

NON-PRECEDENTIAL DECISION - SEE SUPERIOR COURT I.O.P. 65.37

JILL E. CASTANEDA,	:	IN THE SUPERIOR COURT OF
	:	PENNSYLVANIA
Appellee	:	
	:	
v.	:	
	:	
CARLOS CASTANEDA,	:	
	:	
Appellant	:	No. 2217 MDA 2013

Appeal from the Order entered on December 2, 2013
in the Court of Common Pleas of Lancaster County,
Civil Division, No. CI-12-14506

BEFORE: LAZARUS, WECHT and MUSMANNNO, JJ.

MEMORANDUM BY MUSMANNNO, J.:

FILED JULY 24, 2014

Carlos Castaneda ("Castaneda" or "Defendant") appeals, *pro se*, from the Order affirming the denial of his Petition to Modify the trial court's prior Final Order granting the Protection from Abuse Act ("PFA")¹ Petition filed against Castaneda by his wife, Jill E. Castaneda (hereinafter "the victim"). We affirm.

The trial court thoroughly set forth the factual and procedural history underlying the appeal in its Opinion, and we adopt the court's recitation herein by reference. **See** Trial Court Opinion, 1/30/14, at 1-12.

¹ 23 Pa.C.S.A. § 6101 *et seq.*

On appeal, Castaneda presents the following issues for our review:

1. Whether the trial court erred in [its] interpretation ... of [Pa.R.C.P.] 1901.8² [and 23 Pa.C.S.A. § 6117(b)?³]
2. Whether the trial court erred during the Family Business Court presentation when the court decided to hold a full, impromptu hearing immediately that same day, rather than scheduling an official hearing[,], as was being requested[?]
3. Whether the trial court erred in refusing to take all information into consideration during the Family Business Court presentation[] and how the possible additional evidence and witness testimony would compound, which would cause the court to reassess the credibility of the [victim?]
4. Whether the trial court erred by allowing Detective Andrew Morgan to testify without notice or cross[-]examination, ... when the information given during [his] testimony was false, according to a letter from the Chief County Detective[?]
5. Whether the trial court erred by confusing the terms “vacate” and “expire at an earlier date[?]”
6. Whether the trial court erred in its determination as to what behavior is considered “disturbing” within the parameters of this case[?]

² Rule 1901.8 provides, in relevant part, that “[i]f either party seeks a modification after a final judgment has been entered in a protection from abuse action, the party shall petition the court to modify the final order. The court shall enter an order granting or denying the petition following an appearance by the petitioner before the court.” Pa.R.C.P. 1901.8(c).

³ Section 6117(b), governing remedies for bad faith in PFA matters, provides, in relevant part, that “upon finding that an individual commenced a proceeding under this chapter in bad faith, a court shall direct the individual to pay to the defendant actual damages and reasonable attorney fees.” 23 Pa.C.S.A. § 6117(b).

Brief for Appellant at 3 (capitalization omitted; footnotes added; issues renumbered for ease of disposition).

Our standard of review is as follows: “In the context of a PFA order, we review the trial court’s legal conclusions for an error of law or abuse of discretion.” ***Boykai v. Young***, 83 A.3d 1043, 1045 (Pa. Super. 2014) (citation omitted).

Castaneda first argues that, in refusing to modify the Final PFA Order, the trial court erred by failing to consider 23 Pa.C.S.A. § 6117(b), ***supra***, which, he asserts, entitles him to relief because the victim allegedly filed her PFA Petition in bad faith. **See** Brief for Appellant at 19. Castaneda has waived this claim by failing to include it in his court-ordered Pa.R.A.P. 1925(b) Concise Statement. **See** Pa.R.A.P. 1925(b)(4)(vii) (providing that “[i]ssues not included in the Statement ... are waived.”); **see also** ***Commonwealth v. Lord***, 719 A.2d 306, 309 (Pa. 1998). However, even if this claim was not waived, we would conclude that it does not entitle Castaneda to relief because the trial court correctly ruled, at the hearing on Castaneda’s Petition to Modify, that it (1) had previously addressed, and rejected, Castaneda’s claim of bad faith at the hearing on the victim’s PFA Petition; and (2) would not relitigate this issue or the court’s credibility determinations. **See** N.T., 12/2/13, at 19.

In his second issue, Castaneda asserts that the trial court erred and deprived him of due process by not giving him a proper hearing on his Petition to Modify. Brief for Appellant at 11-12; **see also** ***id.*** at 11 (wherein

Castaneda contends that, “[a]s Family Business Court is a setting where multiple cases are heard in a small window of time and with an almost immediate determination, [Castaneda] was not prepared to present all evidence in full, nor was he able to have witnesses present for questioning....”).

The trial court thoroughly addressed this claim in its Opinion, discussed the relevant law, and correctly determined that Castaneda was afforded due process and that the court did not err by conducting a hearing on the Petition to Modify at the Family Business Court session. **See** Trial Court Opinion, 1/30/14, at 19-22. Because the trial court’s sound analysis is supported by the record and the law, we affirm based on its Opinion concerning this issue. **See id.**

Next, Castaneda argues that the trial court erred in failing to conduct a full hearing on his Petition to Modify, at which he could present evidence and witnesses that would allegedly undermine the victim’s credibility. **See** Brief for Appellant at 13-18; **see also id.** at 14 (asserting that “[Castaneda] can show that there was [a] possible motive behind the actions of [the victim.]”).

We have already concluded that the trial court conducted a proper hearing on the Petition to Modify. Moreover, the trial court previously found that the testimony of the victim at the hearing on her PFA Petition was credible, and Castaneda did not file an appeal from the Final PFA Order. Credibility determinations are within the sole province of the fact-finder.

See *Thompson v. Thompson*, 963 A.2d 474, 477 (Pa. Super. 2008) (stating that “[t]his Court defers to the credibility determinations of the trial court as to witnesses who appeared before it.”). Additionally, Castaneda is not permitted to collaterally attack, via a Petition to Modify, the credibility determinations that the trial court made at the hearing on the victim’s PFA Petition. **See** N.T., 12/2/13, at 19 (wherein the trial court explained to Castaneda that “[y]ou testified at [the prior] hearing. The [c]ourt did not find you to be credible. [The victim] testified. The [c]ourt found her to be credible. ... We’re not going to reopen a hearing that was held one year ago, to re-litigate the same issues that were litigated then.”). Accordingly, this claim does not entitle Castaneda to relief.

In his fourth issue, Castaneda argues that the trial court erred by permitting Detective Andrew Morgan to testify at the hearing on the Petition to Modify, without notice to Castaneda, and failed to provide Castaneda an opportunity to question Detective Morgan or respond to his testimony. **See** Brief for Appellant at 23-24. We disagree.

Castaneda failed to object at the hearing to Detective Morgan’s testimony. Thus, Castaneda waived this claim. **See *Thompson***, 963 A.2d at 475-76 (stating that “[i]n order to preserve an issue for appellate review, a party must make a timely and specific objection at the appropriate stage of the proceedings before the trial court. Failure to timely object to a basic and fundamental error will result in waiver of that issue.” (citation omitted)).

