

NOT DESIGNATED FOR PUBLICATION

No. 102,101

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

KRISTIN C. BLACKBURN,
Appellee,

v.

WILLIAM L. BLACKBURN, III,
Appellant.

MEMORANDUM OPINION

Appeal from Butler District Court; MICHAEL E. WARD, judge. Opinion filed June 25, 2010.
Affirmed.

Darren K. Patterson, of Darren Patterson, Chartered, of El Dorado, for appellant.

No appearance by appellee.

Before MCANANY, P.J., CAPLINGER and BUSER, JJ.

Per Curiam: William L. Blackburn appeals from a protection from abuse (PFA) order based on the petition of his former wife Kristin C. Blackburn, now Kristin C. Guthrie. Kristin sought the PFA order on behalf of their child, A.B., who was born in April 2005.

FACTUAL AND PROCEDURAL BACKGROUND

On November 20, 2008, Kristin filed a verified PFA petition in Butler County. Kristin alleged that after A.B. spent time with William, A.B. said her "pe pe burned" as

she was using the restroom. Kristin also attached a letter from two pediatricians, Leslie A. Perry, M.D. and Christopher L. Bird, M.D., stating an opinion that A.B. had "been sexually abused."

The district court issued a temporary PFA order and set the matter for hearing. William retained counsel, and the district court held a hearing on December 18, 2008. Kristin appeared pro se at this hearing and the subsequent proceedings below.

Kristin testified that she was married to William from October 2005 to October 2007. A different judge had presided over the divorce, but the district court in this case reviewed the divorce file which is not in the record on appeal. Kristin testified she had taken A.B. to a hospital about 1 year earlier with concerns of sexual abuse. She also indicated a police investigation was underway.

Kristin testified that when she arrived at William's residence a few months before the hearing, he was bathing A.B., along with "a little boy" he was babysitting. Kristin indicated that William was startled by her presence.

Kristin further testified that A.B. had visited William a few days before she filed the petition. A.B. was acting erratically afterwards, so she took the child to see Dr. Perry. Dr. Perry, however, was not present for testimony.

During William's case-in-chief he called Sarah Coleman, a clinical psychologist at South Central Mental Health. Dr. Coleman had evaluated A.B. on April 3, 2008, at Kristin's request. Dr. Coleman produced a letter stating her initial impressions which was admitted into evidence, but is not in the record.

Dr. Coleman did not see A.B. again until July 17, 2008. Dr. Coleman testified that she "didn't have any direct evidence of [sexual abuse] based on anything that I had

observed," and that she had not reported suspected abuse of A.B. to any agencies. Dr. Coleman also produced a letter on December 1, 2008, describing "what has occurred in our therapy sessions so far." Although the letter was admitted into evidence, it is not in the record on appeal. Dr. Coleman opined that anxiety and aggression exhibited by A.B. could be caused by a number of things, including sexual abuse.

William also called Emily Davis, A.B.'s preschool teacher. Davis stated that she had little opportunity to observe A.B.'s behavior towards William. What she did see, when William picked A.B. up from school, did not cause her any concern. The hearing was continued for the presentation of additional witnesses.

On December 23, 2008, the parties appeared again. Kristin's first witness was Dr. Leslie Perry, a pediatrician who occasionally treated A.B. Dr. Perry saw A.B. six times during the period of 2007-2008. On a July 2007 visit, Dr. Perry noted a viral rash in A.B.'s diaper area. This rash was still present at the time of the hearing. During a February 2008 visit, Dr. Perry also noted "behavioral concerns." Kristin told Dr. Perry that A.B. was crying out in the night, and was scared with diaper changes. Dr. Perry found that "on physical exam, [A.B.] was very resistant to being examined. That . . . was not terribly significant at that time but has since become quite a bit more significant."

During the November 2008 visit, Kristin told Dr. Perry that while A.B. was taking a bath, she "had a paint brush and was inserting the paint brush -- kind of painting her private area." Kristin said A.B. "would have episodes where she would kind of go out of control; scratching, biting, hitting and screaming at her; couldn't get her to go to school." Dr. Perry told Kristin "that was rather concerning behavior coming from a three-year-old, that that would lead me to be suspicious that she had been traumatized in some way."

