FILED
August 26, 2015
Court of Appeals
Division I
State of Washington

73207-2

No. 73207-2-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION ONE

In re the Parentage of T.W.J. and I.B.J.

ANDREA ANTHONY
Respondent

and

AWAN JOHNSON
Appellant

ON REVIEW FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR KING COUNTY

BRIEF OF RESPONDENT

PATRICIA NOVOTNY
NANCY ZARAGOZA
ATTORNEYS FOR RESPONDENT
3814 NE 65th Street, Suite A
Seattle, WA 98115
(206) 525-0711

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I. RESTATEMENT OF ISSUE

Did the trial court properly exercise its discretion by entering a domestic violence protection order based on a finding that Mr. Johnson represents a credible threat to the physical safety of Ms. Anthony when the record contains evidence that he threatened to kill her if she prevailed in current custody proceedings, has been abusive to her in the past, tried to intimidate her in previous proceedings and has become increasingly volatile and hostile toward her?

II. STATEMENT OF THE CASE

Andrea Anthony and Awan Johnson had a relationship for approximately four years, but never married. CP 484. They have two children, T.J (age 3 at the time of the proceedings), and I.J., (age 2 at the time of the proceedings). CP 484. Johnson also has an older daughter from a prior relationship, G.R., who was age 12 at the time of the proceedings. Johnson has limited visitation with G.R. CP 484.

Johnson was verbally abusive to Anthony in front of the children during their relationship and Anthony ultimately left him when the abuse became physical. CP 773. In July 2014, Anthony and Johnson agreed on a parenting plan, which was entered in

October 2014. CP 504.[1] CP 484. The plan gave both parties decision-making authority, but limited Johnson's residential time and did not permit him to have any overnights with the children. CP 502.

On November 15, 2014, while the children were with Johnson, Anthony received a text from Johnson that I.J. was having "breathing problems" and he had called an ambulance. Anthony was at her parents' house at the time, which was a block away from Johnson's apartment, and went immediately to the apartment. CP 486. When she arrived, the paramedics were there and I.J. was sitting in Johnson's lap crying, with no pants on. She found T.J. around the corner, also without pants on. Johnson was angry that Anthony had come, an argument ensued and Johnson called the police in an attempt to make her leave.[2] Anthony ultimately left with the children, as it was the end of Johnson's residential time. T.J. later told Anthony that G.R. had been there at some point that day.

A week later, T.J., then two years old, began acting out and exhibiting sexualized behaviors (referring to his penis as a lollipop,

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[1] The parenting plan was not entered until October 2014 because he did not complete the parenting seminar until then. CP 484.

[2] Johnson was apparently upset when Anthony told paramedics that he did not have overnights with the children when they asked him about Isla's sleep habits. CP 486.

asking his younger sister to touch his penis, CP 488, asking his sister to lie on top of him during a diaper change, CP 490). He then disclosed to Anthony that G.R. "ate his penis and the pee was coming." CP 488. Anthony relayed this information to Johnson, but he dismissed her concerns that G.R. was sexually abusing T.J. or exposing him to inappropriate material, and became angry with Anthony at the suggestion. CP 536, 537.

Daycare workers also informed Anthony and Johnson that T.J. was having increased behavior problems at school and exhibiting other disturbing behavior, such as handling his feces. CP 489, 529, 531, 533, 548. Concerned about these sudden behavioral changes, Anthony began therapy sessions for T.J. with Dr. Suzanne McCallum. Dr. McCallum diagnosed T.J. with PTSD, noting sexualized behaviors that suggested sexual abuse and/or exposure to sexually explicit material. CP 633.[3]

On December 12, 2014, Anthony filed a petition to modify the parenting plan and a motion for an ex parte restraining order

[3] Anthony initially brought T.J. to Children's Hospital for a psychiatric evaluation and was referred to Harborview Center for Sexual Assault, which resulted in a CPS referral against Johnson alleging abuse and/or neglect of T.J. CP 118. The CPS investigation (which did not include interviews of either G.R or T.J.) ultimately resulted in a finding of "unfounded," i.e., that Johnson did not engage in any abuse or neglect, or that there was insufficient evidence of such abuse or neglect. CP 118.

preventing Johnson from allowing G.R. to have contact with T.J. and I.J., and temporary orders limiting Johnson's residential time to supervised visitation and giving Anthony sole decision-making pending the return hearing. CP 17. The court entered an ex parte restraining order / order to show cause, limiting Johnson's visitation to supervised visits. CP 478.