Nevertheless, even if this claim was not waived, we discern no error by the trial court. During the hearing, the trial court, *sua sponte*, requested Detective Morgan to testify concerning Castaneda's allegation that the District Attorneys' Office had initiated an investigation into Castaneda's filing of a private criminal complaint asserting that the victim had committed perjury. **See** N.T., 12/2/13, at 6-8, 12-13. Detective Morgan testified that he and the District Attorneys' Office did not initiate an investigation, and closed the case regarding Castaneda's private criminal complaint, based upon Castaneda's refusal to allow Detective Morgan to view the evidence (*i.e.*, video recordings of the parties' sex acts) that Castaneda averred supported his claim. **See id.** at 12-13; **see also id.** at 6-7 (wherein the trial court judge pointed out that his law clerk had contacted the District Attorneys' Office, and was informed that it was not conducting an investigation regarding the victim). Furthermore, the record belies Castaneda's allegation that "[a] chance to ask rebuttal questions was never given[.]" Brief for Appellant at 23. The trial court, in fact, provided Castaneda an opportunity to respond to Detective Morgan's testimony. **See** N.T., 12/2/13, at 13, 16-17.

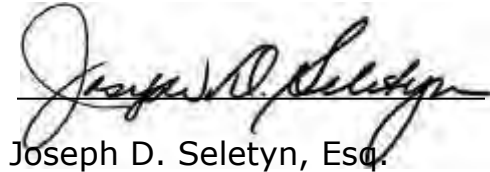
In his final two issues, Castaneda argues that, in issuing its Opinion in support of the denial of the Petition to Modify, the trial court erred in (1) "fail[ing] to understand the difference between a request to 'vacate' and 'terminate' [the Final PFA Order,]" Brief for Appellant at 22; and (2) allegedly stating that the court found Castaneda's sexual conduct was

“disturbing,” when the conduct was consensual. **Id.** at 25. After review, we determine that neither of these claims entitles Castaneda to relief, nor did the trial court commit reversible error.⁴ Moreover, Castaneda fails to cite to any legal authority in support of these claims. **See** Pa.R.A.P. 2119(a) (mandating that an appellant develop an argument with citation to and analysis of relevant legal authority).

Based upon the foregoing, we discern no abuse of discretion or error of law by the trial court in denying Castaneda’s Petition to Modify the Final PFA Order, and thus affirm the Order on appeal.

Order affirmed.

Judgment Entered.

A handwritten signature in black ink, appearing to read "Joseph D. Seletyn". The signature is written in a cursive style and is positioned above a horizontal line.

Joseph D. Seletyn, Esq.
Prothonotary

Date: 7/24/2014

⁴ Castaneda’s claims largely reiterate his attempt to relitigate the trial court’s finding that the victim’s testimony was credible. **See** Brief for Appellant at 22, 25-26. Moreover, the trial court explained in its Opinion that “[Castaneda] mischaracterizes the context in which the [trial c]ourt referenced ‘very disturbing conduct.’ The [c]ourt was commenting on [Castaneda’s] violent acts of abuse that he perpetrated against the victim against her will.” Trial Court Opinion, 1/30/14, at 21 n.29.

IN THE COURT OF COMMON PLEAS OF LANCASTER COUNTY, PENNSYLVANIA
CIVIL ACTION - LAW

JILL E. CASTANEDA

vs.

CARLOS C. CASTANEDA

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:
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:
:

PROTECTION FROM ABUSE

Docket No. CI-12-14506

PROthonotary's OFFICE
LANCASTER, PA.

14 JAN 30 PM 4: 18

ENTERED AND FILED

PA R.A.P. 1925 OPINION

BY TOTARO, J.

Following a hearing held on October 31, 2012, this Court found by a preponderance of the evidence that Carlos Castaneda [hereinafter "Defendant"] committed abuse as defined in the Protection From Abuse [hereinafter "PFA"] Act against Jill Castaneda [hereinafter "victim"]. Consequently, the Court issued a three year protective order prohibiting Defendant from having any contact with the Victim.

Defendant did not timely file an appeal from the Final PFA Order. Nonetheless, on October 31, 2013, Defendant filed a Petition for Modification of the Final PFA Order. Defendant's petition was denied on November 18, 2013. Thereafter, Defendant filed a Petition for Reconsideration of Ruling, requesting that the Final PFA Order be modified to terminate immediately. On December 2, 2013, after conducting a hearing on the record, the Court denied Defendant's Petition for Reconsideration of Ruling. On December 13, 2013, Defendant filed a Notice of Appeal. On December 30, 2013, Defendant filed a seven page "Statement For Matters Complained Of On Appeal," essentially alleging the Court committed error by not modifying the Final PFA Order to terminate effective immediately. This opinion is written pursuant to Rule 1925(a) of the Pennsylvania Rules of Appellate Procedure.

BACKGROUND

On October 3, 2012, the Lancaster County Court of Common Pleas issued a Temporary PFA Order on behalf of the victim against Defendant. *See* Temporary Protection From Abuse Order. A Protection From Abuse Hearing was then held on October 31, 2012.

Testimony at the PFA Hearing established that Defendant and Victim were married on May 15, 2004, and separated in January 2008. (Notes of Testimony, 10/31/12 at 7) [hereinafter "N.T."]. The parties have two children. *Id.* According to testimony from the victim, Defendant informed her that he was diagnosed with a bipolar disorder when he was a teenager, at which time he was institutionalized. *Id.* at 7, 30.¹ Defendant continues to be episodic. *Id.*

Defendant was under the belief that the world was going to end on December 21, 2012. (N.T. 10/31/12 at 7-8). To prepare for anarchy, Defendant purchased gas masks and a gun, despite a prohibition from doing so based upon an incident one year earlier in which Defendant discharged a bullet through the dining room window and into a neighbor's house. *Id.* at 8. Because of that prior incident involving the discharge of a firearm, Defendant was placed on probation for two years and his firearm was confiscated. *Id.* at 9. Nonetheless, the victim testified that Defendant purchased another gun to add to a second firearm he failed to turn over to police. *Id.* at 8-9. Defendant also became bitter, informing the victim that he had a list of people he would "love to take care of including the officer that arrested him and the prosecutor that prosecuted his case." *Id.* at 9-10.

¹ Defendant denied that he was diagnosed with bipolar disorder or that he was ever institutionalized. (N.T. 10/31/12 at 46-47). However, Defendant stated he was diagnosed with "situational anxiety," he was prescribed a mild dose of medication for this, he was a troubled teenager, and he had therapy as a teenager to discuss his emotions and rebellion. *Id.* Defendant also admitted he told the victim that bipolar disorder is a new fad, and he could be diagnosed as bipolar. *Id.* at 47-48.

The victim did not share Defendant's beliefs about the end of the world, and she was concerned that Defendant would use force to take her and the two children to a cabin in Potter County. (N.T. 10/31/12 at 8, 10). More specifically, the victim was concerned that Defendant would use the guns in his possession to force her to go. *Id.* at 11.

