UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1580

September Term, 2014

ROBERT M. HUNNICUTT, JR.

v.

JAIME S. HUNNICUTT

Kehoe,
Hotten,
Reed,

JJ.

Opinion by Hotten, J.

Filed: June 26, 2015

Appellee, Jaime Hunnicutt, petitioned the Circuit Court for Charles County for a protective order against her husband, appellant, Robert Hunnicutt, on behalf of herself and the parties' two minor children. Prior to appellee's petition, appellant had primary custody of the children. Following a hearing, the circuit court granted the protective order and granted appellee custody. Appellant appeals, presenting three questions for our review:

> 1. Was there clear and convincing evidence that [appellant] placed [appellee] and their children in fear of imminent bodily harm?
>
> 2. Did the court sufficiently tailor the relief granted to what is reasonably necessary to protect the people eligible for relief from threat of violence?
>
> 3. Was granting temporary custody of the children most likely to provide protection to the person eligible from relief for custody?

For the reasons that follow, we shall reverse the judgment of the circuit court. Since we answer the first question in the negative, we need not reach the remaining questions.

FACTUAL AND PROCEDURAL HISTORY

Appellant and appellee were married on November 9, 2002 and had two daughters during the course of the marriage, Adrianna, born in 2006, and Brooklyn, born in 2005. The couple separated in 2012. In December 2013, the circuit court granted the parties a limited divorce and as part of its order, the court granted appellant primary custody of both girls along with tie breaking decision making authority.

On August 12, 2014, appellee filed a protective order on behalf of the children against Anthony Hunnicutt ("Anthony"), appellant's brother, based on Adrianna's allegations that Anthony had shown her pornography. During August 17-18, 2014, the weekend prior to the hearing for the protective order against Anthony, the girls were

visiting with appellee. According to appellee, fearful that appellant would not bring the children to court to testify against Anthony, she refused to return the children to him. On August 18, 2014, when appellant went to pick the girls up from appellee's home, a police officer on the scene told him that he could not take the girls. Upset, appellant informed the officer that he had custody, but the officer would not allow him to take the girls. The next day was the hearing for the protective order regarding Anthony. Appellee was present, and the girls were waiting in a separate room in the courthouse being watched by Robin Trivers ("Ms. Trivers"), appellee's next door neighbor. Adrianna was scheduled to testify. Appellant appeared as a witness on behalf of Anthony. During the proceedings, appellant repeatedly requested information from appellee's counsel regarding the children, but his requests were denied. He also asked appellee where the girls were and requested to see them, but these requests were denied. Appellant then became agitated and during a recess, demanded to see the children. Charles County Sheriff's Officer, Officer Plunkettt, was on duty in the Domestic Violence courtroom that day and observed appellant, describing him as very angry, upset and loud, but not yelling. Officer Plunkettt prevented appellant from speaking with the children out of concern that he was going to badger Adrianna prior to her testimony. Officer Plunkettt also observed the girls and remarked that they looked confused, nervous and Adrianna's face looked flushed. Appellant followed appellee down a hallway, still demanding that he be permitted to speak to the girls. Officer Plunkett again prevented him from doing so, after threatening to have appellant arrested if he did not stop following appellee. Following the hearing, the circuit court granted a protective order

against Anthony, and as a condition, granted appellee temporary custody of the girls for one year.

Two days later, appellee filed for a protective order against appellant based on his conduct in the courthouse on August 19, 2014. A hearing was held on August 28, 2014. Both appellant and appellee testified, along with Officer Plunkett, Ms. Trivers, and the police officer who had been called to the scene when appellee declined to return the children to appellant on August 18, 2014. The circuit court granted the protective order, ordering that for one year, appellant not abuse, threaten or harass appellee or the girls, that he have no contact with appellee and Adrianna except to facilitate visitation and that visitation with Adrianna was to occur in a therapeutic setting. The court also granted appellee custody of both girls for one year.

Appellant noted a timely appeal. Appellee did not file a response brief. Additional facts shall be provided, *infra*, to the extent they are helpful in resolving the issues on appeal.

STANDARD OF REVIEW

Maryland Rule 8-131(c) (2011) provides:

> When an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. It will not set aside the judgment of the trial court on the evidence unless clearly erroneous, and will give due regard to the opportunity of the trial court to judge the credibility of the witnesses.

Furthermore "[p]ursuant to Maryland Rule 8–131(c), where, as here, an action has been tried without a jury, the appellate court will review the case on both the law and the evidence. . . . 'The appellate court must consider evidence produced at the trial in a light most favorable to the prevailing party[.]' 'If there is any competent evidence to support

the factual findings below, those findings cannot be held to be clearly erroneous.' A circuit court's conclusions of law, however, are not entitled to the deference of the clearly erroneous standard." *Friedman v. Hannan*, 412 Md. 328, 335-36 (2010) (internal citations omitted).

