Circuit Court for Howard County
Case No. 13-C-17112280

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1399

September Term, 2017

WILLIAM LANIER SWEATS

v.

ASHLEIGH JONES

Kehoe,
Shaw Geter,
Fader,

JJ.

Opinion by Shaw Geter, J.

Filed: October 1, 2018

On October 26, 2017, the Circuit Court for Howard County held a hearing on a petition for protection filed by appellee, Ashleigh Jones, and issued a final protective order against appellant, William Sweats, effective through July 30, 2018, at 11:59 p.m. The court found by a preponderance of the evidence appellant committed an assault on the parties' minor child. Appellant timely appealed and presents the following questions for our review which have been reworded below for clarity[1]:

1. Did the trial court err when it denied an alleged pre-hearing request for continuance to seek counsel in a matter which implicated the appellant's right to raise his child?

2. Did the trial court err in considering appellant's belief in corporal punishment?

3. Did the trial court err in admitting hearsay evidence?

For the reasons discussed below we affirm the judgment of the court.

BACKGROUND

On July 31, 2017, appellee filed a petition for protection against appellant alleging he smacked, spanked, or used other forms of corporal punishment against the parties' minor child who was two years old. In the petition, appellee claimed when the minor child came home from regularly scheduled weekend visitation with the appellant, the child was overly clingy, had bruising on her inner thigh, and had an unusual vaginal discharge. On the same

[1] Appellant presented the following questions:

1. Can a court proceed with a Final Protective Order Hearing without giving the Respondent the right to have an attorney where the Respondent's constitutional rights to raise his/her child are in jeopardy?
2. Can a court find that a parent's belief in Corporal Punishment is sufficient to find abuse without any analysis of the reasonableness of the punishment?
3. Can a court rely solely on hearsay to find physical child abuse by a Preponderance of the Evidence standard?

date appellee filed the petition, a hearing was held, a temporary protective order was entered against appellant, and he was served.

On August 8, 2017, both parties appeared for the final protective order hearing. Appellee appeared with an attorney and appellant appeared without an attorney. The court began the hearing advising appellant that the court could not act as his lawyer. Appellant indicated he understood and appellee then began to present her testimony and evidence.

While on the stand, appellee described the condition of the minor child stating the child comes "from her visitations with her father with various marks and bruises and cuts, acknowledging that this is happening from her father." In response, the court indicated it would not "take information as to the hearsay," but would accept testimony based on appellee's observations. Appellee stated she noticed "bruising on the inner thigh" of the minor child and "marks on her forehead" after the minor child returned from visits with appellant. Two photographs of the parties' minor child with bruising and scratches were then entered. The court asked appellant if he had "[a]ny objection" and he responded he did not. Appellee further testified she received text messages from appellant a few months before the minor child's first birthday regarding the use of corporal punishment on the minor child stating: "[s]he will be biting u [sic] soon enough," "[t]wo months till she can get beat," "[s]he bring her teeth I got a belt," and "[y]ep I win again lok [sic]." Appellee's attorney moved to have copies of the text messages entered into evidence, and the court asked if there was "[a]ny objection." Appellant raised no objection and the messages were entered into evidence. Continuing with her testimony, appellee discussed her concern about appellant's "militant style of discipline for children," noting her anxiety about

potential injury to the parties' minor child who is "so small." Following that testimony, appellee was asked a series of questions pertaining to emails sent between the parties, where appellant indicated he believed in corporal punishment. Those emails were also admitted without opposition. Appellant then cross-examined appellee.

The hearing continued and appellee's witnesses testified about their observations regarding the minor child and their knowledge of the alleged abuse. Officer Tiller testified, without objection, that the minor child told appellee that appellant "hit her and pointed to her rear end." Appellee's second and final witness recounted the minor child's statement indicating that "daddy did it." The court excluded the comment. Appellant did not cross examine either witness.