Additionally, the victim testified to multiple acts of sexual abuse committed by Defendant against her, which started after the birth of their second child in 2007. (N.T. 10/31/12 at 7, 11-12). Defendant wanted a more "open" relationship, so he would not have to look elsewhere. *Id.* at 14. Defendant began to use various "sex toys." *Id.* at 12, 21. Over time the sex acts became more extreme, resulting in pain, vaginal bleeding, anal bleeding, and multiple yeast infections. *Id.* The victim did not consent to these acts. *Id.* at 12, 15. In fact, the victim repeatedly told Defendant she did not consent. *Id.* at 12.

Defendant videotaped the acts of sexual abuse, editing out scenes where the victim was complaining or crying. (N.T. 10/31/12 at 12). In most of the videotapes, the victim stated she was crying and asking Defendant to stop. *Id.* at 13. Defendant threatened to use the videotapes against the victim if she refused to cooperate. *Id.* at 12.

Defendant also became increasingly paranoid about the victim, accusing her of having an affair. (N.T. 10/31/12 at 19-20). On the day the victim filed for an emergency PFA Order, Defendant went to her work to check up on her and found she was not there. *Id.* When he got home, Defendant was extremely angry at the victim, forcing her to take off her underwear so he could check for any secretions. *Id.* As a result of Defendant's escalating paranoia and erratic conduct, his continued descent into isolation with the approach of December 21, 2012, and because of the increasing frequency of sexual abuse, the victim went to the police station to

obtain a PFA Order. *Id.* at 20, 22. According to the victim, she was in fear for her safety and about what Defendant might do with his guns as December 21, 2012 approached. *Id.* at 22.

During cross-examination of the victim, Defendant asked whether the victim's motivation for the PFA Order was financial, suggesting the victim had begun a plan in August of 2012 which involved taking Defendant's paychecks, forging endorsements on the back of his paychecks, and funneling funds from their joint account into an unknown account. (N.T. 10/31/12 at 33). In response, the victim denied planning such an elaborate scheme, while noting that Defendant always permitted her to sign his name on the back of Defendant's checks. *Id.* at 33, 35. During questioning, Defendant also asked the victim whether she was in full cooperation with his recording of sexual videos, at which time the victim replied "no." *Id.*

During his testimony, Defendant stated he never threatened the victim in any way. (N.T. 10/31/12 at 52). However, Defendant acknowledged going to the victim's place of employment on October 2, 2012, which was the date the emergency PFA Order was obtained by the victim. *Id.* at 39. When he arrived at her work, Defendant noted the victim's car was not there. *Id.* Upon arriving home, Defendant became suspicious of the victim because the sheets were changed and the toilet seat was up. *Id.* at 39-40. Later that day, Defendant called the victim, who was at her mother's home, to ask if the victim was alone and to confront her about what he believed to be her deception. *Id.* at 40. The victim hung up on Defendant, and that is when Defendant believes the victim may have gone to the police station for her PFA. *Id.*

In response to the victim's allegations of sexual abuse, Defendant stated he did not force the victim to do any acts she did not want to perform, but rather, since 2010, they had a room where they committed sexual acts known as "role play." (N.T. 10/31/12 at 41, 52-53).

According to Defendant, it was the victim who wanted to “spice things up in our relationship,” after a period of time in which Defendant “did stray,” and the victim had been an active part in all activity. *Id.* at 53.² To that end, Defendant claimed the victim liked to act out in a “victim-type” role. *Id.* at 53, 61. As such, Defendant claimed the victim derived “sexual pleasure off of certain painful acts,” despite the fact that there were times when the victim would say “no” and tell Defendant that it hurt. *Id.* at 61-62. They would discontinue if the victim was “seriously in pain.” *Id.* at 62-63. Defendant further testified to at least two occasions where he used “anal implements” that caused sharp pain to the victim. *Id.*³

In response to the victim’s allegation that he was in possession of firearms, Defendant acknowledged he was charged with Reckless Endangerment for discharging a firearm. (N.T. 10/31/12 at 42-43). Defendant testified he informed the responding officer that he had a rifle in the residence at that time, but no pistols. *Id.* at 43. Thereafter, Defendant delivered two firearms to a third party once he “found out the rules and stipulations of my ARD program.” *Id.* at 42.⁴

Defendant further stated he was not “freaked out by this whole hoopla about the end of the world.” (N.T. 10/31/12 at 51). However, Defendant acknowledged he and the victim did both show concern about some type of accident that could occur. *Id.* For this reason, and due to

² Defendant claimed he had DVDs to show the victim was “in full compliance with all of these acts.” (N.T. 10/31/12 at 53). However, Defendant admitted the DVDs were edited to show excerpts of different sessions, and he also started and stopped the camera at different intervals. *Id.* at 60, 64-67.

³ In rebuttal, the victim testified that she never told Defendant she wanted to spice things up, she never told Defendant she liked to play “victim,” Defendant edited the videotapes because “in the majority of these videos in general I’m either crying or angry about it,” and Defendant did not stop in the middle of an act when she told him to stop. (N.T. 10/31/12 at 69-70).

⁴ In rebuttal, the victim testified that while Defendant did take his firearms to a friend’s house, Defendant brought them back to their residence several weeks later. (N.T. 10/31/12 at 68-69).

political and financial problems in this country, both parties agreed to set forth a plan. *Id.* at 51-52. Consequently, Defendant did order gas masks, water, and “any type of camping equipment that we could get together” to deal with an emergency situation. *Id.* at 52.

After the temporary PFA Order was issued, Defendant went to the bank and discovered that the parties’ account had been closed days prior to the PFA. (N.T. 10/31/12 at 43). Upon looking at bank statements, Defendant realized the victim had been withdrawing money from the ATM and placing paychecks he gave her into a separate account for which he had no knowledge or control. *Id.* at 43-44.⁵ Thus, Defendant claimed the victim planned the “entire ordeal” to divorce him, liquidate everything in their account, and “put me out.” *Id.* at 44. Defendant also claimed this evidence established a motive for why the PFA was filed. *Id.* at 45.⁶

Defendant did not offer any other witnesses to testify on his behalf. (N.T. 10/31/12 at 36). At the conclusion of all testimony, the trial court found the victim to be credible while concluding Defendant was not credible. *Id.* at 73.⁷ Consequently, the Court determined the Defendant did commit abuse as defined in the Protection From Abuse Act and a protective order

⁵ Defendant’s financial statements were marked and admitted into evidence as Defendant’s Exhibit #2. (N.T. 10/31/12 at 44-45, 72). In particular, Defendant referenced the reservation of a U-Haul that was canceled upon the victim obtaining a PFA, which Defendant suggested was evidence to show that the victim chose not to leave when she realized she could “keep this house and take everything through a PFA.” *Id.* at 56. The Court accepted Defendant’s exhibit as offered for the purpose of determining the victim’s motive for obtaining a PFA Order. *Id.* at 45-46.

⁶ In rebuttal, the victim testified that the majority of the money she withdrew from the bank account went to household bills, including \$4,000 that was paid because they were three months behind on their mortgage. (N.T. 10/31/12 at 68).