Johnson hired California attorney Tamara Benefield to respond to the motion. CP 643. The hearing on the motion was set for January 28, 2015. CP 646. On January 21, 2015, Benefield sent Anthony's lawyer an email informing her that Johnson had terminated her representation and further stating:

> FURTHER AND PLEASE BE ADVISED, I called you several times today to warn you on behalf of your client that a conditional threat to kill was made by my former disgruntled client indicating that if he 'gets screwed,' which he may interpret as any restrictions on his custodial rights, he is going to 'Kill Andrea.' He repeated this and variations, perhaps in anger more than once. . . .

CP 650. That same day, fearing for her safety, Anthony sought and received a temporary domestic violence order of protection. CP 40-46, 88-91. The court ordered that the return hearing on this order be heard together with the motion for temporary orders and adequate cause hearing on the motion to modify. CP 234.

On February 10, 2015, the court heard the motions. Johnson appeared pro se. The court found adequate cause to proceed to trial, CP 379, and issued temporary orders allowing Johnson the same residential time provided in the October 2, 2014 parenting plan, but further ordered that this was conditioned on his informing G.R.'s mother of the residential schedule and not allowing G.R. to have any contact with T.J. and I.J. CP 381.

The court also issued a domestic violence order of protection preventing Johnson from contacting Anthony, based on a finding that Johnson "represents a credible threat to the physical safety of the protected person.'' CP 413. The order is effective for one year from the date of issuance, that is, until February 2016.[4]

Johnson appeals the court's issuance of the domestic violence order of protection.

III. ARGUMENT IN RESPONSE TO APPEAL.

THE TRIAL COURT PROPERLY EXERCISED ITS DISCRETION BY ENTRY OF A DV PROTECTION ORDER BASED ON EVIDENCE OF THREATS TO KILL

"Whether to grant, modify, or terminate a protection order is a matter of judicial discretion." *In re Marriage of Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557 (2010). Accordingly, such a

[4] An amended order of protection was entered on February 27, 2015, correcting the original order to accurately reflect the court's ruling. See CP 394-97.

decision “will not be disturbed on review except on a clear showing of abuse of discretion, that is, discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons." *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

RCW 26.50.030 provides for an action to obtain “an order of protection in cases of domestic violence.” Washington's Domestic Violence Prevention Act defines domestic violence as "[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members." RCW 26.50.010(1). A petition seeking a domestic violence protection order “shall allege the existence of domestic violence, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.” RCW 26.50.030(1). The Rules of Evidence do not apply in protection order proceedings under RCW 26.50. ER 1101(c)(4).

Here, the trial court issued the protection order based on a finding that Johnson “represents a credible threat to the physical safety of the protected person.’’ CP 413. This amounts to domestic violence, defined as “the infliction of imminent physical

harm." RCW 26.50.010(1). The record supports the trial court's finding and the court's order of protection. Johnson fails to show the trial court's order was an abuse of discretion.

In support of her petition for a domestic violence protection order, Anthony submitted a detailed declaration and supporting evidence that Johnson engaged in conduct that placed her in fear of imminent physical harm. CP 733-793. As described above, she submitted an email in which Johnson's former attorney informed Anthony's attorney of Johnson's threat to kill her if he "gets screwed" in the custody proceedings. CP 650. The trial court found the threat credible:

> So -- you know, so I'm sceptical [sic] of how good a lawyer she was and whether she was doing an adequate job representing you. Nevertheless, it's an extraordinary thing. The one thing that all lawyers get taught in law school and learn in their bar exam, regardless of what state they're in, is the sanctity of the attorney/client relationship and the need to not disclose any confidences or secrets, except in extraordinary circumstances; and the one exception that's recognized in this state and California, I happen to know, is where the client makes a statement threatening harm, then the attorney has the right to disclose that and may even have the duty to disclose that.
>
> It's not usual -- you pointed out, well, she didn't call law enforcement or the Supreme Court. You wouldn't call the Supreme Court anyway. They don't deal with those matters. They -- they -- they hear appeals of cases like this. And an attorney would not normally

> call law enforcement. They would inform the other attorney and leave it to them, so that's not unusual. So I have to say that it would be really an extraordinary thing for an attorney to claim that their client -- falsely claim that their client had threatened to harm the other party. I mean, that's -- really would be extraordinary and remarkable. And I have to go with -- since I don't know her, I have to go with the assumption that she was reporting what she had heard.

RP 40-41.

