NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT O.P. 65.37

COLLEEN ABEL	:	IN THE SUPERIOR COURT OF PENNSYLVANIA
v.	:	
JASON ACERRA	:	
Appellant	:	No. 790 WDA 2023

Appeal from the Order Entered June 9, 2023
In the Court of Common Pleas of Allegheny County Family Court at No(s): Case No. FD-14-007297-005

BEFORE: BOWES, J., KUNSELMAN, J., and MURRAY, J.

MEMORANDUM BY BOWES, J.: **FILED: January 22, 2024**

Jason Acerra ("Father") appeals from the final protection from abuse ("PFA") order entered on the PFA petition filed by Colleen Abel ("Mother") on behalf of their minor child, S.A. We affirm.

At the time Mother filed the underlying PFA petition against Father in August 2022, the two had divorced and were involved in an ongoing dispute regarding the custody of their children, S.A., born in March 2009, and C.A., born in August 2011. Mother filed this PFA petition after S.A. disclosed sexual abuse committed by Father on July 25, 2022, during his period of custody in Hampton Township.[1] Simultaneously, Butler County Children and Youth

[1] The petition also proffered that Father had physically and emotionally abused C.A. during Father's periods of custody, but the PFA hearing and final order solely focused on the sexual abuse allegations and protecting S.A. We note that, even had the initial petition only concerned the sexual abuse allegations,
(Footnote Continued Next Page)

Services ("CYS"), Allegheny County Children, Youth, and Families ("CYF"), and the Hampton Township police department investigated the allegations of abuse. The trial court entered a temporary PFA order but continued the final hearing until June 2023 to allow time for the other investigations to unfold and to conduct their own investigatory interviews. Ultimately, CYS and CYF closed the case as unfounded.

On June 7, 2023, the trial court conducted an *in-camera* interview of S.A., then fourteen years old. She detailed that Father had called her into a room at his house on July 25, 2022, and touched her breast under her shirt. Additionally, she relayed that, after this occurred, she remembered Father doing the same thing approximately three times in 2017, when Father lived in Cranberry Township.

The court held the final hearing the next day. Mother and Lindsey Nelis, S.A.'s therapist, testified regarding S.A.'s disclosures and her demeanor following the July 25, 2022 incident. Mother explained S.A.'s panicked behavior through text messages and phone calls following the incident, and that she was "really upset" and "teary eyed" when she returned to Mother's home on July 27, 2022. ***See*** N.T. Hearing, 6/8/23, at 85-86. Ms. Nelis

---

Mother properly proceeded under the PFA, and not the Protection of Victims of Sexual Violence or Intimidation, 42 Pa.C.S. §§ 62A01-62A20, which serves as a "counterpart" to the PFA and "applies to victims of sexual violence whose attackers are not members of their family or household." ***In re R.H.M.***, 303 A.3d 146, 149 (Pa.Super. 2021) (cleaned up).

testified about S.A.'s disclosures of abuse, as well as her shaken behavior, continued fear, and discomfort with the investigatory interviews.

In his defense, Father presented testimony from both a CYS caseworker and CYF caseworker regarding their determinations that the case was unfounded. The CYS caseworker explained that their guideline thresholds for an indicated or founded status were not met because S.A. did not suggest during the forensic interview that Father's actions were "for gratification and also like there was no penetration or anything like that." ***Id***. at 9. As for CYF, the caseworker testified that while there were differences between the two CYF interviews and there ultimately was not substantial evidence of child abuse, S.A. was nonetheless consistent regarding where and how she was touched. ***See id***. at 154.

Father also presented testimony from a Cranberry Township detective about his investigation into the 2017 allegations of abuse, which he ultimately closed as unfounded due to a lack of evidence, as well as his prior investigations into other instances of alleged abuse by Father against C.A. Finally, Father's girlfriend testified regarding the activities that she, Father, and S.A. did during Father's period of custody surrounding July 25, 2022.

