.

Terms not defined in the Act “shall have the meaning given to them in [the Crimes Code].” 23 PA.CON.S.TAT.ANN. § 6102(b). Although the Act does

not define "reckless," the Crimes Code defines "reckless" culpability as follows:

**§ 302. General requirements of culpability**

**(b) Kinds of culpability defined. –**

- (3) A person acts recklessly with respect to a material element of an offense when he consciously disregards substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and intent of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a reasonable person would observe in the actor's situation.

18 PA.CON.S.TAT.ANN. § 302(b)(3).

The Crimes Code permits "corporal punishment" in limited family settings:

**§ 509. Use of force by persons with special responsibility for care, discipline, or safety of others**

The use of force upon or toward the person of another is justifiable if:

- (1) The actor is the parent or guardian or other person similarly responsible for the general care and supervision of a minor or a person acting at the request of such parent, guardian or other responsible person and:
- (i) The force is used for the purpose of safeguarding or promoting the welfare of the minor, including the preventing or punishment of his misconduct; and
  - (ii) The force used is not designed to cause or known to create a substantial risk of causing death, serious bodily injury, disfigurement, extreme pain or mental distress or gross degradation.

18 PA.CON.S.TAT.ANN. § 509(1)(i), (ii).

This Court has explained the interaction between Section 509 and the Act, as follows:

The [Act] does not outlaw corporal punishment by a parent. However, the Act will permit a remedy for bodily injury to a family or household member which is inflicted intentionally, knowingly, or recklessly. 23 Pa.C.S.A. § 6102(a).

It is well known by most parents that corporal punishment properly inflicted will not produce bodily injury in a child. However, "corporal punishment" inflicted recklessly or in an enraged manner may result in bodily injury.

***Miller on Behalf of Walker***, 665 A.2d at 1258. Thus, a parent's behavior may serve as the basis for entering a PFA order despite the fact it is otherwise "justifiable" corporal punishment under Section 509 of the Crimes Code. ***See Viruet ex rel. Velasquez***, 727 A.2d at 596.

Here, while Father was attempting to punish or discipline J.D.F. for his actions, *i.e.*, sending an inappropriate text message regarding his stepmother, the corporal punishment was inflicted recklessly in a manner which resulted in bodily injury. Father intentionally pulled down J.D.F.'s pants and underwear and inflicted upon J.D.F. a beating, which resulted in bruises and welts to J.D.F.'s buttocks region as well as a low sacral fracture. Based upon our deferential standard of review, our reliance on the lower court's credibility determinations, and the burden of proof in a PFA action, we conclude there are no grounds to overturn the lower court's finding of "abuse" in this case. We note this Court has previously held that a child's



pain and bruises may establish “bodily injury” under the Act’s definition of “abuse.” ***See Miller on Behalf of Walker***, 665 A.2d at 1256.

Next, Father argues that the lower court abused its discretion in entering an order for custody in the PFA Order, which provides that Father is prohibited from having any contact with J.D.F., except as may be permitted through supervised visitations through an appropriate agency or counseling at their recommendation. ***See*** Appellant’s Brief, at 10.

Section 6108 of the PFA Act, sets forth the relief a court may grant under the Act:

**§ 6108. Relief**

- (a) General Rule.** – The court may grant any protection order or approve any consent agreement to bring about a cessation of abuse of the plaintiff or minor children. The order or agreement may include:
- (1) Directing the defendant to refrain from abusing the plaintiff or minor children.
  - (4) Awarding temporary custody of or establishing temporary visitation rights with regard to minor children. In determining whether to award temporary custody or establish temporary visitation rights pursuant to this paragraph , the court shall consider any risk posed by the defendant to the children as well as risk to the plaintiff. The following shall apply:
    - (i) A defendant shall not be granted custody, partial custody or unsupervised visitation where it is alleged in the petition, and the court finds after a hearing under this chapter, that the defendant:
      - (A) Abused the minor children of the parties or poses a risk of abuse toward the minor children of the parties; or

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- (ii) Where the court finds after a hearing under this chapter that the defendant has inflicted abuse upon the plaintiff or a child, the court may require supervised custodial access by a third party. The third party must agree to be accountable to the court for supervision and execute an affidavit of accountability.
- (iii) Where the court finds after a hearing under this chapter that the defendant has inflicted serious abuse upon the plaintiff or a child or poses a risk of abuse toward the plaintiff or a child, the court may:
  - (A) award supervised visitation in a secure visitation facility; or
  - (B) deny the defendant custodial access to a child.

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- (6) Prohibiting the defendant from having any contact with the plaintiff or minor children, including, but not limited to, restraining the defendant from entering the place of employment or business or school of the plaintiff or minor children and from harassing the plaintiff or plaintiff's relatives of minor children.

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- (10) Granting any other appropriate relief sought by the plaintiff.

23 PA.CON.S.TAT.ANN. § 6108(a)(1), (4), (6), (10).

Father concedes that the lower court was authorized under § 6108(a)(4) to enter an award for custody and "under the statute, in the event that the court finds that the defendant abused the minor children, the court shall not granted any unsupervised visitations." Appellant's Brief, at

11. Father's issue is with the lower court's finding of abuse. **See id.** As we have previously determined that a finding of "abuse" under the Act was proper, this issue must fail. The lower court was within its power under § 6108 of the Act to impose supervised visitations.

In his next five issues, Father challenges the scope of cross-examination at the time of the PFA hearing. **See** Appellant's Brief, at 14. Specifically, Father avers that he should have been granted the opportunity to cross-examine: (1) the testifying physician regarding his expertise with respect to radiology; and (2) J.D.F. regarding the contents of the text message. **See id.**, at 14-15. The record clearly belies Father's arguments.

Counsel for Father cross-examined Dr. Teich on his background and training in the field of radiology. **See** N.T., PFA Hearing, 5/28/13 at 21-22. Dr. Teich was not tendered as an expert in the field of radiology, but, rather, in the field of emergency medicine. **See id.**, at 22. Dr. Teich "looks at x-rays everyday" in the course of his employment in the emergency department. **See id.**, at 21. Moreover, Dr. Teich "looked at the x-ray [himself]" and corroborated the report of the radiologist that a low sacral fracture" was present. **See id.**, at 23-24.

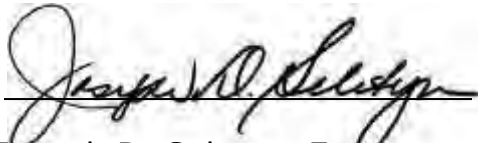
Furthermore, counsel for Father attempted, on several occasions, to elicit testimony regarding the content of the text messages. As the lower court suitably noted "[t]his is a question of degree of punishment. I don't care what the text message said. It could say the most horrible thing in the world. This issue is the level of discipline that was provided to this child."

**Id.**, at 15. We can find no error in this reasoning. As such, cross-examination of J.D.F. on the contents of the text message was unnecessary.

Lastly, Father avers that, the lower court erred in concluding that Father's acts caused substantial injury to J.D.F. **See** Appellant's Brief, at 15. J.D.F. presented to the emergency department, one day following the pummeling with bruises and welts all over his buttocks. X-rays further revealed a low sacral fracture. Clearly, J.D.F. sustained significant injuries as a result of Father's abuse. As such, Father's last claim must fail.

Order affirmed. Jurisdiction relinquished.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn", written over a horizontal line.

Joseph D. Seletyn, Esq.  
Prothonotary

Date: 7/14/2014