

NOT DESIGNATED FOR PUBLICATION

No. 106,202

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

In the Matter of

LORENA PALOS,
Appellee,

v.

ALBERTO HERNANDEZ,
Appellant.

MEMORANDUM OPINION

Appeal from Wyandotte District Court; CONSTANCE M. ALVEY, judge. Opinion filed June 29, 2012. Affirmed.

Alberto Hernandez, appellant pro se.

Gary C. West and Stephine Bowman, of Kansas Coalition Against Sexual and Domestic Violence, for appellee.

Before LEBEN, P.J., STANDRIDGE and ARNOLD-BURGER, JJ.

Per Curiam: Alberto Hernandez appeals the district court's decision to grant Lorena Palos' request for a protection from abuse (PFA) order against him. On appeal, Hernandez argues: (1) the district court did not have jurisdiction to grant the PFA order because Palos alleged in her petition requesting the relief that she had filed two PFA petitions in the 12 months prior to filing her current petition, violating K.S.A. 60-3111; (2) Palos' petition was insufficient to start proceedings under the Protection from Abuse Act (PFAA), K.S.A. 60-3101, *et seq.*, because the petition lacked sufficient facts to

establish a prima facie case of abuse; (3) the evidence presented at the hearing did not establish that Hernandez abused Palos as defined in K.S.A. 60-3102(a); and (4) the district court erred in establishing April 25, 2012, as the expiration date for PFA order entered against Hernandez. Finding no merit to any of these arguments, we affirm the district court's decision.

FACTS

Palos and Hernandez met in 2003 and had a relationship resulting in two children.

On September 13, 2010, Palos filed a pro se PFA petition against Hernandez alleging that Hernandez had caused or attempted to cause her bodily injury and had threatened her, placing her in fear of imminent bodily injury. Specifically, Palos stated the Hernandez had verbally abused her in public, tried to force his way into her home, sexually assaulted her, and followed her everywhere she went. Palos also noted in her petition that she had filed two PFA petitions in the past 12 months. The district court entered a temporary order of protection on the same day the petition was filed.

On October 12, 2010, Hernandez filed an answer to Palos' PFA petition. On that same day, the district court consolidated the PFA case with other cases pending between the parties regarding child support, custody, and visitation of their two children. On October 27, a final hearing was conducted on Palos' PFA petition, which Hernandez failed to attend. Accordingly, the district court granted the PFA order against Hernandez by default, such order to remain in effect until October 27, 2011.

On November 15, 2010, Hernandez filed a motion to vacate the final PFA order, arguing that he believed the matter was going to be heard on December 29, 2010, along with other issues pending in the consolidated cases. A hearing was conducted on April 26, 2011. The court heard arguments on the motion to vacate as well as issues

regarding the modification of child support, custody, and visitation of the parties' two children. After hearing arguments regarding the motion to vacate, the district court determined it was necessary to hear evidence relevant to the underlying merits of the PFA order before deciding whether to set aside the order. The district court reasoned that the allegations of abuse were relevant to deciding issues regarding custody and visitation of the children. Accordingly, the district court heard testimony from Regina Singleton, a licensed, master-level social worker who conducted a mental health evaluation on Palos; Rebecca Rodriguez-Pena, a bilingual victim advocate for the Kansas City, Kansas, police department who had met with Palos several times regarding complaints she had made against Hernandez; B.P., Palos' daughter, who testified about an incident she witnessed where Hernandez had choked Palos in a school parking lot; and Palos, who testified about this incident and described other instances of Hernandez threatening and stalking her. Hernandez also testified and denied ever threatening or physically abusing Palos.

After hearing this evidence, the district court granted Hernandez' motion to vacate the PFA order entered October 27, 2010, because Hernandez was confused about when the matter was scheduled to be heard and thus had not received "his day in court" to dispute whether a PFA order was warranted. Nevertheless, the district court granted Palos' request for a PFA order based on the evidence presented that day, which established by a preponderance of the evidence that Hernandez had abused Palos. The district court ordered the PFA to run from April 26, 2011 (the day of the hearing), until April 25, 2012.

ANALYSIS

1. *Jurisdiction*

On appeal, Hernandez argues the district court did not have jurisdiction over Palos' PFA petition. Specifically, Hernandez directs our attention to Palos' PFA petition, which

states that she filed two PFA petitions in the past 12 months, and K.S.A. 60-3111, which states that "[n]o person may use the procedure provided for in this act more than twice in any twelve-month period, except in the case of abuse of a minor." Applying the facts to the law, Hernandez claims K.S.A. 60-3111 precluded Palos from moving forward with her PFA petition and, consequently, prevented the district court from acquiring jurisdiction over the petition.

