NOTICE
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2011 IL App (4th) 110688-U

Filed 12/15/11

NO. 4-11-0688

IN THE APPELLATE COURT

OF ILLINOIS

FOURTH DISTRICT

In re: the marriage of,	)	Appeal from
CARRIE FERGUSON,	)	Circuit Court of
Petitioner-Appellant,	)	Macoupin County
and	)	No. 05D80
BLAIDE FERGUSON,	)	
Respondent-Appellee.	)	Honorable
	)	Patrick J. Londrigan,
	)	Judge Presiding.

JUSTICE APPLETON delivered the judgment of the court.
Presiding Justice Turner and Justice Knecht concurred in the judgment.

ORDER

¶ 1 *Held*: The trial court's award of custody to respondent is neither an abuse of discretion nor against the manifest weight of the evidence.

¶ 2 Petitioner, Carrie Ferguson, and respondent, Blaide Ferguson, have two children, Gaige Ferguson and Mercie Ferguson, and in this action for dissolution of marriage, the trial court awarded custody of the children to respondent. Petitioner appeals. Because we find that the award of custody to respondent is neither an abuse of discretion nor against the manifest weight of the evidence, we affirm the trial court's judgment. See *In re Marriage of Smithson*, 407 Ill. App. 3d 597, 600 (2011).

¶ 3 I. BACKGROUND

¶ 4 A. The Parties and Their Children

¶ 5 The parties met and began dating one another in 2000. They married on November 22, 2002, in Macoupin County. Two children were born to them: Gaige Ferguson on September 6, 2002, and Mercie Ferguson on September 26, 2006. Petitioner also has a son, Aubrey Abuschon, from a prior relationship.

¶ 6 B. Petitioner's Profession

¶ 7 Petitioner is employed as a cocktail waitress in Sauget, and she lives in a three-bedroom apartment in Highland. She typically works from 10 p.m. to 5 a.m.

¶ 8 Someone in a neighboring apartment has agreed to watch the children at night, while petitioner is at work.

¶ 9 C. Respondent's Profession

¶ 10 Respondent, who lives in the marital residence in Mt. Olive, is employed through an insulator's union. When he is out of work, as frequently happens, he receives unemployment benefits.

¶ 11 A babysitter across the street watches Mercie while respondent is at work. Gaige attends school in Mt. Olive.

¶ 12 D. Respondent's Criminal History

¶ 13 Respondent has a felony conviction for aggravated battery. This conviction predates his marriage to petitioner. During the marriage, he was charged with aggravated battery, which was reduced to a misdemeanor. He also was arrested in 2008 for domestic battery against petitioner. A couple of orders of protection have been granted to petitioner against respondent: one in 2005 and the other in 2008.

¶ 14 E. Enrollment of Gaige in the Mt. Olive School District

¶ 15 Petitioner moved to Highland on Memorial Day weekend in 2010, and she enrolled Gaige in the Highland school district. Before Gaige began attending school in Highland, however, respondent exercised his right to summer visitation pursuant to an agreed-upon mediator's report, and unbeknownst to petitioner, he enrolled Gaige in the Mt. Olive school district.

¶ 16 On August 18, 2010, the parties appeared before the trial court in a hearing on a motion to determine which school Gaige should attend. The court ordered that Gaige remain in the Mt. Olive school district pending further hearings.

¶ 17 II. ANALYSIS

¶ 18 A. Various Reasons Why Petitioner Claims the Award of Custody to Respondent Was Against the Children's Best Interest

¶ 19 1. *Respondent's Felony Conviction*

¶ 20 Petitioner seems to take the position that the trial court ignored respondent's felony conviction. She says: "It appears from a review of the record that the Trial Court did give significant credence to BLAIDE'S testimony. It is uncontroverted that BLAIDE is a convicted felon, a factor the Court should have considered when judging the credibility of his testimony."

¶ 21 Presumably, though, the trial court did consider respondent's felony conviction. His conviction of aggravated battery was proved at trial. So, absent any indication to the contrary, we presume the court took into account that item of evidence along with all the other evidence.

¶ 22 Giving "significant credence" to respondent's testimony does not exclude a consideration of his felony conviction. Just because a party may attack the credibility of a witness by proving that the witness has been convicted of a felony (*People v. Nichols*, 235 Ill. App. 3d 499, 509 (1992)), it does not follow that the attack necessarily will be successful or that the trier of fact has to agree with the logic that because the witness committed a felony, the witness should be

disbelieved.