Dr. Perry found A.B.'s "genital area was completely normal." However, A.B.'s behavior was extreme. She was "hysterically screaming, flailing, kicking, fighting. It took

three of us to hold her down just to do one quick physical exam, which is a very concerning reaction from a three-year-old." When Dr. Perry asked Kristin if "there had been other behaviors like this in the past," Kristin reported that in "the recent past, was one that the diaper area was red [*sic*] and she said daddy hurt me." Kristin also said a friend, Carrie Vineyard, had reported that A.B. said "'daddy made it hurt . . . it's hard,'" and "'I'm coming.'" Kristin further advised that A.B. would "spit on her hand and rub it on the genital area of herself or her doll and state, 'that's how daddy does it.'" Dr. Perry said A.B.'s reaction to the physical exam was "very classic of children who have been sexually abused," and the doctor "felt very strongly after that visit that [A.B.] had been abused."

On the December 2008 visit, A.B. was initially "laughing, somewhat playful," but when Dr. Perry began the physical examination by lifting the child's shirt, she reverted to hysterical behavior. The doctor said the behavior was "like I see in children who have been traumatized." The doctor also said William's mother, Kelly Cranston, and his sister, Bobby Blackburn, expressed concerns to her "that something has happened to [A.B.] abuse-wise."

On cross-examination, Dr. Perry acknowledged that a contentious divorce could cause a child to act out, including hitting or biting. The cross-examination also established the type of viral rash A.B. suffered, mollusca contagiosum. Dr. Perry said the viral rash may be treated with a cream, and if left untreated it will go away in a few years. Dr. Perry testified that it "isn't necessarily sexually transmitted. Children can get it but it's one that can be sexually transmitted. And with it being there in the perineum, that is somewhat concerning due to location." Moreover, Dr. Perry said there was no way to determine if the viral rash was sexually transmitted, other than its location.

Dr. Perry also provided testimony regarding an examination she conducted when William, not Kristin, had brought A.B. to the appointment. When A.B. was with her

father, she was "very subdued," and when examined she gave "almost more of a fearful cry or whimper" rather than "crying and acting out." Dr. Perry thought this was "not . . . reassuring." Dr. Perry referred A.B. to Dr. Kerri Meyer, M.D. of the University of Kansas Medical School. Dr. Perry described Dr. Meyer as "a sexual abuse specialist."

Kelly, William's mother, testified on behalf of Kristin. Kelly said William had showered and bathed with A.B. When Kelly expressed disapproval to William, he responded that "[h]e'll raise her the way he wants." Kelly suggested to William that he simply bath the child, but "[h]e said she doesn't like that. She likes taking showers with daddy or bathing with daddy. She likes tub-tubs with daddy."

Kelly also reported A.B.'s behavior was worsening. "[S]he'll cling to [William] and just not want to stay with anybody else. She'll hold on to him and she won't make eye contact with anybody else around." In contrast, "[w]hen Kristin brings her around, I see this normal child. She'll usually come out of herself. She'll relate to people. . . . When she's with her dad, she acts terrified." Kelly also testified that when William visited their house he insisted on sleeping "on the floor of one of the girl's bedrooms."

Kristin's friend, Carrie, testified that she saw A.B. on a daily basis. Carrie said A.B. "has come to me repeatedly with rashes. . . . She says, 'Nana, look it hurts. My daddy did,' and then she'll walk off." According to Carrie, A.B. "has repeatedly expressed that her pee-pee hurts." Carrie maintained she had personally witnessed A.B. "spitting on her fingers and rubbing the privates" of her dolls. Carrie related another incident when A.B. ran up to her after a bath "and she spread her legs, and she goes, 'Right there is where daddy hurts me.'" Carrie, however, had not contacted the police.

Kristin's friend, Bobby, also testified. Kristin and A.B. had lived with Bobby from December 2007 through February 2008. Bobby said she "was there when the night terrors began; the kicking and screaming, the hitting, the biting, the hours and hours of her just

screaming." She said these behaviors were "always after she came back from [William's] house. She'd be bright red. She wouldn't let us near her."

Bobby testified about an instance in which Bobby's daughter was at William's residence "approximately two hours when he decided to give the girls a bath together." Bobby said she had told William "I'd pick her up in an hour, hour and a half." But William had bathed her daughter for "really no reason," which she "found . . . quite odd."