The trial court properly relied on evidence of the death threat communicated by Johnson's attorney as a basis for the order. *See In re Marriage of Gourley*, 158 Wn.2d 460, 145 P.3d 1185 (2006) (ER 1101(c)(4) allows a court to consider hearsay in deciding whether to issue domestic violence protection orders under chapter 26.50 RCW; no abuse of discretion in protection order proceeding under RCW 26.50 where trial court did not take live testimony from a witness and record contained ample evidence on which to base the order). The trial court was entitled to rely on this evidence and had discretion to find it credible, a factual determination that cannot be disturbed on appeal. *See, State v. Camarillo,* 115 Wn.2d 60, 71, 794 P.2d 850 (1990) (it is the trial court's role to resolve any conflicts in testimony, to weigh the persuasiveness of evidence, and to assess the credibility of witnesses).

As the trial court reasoned, given an attorney's ethical obligations to disclose only those client confidences relating to a risk of harm to another, Johnson's attorney would not have made such claims unless she believed there was a true risk of harm. *See* RPC 1.6(b)(1)("A lawyer to the extent the lawyer believes necessary: Shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm."). Johnson fails to show that such logic was untenable or that the court's finding was manifestly unreasonable. While Johnson contends that there was evidence to suggest that the attorney fabricated these statements in retaliation over her unpaid fees, it was within the trial court's discretion to discredit this factual claim and give greater weight to the attorney's statements.

Moreover, contrary to Johnson's contentions, there was additional evidence in the record to support the trial court's finding that Johnson presented a credible risk to Anthony's physical safety. In addition to the death threat itself, Anthony submitted as an exhibit to her declaration an email exchange between Johnson and his attorney in which the attorney addresses this threat directly with Johnson and expresses concern about his volatility:

> This is the fifth conversation where I simply try to calm you down and help you make better rational thoughtful decisions. You simply refuse to use reason over your emotions. You continue to say irrational statements, "If I keep getting screwed I am going to kill Andrea."

CP 763. Notably, Johnson presented no responsive emails denying that he made such a threat. Instead, he seizes on the attorney's description of the threats as "irrational" to dismiss the death threats as empty rants. But this observation actually demonstrates the gravity of the threat: the very fact that Johnson made these threats as he became increasingly irrational, volatile, and hostile toward Anthony makes them all the more concerning, and only increases the risk that he would act upon them impulsively and harm her. Indeed, this is precisely what would prompt the attorney to alert Anthony about the threats; it is yet further evidence of his inability to control his anger and behave rationally when dealing with Anthony.

Anthony's declaration also details Johnson's past abuse and continued intimidation of her, and his increasing hostility toward her throughout their litigation. Attached as Exhibit I to Anthony's declaration (in support of her petition for a Domestic Violence Protection Order (DVPO)) is her response to Johnson's earlier

motion to restrain her relocation in which she described physical abuse and intimidation by Johnson:

> The reason I decided to leave Awan is because the verbal arguments started to become physical. On two occasions, each while I was holding a child, he came up and poked his finger hard in the side of my head. On another occasion while I was holding [T.J.] and he was holding [I.J.], he was yelling very close to my face, and I pushed him back a little. He smacked my arm and said, "you hit me first." The last was when he brought [G.R.] over after swearing at me on the phone with her in the car, he walked in the room while I was putting the kids to bed for a nap and told me not to "fucking look at him." I was typing notes in my phone and said he was going to throw it off the deck and grabbed it. I held on when he grabbed it, and during the process my finger was cut and bruised. I called 911 then hung up….
>
> There have been many other instances of verbal abuse. Awan has said to me, "Why don't you just go die" in front of the kids. . . If he doesn't agree with something I say, he will call me an "idiot" and tell me to "shut the fuck up." He has told me he hates me in front of [T.J.] and called me a "bitter bitch" in front of the children many times…

CP 773-34. Anthony also described her present fear of Johnson as he became increased hostile toward her when she challenged him through legal proceedings:

> Respondent is not the calm and collected individual that he appears to be; as his former attorney has witnessed, his rage boils below the surface. Respondent is incredibly angry about my Petition for Modification and views it as an act of war…. Respondent also perceives any criticism of concern

> about [G.R.]'s behavior whatsoever to be a threat that he will defend against at all costs.

CP 741. In an email in response to the parenting evaluator's request for examples of Johnson's "anger and safety issues," she expressed this same concern:

> He sees this issue surrounding custody and child support as a fight to be won rather than an opportunity to establish a plan that is in the best interest of our children. He says he will take pleasure in watching me cry in court.

CP 785.

She further states, "I am scared that his hostility toward me has reached a new level, and that he may try to make good on his threat." CP 741. She also refers to text messages Johnson sent her to intimidate her after she disclosed her witness list for trial. CP 776 ("Fuck you. You are going to hurt yourself. Watch n [sic]."). CP 778. She further notes Johnson's admission to downloading spyware to monitor her communications. CP 743-44.