Assuming without deciding that K.S.A. 60-3111 establishes a jurisdictional requirement for bringing a PFA petition, the determination of whether the district court had jurisdiction over Palos' PFA petition raises a question of law over which this court's scope of review is unlimited. See *In re Marriage of Wherrell*, 274 Kan. 984, 987, 58 P.3d 734 (2002).

The record shows that on September 13, 2010, Palos filed a pro se PFA petition against Hernandez. The petition, which consisted of a form provided by the district court and filled out by Palos, see K.S.A. 2010 Supp. 60-3104(c), had a section where it asked Palos to note how many PFA petitions she had filed in the past 12 months, the dates on which the petitions were filed, the counties the petitions were filed in, and if any of the petitions filed involved the abuse of a minor child. Although Palos noted that she had filed two PFA petitions in the last 12 months, she failed to provide the other information requested in the form.

Despite Palos' failure to provide this information, the record further shows that Palos filed a PFA petition in Wyandotte County in August 2009. This petition was ultimately dismissed in September 2009 because Palos failed to appear at the hearing on the petition. There is no other evidence contained in the record to show that Palos filed other PFA petitions in the 12-month period prior to her current petition. It appears, then, that Palos' statement in the current PFA petition asserting she had filed two PFA petitions in the prior 12 months was made in error. Hernandez' answer to Palos' PFA petition

indicates as much because, in his response to Palos' claim regarding her prior PFA petitions, Hernandez identified the August 2009 PFA petition and the current petition as the only PFA petitions Palos had filed in the prior 12 months.

The record shows that when Palos filed her current PFA petition, she had not used the procedure provided for in the PFAA "*more than twice in any twelve-month period.*" (Emphasis added.) See K.S.A. 60-3111. Thus, K.S.A. 60-3111 did not bar Palos from proceeding with her current petition, nor did the statute prevent the district court from acquiring jurisdiction over the petition.

2. *Prima Facie Case of Abuse*

Next, Hernandez argues Palos failed to allege a prima facie case of abuse (as defined in K.S.A. 60-3102[a]) in her petition, which necessarily means the petition was legally insufficient to start proceedings under the PFAA. Specifically, Hernandez contends that the facts contained in the petition were "purely conclusory allegations of verbal abuse."

Notably, Hernandez failed to raise this argument before the district court. Issues not raised before the district court cannot be raised on appeal. *In re Care & Treatment of Miller*, 289 Kan. 218, 224-25, 210 P.3d 625 (2009). Regardless, we find no merit to Hernandez' argument.

To seek relief under the PFAA, an intimate partner or household member may file a verified petition with any district judge or with the clerk of the court alleging abuse by another intimate partner or household member. K.S.A. 2010 Supp. 60-3104(a). "Intimate partners or household members" are defined as "persons who are or have been in a dating relationship, persons who reside together or who have formerly resided together or

persons who have had a child in common." K.S.A. 60-3102(b). Furthermore, "abuse" is defined in part as:

"the occurrence of one or more of the following acts between intimate partners or household members:

"(1) Intentionally attempting to cause bodily injury, or intentionally or recklessly causing bodily injury.

"(2) Intentionally placing, by physical threat, another in fear of imminent bodily injury." K.S.A. 60-3102(a).

As mentioned above, the PFA petition at issue in this case was a form provided to Palos by the district court pursuant to K.S.A. 2010 Supp. 60-3104(c). On the form, Palos reported that she and Hernandez had been in a dating relationship, they had two children in common, and that Hernandez had caused her or attempted to cause her bodily injury and placed her in fear of imminent bodily injury by threatening her. When asked on the form to briefly describe why she was seeking a PFA order, Palos wrote: "Mr. Hernandez would verbally abuse me in public wherever I was and tried to force his way into my home—He follows me everywhere I go & at the hospital he tried to sexually assault me."

Based on the information contained in Palos' petition, we find sufficient facts to show that Palos and Hernandez were intimate partners or household members and that Palos suffered abuse from Hernandez, as defined in K.S.A. 60-3102(a). As such, Palos' petition was sufficient to initiate proceedings under the PFAA.