¶ 23 In short, the trial court could have given due consideration to respondent's felony conviction of aggravated battery and decided it had little bearing on his testimonial truthfulness. A trier of fact does not have to infer dishonesty from a crime of violence. Just because the court declined to draw the inference that petitioner wished the court to draw, it does not follow that the court ignored the evidence.

¶ 24 2. *Allowing Norman Ferguson To Babysit the Children*

¶ 25 Petitioner argues that respondent is not the best choice to be the children's custodian because his father, Norman Ferguson, has three convictions of driving under the influence and respondent allows him to babysit the children now and then. Petitioner finds fault with using Norman Ferguson as a babysitter because "by Norman Ferguson's own testimony he drinks four to five beers a day, at times while babysitting the children."

¶ 26 Actually, Norman Ferguson did not testify he drank the four or five beers while watching the children. Instead, he testified he drank "[f]our or five beers a day, every day," and that it "used to be thirty." He would not necessarily have consumed his entire ration of four or five beers while watching the children. In fact, respondent's attorney asked him:

> "Q. When you were watching the kids for Blaide, did you drink then?
>
> A. No, well I would drink but like I said no more than a couple beers. If I was raking leaves or something I would pop a beer but I have not been intoxicated since June of last year."

Thus, Norman Ferguson testified he drank four or five beers in the course of an entire day and that

of those four or five beers, he drank "a couple" while watching the children. Further, he testified he had not been intoxicated for the past 10 months.

¶ 27 Admittedly, it is less than ideal for an alcoholic to drink any amount of liquor, especially while watching children, because the concern is that he or she might not stop at the second beer. But Norman Ferguson testified, under oath, that he had not been intoxicated for the past 10 months and that while watching the children, he drank no more than a couple of beers. The trial court could have believed him—as did petitioner's attorney, apparently. At the beginning of her cross-examination of Norman Ferguson, she told him: "You have been very honest and candid, I appreciate that with your testimony."

¶ 28 3. *Temporarily Sharing the House With Members of the Extended Family*

¶ 29 In her brief, petitioner says: "At one point, GAIGE, MERCIE, BLAIDE, Norman Ferguson, BLAIDE'S brother, Kyle, Kyle's fiancee, and Kyle's two children lived with BLAIDE at his residence. [Citation to record.] This type of living environment is inappropriate for two small children."

¶ 30 According to Norman Ferguson's testimony, respondent took in these family members because "[t]hey had nowhere else to go at the time." Perhaps, in so doing, respondent taught Gaige and Mercie a valuable lesson of compassion. According to the evidence, these extended family members no longer reside in respondent's house, but their temporary sojourn might have not only brought Gaige and Mercie relationally closer to them but also taught Gaige and Mercie some important values, including the values of charity and family solidarity.

¶ 31 4. *Petitioner's Primary Responsibility for Transporting the Children and Making Medical and Dental Appointments for Them Before the Separation*

¶ 32 At trial, respondent admitted that before he and petitioner separated, "she was the one that primarily handled taking the kids to school and picking them up" and that "she is the one that handled making the doctor's and dentist appointments." He explained, however, that this was "because she wasn't working at that time for the majority of the time."

¶ 33 Respondent has shown he can do these things. He sees to it that Gaige gets to school, where Gaige is earning straight As (except for one B, which respondent has given him an incentive to raise, by promising him a video game if he does so), and it appears from respondent's journal that on August 16, 2010, he took Gaige to the dentist.

¶ 34 5. *Continuity of Employment*

¶ 35 Petitioner states that "[w]hile her employment [as a cocktail waitress] may be unconventional, [she] works hard to provide money and support to the children, while BLAIDE is often unemployed and unable to do so." Her accompanying citation to the record does indeed suggest that respondent often is unemployed, but it does not prove her assertion that he consequently is unable to "provide money and support to the children." He receives unemployment benefits when he is out of work.

¶ 36 Respondent's attorney asked him:

> "Q. And you had $16,754 of unemployment income and $18,560 of wages?
>
> A. Correct.
>
> Q. And that is pretty standard for your type of employment?
>
> A. Correct."