Anthony's declaration also references Johnson's previously expressed desire to kill his former girlfriend and G.R.'s mother, Ayanna Rosenberg:

> It is true that Respondent has never threatened to kill me before. However, I am scared that his hostility toward me has reached a new level, and that he may try to make good on his threat. I am on high alert wherever I go, I keep remembering how Respondent

> once told me that he visualized chopping off the head of his ex-partner and mother of his child [G.R.], Ayanna Rosenberg.

CP 740.

Finally, Anthony's declaration cites Rosenberg's statements as further evidence of Johnson's "dark and violent side." CP 740. Attached as Exhibit L to Anthony's DVPO declaration is an excerpt of a declaration that Rosenberg submitted during her custody litigation with Johnson, stating:

> The whole relationship has been defending; if the petitioner didn't get what he wanted on his terms he would get extremely angry… I realized he was trying to control rather to [sic] parent…. The petitioner would get angry and threaten to hit me. On some occasions I would tell him "I'm going to walk away because I don't want to talk like this and he wouldn't disengage, he would badger and be a bully. I feel that the petitioner does not have the skills to say what he is really needing instead he intimidates, gets angry, and is controlling and this plays out in the way he disciplines Gaia which is very scary for her… when his life is in chaos which is often he takes it out on the people closest around him and emotionally and physically hurts them.

CP 781-82.

Thus, there was ample evidence in the record from which the trial court could determine that Johnson placed Anthony in fear of imminent harm by making the death threat. As the evidence demonstrates, "when his life is in chaos," as it is currently, "he takes

it out on the people closest around him and emotionally and physically hurts them." Coupled with the death threat, such evidence supports the court's finding that Johnson posed a threat to Anthony's physical safety.

Johnson fails to show that the trial court abused its discretion by issuing the order of protection. Other than questioning the credibility of the death threat – a determination solely within the discretion of the trial court – Johnson's singular argument appears to be that there was no evidence that he was in fact likely to carry out the threat to kill. *See* Br. Appellant, at 8-10. He notes that he was already "screwed" by the temporary order of protection entered on January 21, 2014, after he made the death threat, but did nothing further. Br. Appellant, at 10. Compliance with an order does not mean the order is unnecessary.

The nature of the threat and evidence of Johnson's past abuse, continued intimidation, and increased hostility and volatility provided sufficient basis for the trial court to find that Johnson's threat to kill Anthony reasonably put her in fear of imminent physical harm. The trial court did not abuse its discretion in making such a determination. Accordingly, the order of protection should be affirmed.

IV. MOTION FOR ATTORNEY FEES

Anthony seeks attorney fees based on the Domestic Violence Protection Act's attorney fees provision, which states that a court may:

> (g) Require the respondent to pay the administrative court costs and service fees, as established by the county or municipality incurring the expense and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees;

RCW 26.50.060(1); *see, also,* RAP 18.1 (authorizing fees on appeal where statute so provides).

She also requests fees based on her need relative to Johnson's ability to pay on the authority of RAP 18.1 and RCW 26.09.140. See CP 600 (stating Johnson's gross monthly income as approximately $26,000 and Anthony's as $4800).

The statute provides that:

> The court from time to time after considering the financial resources of both parties may order a party to pay a reasonable amount for the cost to the other party of maintaining or defending any proceeding under this chapter and for reasonable attorney's fees or other professional fees in connection there with, including sums for legal services rendered and costs incurred prior to the commencement of the proceeding or enforcement or modification proceedings after entry of judgment.

This statute has as its purpose "to make certain that a person is not deprived of his or her day in court by reason of financial disadvantage." 20 Kenneth W. Weber, Wash. Prac., *Family and Community Property Law* § 40.2, at 510 (1997). It is hard to dispute that a parent with vastly inferior resources "is at a distinct and unfair disadvantage in proceedings" pertaining to a child. *King v. King,* 162 Wn.2d 378, 417, 174 P.3d 659 (2007) (Madsen, J., dissenting). Anthony is vastly disadvantaged in this litigation, precisely the kind of parent who is the subject of the statute's concern. Accordingly, she requests her fees.

V. CONCLUSION

For the reasons above, Anthony respectfully asks this Court to affirm the trial court in all respects and to award her fees.

Dated this 26th day of August 2015.

RESPECTFULLY SUBMITTED,

s/ Patricia Novotny
WSBA #13604
s/ Nancy Zaragoza
WSBA #23281
3418 NE 65th Street, Suite A
Seattle, WA 98115
206-525-0711
novotnylaw@comcast.net
Attorneys for Respondent