

**NOT DESIGNATED FOR PUBLICATION**

**COURT OF APPEAL**

**STATE OF LOUISIANA**

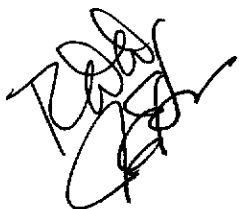
**FIRST CIRCUIT**

**2007 CA 2393**

**AMBERLY KAY MCGRAW**

**VERSUS**

**WILLIAM JASON HARVEY**



**Judgment rendered:     MAY - 2 2008**

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**On Appeal from The Family Court  
Parish of East Baton Rouge, State of Louisiana  
Case Number 161,997; Division D  
The Honorable Jennifer Luse, Judge pro tempore Presiding**

**\*\*\*\*\***

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**BEFORE: PARRO, KUHN AND DOWNING, JJ.**

*Parro, J., dissents and assigns reasons.*

## **DOWNING, J.**

William Jason Harvey appeals a family court judgment in favor of his ex-wife, Amberly Kay McGraw, granting her a protective order against him. We affirm the judgment.

### **Pertinent Procedural History**

On May 18, 2007, Ms. McGraw filed a “Petition for Protection from Abuse,” claiming four incidents of abuse on three specific dates: 1) she alleged that on April 26, 2007, Mr. Harvey, her ex-husband, chased her in her car and pulled a gun on her out his car window; 2) she alleged that on April 30, 2007, Mr. Harvey called her on her cell phone, threatening to kill her and slit her children’s throats; 3) she alleged that later that same evening (April 30, 2007), there was a confrontation with Mr. Harvey where he tried to attack her with a knife. She alleged that Mr. Harvey was accompanied by two other men; and 4) she alleges that on May 9, 2007, Mr. Harvey followed her and tried to run her and her current husband off the road.

The Family Court immediately issued a temporary restraining order against Mr. Harvey. A hearing on the protective order was set for June 5, 2007.

Mr. Harvey filed an exception in the nature of *lis pendens*, alleging that proceedings between the same parties concerning the same incidents and allegations were pending in Livingston Parish. In the same pleading, Mr. Harvey answered the petition by generally denying Ms. McGraw’s allegations. He also filed a petition in reconvention alleging that Ms. McGraw had attempted to kill him by running him down with a truck and that she had actually shot him in the hand. As relief, he sought an order for Ms. McGraw to undergo professional counseling and for her to pay his costs and attorney fees.

The matters came on for hearing on June 5, 2007. At trial, he made an oral motion for a protective order against Ms. McGraw. After hearing the evidence, the

Family Court found that “Mrs. McGraw ha[d] proven significant allegations within the penumbra of the [La. R.S. 46:2135<sup>1</sup>]’ ‘by a preponderance of the evidence,’” and entered judgment granting Ms. McGraw a protective order against Mr. Harvey. The judgment denied Mr. Harvey’s exception, denied his oral motion for a protective order, assessed costs against him, and denied all other relief requested by either party.

Mr. Harvey appeals, asserting only one assignment of error: “The trial court committed manifest error in finding that Appellee, Amberly McGraw, proved her case by a preponderance of the evidence to entitle her to the protective orders sought.”

### **Discussion**

Louisiana Revised Statutes 46:2135 governs the procedures regarding the petition for protective order at issue. In pertinent part, it provides:

B. If a temporary restraining order is granted without notice, the matter shall be set within fifteen days for a rule to show cause why the protective order should not be issued, at which time the **petitioner must prove the allegations of abuse by a preponderance of the evidence**. The defendant shall be given notice of the temporary restraining order and the hearing on the rule to show cause by service of process as required by law within twenty-four hours of the issuance of the order. (Emphasis added.)

The Family Court did not articulate which allegations Ms. McGraw had proved. On our review of the record, however, we conclude the trial court was not manifestly erroneous in finding Ms. McGraw proved her allegations concerning the incidents of April 30, 2007, by a preponderance of the evidence.

Both parties acknowledge communicating with each other on that date. Ms. McGraw alleges that Mr. Harvey threatened to kill her and to slit their children’s throats. Conversely, Mr. Harvey alleges that Mr. McGraw spoke in vulgar language and threatened to show him “how it’s done.”

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<sup>1</sup> The pertinent requirements of La. R.S. 46:2135 are discussed within.

On that evening, Mr. and Mrs. McGraw met with Mr. Harvey. There was an altercation in which Ms. McGraw shot Mr. Harvey through the hand and in which Ms. McGraw's current husband apparently tried to run Mr. Harvey over. She alleges, however, that Mr. Harvey blocked their truck with the one he was riding in. She and her husband assert that Mr. Harvey then came to her husband's truck and tried to break the driver's side window with a knife. She says she shot to miss him. There is no evidence of Mr. Harvey's attempts, however, because Ms. McGraw destroyed the window when she shot through it and hit Mr. Harvey's hand. She testified that she was afraid of him. A sheriff's deputy testified that she and her husband reported Mr. Harvey as having a weapon.

Mr. Harvey argues that they did meet that evening, but that when he tried to come to Mr. McGraw's truck, Mr. McGraw attempted to run him over and Ms. McGraw shot him. A sheriff's detective who investigated the shooting incident testified that Mr. McGraw tried to run Mr. Harvey down with his truck.<sup>2</sup>

The Family Court found that "both litigants were less than forthcoming about some of the facts." However, the facts show that there was a conversation that led to the altercation that evening. The Family Court could have reasonably found that Mr. Harvey's acts that day necessitated a protective order. We note that Mr. Harvey does not appeal the denial of his request for a protective order.