DISCUSSION

Appellant avers that the circuit court did not have sufficient evidence to warrant the issuance of a protective order against him. Maryland Code, Family Law Article ["Fam. Law"] §4-501(b) defines abuse in the domestic violence context.

> *Abuse*. – (1) "Abuse" means any of the following acts:
> (i) an act that causes serious bodily harm;
> (ii) an act that places a person eligible for relief in fear of imminent serious bodily harm;
> (iii) assault in any degree;
> (iv) rape or sexual offense under §§ 3-303 through 3-308 of the Criminal Law Article or attempted rape or sexual offense in any degree;
> (v) false imprisonment; or
> (vi) stalking under § 3-802 of the Criminal Law Article.

Fam. Law §4-506 governs protective orders. Specifically, subsection (c) provides:

> *Issuance*. – (1) If the respondent appears before the court at a protective order hearing or has been served with an interim or temporary protective order, or the court otherwise has personal jurisdiction over the respondent, the judge:
>
> > (i) may proceed with the final protective order hearing; and
> > (ii) if the judge finds by clear and convincing evidence that the alleged abuse has occurred, or if the respondent consents to the entry of a protective order, the judge may grant a final protective order to protect any person eligible for relief from abuse.

Since the circuit court hearing on August 28, 2014, the General Assembly has changed the standard for the issuance of a protective order from clear and convincing to preponderance

of the evidence. Since the standard was clear and convincing at the time of the hearing, that is the standard we must apply. In *Berkey v. Delia*, 287 Md. 302, 319-20 (1980), the Court of Appeals had an opportunity to review what is required under the clear and convincing standard.

> The requirement of "clear and convincing" or "satisfactory" evidence does not call for "unanswerable" or "conclusive" evidence. The quality of proof, to be clear and convincing, has also been said to be somewhere between the rule in ordinary civil cases and the requirement of criminal procedure that is, it must be more than a mere preponderance but not beyond a reasonable doubt. It has also been said that the term "clear and convincing" evidence means that the witnesses to a fact must be found to be credible, and that the facts to which they have testified are distinctly remembered and the details thereof narrated exactly and in due order, so as to enable the trier of the facts to come to a clear conviction, without hesitancy, of the truth of the precise facts in issue. Whether evidence is clear and convincing requires weighing, comparing, testing, and judging its worth when considered in connection with all the facts and circumstances in evidence.

In *Barton v. Hirshberg*, 137 Md. App. 1 (2001), a mother filed for custody and a protective order against the father of her child based on an incident that occurred five days prior to their custody hearing. During the parties' exchange of the son for a scheduled visitation, the mother claimed that the father "appeared in a rage", and refused to let her son say goodbye to her. *Id*. at 11. She alleged that the father threw the son into the car and roughly snapped him in his seat belt, which caused the son to experience trouble breathing. *Id*. Finally, she asserted that as the father was backing out of the driveway, he intentionally struck her leg with his vehicle, which resulted in a bruise. *Id*. The circuit court denied her petition for a protective order, finding that while the father may have unintentionally struck her leg while backing out, the mother had failed to establish by clear and convincing evidence that domestic violence had occurred. *Id.* at 15. The mother appealed, challenging

the denial of the protective order among several other claims. *Id.* This Court began by noting that the burden of establishing alleged abuse for purposes of a protective order lies with the petitioner. *Id*. at 21. We explained that the circuit court was presented with conflicting versions of the incident, but the evidence was unclear regarding whether the father intentionally hit the mother with the vehicle. *Id*. at 22. Based on this lack of evidence, the circuit court declined to find abuse and we agreed. *Id.* The mother contended that regardless of his intentions, the father acted recklessly and that was sufficient to warrant a protective order. We disagreed, opining:

> While in some cases reckless behavior may form the basis for a complaint of domestic violence, the overall goals of the domestic violence statute would not be served by entering a protective order under these circumstances. "The purpose of the domestic abuse statute is to protect and 'aid victims of domestic abuse by providing an immediate and effective' remedy." *Coburn v. Coburn*, 342 Md. 244, 252, 674 A.2d 951 (1996) (quoting *Barbee v. Barbee*, 311 Md. 620, 623, 537 A.2d 224 (1988)). "The primary goals of the statute are preventive, protective and remedial, not punitive. The legislature did not design the statute as punishment for past conduct; it was instead intended to prevent further harm to the victim."

