

IN THE COURT OF APPEALS OF THE STATE OF MISSISSIPPI

NO. 2017-CA-01071-COA

DANIEL K. JOHNSON

APPELLANT

v.

MALINEE C. JOHNSON

APPELLEE

DATE OF JUDGMENT: 12/21/2016
TRIAL JUDGE: HON. DOROTHY WINSTON COLOM
COURT FROM WHICH APPEALED: LOWNDES COUNTY CHANCERY COURT
ATTORNEY FOR APPELLANT: WILLIAM WAYNE HOUSLEY JR.
ATTORNEY FOR APPELLEE: CARRIE A. JOURDAN
NATURE OF THE CASE: CIVIL - DOMESTIC RELATIONS
DISPOSITION: AFFIRMED - 01/08/2019
MOTION FOR REHEARING FILED:
MANDATE ISSUED:

EN BANC.

GREENLEE, J., FOR THE COURT:

¶1. The Lowndes County Chancery Court granted a divorce to Daniel and Malinee “Nikki” Johnson on the ground of Daniel’s habitual cruel and inhuman treatment. Daniel appeals, arguing the chancellor erred by continuing with a trial in his absence and by granting the divorce on the ground alleged. We affirm.

BACKGROUND

¶2. Daniel and Nikki were married on June 21, 1997, and separated in December of 2012. On December 21, 2012, Nikki filed a complaint for divorce, alleging habitual cruel and inhuman treatment and, alternatively, irreconcilable differences. The chancery court entered an agreed upon order setting trial for August 5, 2014. On August 1, 2014, Daniel filed a

motion for a continuance, stating that he had missed several weeks of work due to illness and that missing additional work days would jeopardize his job security. At a hearing on August 5, 2014, the chancery court granted Daniel's motion for a continuance but assessed him with the travel expenses of Nikki's witnesses. The chancellor also heard testimony from Nikki's sister, Malulee Brett.

¶3. On November 10, 2014, Daniel's trial attorney filed a motion to withdraw as counsel, which the chancery court granted on January 12, 2015, nunc pro tunc to August 5, 2014. In its order, the chancery court continued Daniel's trial to allow him to obtain a new trial attorney.

¶4. Daniel's new trial attorney entered an appearance on January 22, 2015, and a trial was set for September 8, 2015. For reasons unclear from the record, the trial was continued again to May 24, 2016.

¶5. On May 24, Daniel did not appear. Daniel's attorney stated that Daniel was in the hospital and requested a continuance. The chancery court granted the continuance, but the chancellor stated, "I would highly suggest" that Daniel's deposition be taken. The chancellor noted that trial had been continued several times before and stated that should Daniel again fail to appear due to medical reasons, the trial would proceed without him.

¶6. On June 3, 2016, Daniel filed a motion for an extension of time stating that he had been admitted to the hospital on May 24 due to a medical condition and was recovering from surgery. Thereafter, the chancery court entered an agreed upon order setting a new trial date for November 16, 2016.

¶7. On the day of trial, November 16, 2016, Daniel did not appear. Nor did he inform his attorney that he would be absent. Daniel's trial attorney indicated that although Daniel had not contacted him, he had received information that Daniel was in the hospital. Daniel's trial attorney moved to withdraw as counsel, but the chancery court denied the motion and proceeded with the trial. The only witnesses were those called by Nikki.

¶8. Nikki testified that Daniel was very jealous and suspicious of her acquaintanceship with other men to the extent that she "[could] not talk to any man." Nikki described one incident where Daniel became mad and accused her of infidelity after she said hello to a customer they saw at Walmart. Nikki explained that this was not a one-time incident; "[i]t happened over and over." Nikki said that Daniel constantly threatened her when he made accusations. She said that once, Daniel threatened to kill her and burn their house down. She also testified that throughout their marriage Daniel verbally abused her, threatened her, and cursed at her. Nikki testified that at some point during their marriage, Daniel's abuse became physical. In 2008, Daniel cursed at Nikki and pinched her during their drive home from a restaurant, and when they arrived home, Daniel hit her leg, "hard." After Nikki expressed that she wanted to stay with her sister instead of fighting at home, Daniel pulled her inside a bedroom, began punching her, and threw her on the bed. When Daniel turned away, Nikki ran to a neighbor's house for help, and she subsequently stayed at a women's shelter, Safe Haven, for two or three hours. Pictures of bruises on Nikki's arms, shoulders, and back were admitted into evidence. Nikki testified that she stayed at Safe Haven a second time for two or three days, but she did not explain when this stay was.