Regarding the alleged April 26 incident where Ms. McGraw claims Mr. Harvey chased her down the highway and pointed a gun at her near Zachary, we note that Mr. Harvey produced evidence of a court notice that he was required to appear in court in Livingston, Louisiana, within a half-hour of the incident. His attorney of record in that hearing testified in this proceeding that Mr. Harvey appeared timely and was present all day. This testimony was corroborated by Mr. Harvey's friend, who woke him up and drove him to the courthouse.

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<sup>2</sup> Mr. McGraw's statement to the detective that he tried to run down Mr. Harvey was corroborated by a blood trail subsequent to Mr. Harvey's being shot.

Regarding the May 9 incident where Ms. McGraw alleged that Mr. Harvey attempted to run her and her husband off the road that evening, we note that Mr. Harvey's medical records show he was discharged from the hospital late that afternoon after surgery to reconstruct his hand where Ms. McGraw shot him. Several witnesses testified that he was unable to walk by himself, that he slept most of the evening after he returned home, and that he could not leave the house. Additionally, he was on pain medication.

Even so, we conclude that the Family Court was not manifestly erroneous in finding that the allegations regarding April 30, 2007, were proven by a preponderance of the evidence, even though the evidence is contradictory. "[W]here two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong." **Stobart v. State, Through Dept. of Transp. and Dev.**, 617 So.2d 880, 882 (La. 1993).

#### **Decree**

Accordingly, we affirm the judgment of the trial court. Costs of this appeal are assessed against William Jason Harvey.

**AFFIRMED**

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**BEFORE: PARRO, KUHN, AND DOWNING, JJ.**

**PARRO, J., dissenting.**

*PK*  
Based on the evidence and my review of the entire record, I disagree with the majority's conclusion that the trial court was correct and that Ms. McGraw proved her entitlement to a protective order against Mr. Harvey by a preponderance of the evidence.

The majority report correctly reflects that two of the alleged harassment situations were completely disproved by the testimony of impartial, disinterested witnesses. Their testimony established that Mr. Harvey could not possibly have been chasing Ms. McGraw in his vehicle and pulling a gun on her out of his car window or trying to run her off the road, as she claimed. When one of these incidents allegedly occurred, he was in court the entire day. On the second occasion, he was at home and on pain medications, recuperating from surgery on his right hand to repair the damage from Ms. McGraw's shooting him. Moreover, there was testimony that none of the cars allegedly owned and used by Mr. Harvey during these vehicle-related incidents was in operating condition. These clear fabrications by the McGraws concerning these two claims cast serious doubt on their credibility.

With reference to the third incident during which Ms. McGraw shot Mr. Harvey in the hand, the majority opinion mentions the observations of the investigating deputy in

only two sentences, one of which merely repeats the statements of the McGraws, who "reported Mr. Harvey as having a weapon." The other sentence confirms that Mr. McGraw tried to run down Mr. Harvey with his truck. Even this one sentence in the majority report revealed a blatant lie in Ms. McGraw's trial testimony, wherein she stated flatly, "My husband never tried to run over him."

Moreover, Detective Truell had much more to say about the April 30 confrontation than the majority report indicates. He said that Ms. McGraw had lied to him in the past in connection with a criminal case. In the matter before us, he testified that the initial version of the incident she provided to him was a complete lie that she later admitted was concocted in order to justify self-defense in the shooting. Her second version was substantially changed, but even this story was belied by the physical evidence at the scene. Detective Truell testified that the location of the blood trail on the ground showed that the shooting did not occur when Mr. Harvey approached the McGraws' truck, as they described it, but happened just as Mr. Harvey got out of the truck in which he was riding. Also, the knife allegedly brandished by Mr. Harvey was not found. From his observations of the tire marks at the scene, Detective Truell also concluded that the McGraws' truck was not "blocked in" by the vehicle in which Mr. Harvey was riding, as the McGraws claimed. He further stated that there were no phone records to verify the McGraws' assertions concerning threatening phone calls from Mr. Harvey; rather, the phone records showed challenging text messages that day from Mr. McGraw to Mr. Harvey. Although Ms. McGraw said at trial that she "shot to miss" Mr. Harvey, Detective Truell said that "according to her recorded and written statement [to him], she shot at Mr. Harvey to hit him." Finally, he testified that as a result of this incident, he had charged both of the McGraws with attempted murder of Mr. Harvey; no charges were filed against Mr. Harvey.

The majority opinion justifies its conclusion with the oft-repeated statement from the Stobart case that "where two permissible views of the evidence exist, the factfinder's choice between them cannot be manifestly erroneous or clearly wrong." Stobart v. State, Through Dept. of Transp. and Dev., 617 So.2d 880, 882 (La. 1993). However, the court in Stobart also admonished that "where documents or objective

evidence so contradict the witness's story, or the story itself is so internally inconsistent or implausible on its face, that a reasonable factfinder would not credit the witness's story, the court of appeal may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination." Id. Considering that two of the incidents claimed by the McGraws were shown not to have occurred at all and there was controverting testimony from an investigating law enforcement officer concerning almost every fact of their descriptions of the third incident, I would find manifest error in the trial court's finding as to the third incident. At a minimum, I fail to see how the McGraws proved any of their contentions by a preponderance of the evidence. The Stobart case also provides that the reviewing court must determine "whether the factfinder's conclusion was a reasonable one." Id. Because the record as a whole reveals that the conclusion of the court was not reasonable, I believe this serves as an additional basis for concluding that the court was clearly wrong and the judgment should be reversed.

For these reasons, I respectfully dissent.