After taking the matter under advisement, the court entered a one-year final PFA order to protect S.A. from Father, with an expiration of June 9, 2024. This timely appeal followed. Ultimately, both Father and the trial court complied with Pa.R.A.P. 1925. Father presents the following issues for our review:

I. Did the [trial court] abuse its discretion in entering a final [PFA] order when the evidence did not support a finding of abuse by the preponderance of the evidence?

II. Did the [trial court] abuse its discretion in determining that the minor child had a reasonable fear of imminent abuse?

III. Did the [trial court] commit an error of law in permitting the hearsay testimony of Lindsey Nelis?

IV. Did the [trial court] abuse its discretion by permitting Lindsey Nelis to provide opinion testimony and evidence that S.A.'s behaviors are a result of [Father's] alleged conduct?

Father's brief at 6 (numbering altered and reordered, cleaned up).

We begin with Father's contention that Mother failed to sustain her burden of establishing the need for a PFA order on behalf of S.A., in light of our well-settled standard of review. "In the context of a PFA order, we review the trial court's legal conclusions for an error of law or abuse of discretion." ***E.K. v. J.R.A.***, 237 A.3d 509, 519 (Pa.Super. 2020) (cleaned up). To obtain a final PFA order, the petitioner must establish abuse by a preponderance of the evidence, that is, "the greater weight of the evidence, *i.e.*, enough to tip a scale slightly." ***Id***. (cleaned up).

When the defendant in a PFA petition challenges the sufficiency of the evidence to sustain the PFA order, we view the evidence admitted in the light most favorable to the petitioner, "granting her the benefit of all reasonable inferences[.]" ***Id***. (cleaned up). Since trial courts observe the witnesses firsthand, we defer to their credibility assessments. ***Id***.

Regarding the specific elements that had to be proven by a preponderance of the evidence in this case, the PFA Act defines "abuse" as follows:

> **"Abuse."** The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:
>
> > (1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.
> >
> > (2) Placing another in reasonable fear of imminent serious bodily injury.
> >
> > (3) The infliction of false imprisonment pursuant to 18 Pa.C.S. § 2903 (relating to false imprisonment).
> >
> > (4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).
> >
> > (5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

23 Pa.C.S. § 6102. This Court has further explained:

> The purpose of the PFA Act is to protect victims of domestic violence from those who perpetrate such abuse, with the primary goal of advance prevention of physical and sexual abuse. In the context of a PFA case, the court's objective is to determine whether the victim is in reasonable fear of imminent serious bodily

> injury. Past acts are significant in determining the reasonableness of a PFA petitioner's fear.

E.K., ***supra*** at 519 (cleaned up).

Father argues that the evidence was insufficient to support the final PFA order because S.A.'s testimony was vague and there were "dramatic differences between S.A.'s testimony and Ms. Nelis's recollection of their session." Father's brief at 22 (typographical errors corrected). Moreover, he alleges that "the evidence presented by Mother lack[ed] any consistency regarding the alleged location, time of day, or type of action that occurred." ***Id***. at 24. Furthermore, Father claims that Mother could not establish that S.A. was in fear because S.A. never explicitly testified that she was afraid of Father. ***See id***. at 26. Finally, Father posits that the court could not rely on Ms. Nelis's testimony to support S.A.'s fear because such evidence was inadmissible.

At the outset, we observe that in conducting our sufficiency review, Pennsylvania courts "consider all evidence that was actually received without consideration of whether the evidence was properly admissible." ***T.M. v. Janssen Pharms. Inc.***, 214 A.3d 709, 727 n.19 (Pa.Super. 2019) (cleaned up). Accordingly, we decline Father's invitation to ignore Ms. Nelis's testimony in conducting our sufficiency review.

Regarding the finding of abuse, the court credited S.A.'s testimony during the *in-camera* interview, which it explained was corroborated by her forensic interview. The court rejected Father's emphasis on the inconsistencies, instead finding that S.A. had given multiple statements and

they "were generally the same with regard to where and how the abuse occurred." Trial Court Opinion, 8/15/23, at 13 (citation omitted). Moreover, the court credited the text messages between S.A. and Mother on July 25, 2022, which it found demonstrated Mother's concern for her daughter and not an attempt to gain leverage in the ongoing custody proceedings. ***Id***.