¶9. Nikki further testified that following the incident in 2008, Daniel refrained from physically abusing her for awhile but continued to emotionally abuse and attack her. Nikki said that Daniel broke a lot of furniture in the house and threatened to pull a cabinet down on her. Nikki testified that “all this” made her feel very afraid, unsafe, and scared. Nikki said that during the last two years of their marriage, Daniel’s behavior began to worsen again. She said that the last episode of physical violence occurred when Daniel slapped her, a month or two before she filed for divorce in 2012. Nikki said that she sought a divorce because Daniel threatened her “so much” and she was scared of him.

¶10. Nikki’s sister, Brett, testified that Nikki stayed with her on many occasions after Daniel locked her out of their house by changing the locks. Brett said that although she never saw Daniel hit Nikki, she saw bruises on Nikki twice. Brett also testified that on the few occasions she was around Daniel, he was controlling. Brett said that Daniel would not let Nikki see her. Brett explained that she owned a bar, but Nikki hardly visited her there because Daniel accused her of seeing another man when she did. Brett testified that Nikki was scared to even say hello to people or turn around because Daniel would be angry. She said Daniel was constantly accusing Nikki.

¶11. Celia Ford, one of Nikki’s friends and customers, also testified. Ford said that on one occasion, she met Nikki at a clothing store to pick up some alterations and Nikki had “a terrified expression on her face.” When Ford asked Nikki what was wrong, Nikki took her to a dressing room, lifted her top up, and showed Ford bruises on her arm, shoulder, and back. Ford then helped Nikki check into Safe Haven. Ford said that on several other

occasions, Nikki told her that Daniel had hurt her. Although Ford admitted that she did not know if Daniel’s abuse of Nikki was ongoing, Ford agreed that Nikki was very afraid of Daniel, stating, “[Y]ou could see it in her eyes.”

¶12. Following trial, the chancery court granted the divorce on the ground for cruel and inhuman treatment. Daniel subsequently filed a Rule 59 motion for a new trial or to alter or amend the judgment. In his motion, Daniel claimed that he missed the trial due to dangerously high blood sugar and other health issues for which he sought hospital care. Daniel further argued that because of the chancellor’s failure to grant a continuance, “he was unable to present evidence in his favor,” and he challenged the grant of divorce on the issue of fault. The chancery court denied the motion, and Daniel appealed.

STANDARD OF REVIEW

¶13. This Court employs a limited standard of review on appeals from a chancery court. *Pace v. Pace*, 16 So. 3d 734, 736 (¶4) (Miss. Ct. App. 2009). We will not interfere with a chancellor’s findings unless they were “manifestly wrong, clearly erroneous or an erroneous legal standard was applied.” *Id.* (internal quotation marks omitted) (quoting *Isom v. Jernigan*, 840 So. 2d 104, 106 (¶6) (Miss. 2003)). We review questions of law de novo. *Id.*

DISCUSSION

I. Continuance

¶14. “It is well settled that the decision to grant or deny a motion for a continuance is within the sound discretion of the trial court and will not be reversed unless the decision results in manifest injustice.” *In re E.G.*, 191 So. 3d 763, 772 (¶37) (Miss. Ct. App. 2016)

(internal quotation mark omitted). “[T]here is no mechanical test for determining whether a continuance should be granted, and the circumstances of each case must be carefully examined, especially the reasons presented to the trial judge at the time the request is denied.” *Harveston v. State*, 742 So. 2d 1163, 1169 (¶21) (Miss. Ct. App. 1999).

¶15. Here, Daniel argues that chancery court’s denial of his continuance requires reversal because he was not afforded the opportunity to present a defense. Although the chancery court noted in its final judgment that it declined to continue trial to another date, the record does not show that Daniel’s attorney requested to continue the November 16, 2016 trial. Even assuming Daniel’s attorney did make such a request, we find the chancery court did not err by declining to continue the matter.

¶16. Daniel did not provide the chancery court with any verification of his claim that he was hospitalized, and therefore, the chancery court had only the representation of Daniel’s uninformed and surprised trial counsel. Under these facts, the chancery court did not err by denying to grant a continuance. *See Pace*, 16 So. 3d at 740 (¶24) (holding the chancery court did not err by failing to grant a continuance to a party that failed to provide verification that he was at the hospital on the day of trial). Daniel forfeited his right to testify when he failed to appear at the trial. *Lee v. Lee*, 78 So. 3d 326, 329 (¶13) (Miss. 2012). Moreover, Daniel ignored the chancellor’s prior suggestion that he have a deposition available to present in the event of his absence.