⁷ Credibility of witnesses and the weight accorded their testimony is within the exclusive province of the judge as fact finder. *Karch v. Karch*, 885 A.2d 535, 537 (Pa. Super. 2005). The assessment of witness credibility is within the sole province of the trial court because the judge who personally observed the demeanor of the parties is in a better position to weigh their testimony. *Brotzman-Smith v. Smith*, 650 A.2d 471, 474-75 (Pa. Super. 1994).

was entered for a period of three years, to expire on October 31, 2015. *Id.*; *see also* Final Protection From Abuse Order.⁸

Defendant did not timely file an appeal from the Final PFA Order. Nonetheless, on October 31, 2013, one year after entry of the Final PFA Order, Defendant did file a Petition to Modify the Final PFA Order.⁹ Defendant's Petition was denied on November 18, 2013.¹⁰

Thereafter, on December 2, 2013, Defendant presented a Petition for Reconsideration of Ruling, again asking for immediate termination of the Final PFA Order. (N.T. 12/2/13 at 2-4).¹¹ Defendant, who did not have any witnesses to present at that time, was requesting a hearing at a later date to present testimony from "multiple parties which were involved." *Id.* at 6, 17. In response to Defendant's Petition for Reconsideration of Ruling, the Court immediately

⁸ The Court instructed Defendant that to the extent he believed the victim dissipated marital property, that matter could be addressed through the filing of a Complaint in Divorce and through the equitable distribution of marital property. (N.T. 10/31/12 at 73).

⁹ In his Petition to Modify Protection from Abuse Case, Defendant requested immediate termination of the final order because: (a) "No threat of abuse exists as defined in the Pennsylvania Protection From Abuse Act to place the Plaintiff in reasonable fear of harm or bodily injury; (b) Discovery of new evidence not previously admitted/available in the form of witness testimony and documents; (c) Evidence is available to prove the Plaintiff had committed multiple offenses to attain a Final Protection Order and suggests that the actions the Plaintiff took to obtain the Emergency, Temporary, and Final Orders were premeditated." Petition to Modify Protection from Abuse Case.

¹⁰ In the Order dated November 18, 2013, the Court noted that a Final Protection From Abuse (PFA) Order was entered against Defendant after a full hearing and finding of abuse, and Defendant failed to file an appeal pursuant to Pa.R.A.P. 903 within thirty (30) days from date of the Final PFA Order. Further, although Defendant was presenting a Petition to Modify Protection from Abuse Case pursuant to Pa.R.Civ.P. 1901.8, Defendant was actually asking that "termination of the Final Order be granted immediately." Therefore, because the Explanatory Comment to Rule 1901.8 states that the trial court has no jurisdiction to set aside a final PFA Order once an order is entered and an appeal has not been filed, Defendant's Petition was denied.

¹¹ Defendant presented his Petition for Reconsideration of Ruling during a Family Business Court session held on December 2, 2013. Family Business Court sessions are held one day each week to allow for the submission of various motions and petitions related to family court matters.

conducted a hearing to determine whether Defendant should be entitled to relief pursuant to Pa. R.C.P. 1901.8, 23 Pa.C.S. § 6108, or 23 Pa.C.S. § 6117.

During the hearing, Defendant was afforded an opportunity to testify in support of his Petition. (N.T. 12/2/13 at 17, 34, 40). Additionally, Defendant was asked to make an offer of proof as to any witnesses he intended to call to support his Petition, at which time Defendant stated he had proof that the victim perjured herself and was not credible. *Id.* at 6, 9-10.¹²

More specifically, Defendant alleged the victim perjured herself on multiple occasions during the hearing, and he had referred the matter to the district attorney for investigation. (N.T. 12/2/13 at 6-7). Consequently, Detective Andrew Morgan of the Lancaster County District Attorney's Office was summoned to the courtroom, at which time the Detective stated that although Defendant filed a private complaint against the victim, Defendant refused to sign a consent form allowing the Detective to review the tapes. *Id.* at 7, 11-16.¹³ According to Detective Morgan, the matter was closed due to Defendant's lack of cooperation, and out of concern for other information pertaining to some of Defendant's witnesses. *Id.* at 11-16.

¹² Responding to Defendant's claim that the victim was not credible, the Court stated: "You testified at that hearing. The Court did not find you to be credible. She testified. The Court found her to be credible. You were given an opportunity at that hearing to present testimony from any other witness. You chose not to do so. We're not going to reopen a hearing that was held one year ago, to re-litigate the same issues that were litigated then. This is not the purpose of the new act for which you reference." (N.T. 12/2/13 at 19).

¹³ Although Defendant informed Detective Morgan that he had destroyed the tapes as previously ordered by the Court, Detective Morgan informed Defendant that their Forensic Unit could probably locate those recordings on the hard drive of Defendant's computer, particularly since Defendant represented that he still had the same computer and the same hard drive in that computer. (N.T. 12/2/13 at 14). Nonetheless, Defendant refused to sign any type of consent to allow detectives access to the computer or hard drive. *Id.* Defendant claimed he refused to do so because this was "embarrassing footage of both Mrs. Castaneda and I, which I do not want anybody to get ahold of." *Id.* at 17.

Defendant was then asked what testimony he would offer to show the victim was not credible, and Defendant stated he could show through bank statements that the victim did not spend all funds withdrawn from the marital account on marital debt as the victim had testified at the original hearing. (N.T. 12/2/13 at 10).¹⁴ In response, the Court noted that this same argument was presented by Defendant during the original PFA Hearing, at which time the Court stated that spending of marital assets by the victim was of no relevance to the Court's determination that Defendant engaged in sexual abuse of the victim. *Id.* at 10-11, 38.¹⁵

Defendant stated he had financial documents to show the victim reserved a U-Haul prior to bringing the PFA action. (N.T. 12/2/13 at 28). However, the Court noted that Defendant testified to this at the original PFA Hearing. *Id.* at 28-29.¹⁶ Defendant further stated he now had possession of financial documents not available at the original hearing to show the U-Haul was canceled the same day the victim obtained the temporary PFA Order. *Id.* at 29. However, Defendant did testify at the PFA Hearing that upon investigating the parties' finances, he

¹⁴ At the PFA Hearing on October 31, 2012, the victim stated she withdrew some money for herself and some money for household bills. (N.T. 10/31/12 at 68, 71). This included \$4,000 that was paid because they were three months behind on their mortgage. *Id.*

¹⁵ At the PFA Hearing on October 31, 2012, Defendant testified to money withdrawals made by the victim, alleging the victim's motivation for the PFA was financial. (N.T. 10/31/12 at 43-44). Additionally, Defendant's financial statements were admitted into evidence and were considered by the Court for the purpose of determining whether the victim had a financial motive for obtaining a PFA Order as alleged by Defendant. *Id.* at 44-46, 72. Furthermore, Defendant asked the victim whether her motivation for the PFA was financial, at which time the victim replied that it was not. *Id.* at 33. After considering the totality of evidence in this regard, the Court found the victim's testimony to be credible and did not accept Defendant's argument that the victim was motivated by money. (N.T. 12/2/13 at 38).

