IN THE COURT OF APPEALS
AT KNOXVILLE

SHARON JEAN DAVIS,	)	KNOX CHANCERY
	)	C. A. NO. 03A01-9901-CH-00015
Plaintiff-Appellee	)	
	)	
	)	
	)	
	)	
	)	
vs.	)	HON. FREDERICK McDONALD
	)	CHANCELLOR
	)	
	)	
	)	
	)	
	)	
JIMMY JOE DAVIS,	)	AFFIRMED AND REMANDED
	)	
Defendant-Appellant	)	

MARK E. STEPHENS, District Public Defender and PAULA R. VOSS, Assistant Public Defender, Knoxville, for Appellant.

No appearance for appellee.

O P I N I O N

McMurray, J.

The appellant, Jimmy Joe Davis, appeals from an order of protection entered against him, effective for a period of one year, pursuant to T.C.A. § 36-3-605. The defendant presents the following issues for our consideration:

1. There is insufficient evidence to support the Petitioner's claim that she or members of her family were subject to or threatened with abuse by the respondent at the time the order of protection was requested or granted.

2. The trial court erred in denying the respondent's request to make the autopsy report an exhibit to the record.

3. The trial court erred in failing to make findings of fact or place findings in the record.

No transcript of the evidence heard in the trial court was filed. There is a statement of the evidence prepared and filed in accordance with Rule 24(c), Tennessee Rules of Appellate Procedure.

At times material, T.C.A. § 36-3-602 provided as follows:

36-3-602. Application of part. — Any and all who have been subjected to or threatened with abuse by a present or former adult family or household member may seek relief under this part by filing a sworn petition

> alleging such abuse by the respondent. (1996 Replacement Volume).

The appellant asserts that the evidence preponderates against the findings of the trial court and that an order of protection should not have been issued. Counsel for the appellant further asserts that no Tennessee cases have been found directly addressing the measure of the evidence necessary to support the issuance of an order of protection. We note that T.C.A. § 36-3-605 requires that "... if the petitioner has proved the **allegation of abuse** by a preponderance of the evidence" the court shall extend the order for a definite period of time not to exceed one year. (Emphasis added). While T.C.A. § 36-3-605 speaks in terms of allegations of abuse only, T.C.A. § 36-2-602 permits the filing of a petition by one "who has been subjected to or threatened with abuse ... by filing a sworn petition alleging such abuse by the respondent." (Emphasis added). We are of the opinion that the provisions of T.C.A. Title 36, Chapter 3, Part 6 must be read in pari materia and that the provisions relating to proving abuse by a preponderance of the evidence likewise encompass a "threat of abuse." Thus, we conclude that a preponderance of the evidence standard is the proper standard.

Our review, therefore, is governed by Rule 13(d) of the Tennessee Rules of Appellate Procedure which provides in pertinent part as follows:

> (d) Findings of Fact in Civil Actions. — Unless otherwise required by statute, review of findings of fact by the trial court in civil actions shall be de novo upon the record of the trial court, accompanied by a presumption of the correctness of the finding, unless the preponderance of the evidence is otherwise.

The statement of the evidence reflects that the appellee, Ms. Davis, was the only witness who testified at the trial. Ms. Davis testified, among other things, that the respondent had threatened that if she ever left him he would get back at her by harming someone she loved and by taking her daughter, Hemi, away from her. She further testified that her son, Dakota, was born during the marriage and died on May 8, 1997. She also testified that the respondent had been acting strange and said that he felt like killing their landlord and killing everyone he came in contact with. At the time of the hearing the appellant was incarcerated in the Knox County jail charged with aggravated child abuse and murder of the parties' son, Dakota.

While we agree with the trial court's observation that this is a "close case" we are persuaded that the evidence does not preponderate against the judgment of the court and the findings

that are necessarily made by implication by issuing the order of protection. We find no merit in appellant's first issue.

Appellant next charges the trial court with error in refusing to permit an autopsy report of the parties' deceased child into evidence. The Chancellor declined to admit the evidence on the basis that it was hearsay. Appellant in his brief argues that "[i]t was error to deny Mr. Davis the opportunity to offer relevant evidence as to the background and nature of the parties' dispute." No authority is cited in the appellant's brief to support the proposition that the report should have been admitted. Nothing is pointed out which would except the report from the rule against the reception of hearsay evidence. Neas v. Snapp, 221 Tenn. 325, 426 S.W.2d 498 (1968) holds that the introduction of an autopsy report into evidence is error because it is hearsay. We find nothing in the present Tennessee Rules of Evidence to change the result.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Tennessee Rules of Evidence. It appears abundantly clear that the argument advanced as a basis for the court's error is in conflict with the "hearsay rule." No argument is made that the report was offered for any other reason than to prove the truth of the matter asserted. We find no merit in appellant's second issue.

Appellant's final issue charges the trial court with error for failing to make findings of fact on the record. Appellant cites as authority Suttles v. Suttles, C.A. No. 03A01-9602-CV-0005 (August 19, 1996; no application to appeal filed.) We find Suttles to be inapplicable to the case at hand. In Suttles, the appellant was found to be in contempt of court for violating an order of protection. This court found that the trial court failed to state sufficient facts in the record to make the order reviewable on appeal, stating: "[g]enerally, 'an order merely reciting that the accused is guilty of contempt, without showing what the conduct was which resulted in the contempt, is not sufficient,'" citing 17 Am.Jur.2d, Contempt § 213, Recitals of Fact, p. 565. "Also, 'the purpose of the requirement of an order reciting the facts of a contempt ... is to permit the correctness of the order to be reviewed on appeal.'" 17 Am.Jur. (Supp. April 1996) Contempt § 213, p.52. We are of the opinion that the above stated rules have no applicability to the issuance of a protective order. Thus, we find no merit in this issue.

Lastly, we feel constrained to briefly comment on the appellant's assertions during oral argument that courts should consider, in dealing with orders of protection, that in certain instances of criminal prosecutions, the punishment is enhanced if an order of protection existed at the time the crime was committed. We agree that in certain instances, the crime charged is enhanced

if the act or acts which are the basis of the charge also constitute a violation of the order of protection. See e.g., T.C.A. § 39-13-102. Under these circumstances we are unsympathetic with the appellant's argument.

We affirm the judgment of the trial court. Costs are assessed to the appellant and this case is remanded to the trial court.

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Don T. McMurray, Judge

CONCUR:

_____
Houston M. Goddard, Presiding Judge

_____
William H. Inman, Senior Judge

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JUDGMENT

This appeal came on to be heard upon the record from the Chancery Court of Knox County, briefs and argument of counsel for the appellant. Upon consideration thereof, this Court is of opinion that there was no reversible error in the trial court.

We affirm the judgment of the trial court. Costs are assessed to the appellant and this case is remanded to the trial court.

PER CURIAM