The court then addressed appellant and asked, "[d]o you wish to testify; stand up, sir; or remain silent?" Appellant responded "yes" and presented testimony, denying that he assaulted the child. He indicated he "didn't know this was the final order." Rather, he "thought this was the first order" and he "didn't seek counsel," choosing instead to bring "a backpack full of evidence" because he anticipated both parties would be self-represented "in front of a judge explaining [their respective] side." Appellant further testified he was "very unprepared" and "very undermanned." He stated, "[a]s far as corporal punishment, I do believe in it and I've always said I believe in it," although he maintained corporal punishment in his view "should never leave bruising of any kind." He did not attempt to introduce any exhibits or documents to the court for its review.

Appellee's lawyer cross-examined appellant, and while inquiring about the bruises on the minor child, counsel asked, "[s]o, you have no idea how that mark would've gotten

there?" Appellant responded, "[n]o, I have no way of knowing when this picture was even taken." Furthermore, he insisted he never used corporal punishment on the minor child.

After considering the testimony and evidence presented, the court highlighted the "distinction between abuse and discipline" commenting on the increased recognition by "health authorities" suggesting that "type of [corporal] punishment can be detrimental." The court made a specific finding regarding the age of the minor child stating that the parties "have a child together age two and a half" and further found by a preponderance of the evidence appellant "committed an assault" on the parties' minor child. Thereafter, the court entered a final protective order effective through July 30, 2018, at 11:59 p.m. This appeal followed.

STANDARD OF REVIEW

The standard of review regarding the issuance of domestic violence protective orders is set forth in *Piper v. Layman*, 125 Md. App. 745 (1999), which states in relevant part:

> The burden is on the petitioner to show by [a preponderance of the evidence] that the alleged abuse has occurred. If the court finds that the petitioner has met the burden, it may issue a protective order tailored to fit particular needs that the petitioner has demonstrated are necessary to provide relief from abuse. When conflicting evidence is presented, we accept the facts as found by the hearing court unless it is shown that its findings are clearly erroneous. As to the ultimate conclusion, however, we must make our own independent appraisal by reviewing the law and applying it to the facts of the case.

Id. at 754 (citations and internal quotation marks omitted).[2]

[2] Prior to October 14, 2014, courts were required to find that abuse be proven by clear and convincing evidence during a final protective order proceeding. Since October 14, 2014, courts have been required to apply a preponderance of the evidence standard. 2014 Md. Laws, Ch. 111, codified at Md. Code (1984, 2012 Repl. Vol., 2016 Suppl.), § 4-506 of the Family Law Article.

DISCUSSION

The protective order which is the subject of this appeal expired on July 30, 2018. Thus, our first inquiry is whether this appeal is moot.

A matter becomes moot when "there is no longer an existing controversy between the parties at the time it is before the court." *Hammen v. Baltimore County Police Dept.*, 373 Md. 440, 449 (2003). In general, we must dismiss moot matters without "deciding the merits of the controversy." *Coburn v. Coburn*, 342 Md. 244, 250 (1996). However, we have long recognized an exception to the mootness doctrine in instances "where a case, while technically moot, presents a recurring matter of public concern which, unless decided, will continue to evade review." *La Valle v. La Valle*, 432 Md. 343, 352 (2013) (citing *Office of the Pub. Defender*, 413 Md. 411, 423 (2010)). The entry of a protective order "implicates an important public policy, it is likely to recur, and on recurrence it will evade review." *Suter v. Stuckey*, 402 Md. 211, 220 – 21 (2007). Furthermore, we have noted there is a "stigma that is likely to attach to a person judicially determined to have committed abuse subject to protection under the Domestic Violence Act" and as a result "the expiration of the protective order does not automatically render the matter moot." *Piper*, 125 Md. App. at 753. We therefore will exercise our discretion and consider the merits of this appeal.

I. The court did not err when it denied appellant's alleged pre-hearing request for a continuance to seek counsel.

Appellant argues the court erred by denying his pre-hearing continuance request to acquire legal representation. He contends the court abused its discretion in rejecting his

right to counsel, thereby, "prejudicially affect[ing] the outcome of the case." Appellant further argues "the [c]ourt must allow a party an opportunity to obtain counsel" because the protective order hearing concerned "access to his minor child and his constitutional right to act as the minor child's natural parent."

