NOT DESIGNATED FOR PUBLICATION

No. 110,753

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

SARAH MYERS,
Appellee,

v.

TANNER MYERS,
Appellant.

MEMORANDUM OPINION

Appeal from Riley District Court; DAVID L. STUTZMAN, judge. Opinion filed July 18, 2014. Affirmed.

Brenda J. Bell, of Brenda J. Bell, P.A., of Manhattan, for appellant.

Sarah R. Myers, appellee pro se.

Before ARNOLD-BURGER, P.J., BUSER and SCHROEDER, JJ.

Per Curiam: Tanner Myers appeals from an order of protection from abuse (PFA) based on the petition of his wife, Sarah Myers. Sarah sought the PFA order on behalf of herself and the parties' minor child, A.M. Finding no error by the district court in granting the PFA for Sarah's benefit only, we affirm.

FACTS

On June 28, 2013, Sarah filed a verified petition for a protection from abuse order. In the petition, Sarah stated she sought protection from abuse because Tanner had caused

her bodily injury. She further stated Tanner had forced her to have sex, hurt her physically, denied her control over her money and possessions, treated her like a child, and made her feel dumb by telling her she was not a smart person. The district court entered a temporary PFA order on June 28, 2013.

At a hearing on July 23, 2013, Sarah testified that Tanner "'hurt [her] very badly. Not only physically, but mentally.'" Tanner was not sympathetic to Sarah's physical pain during sex. Sarah went into great detail about her injuries and suffering and we deem it unnecessary to repeat her allegations in detail.

Sarah' sister-in-law, Judith Whelchel, testified about her conversations with Sarah and Sarah's difficulty and problems with having sex with Tanner. Sarah's brother, Robert Whelchel, also testified about his conversations with Tanner about sex with Sarah. "He just specified on basically how it seems like he's always got to beg."

Tanner testified on his own behalf:

> "There's things that was in that—that PFA that—I will not contest to as far as, you know, specific things as far as we've belittled each other. We've had normal marriage fights. I have talked down to her. I probably have made her feel that she's not as smart as me. We've both done the same thing to each other. But that, I couldn't contest. But when the two things that I was amazed, or I just couldn't believe is the sexual abusive part, and as well as the—the last part she said she's scared of me, because I have never, ever physically harmed her in any way, her or [A.M.]"

Tanner also denied forcing Sarah to have sex or continuing to have sex with her after she told him to stop:

> "I haven't forced sex on my wife. I plead and beg for sex. It's been like this throughout our marriage. And especially after I know Sarah had a trauma with [A.M.] being born.

> But I—I have never physically forced her. I've never pushed her into the bedroom. I've never made—you know, forced her to take off her clothes. You know, when I ask her and then she either says no, and no is no, or she says 'Let's just get over—let's just get it over with,' is what her answer is.
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> . . . .
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> ". . . [I]f she says 'stop,' I stop."

The district magistrate judge entered a final PFA order on July 23, 2013. The order applied to both Sarah and to A.M. Tanner timely appealed to the district court. On September 3, 2013, the district court modified the final PFA order on de novo review, finding Sarah did not allege any abuse of A.M. The district court also granted joint legal custody of A.M. to both parties with primary physical custody awarded to Sarah. In all other respects, the district court affirmed the final PFA order.

Tanner filed a motion to alter or amend judgment on September 27, 2013. He argued the district magistrate judge took a "scattergun" approach to factfinding and the district court judge did not make any formal findings of fact or conclusions of law. In an order filed October 16, 2013, the district court judge clarified that his de novo review "found that there was persuasive evidence, to a standard of preponderance of the evidence, to support the allegation of abuse, as defined in K.S.A. 60-3102(a)(1), by recklessly causing bodily injury," and denied Tanner's motion for additional findings or to alter or amend judgment. Tanner has timely appealed.

ANALYSIS

Tanner contends the district court's PFA order "was not supported by substantial competent evidence." Specifically, Tanner argues Sarah's testimony was "inconsistent." He also argues there was no evidence he was reckless. Lastly, Tanner suggests that Sarah's only motivation in filing the PFA petition was to secure a more favorable custody outcome in a divorce proceeding.

In reviewing a sufficiency challenge, this court construes the evidence in the light most favorable to the party prevailing below and in support of the challenged ruling. *Redondo v. Gomez*, No. 109,642, 2014 WL 802268, at *2 (Kan. App.2014) (unpublished opinion); *cf. In re Adoption of Baby Girl P.*, 291 Kan. 424, 430, 242 P.3d 1168 (2010). An appellate court will neither reweigh the evidence generally nor make credibility determinations specifically. See *Unruh v. Purina Mills*, 289 Kan. 1185, 1195, 221 P.3d 1130 (2009); *Hodges v. Johnson*, 288 Kan. 56, Syl. ¶ 7, 199 P.3d 1251 (2009) (an appellate court reviews a trial judge's findings of fact only to determine if they are supported by competent evidence and will not make credibility determinations or reweigh evidence).

The Protection From Abuse Act, K.S.A. 60-3101 *et seq.*, defines abuse as "[i]ntentionally attempting to cause bodily injury, or intentionally or recklessly causing bodily injury" when such an act occurs "between intimate partners or household members." K.S.A. 60-3102(a)(1). Intimate partners or household members are "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). A dating relationship is "a social relationship of a romantic nature." K.S.A. 60-3102(c). Before a district court may issue a final PFA order, the "plaintiff must prove the allegation of abuse by a preponderance of the evidence." K.S.A. 2012 Supp. 60-3106(a). "Reckless" behavior is "[c]haracterized by the creation of a substantial and unjustifiable risk of harm to others and by a conscious (and sometimes deliberate) disregard for or indifference to that risk." Black's Law Dictionary 1385 (9th ed. 2009).

Here, the district court found Tanner "recklessly caused bodily injury to [Sarah] as she alleged, occurring during acts of sexual intercourse." Reviewing the evidence in the light most favorable to Sarah, the prevailing party below, we find sufficient support for the district court's factual finding. We highlight the following facts introduced at the hearing:

- Tanner and Sarah were married at the time Sarah filed the PFA petition;
- The parties lived together and had a minor child together;
- Tanner knew the birth of A.M. caused Sarah trauma;
- Tanner continued to have sex with Sarah after she asked him to stop due to discomfort and pain;
- Sarah's injuries included pain and vaginal bleeding.

Tanner does not argue the parties were not intimate partners or household members. The record reflects Tanner knew Sarah experienced trauma during the birth of A.M. but disregarded the unjustifiable risk of injuring Sarah by continuing to have sex with her even when she asked him to stop. Because injury resulted from that disregard, the district court did not err in concluding Tanner caused reckless bodily injury to Sarah during acts of sexual intercourse.

We need not address Tanner's suggestion that Sarah only filed the PFA petition to secure a more favorable custody outcome in a divorce proceeding. The issue was not raised before the district court judge and therefore is not properly preserved for appeal. See Supreme Court Rule 6.02(a)(5) (2013 Kan. Ct. R. Annot. 39) (requiring an appellant to explain why an issue not raised below should be considered for the first time on appeal); *State v. Breeden*, 297 Kan. 567, 574, 304 P.3d 660 (2013) (declining to consider issue for this reason).

CONCLUSION

We cannot reweigh the contradictory evidence given by Tanner and Sarah on appeal. Instead, we view the evidence in the light most favorable to the prevailing party, Sarah. Under that standard of review, we find a preponderance of the evidence supported the district court's factual findings that Tanner recklessly caused bodily injury to Sarah, supporting the issuance of the final PFA order.

Affirmed.