UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 2236

September Term, 2016

KENNETH E. STEPHENS

v.

KIMBERLI D. HAMMILL

Meredith,
Reed,
Davis, Arrie W.,
(Senior Judge, Specially Assigned)

JJ.

Opinion by Davis, J.

Filed: June 28, 2017

Appellant, Kenneth Earl Stephens, appeals from a Final Protective Order (FPO), granted by the Circuit Court for Frederick County (Stevenson Solt J.), which had been requested by Appellee, Kimberli Hammill, on behalf of their minor child ("J.S."). In this appeal, Appellant posits the following issue, which we quote, for our review:

> Whether the hearing judge committed an abuse of discretion and reversible error by granting a Protective Order in this case?

FACTS AND LEGAL PROCEEDINGS

Appellant and Appellee, who were divorced at the time of these proceedings, have three biological children, two of whom are adults and J.S. who is a minor child and the subject of this appeal. J.S. was thirteen years old at the time of the incident under review. Appellee resides in West Virginia and Appellant resides in Maryland. Pursuant to a custody order, Appellant was granted physical custody of J.S. and Appellee was permitted unsupervised visitation which provided that J.S. could spend weekends with his mother in West Virginia. Appellant and Appellee shared joint legal custody of J.S.

Appellee filed for a Temporary Protective Order on November 4, 2016, concerning an incident that occurred on or around September 17, 2016. The judge, in finding that a preponderance of the evidence supported the Order, awarded custody of J.S. to Appellee until the FPO hearing scheduled for November 10, 2016. Appellant, Appellee, J.S. and Appellant's girlfriend testified at the hearing.[1] The following was elicited during the course of that hearing.

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[1] At the time, there was a concurrent contempt of court motion filed in Howard County by Appellant against Appellee for kidnapping J.S.

J.S. testified that, on or around September 17, 2016, while at his friend's house next door until around 10:00 p.m., Appellant arrived to take him home. They did not engage in any conversation until they arrived, at which time J.S. and his father began arguing. Appellant attempted to call J.S. earlier, but J.S. did not receive any calls on his cell phone. Appellant argued with J.S. about J.S.'s disrespectful behavior and not cleaning his bedroom when asked.[2]

J.S. testified that, at one point, he, Appellant and Appellant's girlfriend, Elyse Wilson, were outside on the deck arguing when Appellant put J.S. in a "chokehold" to keep J.S. from leaving the deck. According to J.S., he had trouble breathing and subsequently went to his bedroom because Appellant was continuing to yell at him and he didn't want Appellant to "grab" him again.

According to J.S., Appellant then followed him to his bedroom and, after J.S. refused to open the bedroom door, Appellant unscrewed the door and "literally threw the door. There's a mark on the wall from where he threw the door." J.S. then testified: "He made me back up against [the] wall" and started yelling and fighting, but not physically. Sometime later, Appellant left J.S.'s room and began fighting with Wilson. J.S. then ran to the room formerly occupied by Wilson's daughter, shut the door and called his mother. According to J.S., he told his mother that he didn't want to live with Appellant anymore, that he's tried for three years and that it's not working out. J.S. also testified that Wilson

[2] J.S. testified that**,** after the events on September 17, Appellant made him clean his room until 1:00 a.m.

"turned off" his cell phone and that the wireless internet connection (WiFi) was turned off at the house; consequently, J.S. had no further contact with his mother until the following weekend during their scheduled visitation. J.S. testified that he was still in possession of his cell phone, despite his inability to use it. He further testified that he did not take any photographs of any physical injuries he had sustained from the alleged choking, that Appellant has physically restrained him in the past and that Appellant has screamed at him and called him names when they argue.

Appellee, J.S.'s mother,[3] testified that J.S. texted her on September 17th, but that, when she attempted to call him, she was unable to make the connection. Eventually, J.S. contacted her *via* FaceTime, a video telephone application. J.S. was "crying hysterically," but he did not want to talk about what had happened. He did state that he did not want to live with Appellant anymore. Appellee called Appellant and inquired "what was going on," to which Appellant responded that he was disciplining J.S. and that it was "none of [her] business." According to Appellee, Appellant then hung up, but, believing that she had diffused the situation and, since she was out of town, she decided to wait until her next scheduled visitation to see J.S.

After the weekend visitation was over, Appellee testified that J.S. refused to go back to Appellant's home. J.S. threatened to run away or "drink bleach," stating that he was afraid to return. Appellee called Appellant to inform him that J.S. did not want to return,

[3] Appellee did not file an appellate brief.

to which Appellant responded that it was not J.S.'s decision and that he should return.

Appellee testified that, rather than return J.S. to Appellant, she filed a protective order in West Virginia and took J.S. to a psychiatrist. According to Appellee, J.S. was experiencing "flashbacks" and was having trouble focusing. Although J.S. had previously been an honor roll student, he was failing three of his classes. Appellee testified that he was terrified to go home because of Appellant and Wilson.