Id. We continued, explaining that there was no indication that the father had acted recklessly in the past in a way that would create future harm to the mother or the son. *Id.* at 23. Accordingly, a protective order would only work to punish the father, which was not the purpose of protective orders. *Id.*

Returning to the case at bar, appellee filed for a protective order asserting that on August 19, 2014, appellant had committed threats of violence and mental injury of a child. The facts regarding the appellant's behavior on August 19 for the most part are not in dispute. Appellant conceded that he was frustrated and upset because he could not speak

with his children. He admitted that he followed appellee down the hallway demanding to see the girls, and called out for them to come speak to him. Additionally, there appears to be little dispute that the children appeared distressed as a result of the commotion. At the hearing, the circuit court informed appellant multiple times that it was only considering testimony regarding the August 19, 2014 incident to determine whether there was sufficient evidence to warrant the issuance of a protective order. Accordingly, we shall consider the evidence appellee presented regarding appellant's behavior at the August 19, 2014 court date.

Officer Plunkett testified that appellant was angry and demanded to talk to his daughters. He testified that after he told appellant that he could not speak to them, appellant informed him that he had custody of his daughters and should be able to see them. Officer Plunkett also testified that he did not hear appellant threaten appellee or the children; he did not see him touch them; and that while appellant was visibly angry, he was not yelling, but spoke with a loud voice. He stated that appellant "wanted to be heard." Officer Plunkett described the girls as nervous, and stated that Adrianna looked like she had been crying because her eyes were red and flushed. Appellee testified contrary to Officer Plunkettt's testimony, that appellant was screaming. She asserted that she was scared and "thought . . . he was going to knock [her] out on the floor." She testified that there have been instances when the two have engaged in fist fights with each other. Ms. Trivers said that the girls were scared, and that Adrianna had her face buried in a blanket. She also testified that while she did not see appellant, she heard him demanding to see the girls and calling for Brooklyn to come to him. She described his voice as "loud and clear."

Appellant testified since he was the custodial parent, he was shocked when appellee refused to return the girls on August 18, 2014, and was upset that he was not being allowed to speak to them on August 19, 2014. He acknowledged that he was loud and upset and that he demanded to see his daughters. He admitted that he was agitated because he lost custody of his children and was not being permitted to speak to them.

The circuit court found:

> This is a temporary order, but I am finding that [appellee] is a person eligible for relief. You are still legally married. I am finding that there is clear and convincing evidence to believe that you paid . . . placed both [appellee], Brooklyn and Adrianna in fear of imminent serious bodily harm on August 19th by confronting them in the courthouse; following Adrianna and her mother in the hallway in a threatening manner . . . very close . . . you were warned off by the attorney. You were making verbal threats. They needed a police escort to get through the hallway. And you [were] generally behaving in an angry, aggressive and intimidating manner.

Pursuant to Fam. Law §4-506, a circuit court must find clear and convincing evidence that abuse has occurred to issue a protective order. While appellant's conduct was completely unacceptable, it was not abusive, nor was there evidence of verbal threats. Based on the testimony by both parties and their witnesses, there was no evidence that either appellee or the girls were under a threat of imminent bodily harm. Officer Plunkett testified that appellant never threatened nor touched anyone. Appellant's sole act was loudly demanding that he be able to see and speak to his daughters. No one testified regarding any threat that appellant made towards appellee or the girls. *But see Kaufman v. Motley*, 119 Md. App. 623, 625 (1998) (affirming a circuit court's grant of a protective order when the father made "threats of ruining [the mother's] life, arson in the middle of the night, [and] threats to do harm to all who associated with [the mother]. . . ."). Appellee

claims that she feared appellant would "knock her out." However, the record before us is void of verbal threats of harm or physical violence on this occasion, and the circuit court did not appear to rely on the concern of future physical harm to appellee. There was evidence that the girls were obviously distressed by the activity of August 19, 2014. Adrianna was crying and had her face buried in a blanket and according to witnesses, Brooklyn looked confused and nervous. However, the children's reaction to a loud and angry dispute between their parents is not clear and convincing evidence of abuse under the statute. Notably, later that same day, Brooklyn texted her father that she wanted to see him and appellee allowed her to be picked up by him and have dinner together that night.

There was ample evidence that appellant was acting in a loud, angry manner. While his behavior was inappropriate, we fail to conclude that it reaches the level necessary to establish abuse under the statute. In *Barton*, the father was visibly aggravated with the mother and hit her with his vehicle, possibly recklessly but at least unintentionally. We declined to permit a protective order in that instance because issuing one would fail to achieve the goal of protective orders, which are to "aid victims of domestic abuse by providing an immediate and effective' remedy" and not to punish respondents for past bad behavior. 137 Md. App at 22. Therefore, also taking into consideration the overarching goals of the domestic violence statute, we are not persuaded that the incident which occurred on August 19, 2014 is sufficient to warrant a protective order.

Therefore, we conclude that there was not clear and convincing evidence to establish abuse pursuant to Fam. Law §4-501, and hold that the circuit court erred in granting a protective order based on the events of August 19, 2014.

JUDGMENT OF THE CIRCUIT COURT FOR CHARLES COUNTY IS REVERSED. COSTS TO BE PAID BY APPELLEE.