During the oral argument and in his brief, appellant indicates, that prior to the final protective order hearing and off the record, he requested a postponement to acquire an attorney, which was denied by the court. Both parties concede there is no record of this proceeding and they have provided no transcript, recording, or stipulation from which we can properly review this claim. Maryland Rule 8-501 requires appellants to "prepare and file a record extract" that "shall contain all parts of the record that are reasonably necessary for the determination of the questions presented by the appeal." Having none, we therefore decline to speculate on whether there was a prehearing assertion and/or court ruling.

Further, we note that, a final protective order hearing is a civil proceeding limited in scope and duration, and is unlike criminal proceedings where the right to counsel is guaranteed under the Sixth Amendment. *In re Adoption/Guardianship of Chaden M.*, 189 Md. App. 411, 425 (2009). In family cases, such as guardianship and adoption matters, Maryland's Public Defender Act and the Family Law Article provide the right to counsel for parents, as these matters directly implicate a parent's constitutional right to raise their children.[3] Section 4-506 of the Family Law Article provides that in protective order hearings, respondents be given the "opportunity to be heard on the question of whether the

[3] MD Code, Criminal Procedure, §16-204(b)(1)(vi) states in relevant part, "[i]ndigent defendants or parties shall be provided representation under this title in: a family law proceeding under Title 5, Subtitle 3, Part II or Part III of the Family Law Article, including: 1. For a parent, a hearing in connection with guardianship or adoption.

judge should issue a final protective order," but does not mandate that any party to the proceeding have counsel.

At the outset of the hearing, the court asked appellant, "How did you wish to proceed?" Appellant responded by affirmatively stating, "[t]rial, Your Honor." The court then asked appellant if he understood that the court "cannot ask questions for you and so forth?" Appellant, responded, "[y]es, Your Honor." The court then proceeded with the hearing. Following the presentation of witnesses by appellee, the court explained, "[s]ir, you have a right to call any witnesses who are here on your behalf, is there anyone you'd like to call?" The court instructed appellant to "[p]lease, stand up sir" and advised him during the following exchange:

> The Court: Do you wish to testify; stand up, sir or remain silent? This is a civil proceeding but you should be aware that if there's a criminal charge pending or that could path—that could be brought against you any testimony that you give in these proceedings or any proceedings under oath, any testimony could be used in any other criminal proceeding.
>
> The Respondent: I understand that, Your Honor.
>
> The Court: Okay, do you wish to testify, sir or not?
>
> The Respondent: Yes, Your Honor.
>
> The Court: Alright, take the witness stand, sir. I guess in an abundance of caution I should also tell you, the Court can ask you questions and you could be asked questions on pass examination, not only about this incident but about any criminal convictions you may have sustained since your 18 years of age and either represented by counsel or effectively waived counsel, you understand, sir?

The Respondent: Yes, Your Honor.

Appellant proceeded to testify. He initially stated, "[t]his is not the first time that I've been--I've had a protective order lobbied against me with false testimony." He denied hitting the child and, at the end of his testimony, he stated that he "thought this was the first order," he "didn't seek counsel," he was "very unprepared," and "very undermanned." He did not, however, ask to confer with nor did he seek to suspend the proceeding to speak with an attorney.

As we see it, appellant was clearly afforded the opportunity to be heard without limitation and to present witnesses and evidence. The trial court carefully explained the procedures, consequences of his potential testimony and appellant presented his testimony to the court. We find the court's actions were neither arbitrary nor capricious and were well within its discretion.

II. The court did not err in considering appellant's belief in corporal punishment.

Appellant contends the court erred in finding that he had abused his child without considering the reasonableness of corporal punishment as permitted under the law. He argues, Maryland courts must employ a totality of the circumstances test to determine whether abuse has occurred. According to him, the trial court made a determination that corporal punishment is inherently child abuse, improperly expanding on the definition.