¹⁶ At the PFA Hearing on October 31, 2012, Defendant referenced through financial records the reservation of a U-Haul that was canceled upon the victim obtaining a PFA, which Defendant suggested was evidence to show that the victim chose not to leave when she realized she could "keep this house and take everything through a PFA." (N.T. 10/31/12 at 55-56).

discovered the reservation for the U-Haul was canceled with the PFA. (N.T. 10/31/12 at 56).

Thus, this issue was presented at the PFA Hearing for consideration by the Court.¹⁷

Defendant stated he had two witnesses who could testify that the victim brought a prior PFA action against another individual. (N.T. 12/2/13 at 17). When asked how that was relevant, Defendant stated it would show this was not the first time the victim had used a PFA “as a means to eliminate a relationship.” *Id.* at 17-18. According to Defendant, this showed that “there is a habit.” *Id.* at 18. The Court did not find this argument to be persuasive or relevant. *Id.* at 37.

Next, Defendant stated that when filling out a family history for the parties’ son on March 8, 2013, the victim indicated there was no history of violence in the home and no history of bipolar disorder, which would contradict her prior testimony at the PFA Hearing. (N.T. 12/2/13 at 19, 24-26). In response, the Court noted that Defendant himself at the PFA Hearing acknowledged he may have told the victim that he could be diagnosed with bipolar disorder, thus supporting the testimony of the victim. *Id.* at 26-27.¹⁸

Defendant claimed the victim lacked credibility because her time-line of abuse was incorrect. (N.T. 12/2/13 at 20-21). While the victim stated she believed these incidents began in

¹⁷ Defendant first argued the victim rented a U-Haul to vacate the residence, but chose not to leave when she realized she could evict Defendant through a PFA. (N.T. 12/2/13 at 29). Defendant then argued the victim was plotting all along to use a PFA as leverage for custody and eviction from the residence. *Id.* However, as the Court noted, the victim likely would not have rented a U-Haul to vacate the residence if she intended all along to obtain a PFA and have Defendant evicted. *Id.* at 29-30. The Court further noted that even if the victim changed her mind and chose to evict Defendant from the residence through a PFA rather than renting a U-Haul and fleeing the residence with her two children because of the abuse inflicted by Defendant, the victim was within her legal rights to do so and that would not affect the victim’s credibility. *Id.* Simply put, the victim was ready to pack up and leave to get away from Defendant until she realized she could obtain a PFA and have him evicted. *Id.* at 39.

¹⁸ At the PFA Hearing on October 31, 2012, the victim testified that Defendant told her he had been diagnosed as bipolar. (N.T. 10/31/12 at 30). Defendant admitted he told the victim that he could be diagnosed as bipolar. *Id.* at 47-48.

2008, Defendant claimed she was mistaken. *Id.*¹⁹ As the Court noted, any discrepancy in the victim's time-line would only call into question when the abuse actually started, not whether the victim was credible or whether abuse had in fact occurred. *Id.* at 22-23, 38-39.

Defendant asserted the victim attempted to coerce him outside the courtroom prior to the PFA Hearing. (N.T. 12/2/13 at 22). However, Defendant raised this same issue at the PFA Hearing, which the Court discounted when determining credibility. (N.T. 10/31/12 at 57).²⁰

Defendant stated he would like to present testimony from Steven Eddy, who was present when Defendant relinquished his firearms. (N.T., 12/2/13 at 30-31). When asked why Mr. Eddy did not testify at the PFA Hearing, Defendant stated Eddy was out of town on work. *Id.* The Court informed Defendant that the record would not be re-opened to present the testimony of witnesses who were known and who should have been present at the first hearing. *Id.*

Defendant also wanted to call Kyle Leeper as a witness, because Mr. Leeper viewed 15 of the 22 hours of video, and he would testify that the victim was a willing participant "in every moment that he saw in those videos to perform the acts." (N.T. 12/2/13 at 31-32). However, as noted by the Court, Mr. Leeper was not present when the videos were made, he did not have knowledge as to what may have been edited out of the videos by Defendant, he was only provided what Defendant gave to him, and thus he would have no way of knowing whether the

¹⁹ At the PFA Hearing on October 31, 2012, Defendant testified that the behavior known as "sexual role play," where Plaintiff acted out as a victim, began in 2010. (N.T. 10/31/12 at 53).

²⁰ At the PFA Hearing on October 31, 2012, Defendant testified the victim and her attorney made threats that if Defendant did not sign the PFA she would have him charged with rape and destroy his chances of ever seeing his children again. (N.T. 10/31/12 at 57-58). In response to a question from Defendant at the PFA Hearing, the victim acknowledged she did have her attorney offer that if Defendant would agree to a PFA and sign papers for a divorce she would not press charges against Defendant for rape. *Id.* at 27. That testimony was considered by the Court in making a credibility determination.

victim was a willing participant. *Id.* at 32-33, 39. Therefore, the Court precluded this testimony.²¹

Defendant offered his mother as a witness to state that prior to the PFA Hearing, the victim called her and threatened Defendant with criminal charges if Defendant did not agree to a PFA and a divorce. (N.T. 12/2/13 at 33). However, Defendant acknowledged his mother was available to testify at the original PFA Hearing, but she did not appear. *Id.* at 33-34.²²

Because Defendant failed to identify any additional witnesses or testimony that would alter the outcome of the hearing held on October 31, 2012, even if the proffered testimony of his additional witnesses was accepted as true, the Court declined to modify or discontinue the Final PFA Order, and Defendant's requested relief was denied. (N.T. 12/2/13 at 37-41).

DISCUSSION

"The purpose of the PFA Act is to protect victims of domestic violence from those who perpetrate such abuse, with the primary goal of advance prevention of physical and sexual abuse." *Custer v. Cochran*, 933 A.2d 1050, 1054 (Pa. Super. 2007) (*en banc*). The PFA Act defines "abuse" as follows:

§ 6102. Definitions

(a) General rule.—The following words and phrases when used in this chapter shall have the meanings given to them in this section unless the context clearly indicates otherwise:

²¹ At the PFA Hearing held on October 31, 2012, Defendant admitted the DVDs had been edited to show excerpts of different sessions. (N.T. 10/31/12 at 60, 64-67). Additionally, Defendant started and stopped the cameras at different intervals, thus not capturing all events that transpired. *Id.*

²² At the PFA Hearing held on October 31, 2012, the victim acknowledged she did have her attorney inform Defendant that she would not press charges against him for rape if Defendant would agree to a PFA and sign papers for a divorce. (N.T. 10/31/12 at 27). Thus, the testimony of Defendant's mother would simply establish what the victim previously stated at the original PFA Hearing, and this testimony was taken into consideration by the Court when determining credibility.

“Abuse.” The occurrence of one or more of the following acts between family or household members, sexual or intimate partners or persons who share biological parenthood:

(1) Attempting to cause or intentionally, knowingly or recklessly causing bodily injury, serious bodily injury, rape, involuntary deviate sexual intercourse, sexual assault, statutory sexual assault, aggravated indecent assault, indecent assault or incest with or without a deadly weapon.

(2) Placing another in reasonable fear of imminent serious bodily injury.

(3) The infliction of false imprisonment pursuant to 18 Pa.C.S.A. § 2903 (relating to false imprisonment).

