NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2008 CA 2181

DEBRA ALLEN

VERSUS

ROYCE ALLEN, JR.

Judgment Rendered: May 8, 2009

Appealed from the
Twenty-Second Judicial District Court
In and for the Parish of St. Tammany, Louisiana
Docket Number 2008-10160

Honorable Elaine W. DiMiceli, Judge Presiding

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Ellen Cronin Badeaux **Daven M. Hill** **Mandeville, LA**	**Counsel for Plaintiff/Appellant,** **Debra Allen**
Tom Caruso **Slidell, LA**	**Counsel for Defendant/Appellee,** **Royce Allen, Jr.**

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BEFORE: CARTER, C.J., WHIPPLE AND DOWNING, JJ.

WHIPPLE, J.

This is an appeal from a judgment denying plaintiff's request for a protective order pursuant to the Domestic Abuse Assistance Statute, LSA-R.S. 46:2131, et seq. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Debra Allen and Royce Allen, Jr. were married on January 4, 1997. On January 9, 2008, Mrs. Allen filed a petition for divorce and for a temporary restraining order (TRO) enjoining Mr. Allen from harassing her and from coming within 100 yards of her. A TRO was signed by the trial court on January 14, 2008.

On the same date she filed the petition for divorce, Mrs. Allen also filed a petition for protection from abuse pursuant to LSA-R.S. 46:2131, et seq. In the petition, Mrs. Allen alleged that Mr. Allen had abused her by choking, shoving, biting, grabbing, and holding her. She listed three incidents of past abuse and requested that the court issue an *ex parte* TRO prohibiting Mr. Allen from, among other things, abusing, harassing, stalking, following, threatening, or contacting her and from coming within 100 yards of her residence. A TRO to that effect was issued by the trial court on January 9, 2008, and a show-cause hearing was scheduled for January 18, 2008, to determine whether a protective order should be issued.

The hearing on January 18, 2008, was conducted before a hearing officer, as authorized by LSA-R.S. 46:2135(I).[1] Mr. Allen was not present

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[1]Louisiana Revised Statute 46:2135(I) provides:

> The initial rule to show cause hearing required pursuant to Subsection B or D may be conducted by a hearing officer who is qualified and selected in the same manner provided in R.S. 46:236.5(C). The hearing officer shall be subject to the applicable limitations and shall follow the applicable procedures provided in R.S. 46:236.5(C). The hearing officer shall make recommendations to the court as to the action that should be taken in the matter.

at the hearing. Noting that Mr. Allen had been served with notice of the hearing the prior day, the hearing officer went forward with the proceedings and heard testimony from Mrs. Allen. Mrs. Allen identified her petition for protection from abuse and testified that she was fearful of Mr. Allen. When then asked if she were to testify, whether her testimony would be the same as or in greater detail than the allegations of her petition, Mrs. Allen responded, "[m]ore."

Based on this testimony, the hearing officer issued his recommendation on the day of the hearing, recommending that a protective order issue, restraining Mr. Allen from abusing, harassing, stalking, following, threatening, or contacting Mrs. Allen and from coming within 100 yards of her residence. The protective order was signed by the trial court on January 24, 2008.

Mr. Allen objected to the hearing officer's findings, and an evidentiary hearing was conducted before the trial court on March 14, 2008.[2] Following the hearing, the trial court found that Mrs. Allen had failed to prove the allegations in her petition. Thus, the trial court rendered judgment dated March 19, 2008, dismissing with prejudice Mrs. Allen's petition for protection from abuse, and rendered judgment dated April 21, 2008, dissolving the previously issued protective order.

Mrs. Allen appeals, contending that: (1) the trial court erred in dismissing the protective order because there was a preponderance of evidence to support the allegations of abuse; (2) the trial court erred when it

[2]The January 18, 2008 recommendation of the hearing officer provided that the parties had until January 23, 2008, to file an exception to the recommendation. However, as noted by the trial court, Mr. Allen was not served with the hearing officer's recommendation until after January 23, 2008, thereby making it impossible for him to timely object. Thus, the trial judge overruled Mrs. Allen's exceptions, which were based on the alleged untimeliness of Mr. Allen's objection to the hearing officer's findings.

ruled that the audio tapes did not set forth an admission by Mr. Allen of physical abuse; and (3) the trial court abused its discretion by dismissing the protective order.

DISCUSSION

Pursuant to the Domestic Abuse Assistance Statute, LSA-R.S. 46:2131, et seq., upon good cause shown in an *ex parte* proceeding, the court may issue a TRO to protect a person who shows immediate and present danger of abuse. LSA-R.S. 46:2135(A); Rouyea v. Rouyea, 2000-2613 (La. App. 1st Cir. 3/28/01), 808 So. 2d 558, 560. If the TRO is granted without notice, the matter shall be set for a hearing within twenty days, at which time, cause must be shown why a protective order should not be issued. At the hearing, the petitioner must prove the allegations of abuse by a preponderance of the evidence. LSA-R.S. 46:2135(B); Rouyea, 808 So. 2d at 560.

"Domestic abuse" is defined in the Domestic Abuse Assistance Statute as including, but not limited to, "physical or sexual abuse and any offense against the person as defined in the Criminal Code of Louisiana, except negligent injury and defamation, committed by one family or household member against another." LSA-R.S. 46:2132(3). However, family arguments that do not rise to the threshold of physical or sexual abuse or violations of the criminal code are not in the ambit of the Domestic Abuse Assistance Statute. Rouyea, 808 So. 2d at 561.