Upon review, we hold that the court's conclusions and credibility determinations are supported by the certified record. S.A. consistently stated in her investigatory interviews, in sessions with Ms. Nelis, and during the *in-camera* interview with the trial court that on July 25, 2022, Father invited her into a bedroom at his house and groped her breast beneath her shirt and over her bra. While she provided more details to her therapist, those additional details did not render the other accounts inconsistent. ***See*** N.T. Hearing, 6/8/23, at 31 (Ms. Nelis testifying that S.A. disclosed that while Father was intoxicated, he beckoned her into a bedroom, exposed himself, and touched her breast under her shirt); ***see also id***. at 120-21 (Mother testifying that S.A.'s initial disclosure to her on July 27, 2022, was that Father had called her into a room while he was watching pornography, which she thought initially was a Zoom conference call, and "she saw his thingy"). Indeed, when told that S.A. only included limited details in her accounting to the court and in the investigatory interviews, Ms. Nelis explained that S.A. feared Father was listening to the interviews and that "she struggles to share openly with people that she's not familiar with." ***Id***. at 40-41, 75.

With respect to S.A.'s fear of Father, the court inferred S.A.'s fear from her answers to the court's questioning of whether she wanted to see Father again. This exchange followed the court's question:

> S.A.: I don't know.
>
> Court: You don't know?
>
> S.A.: No, I haven't really thought about it because I don't like thinking about stuff that makes me feel uncomfortable.

N.T. Interview, 6/7/23, at 20. In addition, the court credited Ms. Nelis's testimony that S.A. had reported being afraid of Father. ***See*** Trial Court Opinion, 8/15/23, at 11-12 (citing N.T. Hearing, 6/8/23, at 34). Based on S.A.'s stated "discomfort when considering seeing Father again, as well as the statements of her therapist, the court reasonably concluded that she was fearful of both imminent and serious abuse as defined by the PFA Act." ***Id***. at 12 (cleaned up). The certified record bears out this conclusion and we discern no error in the court's inference regarding S.A.'s testimony. Ms. Nelis's testimony bolstered the inference that S.A. was afraid of Father following the July 25, 2022 incident. ***See*** N.T. Hearing, 6/8/23, at 34, 38-39, 48-49 (explaining S.A.'s sleep disturbances following the incident, being "very emotionally reactive[,]" and her fear of retaliation from Father).

We next turn to Father's claims challenging the admissibility of Ms. Nelis's testimony. The admissibility of evidence lies "within the sound discretion of the trial court" and will only be overturned upon "an abuse of

that discretion." ***Commonwealth v. Wallace***, 289 A.3d 894, 900 (Pa. 2023) (cleaned up). Father's first objection is that the trial court improperly admitted hearsay. ***See*** Father's brief at 14. Our Supreme Court has expressed that "[b]ecause hearsay is presumptively unreliable and unworthy of belief, it generally is barred from admission in courts of law." ***Commonwealth v. Fitzpatrick*,** 255 A.3d 452, 458 (Pa. 2021) (footnote omitted). While the line between hearsay and non-hearsay "can be difficult to discern[,]" for a statement to be considered hearsay, it "first must be uttered out-of-court, and then it must be offered in court for the truth of the matter asserted in the statement." ***Wallace***, ***supra*** at 904 (cleaned up); Pa.R.E. 801(c).