Appellant, the next witness to testify, stated that he never consented to a protective order in West Virginia and that it was dismissed. According to Appellant, he never put J.S. in a chokehold while on the outside deck. He testified that, a week before the incident, he "bear-hugged" J.S. around the shoulders and would not let go of him. Appellant testified: "He kept wanting to walk away and I was holding him firm around his shoulders telling him I loved him and that, you know, he needed to start doing the right thing."

Appellant's recollection of the events on September 17th was different from J.S.'s, who stated that, a week prior to the incident, Appellant put a lock on J.S.'s bedroom door, but he told J.S. that, if he ever locked him out of the room, J.S. would lose "door privileges." Appellant testified that he was confused by J.S.'s assertion that he choked him. He asserted, "Jake, you know that didn't happen." Appellant further testified that he took the door knob off J.S.'s door when he refused to exit the room and that he took the door off the hinges and set it aside. J.S. went into the bathroom and locked himself behind two doors. According to Appellant, he again removed the door knobs from each door and removed the doors from their hinges. According to Appellant, J.S. would still not engage

in the discussion Appellant wanted to have with him about being more responsible and cleaning his room. J.S. then went into another bedroom "and was hiding in a bunch of junk, making a claim that he was afraid, and I'm like, what are you afraid of? There's no reason for you to be afraid."

Appellant testified that, when J.S. "came out of the room," he asked for J.S.'s cell phone as punishment, but that J.S. refused to hand over the cell phone. At this point, Appellant told his girlfriend, Wilson, to terminate J.S.'s cell phone service. Appellant stated that he talked with J.S.'s mom that evening, whereupon his counsel asked him: "And Mom responded in the same way she's done in the past?" "Correct." "With the protective orders?" Appellant responded, "Yes, sir."

The next witness to testify, Elyse Wilson, stated that she and Appellant have been together for two and a half years and that J.S. has lived with them during that time. Wilson testified, over objection, that she has a protective order against Appellee, J.S.'s mother. Wilson testified that Appellant installed a lock on J.S.'s door a week prior to the incident and that J.S. was informed that, if he locked them out of his room, he would lose "door privileges."

According to Wilson, "There was no headlock on that day. There was no physical situation that day. I don't know if J.S. is confusing the days or what and there was never a headlock." Wilson stated that, outside on the deck, Appellant gave J.S. "a very endearing hug" but that Appellant "never laid a mean physical hand on that child, ever."

After presentation of closing arguments, the Court issued the following opinion:

> On the evening that these events occurred, I am not convinced that a choke hold occurred. However, I am convinced that [J.S.] and his father got into an argument; that argument began at approximately 11 o'clock at night; that during the course of that argument, [J.S.] went to his room, he locked the door; his father, in order to continue the argument, took the door off the hinges and removed it; [J.S.] then—and this is basically uncontradicted—went from the room to the bathroom, again locking the door and that the respondent then either removed the hinges or got, opened those doors; at that time [J.S.] went to a third room, I believe he testified was his sister's room, and again, he was hiding from Mr. Stephens; and that Mr. Stephens even testified that Jake told him then that he was afraid.
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> Whatever happened during the course of that argument, this Court is convinced, not only by a preponderance of the evidence but by clear and convincing evidence, whatever occurred, [J.S.] was afraid at that time and place, in fear of imminent bodily harm, and that Mr. Stephens' actions by escalating and not allowing the situation to resolve itself in another way, that that does constitute, one, both a second-degree assault by placing him in fear of harm, which is one of the forms of a second-degree assault, but there's also—they also say for the domestic violence, just without necessity qualifying it as a second-degree assault, placing one in fear of harm is a ground.
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> So I do find that there are grounds to grant the petition.

The FPO was granted for six months to allow resolution of the collateral custody proceeding in Howard County, during which temporary custody was awarded to Appellee. The instant appeal followed.

DISCUSSION

Appellant contends that the trial court erred in granting the FPO because the evidence was insufficient to support the statutory definition of domestic violence. Specifically, Appellant asserts that "the domestic violence statute was not created as a vehicle for the Court to second guess a parent as to how that parent 'parents.'" Appellant summarizes the gravamen of his appeal as follows:

> In this case, there was absolutely not one iota of proof that any such threats were made or any such physical violence or contact was made on the day in question. To suggest that a 13-year-old man suffered an assault under the statute at issue in this case because he was "mentally" injured by a parent attempting to (a) have this teenager clean his room or (b) do better in school or (c) be respectful or (d) have his cell phone taken from him is truly disturbing and constitutes a wide departure from the very domestic violence for which the statute was created. Nor was there any medical evidence or expert witness to support any such assault.