A trial court's decision to issue or deny a protective order is reversible only upon a showing of an abuse of discretion. Rouyea, 808 So. 2d at 561. Additionally, the trial court sitting as a trier of fact is in the best position to evaluate the demeanor of the witnesses, and its credibility determinations

will not be disturbed on appeal absent manifest error. Ruiz v. Ruiz, 05-175 (La. App. 5th Cir. 7/26/05), 910 So. 2d 443, 445.

At the March 14, 2008 hearing, Mrs. Allen testified as to the alleged acts of abuse as set forth in her petition for protection from abuse. She testified to an argument in May of 2007, during which Mr. Allen allegedly grabbed her arm and shoved her against the wall, threatening to "bash [her] head in, or something."[3] In her petition for protection from abuse, Mrs. Allen also alleged that Mr. Allen had kicked a hole in the door during this incident. However, at trial, she testified that the door was damaged in December 2004 and that there was no damage to the home in 2007. She later testified that Mr. Allen had **punched** a hole in the door. However, when reminded that she had alleged in her petition that he had **kicked** the door, Mrs. Allen testified that the hole was in fact caused by his kicking.

When questioned about an October 15, 2007 incident that she had listed in her petition for protection from abuse, Mrs. Allen responded that she could not remember the exact date of the incident and further stated, "I'm trying to remember if that was the night he grabbed me and shoved me by the arm and told me I was going to listen to him or he could do whatever he wanted to do basically." When further asked what time of the day this incident occurred, Mrs. Allen stated that she could not recall.

Regarding the third incident of abuse alleged in the petition, Mrs. Allen testified that in December of 2007, she and Mr. Allen had an argument which resulted in Mr. Allen grabbing Mrs. Allen around the throat. According to Mrs. Allen, when she attempted to remove his hands from her throat, Mr. Allen bit her left ring finger.

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[3]Notably, in her petition, Mrs. Allen alleged that Mr. Allen had threatened to throw her in the street, and she made no mention of the alleged threat to which she testified at trial.

In an effort to corroborate her testimony about the bite marks, Mrs. Allen presented the testimony of her friend, Julie Brinkman, and her adult son, Jonathan Johnson. Brinkman testified that she had seen a bite mark on Mrs. Allen's hand. Johnson testified that he saw a bite mark, but did not indicate where the mark was located. When Johnson questioned his mother about the bite mark, she indicated to him that Mr. Allen had bitten her. At trial, Johnson testified that he "couldn't believe what she said, but that's what she told [him]." Neither Brinkman nor Johnson actually saw Mr. Allen abuse Mrs. Allen.

Mrs. Allen also introduced into evidence an audio tape of telephone conversations with Mr. Allen, which she contended contained an admission by Mr. Allen of abuse. Based on our review of the audio tape, we find no merit to Mrs. Allen's argument that the trial court erred in rejecting her claim and finding that the taped conversations did not contain an admission by him. When initially confronted by Mrs. Allen in the phone conversations with the allegation of physical abuse, Mr. Allen clearly denied such abuse. While Mr. Allen did not specifically deny biting her when, later in the conversation, Mrs. Allen accused him of doing so, he likewise did not specifically admit to biting her finger.

Mr. Allen testified at the hearing and denied each of the incidents of abuse alleged by Mrs. Allen. Mr. Allen also denied that he had kicked a hole in the door. Additionally, when questioned at trial as to why he did not deny biting Mrs. Allen's finger during the taped telephone conversation, Mr. Allen testified that he was not quite sure he had even heard Mrs. Allen accuse him of such behavior during that conversation.[4] Mr. Allen

[4]Moreover, our review of the audio tape reveals that the conversations revolved largely around Mrs. Allen's vocal (and understandable) objection to Mr. Allen's admitted use of the internet to view pornography.

acknowledged that he and Mrs. Allen had had arguments, but denied that they ever escalated into him physically abusing Mrs. Allen.

If the fact finder's findings are reasonable in light of the record reviewed in its entirety, the court of appeal may not reverse, even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Crochet v. Barbera Chevy-Chrysler Co., Inc., 2004-1390 (La. App. 1st Cir. 6/29/05), 917 So. 2d 49, 53. Considering the foregoing and the record as a whole, and given the conflict in the testimony of the parties and, thus, the obvious credibility determinations facing the trial court, the lack of specificity of some of the events, and Mrs. Allen's apparent confusion over some of the dates, we are unable to say the trial court erred in finding that there was insufficient proof of the alleged abuse.[5] Accordingly, we cannot conclude that the trial court abused its discretion in dismissing with prejudice Mrs. Allen's petition for protection from abuse. See Mitchell v. Marshall, 2002-0015 (La. App. 3rd Cir. 5/1/02), 819 So. 2d 359, 361-362.

CONCLUSION

For the above and foregoing reasons, the March 14, 2008 and April 21, 2008 judgments of the trial court, dismissing with prejudice Mrs. Allen's petition for protection from abuse and dissolving the previously issued protective order, are affirmed. The motion for leave of court to attach

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[5]We note that, in oral reasons for judgment, the trial court misspoke when it erroneously stated that the proceeding before it was "quasi-criminal" in nature. (R. 176). However, our review of the trial court's reasons does not indicate that the trial court incorrectly applied a burden of proof higher than the required preponderance of the evidence. See LSA-R.S. 46:2135(B). Moreover, Mrs. Allen has not assigned as error any alleged application of an improper burden of proof by the trial court.

appendices filed by Mrs. Allen is denied. Costs of this appeal are assessed against Debra Allen.

JUDGMENTS AFFIRMED; MOTION FOR LEAVE OF COURT TO ATTACH APPENDICES DENIED.