(4) Physically or sexually abusing minor children, including such terms as defined in Chapter 63 (relating to child protective services).

(5) Knowingly engaging in a course of conduct or repeatedly committing acts toward another person, including following the person, without proper authority, under circumstances which place the person in reasonable fear of bodily injury. The definition of this paragraph applies only to proceedings commenced under this title and is inapplicable to any criminal prosecutions commenced under Title 18 (relating to crimes and offenses).

23 Pa.C.S.A. § 6102(a).

After considering all testimony presented at the PFA Hearing held on October 31, 2012, this Court found that the evidence clearly established “abuse” by a preponderance of the evidence. *See, e.g., Raker v. Raker*, 847 A.2d 720, 725 (Pa. Super. 2004) (explaining that defendant’s actual intent with regard to his actions toward PFA petitioner is “of no moment;” proper inquiry is whether the circumstances placed the victim in reasonable fear). Consequently, a Final PFA Order was entered for a period of three years.

Defendant failed to file an appeal from the Final PFA Order. However, one year later Defendant filed a Petition to Modify the Final PFA Order. When Defendant’s Petition was denied, Defendant filed the instant appeal. Thereafter, Defendant filed a lengthy Statement for

Matters Complained of on Appeal, which can be condensed into three questions: 1) whether Defendant may unilaterally petition to modify a Final PFA Order after a full evidentiary hearing and finding of abuse so the Final PFA Order would terminate immediately; 2) whether Defendant was entitled to a full evidentiary hearing on his Petition to Modify; and 3) whether the evidence at the original PFA Hearing was sufficient to prove the allegations of abuse by a preponderance of the evidence to sustain issuance of the Final PFA Order.²³

Addressing his first argument, Defendant contends Pennsylvania Rule of Civil Procedure 1901.8(c), which was predicated on language found at 23 Pa. C.S.A. § 6117(a), allows a defendant in a PFA action to unilaterally petition a court to modify a Final PFA Order entered after a full hearing and finding of abuse so that the Final PFA Order may terminate effective immediately. Unfortunately, this issue requires the reconciliation of seemingly conflicting language between that found in Pa. R.C.P. 1901.8(c), which was adopted by the Supreme Court of Pennsylvania on July 25, 2013, and that of 23 Pa. C.S.A. § 6117(a), which was enacted by the Pennsylvania Legislature.

According to Rule 1901.8(c), “[i]f either party seeks a modification after a final judgment has been entered in a protection from abuse action, the party shall petition the court to modify the final order. The court shall enter an order granting or denying the petition following an appearance by the petitioner before the court.” Pa. R.C.P. 1901.8(c). The stated purpose for this rule was to “provide a uniform process” for the modification, discontinuance, or withdrawal of a

²³ As a preliminary matter, the third question presented in Defendant’s Statement should have been presented in an appeal from the original Final PFA Order. Because Defendant failed to timely file an appeal from the Final PFA Order issued on October 31, 2012, he may not re-open the issue here. *See* Pa. R.A.P. 903(a); *In re Greist*, 636 A.2d 193 (Pa. Super. 1994) (strictly construing the 30 day limitation for appeals). Consequently, the Court does not address Defendant’s sufficiency argument.

PFA action, and was created in response to different practices being used by different courts throughout the state. Pa. R.C.P. 1901.8 (2013 Explanatory Comment).

Conversely, the relevant language of 23 Pa. C.S.A. § 6117(a) states as follows:

The *plaintiff and the defendant* may seek modification of an order issued under section 6108 (relating to relief) at any time during the pendency of an order. Except as otherwise indicated in this chapter, modification may be ordered after the filing of a petition for modification, service of the petition and a hearing on the petition.

23 Pa. C.S.A. § 6117(a) (emphasis added). A logical interpretation of Section 6117 does not afford “either” party with the right to petition a court for modification of a Final PFA Order. Had Section 6117(a) used the word “or” in place of “and” it would be easy to see that either party could petition a court for modification. The use of “and,” however, seems to mandate mutual participation in order for a proper Petition to Modify to be filed.²⁴

When the endeavor of statutory interpretation is undertaken, the object is to “ascertain and then effectuate the intention of the Legislature.” *Ferko-Fox v. Fox*, 68 A.3d 917, 921 (Pa. Super. 2013) (citing 1 Pa. C.S.A. § 1921(a)). Whenever possible, a court should construe every statute so as to give effect to all of its provisions. *Id.* If the terms of a statute are unambiguous, a court should not “disregard the letter of the law in favor of pursuing its apparent spirit.” *Id.* However, when the words of a statute are not explicit, the Superior Court has stated as follows:

²⁴ Pennsylvania case law is silent on whether a defendant may unilaterally petition a court to modify a final PFA order. In *Kuhlmeier v. Kuhlmeier*, the Superior Court held that the lower court erred in failing to extend a PFA order when a Petition to Extend was filed by plaintiff. 817 A.2d 1127, 1129 (Pa. Super. 2003). In *Stamus v. Dutcavich*, where neither party petitioned for modification or termination of the PFA order but the court *sua sponte* dismissed the protective order when the matter was before that court by way of a police complaint of indirect criminal contempt, it was held that under 23 Pa. C.S.A. §§ 6108(d) and 6117(a) a court may only modify a PFA order following a petition to do so. 938 A.2d 1098, 1099-1101 (Pa. Super. 2007). Neither *Kuhlmeier* nor *Stamus* addressed the issue of whether a PFA defendant may unilaterally petition for modification to terminate a final order after a finding of abuse.

this Court must determine what it was that the General Assembly intended. We then apply the legislators' intent when interpreting the law in question. When determining legislative intent, there are a number of factors that may be helpful. Among these are the occasion, necessity and circumstances of the enactment of the statute, the mischief to be remedied and the object to be attained thereby. Also important are the consequences of our interpretation. More specifically, we must consider whether that interpretation furthers the Legislature's purpose.

Ferko-Fox, supra, 68 A.3d at 921 (internal citations omitted).

Very similar principles are to be considered when a court seeks to interpret a Rule of Civil Procedure. Generally, unambiguous language in a Rule requires a court to follow the letter of the Rule and attempt to give effect to all of its provisions. Pa. R.C.P. 127(a), (b). However, when the words of a Rule are not explicit, the intent of the Supreme Court may be ascertained by considering, among other matters:

(1) the occasion and necessity for the rule; (2) the circumstances under which it was promulgated; (3) the mischief to be remedied; (4) the object to be obtained; (5) the prior practice, if any, including other rules and Acts of Assembly upon the same or similar subjects; (6) the consequences of a particular interpretation; (7) the contemporaneous history of the rule; and (8) the practice followed under the rule.

Pa. R.C.P. 127(c). When ascertaining the intent of the Supreme Court in the promulgation of a Rule, courts may be guided by the presumption that (1) the Supreme Court does not intend a result that is absurd or unreasonable; and (2) the Supreme Court intends to favor the public interest as against any private interest. Pa. R.C.P. 128(a), (e).