Md. Code Ann., Fam. Law (F.L.) § 4–506 governs FPOs.[4] Subsection (c)(2) requires that, before a FPO may be issued, the individual seeking the FPO must first file a Petition pursuant to F.L. § 4–504, which is for persons seeking relief from abuse. F.L. § 4–501(b)(1) defines "abuse" as any of the following acts, *inter alia*, "an act that places a person eligible for relief in fear of imminent serious bodily harm[.]"

Subsection (b)(2) provides:

> If the person for whom relief is sought is a child, 'abuse' *may also* include abuse of a child, as defined in Title 5, Subtitle 7 of this article. Nothing 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.

(Emphasis supplied).

F.L. § 5–701(1) defines "abuse of a child" as

> the physical or mental injury of a child by any parent or other person who has permanent or temporary care or custody or responsibility for supervision of a child, or by any household or family member, under circumstances that indicate that the child's health or welfare is harmed or at substantial risk of being harmed;

Pursuant to F.L. § 4–506(c)(1)(ii), a judge will grant a FPO if he or she finds, by a

[4] Amended by 2017 Maryland Laws Ch. 161 (S.B. 944); amended by 2017 Maryland Laws Ch. 162 (H.B. 647).

preponderance of the evidence, that the alleged abuse occurred.

"The purpose of the domestic abuse statute is to protect and 'aid victims of domestic abuse by providing an immediate and effective' remedy. The statute provides for a wide variety and scope of available remedies designed to separate the parties and avoid future abuse." *Katsenelenbogen v. Katsenelenbogen*, 365 Md. 122, 134 (2001) (quoting *Coburn v. Coburn*, 342 Md. 244, 252 (1996)).

"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. We leave the determination of credibility to the trial court, who has 'the opportunity to gauge and observe the witnesses' behavior and testimony during the trial." *Barton v. Hirshberg*, 137 Md. App. 1, 21 (2001) (citations omitted).

In the instant case, the circuit court expressly found that F.L. § 4–501(b)(1)(ii), "an act that places a person eligible for relief in fear of imminent serious bodily harm" had been met. In its ruling, the court noted the following:

> Whatever happened during the course of that argument, this Court is convinced, not only by a preponderance of the evidence but by clear and convincing evidence, whatever occurred, [J.S.] was afraid at that time and place, in fear of imminent bodily harm, and that Mr. Stephens' actions by escalating and not allowing the situation to resolve itself in another way, that that does constitute, one, both a second-degree assault by placing him in fear of harm, which is one of the forms of a second-degree assault, but there's also—they also say for the domestic violence, just without necessity qualifying it as a second-degree assault, placing one in fear of harm is a ground.

Accordingly, we hold that the trial court properly found that, based on a preponderance of the evidence, J.S. was in fear of imminent, serious bodily harm,

satisfying F.L. § 4–501(b)(1) and, concomitantly, the FPO.

Appellant argues that "no evidence of any assault" was proffered by Appellee on behalf of J.S.; however, Appellant mistakenly focuses his analysis upon "actual physical violence." The statute does not require actual physical violence to have occurred. On the contrary, the threat of imminent serious bodily harm that rises to the level of fright in the victim is sufficient to satisfy "assault," under its judicial construction and "abuse" under F.L. § 4–501(b)(1).

Finally, Appellant argues that a FPO carries a "stigma" and a domestic violence action should not be used as a "fast way to obtain custody or a change of custody." Appellant asserts that, while "preventative measures to halt the occurrence of further violence are to be applauded[,]" the domestic violence statute can be taken advantage of to circumvent a custody order. Beside the bald assertion that Appellee is bringing a protective order on behalf of a minor child pursuant to the Family Law Article as a way to obtain a "fast" custody order, Appellant provides no argument as to why this assertion is true.[5] It would defy logic to leave the custody intact for a minor child who is in a situation that was deemed sufficiently abusive to warrant a protective order under the Domestic Violence Act. Furthermore, J.S. is in the temporary custody of Appellee for six months, dating from

[5] Appellant notes, in his brief, that "the Chancellor in this case has no idea as to the background of the Mother in this case; the Chancellor in this case has no idea as to the Mother's mental condition although there was evidence that Ms. Wilson had to obtain a peace order against her." However, Appellant provided no evidence that a temporary custody award would not be in the best interest of the child in rebuttal to the temporary protective order or the FPO at the FPO hearing or on this appeal.

the FPO hearing, until the appropriate court can determine permanent custody. The circuit court noted that the temporary custody under the FPO was meant only as a "stopgap." "Section 4–506(d), listing the forms of relief that may be granted under a protective order, expressly provides that, as part of the protective order itself, the judge may 'award temporary custody of a minor child'" to the party bringing the petition for relief, upon a finding based on the preponderance of the evidence. *Kaufman v. Motley*, 119 Md. App. 623, 629 (1998).

Therefore, we hold that there was no abuse of discretion when the hearing judge granted the protective order.

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