IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA19-31

Filed: 6 August 2019

Alleghany County, No. 18CVD77

LORRI ANDERSON obo
G.T. and R.T., Plaintiff,

v.

MICHAEL SCOTT TREDWELL, Defendant.

Appeal by Defendant from order entered 31 July 2018 by Judge Robert C. Crumpton in Alleghany County District Court. Heard in the Court of Appeals 6 June 2019.

No brief filed for Plaintiff-Appellee.

Randolph & Fischer, by J. Clark Fischer, for Defendant-Appellant.

INMAN, Judge.

Defendant Michael Scott Tredwell ("Father") appeals from the trial court's domestic violence protective order ("DVPO") concluding that he committed domestic violence. Father argues on appeal that there was insufficient evidence that he placed his ex-spouse Lorri Anderson ("Mother") and her husband Andy in imminent fear of

serious bodily injury. After thorough review of the record and applicable law, we reverse the trial court's order.

I. FACTUAL AND PROCEDURAL BACKGROUND

The evidence in the record tends to show the following[1]:

Father and Mother have been in divorce and custody litigation since 2011. They share two children, fourteen-year-old G.T. and twelve-year-old R.T (collectively, "the children").[2] Mother is remarried to her second husband Andy,[3] the children's stepfather, and Father has had a girlfriend named Toni for the last five years. In 2015, the parties consented to a court order giving Mother full custody of the children and giving Father visitation rights every other weekend.[4]

The protracted and volatile legal proceedings and other factors caused the children stress and anxiety to such an extent that their parents sought professional help. In 2016, the trial court appointed a parenting coordinator, pursuant to N.C. Gen. Stat. § 50-91. The trial court later dismissed the parenting coordinator in June 2017.

In August 2017, the children began seeing Patricia Andrews ("Andrews"), a licensed professional counselor, for routine therapy sessions. Andrews recommended

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[1] Because of the dearth of information in the record and the conflicting testimony from the relevant parties, we dispense with the facts insofar that they do not pass into the realm of speculation.

[2] We use the above pseudonyms to preserve the juveniles' identities.

[3] The record does not reflect when Mother remarried.

[4] The consent custody order is not contained in the record on appeal, but it is referred to in the transcript of the proceedings and neither party disputes its provisions.

that the entire family, including Mother's second husband Andy, participate in joint counseling sessions. Father and Mother and Andy never participated in a counseling session together.

Andrews continued to meet individually with each of the children. G.T. displayed signs of depression and anxiety, citing tensions at home and school and the minimal contact he was having with Father. R.T. was "not as emotionally attached" to Father as G.T. and "[did] not have a great desire to spend time with [] [F]ather under any circumstance."[5]

Andrews met with Father and G.T. together on 11 October 2017, which "went well." Another session with Father and G.T. was scheduled for 18 November 2017, but Father cancelled the appointment and ceased communication with Andrews. G.T. and Mother met with Andrews on 27 November 2017 and discussed the possibility of G.T. residing with Father during the spring 2018 school year.

There was then a "gap in treatment" between 27 November 2017 and the next session on 2 March 2018. Father stopped seeing the children for his periodic visitations beginning in either December 2017 or January 2018.[6] When Mother and the children returned to see Andrews on 2 March 2018, Mother highlighted the "major" conflicts she and Andy were having with Father, so much so that she and

[5] The date for when Andrews met with R.T. alone is not provided.

[6] Father testified and Mother's complaint states that it was December since visitation occurred, but R.T. testified that it was January.

Andy were "discussing legal action" and talking to law enforcement. The children told Andrews that they were concerned that this rift could potentially cause violence between their parents. Andrews was also told that Father had a "history of violence and verbal threats" directed at Mother and possibly Andy.[7]

Throughout the divorce and custody litigation, a point of contention was Father's alcohol use. Father had been convicted of driving while impaired in 2010. The 2015 consent order required Father to refrain from drinking and driving and "drinking in excess." Mother also sought help from the parenting coordinator to curb Father's drinking and driving, but the parties failed to come to a resolution.

On 28 March 2018, Andrews held another session with Mother and the children. Mother reported that R.T. told her that Father and his girlfriend Toni had been frequently drinking and driving their vehicles while the children were passengers.[8] The children recounted the incident of Toni pulling into the driveway in her truck while intoxicated with the children inside and accidentally bumping into

[7] The record does not disclose who told Andrews about Father's past violence.