On appeal, Father argues that Ms. Nelis's testimony about "statements made to her by S.A. regarding the allegation of sexual abuse" were inadmissible hearsay. Father's brief at 14. Additionally, he assails the court's "reliance on hearsay to support a determination that S.A. was fearful of Father." ***Id***. at 16. Namely, Father challenges Ms. Nelis's testimony that S.A. conveyed feeling afraid of him. ***Id***. at 16-17. However, while Father objected to Ms. Nelis testifying about S.A.'s statements concerning the allegations of abuse, he did not object to the portion of Ms. Nelis's testimony pertaining to S.A.'s statements of fear. ***See*** N.T. Hearing, 6/8/23, at 20-21 ("I wasn't objecting to her testifying overall, I just believe it is inappropriate for her to testify as to what the child told her with regard to the allegations."). Therefore, Father waived any challenge to the admissibility of that evidence

on hearsay grounds. ***See*** Pa.R.A.P. 302(a) ("Issues not raised in the trial court are waived and cannot be raised for the first time on appeal."). Instead, we will focus on the preserved issue of whether the court erred in overruling Father's hearsay objection to Ms. Nelis's testimony about S.A.'s disclosures of sexual abuse.

Here, the trial court explained in its Rule 1925(a) opinion that it did not view Ms. Nelis's testimony regarding S.A.'s disclosures for the truth of the matter asserted in those statements, *i.e.*, that Father committed those specific acts against S.A. ***See*** Trial Court Opinion, 8/15/23, at 6. Rather, "the court only consider[ed S.A.'s] statement as described by Ms. Nelis in order to evaluate the consistency between [S.A.'s] telling of events in the days following the alleged incident and her recounting thereof almost a year later during her *in-camera* interview." ***Id***. The court clarified that "[a]t no point did the [c]ourt rely on the child's statement as testified to by Ms. Nelis in making a final determination[,]" instead basing its decision on, *inter alia*, "the allegations contained in [S.A.'s] testimony, which Father never denied." ***Id***.

In other words, the court did not regard the statements for the truth of the matter asserted in them, but rather as prior consistent statements in assessing S.A.'s credibility. Prior consistent statements are governed by Pa.R.E. 613, which provides in pertinent part as follows:

> **(c) Witness's Prior Consistent Statement to Rehabilitate.** Evidence of a witness's prior consistent statement is admissible to rehabilitate the witness's credibility if the opposing party is given an opportunity to cross-examine the witness about the statement

> and the statement is offered to rebut an express or implied charge of:
>
> > (1) fabrication, bias, improper influence or motive, or faulty memory and the statement was made before that which has been charged existed or arose[.]

Pa.R.E. 613.

It was apparent that Father's defense was to cast S.A.'s allegations during her *in-camera* interview as fabricated and improperly influenced by Mother to gain favor in the custody proceedings. Therefore, we readily conclude that there was an implied charge of fabrication and improper influence or motive. As for the second requirement, that the opposing party have the opportunity to cross-examine the witness regarding the statement, Father argues that he did not have such an opportunity here. ***See*** Father's brief at 15-16. While the trial court entered an order directing that S.A.'s testimony from the *in-camera* interview would be incorporated into the record and that she would not be recalled during the final hearing, the court expressly left open the possibility that S.A. could be recalled if requested and good cause was shown. Father similarly had the opportunity to cross-examine Ms. Nelis regarding the statements and availed himself of that opportunity. Following Ms. Nelis's testimony, he also had the option to seek leave to recall and cross-examine S.A. about the statements she had made to Ms. Nelis. Declining to pursue cross-examination of S.A. does not equate to not having the opportunity to do so. Therefore, Father had the opportunity to cross-examine both Ms. Nelis and S.A.

Based on the foregoing, we discern no abuse of discretion on the trial court's part in admitting this testimony to assess S.A.'s credibility as a prior consistent statement and not for the truth of the matter asserted.

Finally, Father contends that the trial court erred in permitting Ms. Nelis to "opine [about S.A.'s] diagnosis and connecting [her] behaviors to a response to a[n] alleged trauma" because that "crossed into the territory of expert rather than layperson opinion." Father's brief at 19. Additionally, he assails the admission of Exhibit 2, a letter Ms. Nelis had written to S.A.'s school to excuse her from a standardized test, as an inadmissible expert report and as hearsay. ***Id***. at 19-21.