Thus, it does not appear that during the periods of unemployment that are endemic to his construction-related line of work, respondent has been entirely without means to support the children.

¶ 37 B. Violence and Abuse

¶ 38 Section 602(a) of the Illinois Marriage and Dissolution of Marriage Act (750 ILCS 5/602(a) (West 2010)) provides that when "determin[ing] custody in accordance with the best interest of the child," the trial court is to "consider all relevant factors," including the nonexhaustive list of factors in subsection (a). Two of the factors relate to violence and abuse. Sections 602(a)(6) and (a)(7) express those factors as follows:

> "(6) the physical violence or threat of physical violence by the child's potential custodian, whether directed against the child or directed against another person;
>
> (7) the occurrence of ongoing or repeated abuse as defined in Section 103 of the Illinois Domestic Violence Act of 1986 [(750 ILCS 60/103 (West 2010))], whether directed against the child or another person." 750 ILCS 5/602(a)(6), (a)(7) (West 2010).

¶ 39 Petitioner claims that the trial court "blatantly ignored the definition of abuse as mandated by the Illinois Legislature as it relates to behavior occurring in the home of CARRIE and BLAIDE. Not only was there testimony from BLAIDE and CARRIE concerning the abuse in the house, but CARRIE'S older son, Aubrey also testified about the trauma he went through living in the residence."

¶ 40 Granted, there was testimony that respondent physically abused petitioner and

verbally abused Aubrey and that he did these things more than once to both of them. Petitioner also testified, without being contradicted in this regard, that respondent once called Gaige "stupid" and "retarded" when he was four years old and was not learning how to ride a bicycle fast enough to suit respondent. These episodes are ugly and troubling.

¶ 41 Nevertheless, it does not follow that the trial court "blatantly ignored" the definition of abuse. The court did not have to give dispositive weight to these instances of abuse, considering that (1) respondent never physically abused Gaige or Mercie; (2) there appears to be no evidence that respondent ever verbally abused Gaige again, (3) respondent's father, Norman Ferguson, testified that respondent had matured considerably in the last two years; and (4) even according to Aubrey, who admitted he did not like respondent, Gaige and Mercie appeared to love respondent and to get along well with him.

¶ 42 C. Respondent's Willingness To Facilitate and Encourage the Relationship Between the Children and Petitioner

¶ 43 Another factor in section 602 is "the willingness and ability of each parent to facilitate and encourage a close and continuing relationship between the other parent and the child." 750 ILCS 5/602(a)(8) (West 2010). Petitioner argues that by doing two things, respondent has evinced an unwillingness to facilitate and encourage a close and continuing relationship between the children and herself.

¶ 44 First, respondent deceived petitioner by requesting a two-week visitation at the end of the summer in 2010 so that he could surreptitiously enroll Gaige in the Mt. Olive school district, knowing that petitioner planned to enroll him in the Highland school district. We understand petitioner's criticism and resentment of this ruse, but we do not understand how it shows an unwillingness on respondent's part to facilitate and encourage a close and continuing relationship

between the children and petitioner.

¶ 45 Obviously, Gaige had to attend school either in Mt. Olive or in Highland; he could not attend school in both places. If respondent's desire for Gaige to attend school in Mt. Olive evinces an unwillingness on his part to encourage the children's relationship with petitioner, then, by the same logic, petitioner's desire for Gaige to attend school in Highland would evince an unwillingness on her part to encourage the children's relationship with respondent. But, really, neither proposition is true.

¶ 46 Second, during Gaige's two-week Christmas vacation in 2010, petitioner obtained time off from work and requested respondent to allow her to spend time with the children. Respondent allowed her to have the children only one night during the two-week Christmas vacation. The reason he gave was that under the terms of the mediator's report, "it was his time to have the kids."

¶ 47 Petitioner and respondent both agreed to the mediator's report, which set down a schedule whereby each parent was allowed to have time with the children. For example, the mediation report said: "The Mother shall have the children each Christmas break from the time that school lets out until Christmas Day at 9:00 A.M. The Father shall have the children each Christmas break from Christmas Day at 9:00 A.M. until school begins again." Insisting on adherence to the mediator's report was not a hostile act toward petitioner's relationship with the children. The mediator's report was designed to preserve and encourage the children's relationship with both parents. A parent does not sabotage the other parent's relationship with the children by following an agreed-upon visitation schedule. Otherwise, there could be no visitation orders.