3. Sufficiency of the Evidence

Next, Hernandez argues that Palos failed to present sufficient evidence of abuse at the hearing to justify the district court's decision to grant the PFA order. Although he concedes there was evidence presented at the hearing to establish that he choked Palos in a school parking lot in August 2009, Hernandez contends this incident cannot serve as a

basis for finding that he abused Palos for a variety of reasons. First, Hernandez contends this was not an incident Palos specifically complained about in her 2010 PFA petition. Second, he contends that because the August 2009 incident was found to be unsubstantiated by a state agency and was the subject of Palos' first PFA petition, which ultimately was dismissed by the court, the incident could not serve as a basis for finding abuse. Finally, Hernandez contends that *Paida v. Leach*, 260 Kan. 292, 917 P.2d 1342 (1996), precludes a finding of abuse in the absence of evidence that Palos suffered substantial physical pain or an impairment of physical condition from being choked.

K.S.A. 60-3106(a) provides that within 20 days of filing a PFA petition, a hearing shall be conducted on the petition where "the plaintiff must prove the allegation of abuse by a preponderance of the evidence and the defendant shall have an opportunity to present evidence on the defendant's behalf." Accordingly, we review the district court's finding of abuse to see if it is supported by substantial competent evidence. *Trolinger v. Trolinger*, 30 Kan. App. 2d 192, 196, 42 P.3d 157 (2001), *rev. denied* 273 Kan. 1040 (2002). Substantial competent evidence possesses both relevance and substance and provides a substantial basis of fact from which the issue can be reasonably determined. *Evenson Trucking Co. v. Aranda*, 280 Kan. 821, 836, 127 P.3d 292 (2006). An appellate court views all the evidence in a light most favorable to the prevailing party, and it does not reweigh competing evidence or assess the credibility of witnesses. 280 Kan. at 836-37. This court must accept all evidence and inferences that support or tend to support the district court's finding as true, and this court must disregard all conflicting evidence. *Frick Farm Properties v. Kansas Dept. of Agriculture*, 289 Kan. 690, 709-10, 216 P.3d 170 (2009).

Palos and B.P. testified at trial about an incident in August 2009 where Hernandez choked Palos in a school parking lot. Although Hernandez lodged an objection at the start of B.P.'s testimony, the stated evidentiary basis for the objection was that B.P. was not competent to testify. There is no evidence to support a finding that Hernandez lodged an

objection on grounds that the incident was not one about which Palos specifically complained in her 2010 PFA petition. A party may not object at trial to the admission of evidence on one ground and then on appeal argue a different ground. *Butler v. HCA Health Svcs. of Kansas, Inc.*, 27 Kan. App. 2d 403, 435, 6 P.3d 871, *rev. denied* 268 Kan. 885 (1999). Furthermore, it is well established that a trial court has jurisdiction to decide only such issues as are raised by the pleadings or defined at a pretrial conference, *except new issues raised by evidence to which there is no objection*. See K.S.A. 2010 Supp. 60-215(b)(2) ("When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move at any time, even after judgment, to amend the pleadings to conform them to the evidence and to raise an unpleaded issue. *But failure to amend does not affect the result of the trial of that issue.*" [Emphasis added.]); K.S.A. 60-3109 (Except as otherwise provided in the PFAA, any proceeding under the PFAA shall be in accordance with chapter 60 of the Kansas Statutes Annotated.); see also *Febert v. Upland Mutual Ins. Co.*, 222 Kan. 197, 200, 563 P.2d 467 (1977); *Williams v. Evans*, 220 Kan. 394, 397, 552 P.2d 876 (1976).

Similarly, Hernandez failed to object to the evidence at issue on grounds that the incident was deemed unsubstantiated after an agency investigation or on grounds that the incident was the basis of Palos' 2009 PFA petition, which ultimately was dismissed because she failed to appear at the hearing. Again, issues not raised before the district court cannot be raised on appeal. *In re Care & Treatment of Miller*, 289 Kan. at 224-25.

This brings us to Hernandez' contention that the August 2009 incident cannot constitute abuse under the PFAA based on *Paida*. In *Paida*, the court was presented with an issue that required it to analyze the line between acceptable parental discipline of a child and unacceptable parental conduct that causes more than minor or inconsequential injury to a child. In particular, the court sought to limit district court discretion and intervention into the way that parents discipline their children. The court ultimately

concluded that when a parent is accused of physically abusing a child under the PFAA, there must be evidence that the parent caused the child substantial physical pain or an impairment of physical condition before a district court can make a finding of abuse to justify imposing a PFA order against the parent. 260 Kan. at 300-01.