[8] There is an ambiguity in the transcripts as to what prompted Mother to start therapy sessions again with Andrews in March and when the issue regarding Father's drinking resurfaced. Andrews testified that the issues of drinking and driving were raised at the 2 March session, but that the details were more heavily discussed at the next session on 28 March. When Andrews testified about the 2 March session, she relegated her testimony to the conflict the parents were having and its effect on the children. Mother, however, testified that Father's drinking and driving "caused [her] to get them back into counselling [sic] in March" because it was first "brought to [her] attention" prior to the 2 March session. R.T. corroborated his Mother's testimony when he testified "I told my mom [about Father's drinking] and then when she got me into counselling, [sic] then I told the counsellor [sic] all of the rest."

a metal pole. Before March 2018, neither of the children had reported any concerns about Father or Toni drinking.

Mother and the children also expressed concerns about Father and Toni owning guns.[9] Father owns multiple guns that he keeps in various places, including his car and in his residence, but the children did not report that they felt unsafe as a result. The children did report that Toni, who also owns a handgun, scared them one day when she used her gun for target practice in the backyard while intoxicated and in the presence of the children.[10]

On 29 March 2018, Mother filed a complaint requesting an *ex parte* Domestic Violence Protective Order ("DVPO") against Father.[11] The complaint stated that a week prior, the children, on their last visit with Father in December 2017, told her the following: (1) Father operated his vehicle while intoxicated with the children inside; (2) Toni scratched the front of her vehicle pulling into the driveway while the children were in the truck after she had consumed alcohol; (3) Father threatened to "take the kids out of state [and] not bring them back;" and (4) "per the children [Father] said that he would break in [and] kill [Mother and] my husband Andy." On

[9] The transcripts do not indicate when the issue as to guns was first mentioned.

[10] Andrews testified that, while Toni did brandish the handgun that R.T. spoke of, she was not sure if the children "used the verb 'shooting' " or whether Toni had mere "possession of the gun and [whether it] made both boys feel very anxious." The date for when this incident occurred was not provided by Andrews or the children.

[11] Because the file stamp on Mother's complaint is indecipherable, we rely on Father's factual statement that the complaint was filed on this date, and note that it is the same date as the trial court's notice of hearing.

the same day, the trial court issued the order, concluding that Mother and "a member of [Mother's] family" were in fear of imminent serious bodily injury and continued harassment.

A hearing was set for 10 April 2018 to determine whether a permanent DVPO would be necessary. The hearing ultimately proceeded on 3 and 31 July 2018.[12] R.T. testified regarding his relationship with Father, Father and Toni's alleged affinity for drinking and guns, the family dynamic, and, of particular note, Father's statements about his intent to kill Mother and Andy. R.T. testified that he overheard Father say that "he was pissed off at [Mother] and Andy and he wished he could kill them." R.T. testified that he and G.T. "were in the backroom" playing Xbox in Toni's residence when he overheard Father and could not remember why or when Father made that statement. R.T. also testified that Mother showed him a text message[13] sent from Father to Mother in 2016 or 2017—before Father's statement that was overheard by the children—saying that "he wished he could harm [Mother and Andy]."[14] R.T.

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[12] Although N.C. Gen. Stat. § 50B-2(c)(5) provides that a hearing must commence on the later of within ten days from the issuance date of the order or within seven days upon service of process, the hearings were held weeks later. *But see id.* ("A continuance shall be limited to one extension of no more than 10 days unless all parties consent *or good cause is shown*." (emphasis added)). Father does not raise this discrepancy in his brief nor does he contest the *ex parte* DVPO. We therefore do not need to discuss it. *See Hensey v. Hennessy*, 201 N.C. App. 56, 66, 685 S.E.2d 541, 548 (2009) ("Although we have not reversed the ex parte DVPO, defendant is incorrect in his argument that the DVPO is dependent upon a valid ex parte DVPO. . . . We must therefore consider defendant's arguments as to the DVPO . . . , as these are independent of the issues regarding the ex parte DVPO.").

[13] The text message was not put into evidence.