In his defense, William took the stand and claimed that Kristin had refused him parenting time since "the day I got served with divorce papers." William denied he had abused A.B. With regard to Dr. Perry, William said she "won't talk to me. I made repeated attempts, even after these allegations were made, to contact her, schedule an appointment, visit with her with my daughter, anything at her convenience."

William testified about the reason for bathing Bobby's daughter. William claimed the girl was at his residence for several hours. He said they had made cookies, that he had given her a popsicle, and that she had played outside. So she was "covered in dirt and sticky, and he "turned her and my daughter loose in the bathtub together."

As for bathing A.B. with the little boy, William said "they were two babies in the bathtub. They're not teenagers. They're not thinking about sex or anything along those lines." William said that when Kristin arrived she came "in there and helped bathe them She didn't have a problem with that at the time, she thought it was adorable."

William also testified about bathing with A.B.:

"I was brought up -- my dad showered with me and my sister. I can remember being five years old and being in the tub with my sister and my dad. He didn't touch us inappropriately. Until she was about one, yeah, I showered with her.

"I didn't touch her. She'd be sitting down there and playing in the tub and want to get out if somebody didn't get in there with her. My ex-wife didn't want to get in there with her, I would. I'd get in there, shower, clean off, and get out. And that would satisfy her."

William testified that "Bobby was arrested twice this year on drug charges both from Butler and Sedgwick County [*sic*]." William said this was the reason he did not want A.B. "in her house." William also acknowledged that he had long-standing "family issues" with his mother.

The district court found that Dr. Perry, who "sees kids every day," had "reached the conclusion based on a lot of factors that [William] was sexually abusing [A.B.] and she put that in the form of a letter. A letter signed not just by her, but by her cohort Dr. Bird. So that's her opinion." The district court noted that while the medical examinations had not shown any signs of trauma, "[t]he child also has a rash that won't go away, a viral rash, that can be sexually transmitted but isn't necessarily [so] transmitted." The district court found A.B. "has some issues psychologically, some very serious issues. And what those stem from, no one can exactly say." The district court stated that the psychological issues did not "necessarily prove . . . that her father's been sexually abusing her There's a lot of things the child can observe that would cause the child to be acting out. The mother has never seen . . . [William] sexually abuse . . . [A.B.]." The district court continued, "Now, [A.B.] has said something to her mother, to her grandmother, and to others about her pee-pee hurting and daddy touching her there. [William] vehemently denies it."

The district court next noted that the "matter is under investigation. You're obviously not in jail. You haven't been charged. . . . I don't know what will come of that investigation. That's not for me to determine." The district court said its "determination . . . is whether or not by preponderance of the evidence, [Kristin] has

proven her allegations of abuse." The district court concluded Kristin had met this standard. On December 29, 2008, the trial court filed the final PFA order and set the expiration date for December 23, 2009.

On January 12, 2009, William filed a motion for new trial or to alter and amend the judgment. William argued that he wished to present new evidence. The trial court set "a new trial" for February 18, 2009.

On February 18, 2009, the parties appeared as before. William called Chad Young, a detective with the El Dorado Police Department. Detective Young had interviewed Kristin, Dr. Coleman, Dr. Perry, Dr. Meyer, and at Kristin's suggestion, William's brother John Blackburn. Kristin told Detective Young that John had alleged abuse by William, and she provided him with a letter from John to that effect.

Detective Young testified that William had acted as a confidential informant to arrange drug buys from John and that as a result John was convicted for sale of methamphetamines. Detective Young indicated he "certainly thought about" the fact that William had "been involved in helping" put John in prison. Detective Young also said William believed that John was "sleeping with [Kristin] when they were married." Detective Young reported that the case against William had been inactivated, and he agreed with William's counsel there was "no evidence that [A.B.'s] been sexually abused."

Next, William presented Dr. Meyer, a pediatrician on the faculty of the University of Kansas School of Medicine. The district court certified her as an "expert witness in the area of sexual or physical abuse to children from the standpoint of a pediatrician." Dr. Meyer saw A.B. on December 18, 2008. She took a history from Kristin. In addition to relating her suspicions regarding William and A.B., Kristin told Dr. Meyer that William had "been abusive to his brothers in the past."

