

IN THE COURT OF COMMON PLEAS OF LYCOMING COUNTY, PENNSYLVANIA

FELICIA LEONARD,	:	
Appellant	:	No. FC-20-20350
	:	
v.	:	
	:	Superior Court Docket:
DUKE KERSHNER (HARRINGTON	:	
KERSHNER, IV),	:	1192 MDA 2020
Appellee	:	APPEAL

Date: October 27, 2020

OPINION IN SUPPORT OF THE COURT'S ORDER
IN COMPLIANCE WITH RULE 1925(a) OF THE
RULES OF APPELLATE PROCEDURE

Felicia Leonard (hereinafter referred to as "Appellant") files this appeal following the denial of a Final Protection From Abuse Order on August 13, 2020. Appellant's Notice of Appeal was timely filed on September 11, 2020. Appellant timely filed her Concise Statement of Errors Complained of on Appeal on October 5, 2020 citing the following matters complained of which the Court will address separately:

1. Whether the trial court abused its discretion and/or committed errors of law by misapplying the preponderance of the evidence standard, particularly when Defendant did not contradict any of the evidence relied upon by the Court to deny a directed verdict.

"A preponderance of the evidence is 'the greater weight of the evidence, *i.e.*, to tip a scale slightly is the criteria or requirement for preponderance of the evidence.' *In re Navarra*, 185 A.3d 342, 354 (Pa. Super. 2018), *citing to Raker v. Raker*, 847 A.2d 720, 724 (Pa. Super. 2004). Judging the credibility of each witness is a large part of determining whether the Plaintiff has met her burden of proof. The Superior Court of Pennsylvania has held that generally, the trial court's judgment regarding credibility of

witnesses will be upheld. *Hood-O'Hara v. Wills*, 873 A.2d 757, 762 (Pa. Super. 2005) (“We will not overturn the credibility determination of the judge”); *Com. v. La*, 640 A.2d 1336, 1351 (Pa. Super. 1994) (“Where the credibility of a witness is at issue, the trial court's judgment will remain undisturbed on appeal”).

In this case, the credibility of each witness as determined by the Court played a large role in the outcome of the case, especially considering the alleged victims did not testify and therefore, no statement made by them were admitted into evidence. The Court agrees that the Defendant did not contradict most or all the evidence presented by the Plaintiff. However, after the Court denied the Defendant’s oral motion for directed verdict, the Defendant testified as to the reasons his actions. For example, there was evidence presented that Defendant keeps food in his bedroom such as candy and other sweets. Defendant explained that he does so because he and his wife are both diabetic. There was also evidence that Defendant kisses the minor children on the lips. Defendant explained that the children will kiss his cheek when they get home and sometimes, although infrequently, he will accidentally turn his head to look at the child and catch the edge of her lip. The Court found that Defendant provided reasonable explanations and generally found Defendant’s testimony credible.

2. Whether the trial court abused its discretion and/or committed errors of law by failing to make inferences favorable to the Plaintiff based upon the circumstantial evidence.

This statement is generic in regard to what circumstantial evidence is being referenced. However, as explained above, the Court’s determination was based upon the Court’s consideration of the credibility of the witnesses presented.

3. Whether the trial court abused its discretion and/or committed errors of law by failing to consider or give weight to Children and Youth’s indicated

reports, which found that the Defendant committed child abuse against the protected children, or consider that such findings could establish the requisite burden of proof without requiring the victims to testify.

Plaintiff presented the testimony of a Children and Youth caseworker who stated that Children and Youth had received a report against the Defendant and that the report was indicated as decided by a child abuse team. The extent of the investigation consisted of interviews with the alleged victims and the Defendant. There was no evidence presented that this matter has been litigated or that the report was founded, meaning that there has been no “judicial adjudication based on a finding that a child who is a subject of the report has been abused” 23 Pa.C.S.A. § 6303. The Court is not required to blindly accept Children and Youth’s indicated findings especially when all of the evidence, including the testimony from the alleged victims, has not been presented to the Court. Rather, the Court is required to weigh all the evidence presented to it. In addition to the above, for purposes of this Opinion, the Court will rely on the August 12, 2020 transcript which addresses the Court’s findings regarding the Children and Youth report and the evidentiary issues surrounding the report and the Children and Youth caseworker’s testimony.

4. Whether the trial court abused its discretion and/or committed errors of law for failing to consider, admit into evidence, and/or provide any weight to the Defendant’s prior criminal conviction for indecent assault when the conviction was offered to show Defendant’s intent and the absence of mistake in sending the text to the minor child.

The Court allowed Plaintiff’s Counsel the opportunity to lay a foundation to establish a similarity between a prior incident resulting in conviction and the facts that are alleged here. Plaintiff’s Counsel proceeded to ask the Defendant questions regarding his relationship to and the age of the victim in the prior incident. Despite an

objection from Defendant's Counsel, the Court gave Plaintiff's Counsel latitude to establish a foundation at which point she asked one more question of the Defendant and rested. *See August 12, 2020 Transcript at page 39, line 3 to page 42, line 5.* The Court gave Plaintiff's Counsel opportunities to question the Defendant on this subject within the scope of the Rules of Evidence and gave appropriate weight to the evidence as it was presented. In addition to the above, for purposes of this Opinion, the Court will rely on the August 12, 2020 transcript which addresses the Court's evidentiary findings regarding evidence of Defendant's prior conviction.

5. Whether the trial court abused its discretion and/or committed errors of law by admitting into evidence and considering an extremely prejudicial and incomplete video that was proffered only for the irrelevant purpose of alleging that one protected child was not fearful of Defendant because she kicked Defendant's wife, when fear is not required to establish sexual abuse and sexual grooming of children and the prejudice far outweighed any possible probative value.

On direct examination, Plaintiff testified regarding the incident taking place in the video and therefore opened the door to the Defendant. While the video was not available in its entirety, the Court took that into consideration when weighing the credibility and the relevancy of the video. The Court also allowed the admission of the video to show potential motivation of the Plaintiff, who is the mother of the alleged victims, to file the Petition for Protection From Abuse against the Defendant. The video clearly shows Plaintiff and the Defendant's wife involved a physical altercation. In addition to the above, for purposes of this Opinion, the Court will rely on the August 12, 2020 transcript which addresses the Court's evidentiary findings and other reasoning regarding the admission of the video.

BY THE COURT,

Ryan M. Tira, Judge

RMT/ads

cc: Superior Court (Original +1)
Court Reporter (LW)
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