[14] On cross-examination, R.T. seemed to contradict himself by agreeing that he "never really heard [Father] say, 'I could harm' " Mother and Andy, but that it was only "[the] text message that they showed [him.]"

further testified that in 2017, Father said "he was going to break into their house and kill" Mother and Andy. Andrews testified that during a therapy session on 13 April 2018—weeks after the *ex parte* DVPO—the children stated that " '[Father] has said that he will shoot [Mother] and Andy." Mother did not testify as to these statements by Father.

At the close of Mother's evidence, Father moved for a directed verdict, arguing that the evidence was insufficient to sustain a finding that he had engaged in domestic violence. In response, Mother's counsel argued that because "the most severe conduct that has occurred [was] the drinking," it could support the existence of "imminent issues of bodily harm." The trial court denied the motion for directed verdict "in part or mainly in light of the testimony concerning the threats to shoot [Mother] and her husband [Andy]."

On 31 July 2018, the trial court issued a DVPO against Father, finding that in December 2017 Father made threats about killing Mother and Andy, and that the children heard these threats while in his presence. Based on those facts, the trial court concluded that Father placed Mother and "a member of [Mother's] family" in "fear of imminent serious bodily injury." The trial court noted that, while the "other issues about guns and alcohol are concerning, [they are] more appropriately dealt with in a custody order."

Father appeals.[15]

II. ANALYSIS

Father argues that there was no competent evidence to support the trial court's finding that he committed domestic violence against Mother and Andy because (1) his threats did not render them "imminently" in danger of serious bodily injury, as the word is defined; and (2) no evidence was introduced that they actually feared the threat of imminent injury. Because no evidence was presented regarding Mother's or Andy's fear of Father, we reverse the trial court's DVPO.

In reviewing the sufficiency of a DVPO, our standard of review for the relevant circumstances is the following:

> When the trial court sits without a jury regarding a DVPO, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. Where there is competent evidence to support the trial court's findings of fact, those findings are binding on appeal.

[15] The order was amended and filed on 16 August 2018 because the trial court mistakenly put down the DVPO's expiring date as 31 July 2018 instead of 31 July 2019. Rather than appealing the amended order, Father appeals the original 31 July 2018 order. This is immaterial, however, as Father appealed on 9 August 2018 before the amended order was entered, voiding the amended order. *See Cnty. of Durham v. Hodges*, __ N.C. App. __, __, 809 S.E.2d 317, 322 (2018) ("The 17 June 2016 order is void because the trial court lacked jurisdiction to enter it once defendant appealed the 14 June 2016 order." (citing *France v. France*, 209 N.C. App. 406, 410-11, 705 S.E.2d 399, 404 (2011))). Additionally, although the original DVPO expired prior to the Court hearing Father's appeal, "there are numerous non-legal collateral consequences to entry of a [DVPO] that render expired orders appealable." *Smith v. Smith*, 145 N.C. App. 434, 437, 549 S.E.2d 912, 914 (2001); *accord Rudder v. Rudder*, 234 N.C. App. 173, 177, 759 S.E.2d 321, 325 (2014).

Kennedy v. Morgan, 221 N.C. App. 219, 220-21, 726 S.E.2d 193, 195 (2012) (citation omitted).

A person living in North Carolina can seek relief under Chapter 50 "alleging acts of domestic violence against [one's self] or a minor child who resides with" that person. N.C. Gen. Stat. § 50B-2(a) (2017). "Any aggrieved party entitled to relief under this Chapter may file a civil action[.]" *Id.* "Domestic violence" is defined as:

> [T]he commission of one or more of the following acts upon an aggrieved party or upon a minor child residing with or in the custody of the aggrieved party by a person with whom the aggrieved party has or has had a personal relationship, but does not include acts of self-defense:
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> (1) Attempting to cause bodily injury, or intentionally causing bodily injury; or
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> (2) *Placing the aggrieved party or a member of the aggrieved party's family or household in fear of imminent serious bodily injury* or continued harassment, as defined in [N.C. Gen. Stat. §] 14-277.3A, that rises to such a level as to inflict substantial emotional distress; or
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> (3) Committing any act defined in [N.C. Gen. Stat. §] 14-27.21 through [N.C. Gen. Stat. §] 14-27.33.