Abuse, in relevant part, is defined in the Family Law Article as "an assault in any degree."[4] Md. Code Ann., Family Law, §4-501. The Subtitle provides "[n]othing in this subtitle shall be construed to prohibit reasonable punishment, including reasonable corporal punishment, in light of the age and condition of the child, from being performed by a parent or stepparent of the child." *Id.* In *Charles County Dept. of Social Services v. Vann*, the Court of Appeals held "child abuse and reasonable corporal punishment are mutually exclusive; if the punishment is one, it cannot be the other." 382 Md. 286, 303 (2004). The Court further specified that "the reasonableness of corporal punishment depends not simply on the misbehavior of the child and the amount of force used in the punishment from the parent's perspective, but also on the physical and mental maturity of the child." *Id.* at 299. Moreover, in *B.H. v. Anne Arundel County Department of Social Services*, we reviewed the decision of an administrative law judge who after hearing extensive testimony from the Department of Social Services, the minor child's sister, and mother determined the appellant's actions were abuse and were "the actions of an angry or out-of-control person, not a parent imposing reasonable corporeal [sic] punishment." 209 Md. App. 230 (2012). There, the appellant grabbed a four-year old child hard enough to leave bruises on the child's neck and a scratch on the child's chin—and we upheld the administrative law judge's finding that those acts were both unreasonable and abusive. *Id.*

[4] Family Law, §4-501 was amended by the 2018 Maryland Laws Ch. 501 (S.B. 121), effective October 1, 2018. However, no change was made regarding assault, abuse, or corporal punishment. 2018 Md. Laws, Ch. 501, codified at Md. Code (1984, 2012 Repl. Vol., 2016 Suppl.), § 4-501 of the Family Law Article.

Here, the trial court heard testimony regarding the child's age, small stature, and skittish behavior as well as admitted photographic evidence of physical injuries. Appellee testified she observed "marks and bruises" on the parties' minor child, who was two years old, immediately after the child returned from visitation. There were also text messages from appellant indicating he intended to use corporal punishment on the minor child at the age of one. The court's consideration of the evidence and testimony included due regard to the propriety of reasonable corporal punishment, the minor child's age, and the photographic and testimonial evidence. As such, it was not error.

On review, we defer to the trial court's finding of fact because the trial court, being in the original position, "had the opportunity to view the witnesses, observe the parties, and weigh the evidence presented throughout the proceeding." *Barton v. Hirshberg*, 137 Md. App. 1, 21 (2001). We further note that a judge is not required to articulate every factor of its ruling. *Cobrand v. Adventist Healthcare, Inc.* 149 Md. App. 431, 445 (2003) (citing *Wagner v. Wagner* 109 Md. App. 1, 50 (1995)).

III. The court did not err by considering hearsay evidence.

Appellant asserts the trial court erred by solely relying on hearsay evidence in making its decision. He argues the court ruled the alleged hearsay statements from the minor child were stricken and/or inadmissible, yet, the final protective order provides a description of harm as "[c]hild states father did those things to her." He contends the court erred because "[no] doctor records, no DSS reports, no statement from the alleged victim, no statement from the SAFE nurses, no witness statement[s] were submitted to show the

alleged abuse," comparing this case to, *Deloso v. State*, 37 Md. App. 101 (1977) (holding that hearsay evidence alone is an insufficient basis for a finding of abuse).

We disagree with appellant's characterization. While the court order does contain the following description of harm as "[t]he weekend before July 16, 2017 [,] at weekend visitation, child returned from visit w/RES/ w/marks on her face, back and thighs, vaginal discharge . . . [c]hild states father did those things to her. RES told PET he believes in corporal punishment," the evidence presented during the hearing was more detailed. Appellee and the child's godmother testified to their observations of the child when she returned from visitation. Appellee also presented photographs and text messages from appellant. Officer Tiller further testified to the minor child's statement, without objection by appellant.

We find nothing in the record to substantiate appellant's assertion that the court relied solely on hearsay evidence. Further, Maryland Rule 2-517 requires that "an objection to the admission of evidence" be made "at the time the evidence is offered" or it is waived. As previously noted, appellant did not lodge an objection to the admission of any of the testimony or evidence offered during the hearing. Thus, his argument was not preserved.

Assuming arguendo, the hearsay evidence was improperly admitted, we find the court's error was harmless as there was an abundance of other evidence properly before the court. Similarly, the court's order containing a description of the injury was harmless error considering the court's oral findings.

JUDGMENT OF THE CIRCUIT COURT FOR HOWARD COUNTY AFFIRMED; COSTS TO BE PAID BY APPELLANT.