NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

FRANCIS NICHOLAS REGALBUTO Appellee v. TRACY JO REGALBUTO Appellant	IN THE SUPERIOR COURT OF PENNSYLVANIA No. 2675 EDA 2013

Appeal from the Order of September 10, 2013
In the Court of Common Pleas of Montgomery County
Domestic Relations at No.: 2013-24398

BEFORE: BOWES, J., OTT, J., and JENKINS, J.

MEMORANDUM BY JENKINS, J. **FILED JULY 09, 2014**

Appellant Tracy Jo Regalbuto ("Wife") appeals from the order dismissing her petition filed pursuant to the Protection from Abuse ("PFA") Act, 23 Pa.C.S.A. §§ 6101 *et seq*, against Francis Nicholas Regalbuto ("Husband"). Wife asks this Court to reverse the trial court's order dismissing her PFA petition and issue a final order granting her petition, or alternatively, remand for further proceedings. She argues that the trial court improperly excluded evidence of Husband's mental health background, and that she presented sufficient evidence of "abuse" to warrant relief. Upon careful review, we affirm.

On January 21, 2012, the parties married. During their marriage, they resided in a house owned by Wife's parents. Trial Court Opinion, October 30, 2013 ("Trial Court Opinion") at 2. On May 2, 2013, the parties separated.

On June 17, 2013, Wife filed a complaint seeking spousal support. On July 18, 2013, after a Domestic Relations hearing, the trial court ordered Husband to pay Wife $850.00 per month in spousal support and $85.00 per month in arrears.

On July 30, 2013, Husband drove to the former marital residence, where Wife continued to reside, to retrieve his personal belongings. N.T. 9/10/2013 at 7-11, 13-16.[1] Wife was not at home. Husband remained in his vehicle parked in the driveway of the former marital residence.

While Husband waited, the parties engaged in a heated telephone argument about conflicting schedules and whether Husband could bring friends to assist him in picking up his belongings. N.T. 9/10/2013 at 7-11, 13-16; Trial Court Opinion, at 2. Wife testified that during the course of the phone conversation, Husband stated: "I should have beat [you] during [our] marriage, and I want to punch you in your mouth." Husband never directed a physical act of violence towards Wife. Trial Court Opinion, at 2.

On July 31, 2013, Wife filed a PFA petition against Husband. Judge Patricia Coonahan issued a Temporary PFA Order that same day, the finality of which would be determined at a subsequent hearing.

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[1] Husband had attempted to retrieve his personal belongings on multiple prior occasions. N.T. 9/10/2013 at 7-11, 13-16.

During the September 10, 2013 PFA hearing,[2] the court found the testimony insufficient to issue a final PFA order in Wife's favor. Although the trial court found that Wife could have regarded Husband's comment as threatening, it did not believe the comment placed Wife in reasonable fear of imminent bodily injury. Trial Court Opinion, at 2. On September 19, 2013, Wife filed a timely notice of appeal.

Wife raises the following issues for our consideration:

> I. Did the trial court err as a matter of law and abuse its discretion when it denied [Wife]'s Petition for Protection from Abuse in light of the testimony presented, findings stated by the trial court and the definition of [`]abuse[']provided by 23 Pa.C.S. § 6102(a)?
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> II. Did the trial court err as a matter of law and abuse its discretion when it excluded [Wife]'s testimony regarding her knowledge of [Husband]'s prior psychological diagnoses, use of medication, and commitment to a mental health facility?

Brief for Appellant at 8. We find these claims meritless.

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[2] Temporary PFA orders are typically valid for, at most, 10 business days. 23 Pa.C.S. § 6107(a) ("[w]ithin ten business days of the filing of a petition under this chapter, a hearing shall be held before the court . . . ."). Nevertheless, trial courts have discretion to continue final PFA hearings. ***See*** 23 Pa.C.S. § 6107(c); ***Ferko-Fox v. Fox***, 68 A.3d 917, 925-26 (Pa.Super.2013) (grant of petitioner's request for continuance upheld). Here, the evidentiary hearing regarding the final PFA order occurred 40 days after the temporary PFA order because Husband obtained a continuance due to unavailability of counsel.

In a PFA action, we review the trial court's legal conclusions for an abuse of discretion or an error of law. ***Mescanti v. Mescanti***, 956 A.2d 1017, 1019 (Pa.Super.2008) (citations omitted). ***Mescanti*** defined "abuse of discretion" as follows:

> The term 'discretion' imports the exercise of judgment, wisdom and skill so as to reach a dispassionate conclusion, within the framework of the law, and is not exercised for the purpose of giving effect to the will of the judge. Discretion must be exercised on the foundation of reason, as opposed to prejudice, personal motivations, caprice or arbitrary actions. Discretion is abused when the course pursued represents not merely an error of judgment, but where the judgment is manifestly unreasonable or where the law is not applied or where the record shows that the action is a result of partiality, prejudice, bias or ill will.