¶17. Absent Daniel’s defense, Nikki was still required to prove the alleged ground for divorce. *Turner v. Turner*, 73 So. 3d 576, 583 (¶30) (Miss. Ct. App. 2011). “If that is done,

the chancellor has authority to grant the divorce despite the absence of the defendant.” *Carlisle v. Carlisle*, 11 So. 3d 142, 145 (¶12) (Miss. Ct. App. 2009). Finding the chancellor did not err by failing to grant a continuance, we proceed to review whether sufficient proof supported the judgment of divorce.

II. Habitual Cruel and Inhuman Treatment

¶18. “Habitual cruel and inhuman treatment as a ground for divorce must be proved by a preponderance of credible evidence.” *Gillespie v. Gillespie*, 106 So. 3d 869, 872 (¶13) (Miss. Ct. App. 2013) (citing *Chamblee v. Chamblee*, 637 So. 2d 850, 859 (Miss. 1994)).

This Court has stated:

Conduct that evinces habitual cruel and inhuman treatment must be such that it either (1) endangers life, limb, or health, or creates a reasonable apprehension of such danger, rendering the relationship unsafe for the party seeking relief, or (2) is so unnatural and infamous as to make the marriage revolting to the nonoffending spouse and render it impossible for that spouse to discharge the duties of marriage, thus destroying the basis for its continuance.

Id. (quoting *Fulton v. Fulton*, 918 So. 2d 877, 880 (¶7) (Miss. Ct. App. 2006)). “Generally, the cruel and inhuman treatment must be shown to be routine and continuous; however, a single occurrence may be sufficient for a divorce on this ground.” *Id.* (internal quotation mark omitted).

¶19. In *Gillespie*, we addressed the requirement that the claims of cruel and inhuman treatment be corroborated by a witness. *Id.* at (¶¶16-18). We noted that the husband offered one corroborating witness, who observed bruises on the husband but had no independent knowledge of how they were received. *Id.* Absent testimony from a witness with

independent knowledge of the instances of cruel and inhuman treatment, we determined the evidence was insufficient to grant a divorce on that ground. *Id.*

¶20. In *Fulton*, the wife produced three witnesses to corroborate her claim that her husband abused her. *Fulton*, 918 So. 2d at 880 (¶9). Her mother testified she had bruises on her. *Id.* A friend testified that on many occasions the wife called late at night to discuss altercations between her and her husband. *Id.* And a cousin testified she took pictures of the wife’s bruises and scratches in her mouth. *Id.* The cousin also observed tension in the household during her visits. *Id.* This Court held that this evidence was sufficient to grant a divorce based on cruel and inhuman treatment. *Id.* at 881 (¶10).

¶21. Here, Nikki offered two witnesses, Ford and Brett, to corroborate her claim of cruel and inhuman treatment. Ford observed bruises on Nikki but had no independent knowledge of how Nikki had received the bruises. But Brett testified that she saw bruises on Nikki twice and observed that Daniel was jealous, controlling, and angry. Brett also said that Daniel was constantly accusing Nikki of being with another man and that Nikki stayed with her several times after Daniel locked Nikki out of the house.

¶22. Habitual cruel and inhuman treatment may be in the form of emotional abuse when it falls “along the lines of habitual ill-founded accusations, insults and threats.” *Reed v. Reed*, 839 So. 2d 565, 570 (¶19) (Miss. Ct. App. 2003). Such conduct must be “more than mere ‘unkindness, rudeness, or incompatibility.’” *Id.* (quoting *Brooks v. Brooks*, 652 So. 2d 1113, 1124 (Miss. 1995)). Although Nikki testified to only two specific instances of physical abuse by Daniel, her and Brett’s testimonies demonstrated a pattern of abuse that enabled the

chancellor to grant a divorce on the grounds of habitual cruel and inhuman treatment.

CONCLUSION

¶23. We affirm the chancery court's decision not to continue the trial and to grant a divorce to Nikki based on the ground of habitual cruel and inhuman treatment.

¶24. **AFFIRMED.**

GRIFFIS, C.J., BARNES AND CARLTON, P.JJ., WILSON, WESTBROOKS AND TINDELL, JJ., CONCUR. McDONALD, LAWRENCE AND McCARTY, JJ., NOT PARTICIPATING.