N.C. Gen. Stat. § 50B-1(a) (2017) (emphasis added). If the trial court "finds" that domestic violence has occurred, it "shall grant a protective order restraining the defendant from further acts of domestic violence." N.C. Gen. Stat. § 50B-3(a) (2017).[16]

When the trial court issued its DVPO using the preprinted form

[16] "Although [Section] 50B-3(a) states that the trial court must 'find' that an act of domestic violence has occurred, in fact this is a conclusion of law[.]" *Kennedy*, 221 N.C. App. at 223 n.2, 726 S.E.2d at 196 n.2.

AOC-CV-306,[17] it only check-marked the box finding that Mother and Andy were "in reasonable fear of imminent serious bodily injury."[18] Thus, the trial court narrowed its domestic violence finding to the first part of Section 50B-1(a)(2). While the DVPO is unclear as to whether "a member of [Mother's] family" encompasses Andy *and* the children, the trial court's findings used to support its conclusion shows that it only applies to Andy. No findings related to the children identified them as being afraid of bodily injury; the trial court only found that Father threatened Mother and Andy in the children's presence. And the trial court reasoned that concerns surrounding the children's risk of injury from the drinking and the guns were "more appropriately dealt with in a custody order."

We have held that the "test for whether the aggrieved party has been placed

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[17] Concerning the use of preprinted forms in the domestic violence context:

> [W]e urge trial judges to exercise caution in completing the standard Domestic Violence Protective Order, Form AOC–CV–306. While we appreciate the convenience such forms provide the trial courts, given the large number of domestic violence cases filed, we stress the importance of ensuring that each finding of fact, conclusion of law, and mandate of the order is supported by competent evidence. Where the provisions of a Domestic Violence Protective Order are not supported by the facts, the order will be reversed.

Wilson v. Wilson, 134 N.C. App. 642, 644, 518 S.E.2d 255, 257 (1999) (citations omitted).

[18] While a "fear of imminent serious bodily injury" could be construed as a conclusion of law, our Court has alluded that these determinations are ultimate findings that must support the trial court's conclusion of law that domestic violence has occurred. *See Stancill v. Stancill*, 241 N.C. App. 529, 538 n.5, 773 S.E.2d 890, 896 n.5 (2015) ("[W]e treat [a determination as to whether an aggrieved party was placed in continued harassment] as a finding of ultimate fact." (citing *Kennedy*, 221 N.C. App. at 222, 726 S.E.2d at 195)). *But see Smith*, 145 N.C. App. at 438, 549 S.E.2d at 915 ("These findings of fact which show Defendant's conduct caused Plaintiff to feel uncomfortable but did not place her in fear of bodily injury do not support a conclusion Defendant placed Plaintiff 'in fear of serious imminent bodily injury.' ").

in 'fear of imminent serious bodily injury' is subjective; thus, the trial court must find as fact the aggrieved party 'actually feared' imminent serious bodily injury." *Smith*, 145 N.C. App at 437, 549 S.E.2d at 914 (citations omitted); *see also Brandon v. Brandon*, 132 N.C. App. 646, 654-55, 513 S.E.2d 589, 595 (1999) ("The plain language of [S]ection 50B-1(a)(2) imposes only a subjective test, rather than an objective reasonableness test, to determine whether an act of domestic violence has occurred. . . . Accordingly, where the trial court finds that a plaintiff is actually subjectively in fear of imminent serious bodily injury, an act of domestic violence has occurred pursuant to [S]ection 50B-1(a)(2).").

Here, there are no such findings or evidence. Throughout Mother's testimony, neither attorney asked, and Mother never testified, about Father's alleged threats to kill or harm her and Andy, and she did not discuss the text message that she allegedly showed R.T. Neither Mother nor Andy testified that they felt unsafe or afraid of Father. Although it could be argued that Mother and Andy had feared that Father would drink and drive with the children in the vehicle, putting them at risk of serious bodily injury, the trial court expressly declared that the "issues about guns and alcohol are concerning *but more appropriately dealt with in a custody order*." (emphasis added). As such, the trial court relied only on Father's alleged threats to harm Mother and Andy as a basis for its DVPO against him. Presuming the trial court premised its order on Father's drinking, Mother merely testified that she feared

for her children's safety, rather than hers or Andy's.

Because no evidence was introduced that Mother and Andy actually feared Father's threats of violence, the trial court erred in determining that Father committed domestic violence by placing them in fear of imminent serious bodily injury. Therefore, the trial court erred in its issuance of the DVPO.

REVERSED.

Judges ARROWOOD and COLLINS concur.

Report per Rule 30(e).