Dr. Meyer conducted a physical examination. According to her, A.B. "was a pretty stressed out little girl from the beginning. She didn't want me to examine her. And when I did examine her, she really fought it. She did not want me anywhere near her." She described the results of the examination:

"She had several kind of like lesions around her buttock area which is consistent with mollusca contagiosum, big fancy term. It just means warts. And they're not specific for child sexual abuse at all; very common in young children on all parts of the body. Other than that, her genital examine [*sic*] was normal."

When asked if she had "an opinion about whether [A.B.] was sexually abused by her father," Dr. Meyer responded: "I don't have a strong opinion about that. I had concerns about that based on the mother's history, yes." Dr. Meyer later stated "it's very concerning that she has been abused. And I recommended further investigation and evaluation which I believe has been done at this point." Dr. Meyer did acknowledge that the behaviors she had witnessed could be "associated with a child who has been subjected to a very bad divorce." Dr. Meyer prepared a report of her examination which was admitted into evidence but is not in the record on appeal.

Finally, William testified, linking the timing of Kristin's allegations with disputes over who would have the child for holidays. The district court took the matter under advisement and on February 25, 2009, it filed a detailed journal entry affirming its earlier decision.

The district court concluded the new evidence "does not change this Court's opinion that [Kristin] has proven her allegations of abuse in this case by a preponderance of the evidence." The district court thought Detective Young's testimony "dealt as much with the John Blackburn statement as any other aspect of the evidence in this case." The district court noted it had not relied on John's statement and that other evidence supported

its decision to issue the PFA order. The district court found Dr. Meyer's testimony supported its prior decision since it added "further support for ensuring the child's safety in this case by a continuation of the restraining order." In particular, the district court noted Dr. Meyer's "best recommendation" to "limit the father's visitation to supervised visits."

On February 26, 2009, William filed an appeal to this court. Kristin did not file an appellate brief.

On November 18, 2009, Kristin filed a motion before the district court to extend the final PFA order. On December 3, 2009, the parties appeared for the hearing. The district court, the same judge presiding, filed a form journal entry extending the final PFA order until December 23, 2010.

On April 28, 2010, this court issued a show cause order. It ordered the parties "to show cause why the above-captioned case should not be dismissed as moot given the lack of evidence in the record showing the basis for the extension." William responded and later added a transcript of the extension hearing to the record on appeal.

The transcript shows Kristin testified at the extension hearing, but only regarding A.B.'s current condition. Stating "there's not much new information presented today," the district court "reviewed my order of February the 25th" and concluded "the rationale that I set out in that order then remains today." Accordingly, the district court extended the final PFA order for 1 year.

STANDARD OF PROOF

William raises a question regarding the standard of proof. Our review of the legal standards applied by the district court is unlimited. See *Barnett v. Barnett*, 24 Kan. App. 2d 342, 348, 945 P.2d 870 (1997)

In the district court's latest order it stated the standard as follows: "[T]he burden of proof in a PFA case is preponderance of the evidence, the standard civil case burden of proof. K.S.A. 60-3106(a). The finder of fact must determine from the evidence whether it is more probably true than not true that the acts of abuse occurred."

The district court stated the correct standard of proof. See K.S.A. 60-401(d); K.S.A. 60-3106(a); *In re B.D.-Y.*, 286 Kan. 686, 691, 187 P.3d 594 (2008); *Paida v. Leach*, 260 Kan. 292, 300, 917 P.2d 1342 (1996).

William, however, focuses on the prior sentence in the order, which read: "the evidence required in a PFA case is less than that which is required to arrest someone for a crime or to issue a search warrant (probable cause), or certainly that which is required for conviction in a criminal case (proof beyond a reasonable doubt)." William argues preponderance of the evidence is a more stringent standard than probable cause, not a less stringent standard as the district court indicated.

Our Supreme Court has recently defined preponderance of the evidence as "evidence which shows that the truth of the facts asserted is more probable than not." *In re B.D.-Y.*, 286 Kan. 686, Syl. ¶ 1. Probable cause has several meanings, but the district court referred to criminal law, and in that setting it is generally defined as "the reasonable belief that a specific crime has been committed and that the defendant committed the crime," which as expanded is as follows: "Probable cause exists where the facts and circumstances within the acting officers' knowledge and of which they had reasonably

trustworthy information are sufficient in themselves to warrant a person of reasonable caution in the belief that an offense has been or is being committed." *State v. Fewell*, 286 Kan. 370, Syl. ¶¶ 3 and 4, 184 P.3d 903 (2008).