Applying the language of *Ferko-Fox* and Pa. R.C.P. 128 to the case *sub judice*, it is difficult to imagine that the intent of Pa. R.C.P. 1901.8(c) or 23 Pa. C.S.A. § 6117 was to allow PFA defendants an ability to unilaterally petition a court to modify a final PFA Order, entered after a hearing and a finding of abuse, so the Order would terminate immediately. Such an interpretation would not only disturb the finality of a Final PFA Order, but it would allow PFA

defendants to force their victims to re-appear in court to defend an action for which the victims had previously prevailed. This result would be absurd and unreasonable. *See* Pa. R.C.P. 128(a).

Additionally, public policy considerations and the stated purpose of the Protection From Abuse Act support requiring plaintiff participation in a Petition to Modify. *See* Pa. R.C.P. 128(e); *see also* 1 Pa. C.S.A. § 1921. “The purpose of the PFA Act is to protect victims of domestic violence from those who perpetrate such abuse, with the primary goal of advance prevention of physical and sexual abuse.” *Mescanti v. Mescanti*, 956 A.2d 1017, 1022 (Pa. Super. 2008) (quoting *Custer, supra*, 933 A.2d at 1054). The “central and extraordinary feature of the PFA,” is to “prospectively control and prevent domestic violence.” *Lawrence v. Bordner*, 907 A.2d 1109, 1113-14 (Pa. Super. 2006).

The notion that a PFA defendant may petition to modify a final PFA order without the consent or participation of the victim, after a hearing and finding of abuse, is extremely troubling. Such a result would clearly favor the private interest of a PFA defendant over the public interest of abuse victims who seek protection through our courts.

Applying the language of Pa. R.C.P. 127 to the present case, the object to be obtained through adoption of Pa. R.C.P. 1901.8 was to “provide a uniform process” for the modification, discontinuance, or withdrawal of a PFA action, and was created in response to different practices being used throughout the state. Pa. R.C.P. 1901.8 (2013 Explanatory Comment). The purpose was not to allow PFA defendants a forum in which to dismiss final orders after a finding of abuse. Likewise, the mischief to be remedied was the use of different practices by different courts throughout the state when addressing petitions to modify, not a concern about affording PFA defendants an opportunity to re-litigate their cases after a finding of abuse. *Id.*

When reviewing the circumstances for which the Rule was promulgated, Pa. R.C.P. 1901.8 was originally published for public comment by the Domestic Relations Procedural Rules Committee with the specific language as follows:

A petitioner who has a protection from abuse order against another party and wishes to withdraw, discontinue or modify the action shall file a petition with the court. The court shall enter an order granting or denying the petition following an appearance by the petitioner before the court.

42 Pa.B. 3722 (June 30, 2012) (emphasis added). This first draft of the rule clearly limited the filing of a petition to modify to “[a] petitioner who has a protection from abuse order against another party.” *Id.* Furthermore, the Explanatory Comment to this proposed rule provided clear support that the draft limited the power to petition for modification and discontinuance to plaintiffs who had already succeeded in obtaining a Final PFA Order. 42 Pa. B. 3722 (June 30, 2012) (2012 Explanatory Comment). The June 30, 2012 draft of Rule 1901.8 was modified to the version that was ultimately adopted by the Supreme Court of Pennsylvania, with no stated purpose given for the change in language to that which was ultimately adopted. *See* 43 Pa.B. 3932 (July 13, 2013).

The intent of the Supreme Court may also be ascertained by considering other rules and Acts of Assembly upon the same or similar subject. Significantly, the version of Rule 1901.8 that was ultimately adopted by the Supreme Court of Pennsylvania referenced 23 Pa. C.S.A. § 6117(a) as the basis for adopting such a Rule. 43 Pa.B. 3932 (July 13, 2013). However, the language of Rule 1901.8(c) is inexplicably different from that of 23 Pa. C.S.A. § 6117(a).

Finally, the consequences of Defendant’s interpretation are alarming. Allowing an abuser to have a means of modifying a Final PFA Order, regardless of the position of the victim,

accomplishes the exact opposite of protecting that victim. Rather, such a mechanism would expose a victim to the fear that a *final* order is not in fact final and the abuser could potentially have such an order vacated or modified at any time.²⁵ The only bar to a potential modification or dismissal of a final PFA order, even after a finding of abuse, would be a defendant's ability to write a simple petition. Where abuse has been established, PFA defendants should not be afforded another opportunity to further harass, manipulate or control the victim, nor to engage in continued psychological warfare.

Defendant next asserts he was denied due process because he was not afforded a proper hearing regarding his Petition to Modify.²⁶

Pennsylvania Rule of Civil Procedure 1901.8(c) provides that “[i]f either party seeks a modification after a final judgment has been entered in a protection from abuse action, the party

²⁵ One of the primary concerns with the *sua sponte* dismissal of a PFA order as seen in *Stamus, supra*, was the concern that a defendant could purposely violate his PFA Order so he could put the matter before a court for potential dismissal. *Stamus*, 938 A.2d at 1102 n. 5. The interpretation put forward by Defendant in the instant case provides even less protection than the procedure rejected in *Stamus*.

²⁶ Procedural due process is “not a fixed precept, but rather, a flexible concept that calls for such procedural protections as the particular situation demands.” *Ferko-Fox, supra*, 68 A.3d at 922 (quoting *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)) (internal quotation marks omitted). The question of what process is due depends on the consideration of three distinct factors: “[f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *Ferko-Fox, supra*, 68 A.3d at 922 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976)).

When applying the three *Mathews* factors to the present case, there is very little risk of erroneous deprivation of Defendant's interest in re-litigating a PFA petition at this stage in the process, because there was a full evidentiary hearing on this matter prior to entry of the final PFA Order. That prior hearing afforded Defendant due process by allowing him to testify on his own behalf, call witnesses, and cross examine the victim. The risk of error was further mitigated by the availability of appellate review. Furthermore, to allow a full evidentiary hearing on a Petition to Modify, after the same has already been held under Section 6108(b), would have the potential to significantly impact judicial resources as PFA defendants discover they have a new forum in which to vacate Final PFA Orders.

shall petition the court to modify the final order. The court shall enter an order granting or denying the petition *following an appearance by the petitioner before the court.*” Pa. R.C.P.

1901.8(c) (emphasis added). This section does not on its face require a full hearing as suggested by Defendant, and no such requirement has been interpreted from the language of this section.²⁷

In the present case, Defendant did in fact appear before the Court as required pursuant to Pa. R.C.P. 1901.8(c), at which time he was afforded an opportunity to be heard on his Petition to Modify. During that proceeding, which was held on the record, Defendant was permitted to testify as a witness and to call other witnesses on his behalf. Because Defendant stated his witnesses were not present, he requested a future hearing date.

Thereafter, in determining whether to grant Defendant’s request to schedule an additional hearing at a later date, the Court asked Defendant to identify the witnesses he would call and provide an offer of proof as to what they would say. Defendant first asserted that the victim had perjured herself at the original PFA Hearing and as a result he had filed a claim with the District Attorney’s Office. However, a Lancaster County detective testified that Defendant’s complaint was closed due to lack of cooperation by Defendant. A baseless and unfounded claim of perjury would have no effect on the Court’s finding of abuse or the entry of a final PFA Order.