Father's complaints are wholly belied by the record. As summarized by the trial court:

> at no point was Ms. Nelis offered or qualified as an expert witness. When she testified on issues regarding her sessions with [S.A.], the court understood that her testimony was to be based purely on her perception and not based on specialized knowledge that is beyond that possessed by the average layperson.

Trial Court Opinion, 8/15/23, at 7 (citation omitted). In fact, the trial court sustained Father's objections to Ms. Nelis's testimony as to the general behavior of traumatized children, limiting her testimony to her personal observations of S.A.'s behavior. ***See*** N.T. Hearing, 6/8/23, at 45-47. Our review of the testimony confirms the court's conclusion that Ms. Nelis only testified as a lay witness and was not permitted to provide testimony regarding a diagnosis of trauma or the general behaviors associated with a trauma diagnosis.

Turning to the admission of the challenged letter, the following exchange occurred at the final PFA hearing:

> Father's counsel: I'm going to object because this letter was prepared, I'm assuming, for the school - - . . . to exempt her, not for the court. It wasn't something that was prepared. **It's not a report that I had an opportunity to review in advance. It's not relevant to these proceedings.**
>
> Mother's counsel: This is a child who is still to this day under stress. In March of 2023 she was under stress and still to this day she is under stress. Those were my final questions, Your Honor.
>
> Court: Okay, Exhibit 2 will be admitted over objection.

N.T. Hearing, 6/8/23, at 66-67 (emphasis added).

Father now argues that the letter was an inadmissible expert report because it was not disclosed, and that this objection encompassed a hearsay objection. We disagree with Father's characterization of his objection to the letter. First, Father did not argue at trial that the letter constituted an expert report that needed to be disclosed. Indeed, he challenged the letter, in part, because it was **not** prepared for court. This expressly undercuts his attempt now to couch the letter as an expert report because an expert report would, by definition, have been prepared for court. Second, Father did not set forth any argument at trial that could be interpreted as a hearsay challenge to the letter. Moreover, his Rule 1925(b) statement identified no such issue, instead claiming without elaboration that the trial court erred in admitting the letter.

See Pa.R.A.P. 1925(b) Statement, 7/28/23, at ¶ 3(f). Accordingly, any challenge in that regard is waived.[2] ***See*** Pa.R.A.P. 302(a). Rather, we conclude that Father's objection at trial was that the letter was a "report" that he did not have "an opportunity to review in advance[,]" and that it was irrelevant. ***Id***. Since he did not explain why he was entitled to review it beforehand, we turn our focus to his relevancy argument.

Rule 401 provides that "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Pa.R.E. 401. In its Rule 1925(a) opinion, the court explained that it "found the letter to be relevant in determining whether [S.A.] continued to carry the trauma described by Ms. Nelis in the weeks and months following the alleged events which gave rise to the PFA." ***Id***. We note that the trial court's verbiage at first glance smacks of an expert opinion. However, we understand the court's phrase of "carry[ing] the trauma" not as a finding of trauma pursuant to any medical definition, but rather as a common expression indicating that S.A. continued to be negatively affected by the incident, which was relevant to

---

[2] Even if Father had objected to the letter as being an inadmissible expert report, we already determined that Ms. Nelis was not admitted as an expert witness. Moreover, while the letter included S.A.'s diagnoses, the relevancy of the letter was, as discussed in the body of this memorandum, to demonstrate the continued stress on S.A. as it pertained to her credibility. ***See*** Trial Court Opinion, 8/15/23, at 8 (indicating that it overruled Father's objection regarding nondisclosure of the letter because the letter did not constitute an expert report that needed to be turned over prior to trial). Thus, we do not find that the letter constituted an expert report and nondisclosure prior to trial did not impact its admissibility.

ascertaining her credibility regarding the disclosure of sexual abuse. Thus, upon review, we discern no error in the trial court's conclusion that the letter was relevant.

Based on the foregoing, we affirm the final PFA order.

Order affirmed.

Judgment Entered.

Benjamin D. Kohler

Benjamin D. Kohler, Esq.
Prothonotary

DATE: 01/22/2024