In reaching this conclusion, the *Paida* court noted:

"The legislature defined abuse in the context of the [PFAA] and focused on protecting spouses. There undoubtedly are instances when discipline of children escalates into domestic violence which would warrant relief under the [PFAA], but discipline of children is not the chief evil at which the [PFAA] was aimed. *The principal purpose of the legislation was to provide relief for battered spouses or cohabitants.* [Citation omitted.] *The discipline of children and the abuse of spouses share little common ground.* Because these disparate family interactions fall under the same legislative enactment, the trial court can and should determine in light of all the circumstances in each individual case whether the plaintiff has shown abuse by a preponderance of the evidence. Those circumstances will include the age of the alleged victim and his or her relationship to the alleged abuser." (Emphasis added.) 260 Kan. at 300.

Subsequent cases have limited the application of *Paida's* holding to only cases of alleged physical abuse between a parent and child and have not applied the substantial-physical-pain-or-impairment-of-a-physical-condition standard to cases of alleged physical abuse between current or former spouses, lovers, or cohabitants. See *Crim v. Crim*, 40 Kan. App. 2d 367, 372, 196 P.3d 375 (2008); *Trolinger*, 30 Kan. App. 2d at 197 (noting that *Paida* did "not establish a bright line rule that the victim must actually show that he or she has shed blood or suffered real physical pain in order to obtain an order which may avoid that circumstance"). Furthermore, "abuse" is broadly defined in K.S.A. 60-3102(a) and does not require a victim to actually suffer bodily injury before a finding of abuse can be made. In fact, a defendant can be found to have committed abuse by

merely *attempting* to cause bodily injury or by intentionally placing, by physical threat, another in fear of imminent bodily injury. See K.S.A. 60-3102(a)(1), (a)(2).

Because Hernandez failed to object to the district court considering the August 2009 incident in determining whether he abused Palos, and because his contention that the August 2009 incident cannot constitute abuse under *Paida* is without merit, we properly may consider whether that incident, as well as other evidence presented at the hearing, constitutes substantial competent evidence supporting the district court's finding that Hernandez abused Palos as defined in K.S.A. 60-3102(a).

A review of the evidence shows that Singleton, a licensed, master-level social worker, testified that she conducted a mental health evaluation of Palos. Singleton met with Palos on three occasions between December 2010 and March 2011 for a total of 8 hours. During these sessions with Singleton, Palos described one instance where Hernandez had come into her home, threw her against a wall, choked her, and threatened to kill her. Palos conveyed to Singleton that she believed Hernandez possessed the ability to kill her. Palos also described instances of sexual abuse where Hernandez would throw her on a bed, grab her hands and pull them up over her head, rip her clothes off, and tell her that if he ever found out that other men were having sex with her, she would pay. Based on the acts Palos described during these sessions, and her demeanor while describing the acts, Singleton diagnosed Palos as having posttraumatic stress disorder and depression. Singleton recommended to Palos that she participate in a women's domestic violence survivor group and individual therapy sessions to address anxiety and trauma issues resulting from the abuse she suffered from Hernandez.

Rodriguez-Pena, a bilingual victim advocate for the Kansas City, Kansas, police department, testified that in 2007, Palos contacted her complaining that Hernandez had pushed her and was forcing her to have sex with him. Rodriguez-Pena said that when Palos was conveying this information to her, she was very frightened. When she

discussed with Palos about filing a PFA petition at that time, Rodriguez-Pena stated that Palos was very apprehensive about going through with such a proceeding because Hernandez had threatened to have her deported if she pressed criminal charges against him or attempted to serve him with legal documents. Palos also said that Hernandez had told her that if she was ever deported, she would never see her kids again because they were United States citizens. Rodriguez-Pena also noted that in June 2010, Palos filed a police report complaining that when Hernandez would come to her residence for the purpose of visiting their children, he would use the time instead to make unwanted sexual advances on her.

In addition to this evidence, Palos and B.P. testified about an incident in August 2009 where Hernandez choked Palos in a school parking lot. Palos also testified that during the summer of 2010, Hernandez was constantly calling her on the phone, coming to her home in the middle of the night, and would constantly "find" her whenever she went out in public. She also said that Hernandez would call B.P. and tell her that he was going to kill Palos. Palos said that Hernandez had become more violent and aggressive as time had passed and that his behavior since August 2009 had caused her to be in fear of her life and to feel that she was in immediate danger.