Id. (citing ***Commonwealth v. Widmer***, 744 A.2d 745, 753 (Pa.2000). With regard to credibility and weight of the evidence issues, we defer to the trial judge who viewed and assessed the witnesses first hand. ***Id.*** at 1019-20.

In her first issue on appeal, Wife claims that the trial court erred in finding the evidence insufficient to grant her PFA petition. When the Appellant in a PFA action challenges the sufficiency of the evidence, we "must view the evidence in the light most favorable to the verdict winner, granting [him] the benefit of all reasonable inferences." ***Id.*** at 1020 (citations omitted). We determine whether the evidence is sufficient to sustain the trial court's conclusions by a preponderance of the evidence,

which is defined as "the greater weight of the evidence, *i.e.,* to tip a scale slightly. . . ." ***Id.*** (citations omitted).

"The purpose of the PFA Act is to protect victims of domestic violence from those who perpetrate such abuse, with the primary goal of advance prevention of physical and sexual abuse." ***Id***. at 1022 (citation omitted). The petitioner in a PFA action must "prove the allegation of abuse by a preponderance of the evidence." 23 Pa.C.S. § 6107(a). The PFA Act defines "abuse", in relevant part, as follows:

> 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:
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> * * *
>
> (2) Placing another in reasonable fear of imminent serious bodily injury. . .[3]
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> * * *

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[3] The other definitions of "abuse" in Section 6102(a) do not apply to this matter. Since Wife argues only that Husband's acts placed her in fear of imminent serious bodily injury, Appellant's Brief at 12-14, Section 6102(a)(3) (related to infliction of false imprisonment) and Section 6102(a)(4) (relating to physically or sexually abusing minor children) are obviously not at issue. Section 6102(a)(1) (relating to attempts to cause or intentionally, knowing or recklessly causing bodily injury) does not apply because Wife did not testify about any attempt by Husband to cause any bodily injury (or any actual bodily injury caused by him). Section 6102(a)(5) does not apply because Wife's testimony does not suggest a "course of conduct" by Husband that placed her in reasonable fear of bodily injury.

23 Pa.C.S.A. § 6102(a). "[T]he court's objective is to determine whether the victim is in reasonable fear of imminent serious bodily injury. . . . [The] intent [of the alleged abuser] is of no moment." ***Raker v. Raker***, 847 A.2d 720, 725 (Pa.Super.2004).

Viewed in the light most favorable to Husband, the verdict winner, we agree with the trial court's determination that the evidence does not warrant a PFA order against Husband. Husband's statement that he "should have" beaten Wife during their marriage and wanted to "punch [her] in [her] mouth" was certainly impolite, but it did not place Wife in "*reasonable* fear of *imminent* serious bodily injury." 23 Pa.C.S. § 6102(a)(2) (emphasis added). Husband did not utter this comment in Wife's presence; he said it over the phone during an argument concerning retrieval of his personal belongings. Husband did not have a history of violent behavior towards Wife. To the contrary, he had never threatened an act of physical violence. He left the driveway after the phone call and did not contact Wife again. In short, Wife could not reasonably believe she was in imminent danger, because Husband was merely venting frustration, not threatening harm.

Wife argues that the trial court erroneously focused on Husband's intent, instead of on the reasonableness of her fear. The reasonableness of one's fear of bodily harm is not divorced from the degree to which a particular threat of bodily harm is credible. The reasonableness of Wife's fear necessarily includes an assessment of whether Husband intended to carry out his threats. The trial court found Wife's fear unreasonable because

Husband never attempted to hurt her before, was not in the immediate vicinity of Wife during the heated phone call, immediately left Wife's house after the phone conversation, and has not attempted to see or contact her since that day. Thus, we agree with the trial court that Wife's fear was not reasonable.

Wife also argues that the trial court incorrectly held that prior physical harm is a prerequisite to PFA relief under Section 6102(a)(2). We disagree.[4] The trial court did not transform prior physical harm into an indispensable element of the section 6102(a)(2) calculus. It merely reasoned that the lack of prior physical harm was one of the factors that is relevant to whether Wife was in reasonable fear of imminent serious bodily injury. ***See*** N.T. 9/10/2013 at 21-24; Trial Court Opinion, at 3. We find this approach sensible.

Wife misinterprets our prior PFA decisions[5] as requiring the trial court to view the evidence in the light most favorable to the PFA petitioner. These

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[4] We agree with Wife that "the victim of abuse need not suffer actual injury, but rather be in reasonable fear of imminent serious bodily injury." ***DeHaas v. DeHaas***, 708 A.2d 100, 102 (Pa.Super.1998), *appeal denied*, 557 Pa. 629, 732 A.2d 615 (1998); 23 Pa.C.S.A. § 6102(a). Nevertheless, the evidence accepted by the finder of fact must demonstrate that the victim's fear of "imminent" harm is "reasonable." ***Fonner,*** 731 A.2d at 163.