¶ 48 D. Gaige's Preference

¶ 49 In his *in-camera* interview with the trial court, Gaige said he preferred living with respondent. He told the court: "The only reason I don't like my mom's is because I don't got that much of [video] games over there." He also told the court he liked the big old house in Mt. Olive better than his mother's apartment in Highland.

¶ 50 We do not know how much weight the trial court gave to Gaige's expressed preference, but petitioner admits the following:

> "In the instant case, GAIGE is an eight-year old child who has resided in Mount Olive, Illinois, since the time he was born. It is not abnormal that he would prefer to stay in his present school district, however eight is a young enough age that he would not experience any extreme trauma if he were to move thirty minutes away from his present residence. It is also not abnormal that GAIGE would want to stay in the house he is accustomed to, but this is a residence that BLAIDE has allowed to become a revolving door for relatives, including allowing up to eight people to reside there at one time."

¶ 51 "[T]he child's adjustment to his home, school and community" is one of the factors a trial court is to consider when determining custody, and as petitioner admits, Gaige is accustomed to his lifelong home in Mt. Olive.

¶ 52 Petitioner characterizes the Mt. Olive home as "a revolving door for relatives." "Revolving door" sounds like a hyperbole. Petitioner does not specify how many times relatives have resided with respondent.

¶ 53 In any event, if petitioner criticizes respondent for the guests he has allowed to live

with him, it is only fair to point out that a similar criticism could be leveled against petitioner. We refer to Todd Smith.

¶ 54 Respondent testified that on October 1, 2009, petitioner telephoned him at 4 or 5 a.m., complaining of Smith. He recounted the telephone conversation as follows:

> "A. She told me some problems with her and her boyfriend, Todd Smith, as far as he had, they had went on a ride and he was driving the car and they hit a dog and broke the radiator, well Carrie had instructed him to pull over and he wouldn't pull over because they were going to Collinsville area and he wanted to get down there to purchase drugs, I guess.
>
> Q. You guess or she told you that?
>
> A. She told me that.
>
> MS. DAVIS [(petitioner's attorney)]: I object, if any of this called for double hearsay that Carrie told him what her boyfriend told her.
>
> THE COURT: Sustained.
>
> MR. PRETNAR [(respondent's attorney)]: Wait a minute, I am just asking what Carrie told him.
>
> THE COURT: Well then repeat it and ask it that way.
>
> MR. PRETNAR:
>
> Q. So what did Carrie tell you was the reason they were going to Collinsville?

A. [S]o her boyfriend could buy drugs.

Q. Okay, so they hit a dog and broke the radiator?

A. Broke the radiator and messed Carrie's car rim.

Q. All right—

A. He continued to drive and they were about to Collinsville and it tore the motor up.

Q. And what happened to the car?

A. She had another friend, a regular guy that she works with that paid for her car to be repaired.

Q. Okay, you mean some other guy. Do you know how much it cost to repair the car?

A. Thousands of dollars, thirty five hundred I think it was.

Q. Who was the guy that paid for it?

A. His name is Randy, I don't know his last name, an older guy that she also had around the kids."

Pretnar asked respondent why petitioner told him all this on October 1, 2009. He answered that she wanted his help in removing Smith from the marital residence in Mt. Olive (where petitioner and the children were living at the time, while an order of protection against respondent was in effect).

¶ 55 Thus, Smith and petitioner supposedly broke up in October 2009. Apparently, however, Smith still is a frequent guest in petitioner's apartment. Gaige told the trial court in the *in-camera* interview: "Yea, I don't like that he comes over, though." The court asked Gaige:

"THE COURT: How often does he come over?

THE MINOR: He used to come over a lot, he visited one week ago and a couple days probably.

THE COURT: Yea.

THE MINOR: Yea I think so.

THE COURT: So he stayed there overnight with you and mom?

THE MINOR: Yea.

* * *

THE COURT: Whenever mom doesn't work, and then Todd is there sometimes?

THE MINOR: Yea."

In short, the trial court could have reasonably decided that the grandfather, uncle, and cousins were better company than Todd Smith.

¶ 56 III. CONCLUSION

¶ 57 For the foregoing reasons, we affirm the trial court's judgment.

¶ 58 Affirmed.