Defendant next contended the victim was not truthful in her testimony regarding spending of marital assets. However, this same argument was presented by Defendant and considered at

²⁷ Under the PFA Act, a hearing is required before the court may enter a temporary or final PFA Order. 23 Pa. C.S.A. § 6107. Pursuant to 23 Pa. C.S.A. § 6108(e), a hearing must be held, in accordance with § 6107, before the court may extend a PFA order on behalf of the victim. Additionally, a hearing is required when “the plaintiff and the defendant” seek modification. 23 Pa. C.S.A. § 6117. However, § 6117 of the PFA Act is silent as to whether a hearing is required when the defendant unilaterally files a petition to modify, the defendant is seeking to terminate a Final PFA Order previously entered after a full hearing and finding of abuse, and the defendant fails to timely appeal the finding of abuse.

the PFA Hearing, and the Court found it was not relevant as to whether Defendant abused the victim. Likewise, such testimony would not warrant modification of the Final PFA Order.

Defendant next sought to offer evidence that the victim had brought a PFA against another individual. However, assuming *arguendo* another PFA Order did exist, an unrelated incident involving another defendant would not be admissible to establish habit as suggested by Defendant, nor would it be relevant to the finding of the Court that Defendant abused the victim in the present case.²⁸

Finally, Defendant sought to offer the testimony of Steven Eddy, Kyle Leeper, and Defendant's mother. However, all three individuals were available to testify at the original PFA hearing, but they were not called by Defendant. Furthermore, the proffered testimony of each witness was either inadmissible or would have no bearing on the Court's finding of abuse.

Defendant personally appeared in court to address his Petition to Modify, which allowed the Court an opportunity to discuss with Defendant his specific allegations. The Court was also able to assess Defendant's body language. At the conclusion of the hearing, after determining the proffered evidence would not warrant modification or termination of the Final PFA Order, Defendant's petition was properly denied.²⁹ Nonetheless, Defendant asserts a right to completely

²⁸ The concepts of "habit" and "routine practice" denote conduct that occurs with fixed regularity in repeated specific situations. Pa.R.E. 406 (Comment). Habit describes a person's regular response to a particular and repeated situation to the point it becomes semiautomatic, nonvolitional, invariable, reflexive, or fixed. *Baldrige v. Matthews*, 106 A.2d 809 (Pa. 1954). An alleged prior PFA action by the victim against another individual does not meet the criteria for habit or routine practice.

²⁹ In his Statement For Matters Complained Of On Appeal, Defendant alleges the trial court violated Judicial Canon 3(c)(1)(a) by finding in favor of the victim based upon personal feelings that Defendant's sexual preferences constituted "very disturbing conduct." However, Defendant mischaracterizes the context in which the Court referenced "very disturbing conduct." The Court was not commenting on Defendant's sexual preferences. Rather, the Court was commenting on Defendant's violent acts of abuse that he perpetrated against the victim against her will. (N.T. 12/2/13 at 8-9).

re-open and re-litigate the original PFA Hearing, long after the time for an appeal has lapsed. No such right is expressed in the Protection from Abuse Act, and Defendant will not be permitted to employ this procedural tactic as a means to circumvent the time for appeal. *Philadelphia Suburban Water Co. v. Dep't of Transp.*, 387 A.2d 501, 504 (Pa. Cmwlth. 1978).

CONCLUSION

In the present case, the Court entered a Final PFA Order against Defendant after a full evidentiary hearing and finding of abuse. No appeal was filed. Defendant now seeks to unilaterally petition the court to modify the Final PFA Order, so the Order would terminate immediately. Defendant's interpretation of the laws regarding PFA modification, if accepted, would create a dangerous precedent, subjecting victims of domestic violence to further torment by their abusers. Such a result would be unconscionable. Where abuse has been established, PFA defendants should not be afforded another opportunity to further harass, manipulate or control their victim, or to engage in continued psychological warfare.

Defendant further alleges the trial court violated Judicial Cannon 3(a)(4) by not allowing Defendant his full right to be heard. However, a review of the original PFA Hearing transcript shows the Court afforded Defendant, who was *pro se*, every opportunity to challenge the victim's testimony and present his own case. (N.T. 10/31/12 at 26, 35-36, 60, 67, 70). In fact, the Court assisted Defendant in marking defense exhibits and asking proper questions of the victim. *Id.* at 28-29, 31-32, 37-39, 44, 46-49, 72. The Court also asked Defendant a number of clarifying questions. *Id.* at 60-67. After a finding of abuse, the Court prepared a PFA Order that accommodated Defendant's request for the return of personal property and provided him with partial physical custody of the children. *Id.* at 79-86. Likewise, a review of the transcript from the hearing on Defendant's Petition to Modify shows the Court discussed with Defendant documents he would like to introduce, asked Defendant repeatedly who he would like to call as witnesses at a subsequent hearing, and asked what they would say. (N.T. 12/2/13 at 9, 16-17, 20, 23-26, 28, 30-33). At one point, the Court stated "Mr. Castaneda, I'm going to give you an opportunity under oath to add anything you'd like to the record at this time." *Id.* At 17. At another point the Court asked Defendant to slow down so each potential witness could be discussed individually. *Id.* at 18. Prior to the conclusion of the Hearing, Defendant was again asked if there was "anything else you would like to say at this time under oath." *Id.* at 34. Defendant responded by saying "I believe that would be all regarding this particular set-up, or this particular item." *Id.* The Court then concluded the hearing after affording Defendant "one last opportunity to make your argument, Mr. Castaneda." *Id.* at 40.

Assuming arguendo Defendant may unilaterally file such a petition to modify, the Court complied with the requirements of Pa. R.C.P. 1901.8(c) by entering an order denying Defendant's petition following an appearance by Defendant before the court. During that appearance, Defendant was afforded every opportunity to testify or present testimony on his behalf. Defendant was also permitted to make an offer of proof for witnesses not presently available. Because Defendant failed to identify any additional witnesses or testimony that would alter the outcome of the hearing held on October 31, 2012, even if the proffered testimony of his additional witnesses was accepted as true, the Court declined to modify or discontinue the Final PFA Order.

The trial court properly denied Defendant's Petition For Modification of the Final PFA Order. In a PFA action, the appellate courts will review the trial court's legal conclusions for an error of law or abuse of discretion. *Lawrence v. Bordner*, 907 A.2d 1109, 1112 (Pa. Super. 2006). Because there was no error of law or abuse of discretion, Defendant's appeal should be denied.

BY THE COURT

January 30, 2014
DATE

Donald R. Totaro
DONALD R. TOTARO, JUDGE

Attest: Douglas P. Lehman
Deputy

Copies: Douglas P. Lehman, Esquire, Attorney for Plaintiff
 Carlos C. Castaneda, Defendant, *Pro Se*

NOTICE OF ENTRY OF ORDER OR DECREE
PURSUANT TO PA. R.C.P. NO. 236
NOTIFICATION - THE ATTACHED DOCUMENT
HAS BEEN FILED IN THIS CASE
PROTHONOTARY OF LANCASTER CO., PA
DATE: 1-31-14 Mailed