Based on this evidence, we find substantial competent evidence to support the district court's finding that Hernandez had abused Palos as defined in K.S.A. 60-3102(a)(1) and (a)(2). The evidence indicates that Hernandez intentionally caused or attempted to intentionally cause bodily injury to Palos and that he intentionally placed Palos, by physical threat, in fear of imminent bodily injury.

4. Effective Date of the PFA Order

As noted above, the district court entered a 1-year PFA order against Hernandez on October 27, 2010, after he failed to appear at the hearing on that day. Hernandez

subsequently filed a motion to vacate the order, arguing that he believed the hearing was scheduled for December 29, 2010. On April 26, 2011, a hearing was conducted to hear arguments on the motion as well as consider other closely related issues regarding the modification of child support, custody, and visitation of the parties' children. After hearing arguments from the parties, the district court decided to hear evidence relevant to the underlying merits of the PFA order before deciding whether to set aside the order. The district court reasoned that the allegations of abuse were relevant to deciding issues regarding custody and visitation of the children. At the conclusion of the hearing, the district court decided to grant Hernandez' motion to vacate the judgment based on the reasoning that Hernandez had not received "his day in court" to dispute Palos' allegations of abuse. The district court, however, ultimately granted Palos' request for a PFA order based on the evidence it had heard that day. The district court ordered the PFA order to run from the day of the hearing until midnight on April 25, 2012.

Hernandez argues that the district court erred when it ordered the new PFA order to run until April 25, 2012. Hernandez argues that the district court should have set the PFA order to expire on October 27, 2011, so he could receive "credit" for time he was under the command of the vacated PFA order established on October 27, 2010. In support of this argument, Hernandez notes that K.S.A. 2010 Supp. 60-3107(e) states that "a protective order . . . shall remain in effect until modified or dismissed by the court and shall be for a fixed period of time not to exceed one year, except that, on motion of the plaintiff, such period may be extended for one additional year." Accordingly, Hernandez contends that by ordering the new PFA order to run until April 25, 2012, the district court, without receiving a request from Palos to do so, extended the duration of the PFA order beyond the 1-year time period of K.S.A. 2010 Supp. 60-3107(e).

Whether the district court violated K.S.A. 2010 Supp. 60-3107(e) by setting the PFA order's expiration date on April 25, 2012, raises a question of law subject to unlimited review. See *Owen Lumber Co. v. Chartrand*, 283 Kan. 911, 915, 157 P.3d 1109

(2007) (The interpretation of a statute is a question of law over which this court has unlimited review.).

As a preliminary matter, we find it significant to note that Hernandez actually caused the situation about which he now complains about on appeal. If Hernandez had not filed a motion to vacate the October 27, 2010, PFA order, the order would have expired on October 27, 2011, the date he now asks this court to establish as the end date for the current PFA order. "A party may not invite error and then complain of that error on appeal. [Citation omitted.]" *Butler County R.W.D. No. 8 v. Yates*, 275 Kan. 291, 296, 64 P.3d 357 (2003). Regardless, when a district court sets aside a judgment, the status of the parties prior to the judgment is restored, and the issues between the parties stand again for trial or for such other disposition as may be appropriate to the situation. See *Ahern v. Fankhouser*, 189 Kan. 506, 508, 370 P.2d 98 (1962); *Dimit v. Bradshaw*, 186 Kan. 220, 222, 350 P.2d 131 (1960); *Voth v. Thompson*, 178 Kan. 539, 542-43, 289 P.2d 733 (1955).

Thus, when the district court decided to set aside the October 2010 PFA order, the status of the parties prior to the judgment was restored, *i.e.*, it was as if the PFA order never existed. Consequently, the issue of whether a PFA order should be granted against Hernandez remained pending and could be decided anew at the April 26, 2011, hearing. Based on the evidence presented at the hearing establishing that Hernandez abused Palos, the district court properly granted the PFA order and, in compliance with K.S.A. 2010 Supp. 60-3107(e), set April 25, 2012, as the expiration date for the order—a time period not exceeding 1 year. Accordingly, we find no merit to Hernandez' argument concerning the time period of the PFA order.

Affirmed.