[5] ***See, e.g., Custer v. Cochran***, 933 A.2d 1050, 1058 (Pa.Super.2007), ***Hood-O'Hara v. Willis,*** 873 A.2d 757, 760 (Pa.Super.2005), ***Raker v. Raker***, 847 A.2d 720, 724 (Pa.Super.2004), ***Fonner v. Fonner***, 731 A.2d

(Footnote Continued Next Page)

decisions construe the evidence in the light most favorable to the PFA petitioner because they were appeals from orders in favor of PFA petitioners. In this case, however, the trial court ruled in favor of the PFA respondent; therefore, we must view the evidence in the light most favorable to him. ***Mescanti, supra***.

In her second issue on appeal, Wife challenges the trial court's exclusion of evidence concerning Husband's mental health background. The exclusion of evidence

> is within the sound discretion of the trial court, and in reviewing a challenge to the admissibility of evidence, we will only reverse a ruling by the trial court upon a showing that it abused its discretion or committed an error of law. Thus, [this Court's] standard of review is very narrow. To constitute reversible error, an evidentiary ruling must not only be erroneous, but also harmful or prejudicial to the complaining party.

Commonwealth v. Lopez, 57 A.3d 74, 81 (Pa.Super.2012). A PFA petitioner is not "rigorously limited to the specific allegations of abuse found in the [p]etition." ***Snyder v. Snyder***, 629 A.2d 977, 981 (Pa.Super.1993). Further, "[i]n light of the purpose of the [PFA] to 'prevent imminent harm to abused person(s),' some flexibility must be allowed in the admission of evidence relating to past acts of abuse." ***Miller on Behalf of Walker v.***

(Footnote Continued) ———————————

160, 162 (Pa.Super.1999); ***Miller on behalf of Walker v. Walker***, 665 A.2d 1252, 1255 (Pa.Super.1995)

Walker, 665 A.2d 1252, 1259 (Pa.Super.1995) (quoting ***Snyder***, 629 A.2d at 982).

Nevertheless, "[e]vidence that is not relevant is not admissible." Pa.R.E. 402. Evidence is relevant if:

> (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
>
> (b) the fact is of consequence in determining the action.

Pa.R.E. 401.

The trial court precluded evidence of Husband's mental health diagnoses, use of medications, and commitment to a mental health facility on the ground that the information was not relevant to a determination of whether "abuse" had occurred. Trial Court Opinion, at 3. Wife argues that her knowledge of Husband's mental instability is probative of whether she held a reasonable fear of imminent serious bodily harm. This argument is unavailing. In our view, since Husband had no prior history of violence and his comment discussed a prior situation, his mental health background was not relevant either to the question of whether Wife's fear of bodily harm was "reasonable", whether the bodily harm she feared was "imminent", or whether "abuse" had occurred.

Wife claims Husband's mental health background is analogous to past acts of abuse, a category of evidence we have found admissible in PFA cases

to demonstrate the reasonableness of the petitioner's fear. Brief for Appellant at 7. ***See, e.g., Mescanti***, 956 A.2d at 1023-24 (husband's prior bad acts in repeatedly locking wife out of home and preventing her from leaving home, depriving her of sleep, following her when she went out with friends, and going to the basement following arguments with her and cocking his guns admissible). Past abusive conduct factors into the reasonableness inquiry because it lends greater weight to any subsequent threats by the aggressor or the likelihood that another instance of abuse will occur. ***See Walker***, 665 A.2d at 1259. We do not construe ***Walker*** to encompass the admission of mental health history and medication use when, as here, PFA respondent's mental health history and/or medication use is not accompanied by a history of violence (particularly violence against the petitioner). Absent a history of past violence, this evidence does not bolster the reasonableness of the petitioner's fear and is more prejudicial than probative.[6] Because Husband has no history of violence, we do not consider his mental health history or medication use relevant to the reasonableness of Wife's fear.

Order ***affirmed***.

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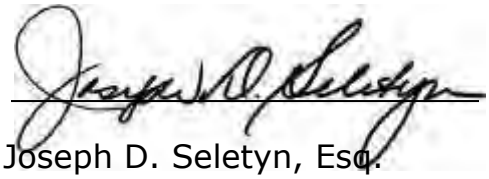
[6] Unlike the past acts of abuse in ***Walker***, ***supra***, Husband's mental health background, without more (e.g., prior acts of abuse or history of violence), does not lend greater weight to subsequent threats, make an instance of abuse more likely, or otherwise further the trial court's inquiry of whether "abuse" occurred. N.T. 9/10/2013 at 4, 5.

Judgment Entered.



Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/9/2014