However, our Supreme Court has recently equated the two standards of proof: "[W]e note that the factors relied upon by the Court of Appeals might cause us pause if we were considering whether there was probable cause—*i.e.*, a preponderance of the evidence given the totality of the circumstances—. . . Here, however, the less rigorous standard of reasonable suspicion is applicable." *State v. Pollman*, 286 Kan. 881, 896, 190 P.3d 234 (2008).

Whatever the relation of the preponderance of the evidence standard and the probable cause standard in Kansas, the district court correctly defined the legal standard to be applied in this PFA case—preponderance of the evidence. Given that this standard of proof actually applied, the district court's additional statements regarding the proof necessary to arrest William in the criminal investigation were dicta. William has not shown the district court applied the wrong standard in this PFA case.

SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE DISTRICT COURT'S HOLDING

Kristin's PFA petition alleged that William "engaged in any of the following acts with a minor . . . sexual intercourse or lewd fondling or touching of the person of either the minor or the defendant." Both sexual intercourse and lewd fondling or touching are included under the definition of "abuse" in the protection from abuse act, K.S.A. 60-3101 *et seq.* K.S.A. 60-3102(a)(3)(A) and (B). The district court concluded that William had committed abuse.

William contends "there was not substantial evidence for a reasonable person to accept the conclusion of the Court." We review the district court's holding for substantial

competent evidence. See *State v. Inkelaar*, 38 Kan. App. 2d 312, 315, 164 P.3d 844 (2007), *rev. denied* 286 Kan. 1183 (2008) (review of probation revocation decided on preponderance of the evidence); *Barnett*, 24 Kan. App. 2d at 348 (review of PFA order). "Substantial competent evidence is such legal and relevant evidence as a reasonable person might regard as sufficient to support a conclusion. [Citation omitted.]" *Hodges v. Johnson*, 288 Kan. 56, 65, 199 P.3d 1251 (2009).

William highlights the evidence suggesting he did not abuse A.B., and he contends the "only witnesses whom [*sic*] suggested sexual abuse except for Dr. Perry are those with something to gain, who are not objective." However, the "trial court is the sole arbitrator as to the credibility of the witnesses and must determine which witnesses it believes." *Trolinger v. Trolinger*, 30 Kan. App. 2d 192, 197, 42 P.3d 157 (2001), *rev. denied* 273 Kan. 1040 (2002). Because the facts supporting PFA orders are often subjective, an "appellate court is reluctant to substitute its judgment for that of the trial court which is in the best position to judge whether the situation requires an order of protection from abuse." 30 Kan. App. 2d 192, Syl. ¶ 1.

As detailed earlier, both pediatricians thought A.B.'s behavior was consistent with sexual abuse. Multiple witnesses testified to statements and behavior by A.B. which indicated sexual abuse. A.B. reported genital pain after being in William's care, and her genitalia were red. A.B. enacted fondling of genitalia on herself and on dolls. William's bathing habits, both of himself with A.B., and of A.B. with other children, were suspect. A reasonable person could accept the evidence as sufficient to support the conclusion that William had engaged in the lewd fondling or touching of A.B.

Moreover, because William has omitted several letters and reports from the record, along with the entire divorce file, which the district court reviewed, this court cannot examine all the evidence before the district court. William, therefore, has not met

his burden of designating a record affirmatively showing error. See *Kelly v. VinZant*, 287 Kan. 509, 526, 197 P.3d 803 (2008).

William argues separately that no evidence showed the lewd fondling or touching was "done or submitted to with the intent to arouse or to satisfy the sexual desires of either the minor or the offender, or both." K.S.A. 60-3102(a)(3)(B). William notes further that the district court made no findings on this element of abuse.

There was evidence that William lewdly fondled or touched A.B. numerous times. This was circumstantial evidence that William had acted with an intent to arouse or satisfy sexual desires. See *State v. Rutherford*, 39 Kan. App. 2d 767, 776, 184 P.3d 959, rev. denied 286 Kan. 1184 (2008); *In re A.C.W.*, 26 Kan. App. 2d 468, 471, 988 P.2d 742, rev. denied 268 Kan. 886 (1999). As for the lack of a judicial finding, William did not object to the omission below, meaning this court presumes the district court made the findings necessary to support its judgment. See *Hodges*, 288 Kan. at 65.

Affirmed.