RENDERED: APRIL 17, 2020; 10:00 A.M.
TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001154-DG

JOHN DOE, A MINOR — APPELLANT

ON DISCRETIONARY REVIEW FROM JEFFERSON CIRCUIT COURT
v. HONORABLE JUDITH E. MCDONALD-BURKMAN, JUDGE
ACTION NO. 18-XX-000030

TAMMY LYNN RAMEY — APPELLEE

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; MAZE AND K. THOMPSON, JUDGES.

THOMPSON, K., JUDGE: John Doe, a minor, appeals from the Jefferson Circuit Court's opinion and order affirming the Jefferson District Court's grant of an interpersonal protection order (IPO) against him in favor of Tammy Lynn Ramey (T.L.C.'s mother) protecting T.L.C. We accepted discretionary review and reverse

the circuit court's opinion and order, because the district court lacked jurisdiction to issue an IPO where a juvenile was the respondent.

Doe and T.L.C. lived in the same apartment complex, attended the same middle school, and were assigned to sit on the same seat on their bus. Doe was an eighth grader and age thirteen, and T.L.C. was a sixth grader and age eleven when T.L.C.'s mother filed a petition/motion on T.L.C.'s behalf for an order of protection against Doe, alleging as follows:

> Petitioner, on behalf of minor child(ren) says that on 2/15/2018 in JEFFERSON County, Kentucky, the above-named Respondent engaged in act(s) of domestic violence and abuse, dating violence and abuse, stalking or sexual assault in that: I am filing [about] my 11 years old son [T.L.C.]. On 2/15/2018, as [T.L.C.] got off the bus today, [Doe] was yelling out the door at [T.L.C.], "You little f***er, [you're] the reason why I got suspended from school.["] [T.L.C.] walked from the bus and reported the incident to me. I went to the apartment manager and told her [about] the incident. She advised that I file for protection. I also called the school and spoke with the assistant principal. I was told that the school would contact the parent to inform her of [Doe's] behavior. [It] was reported to me on 2/8/2018 what had been going on between him and [Doe]. [Doe] grabbed [T.L.C.'s] hand and placed it next to his penis while slapping [T.L.C.] on his head telling him to "slap his meat." He would scream and yell at [T.L.C.], "F*** me baby, f*** me." If you [ever] touch me down here, then you are considered to be gay and called [T.L.C.] transgendered. Two weeks prior to [Doe] being suspended from school, he followed [T.L.C.] to the front door of our apartment and slapped him across the face. [Doe] is twice the size of [T.L.C.] and I am afraid that things will get worse. Before [Doe] was suspended, the

> school pulled the video from the bus and confirmed what [T.L.C.] said was true. I want [Doe] to stay away from [T.L.C.] I fear for his safety getting on and off the bus and when he is at school. I want my son protected and for this to stop.

Doe was served through R.C. (Doe's mother) and a temporary IPO was granted.

A hearing was held on March 1, 2018, before the adult session of the district court on the IPO docket in Jefferson County. T.L.C.'s mother was represented by legal aid through a law student practitioner who was being supervised. Doe did not have counsel and Doe's mother acted as his representative.

T.L.C.'s mother clarified that the petition was inaccurate because Doe slapped T.L.C.'s hand and not his head and a tape was not obtained from the bus. The district court explained that the petition was hearsay because the statements were made by T.L.C.'s mother and not T.L.C. directly, and would be excluded.

The district court repeatedly warned Doe's mother about Doe testifying. Initially, the district court advised Doe's mother:

> Well, so, here's what I need to tell [Doe's mother], so [Doe's mother] I am going to address you and not your child, as he's obviously a minor child. So, there are no criminal charges pending but what they are alleging is criminal in nature. Anything that your son says or anything you say or anything anyone says in this court room is available to prosecutors or defense attorneys to be used at another trial. Your son has a Fifth Amendment right not to incriminate himself. I note that you are not represented by an attorney; there is no

> requirement that you all be represented by an attorney. But I want to make sure you understand anything he says can be used against him in a court of law including a criminal trial. So [T.L.C.'s mother] is hoping it gets resolved today but you know even if nothing criminal is pending today, they could be pending. Do you understand what I am saying?

Doe's mother acknowledged her understanding and then after the district court judge asked, "So, are you intending for your child to testify?" Doe's mother said, "No."

T.L.C. testified, with the district court first questioning him. T.L.C. testified he knew Doe "in real life" and on PlayStation, and they were assigned to the same seat by the bus driver along with a seventh grader, Z. Then, the following exchange took place:

> Judge: Can you tell me, did something bad happen between you and [Doe]?
>
> T.L.C.: Not really.
>
> Judge: Did he ever make you feel uncomfortable?
>
> T.L.C.: Yeah, sometimes, with what he said.
>
> . . . .
>
> Judge: Can you tell me about that? What did he say to make you uncomfortable?
>
> T.L.C.: Uh, "beat my meat. . . ." He said "beat my meat'; it was really uncomfortable.
>
> Judge: How many times has he done that?

T.L.C.: A few times.

Judge: A few? Did he ever touch you?

T.L.C.: He touched my hands.

Judge: What did he do?

T.L.C.: He would just take my hand and put it close to his penis and just say "beat my meat" while slapping my hand.

Judge: How many times has he done that?

T.L.C.: I actually don't know.

Judge: More than once? Or just once?

T.L.C.: More than once.

When T.L.C.'s counsel questioned him, the following exchange took place:

Counsel: Has [Doe] ever threatened you since, since you had the incidents on the bus with hand touching?

T.L.C.: No, except for the time he opened his door and he said I got him suspended.

Counsel: Did he ever say he would do something in the future if he saw you again?

T.L.C.: No.

Counsel: Has [Doe] within . . . sometimes when these things happened he would touch you, would you ever say anything to him? Ask him to stop?

T.L.C.: Yes, I'd say "stop" or sometimes, not a lot, I would cuss at him and tell him to stop.

Counsel: Did he stop when you asked him to?

T.L.C.: No, not always.

Counsel: Do you want to have no contact with [Doe]?

T.L.C.: Yes.

Afterwards, Doe's mother was asked if she had any questions for T.L.C. She responded in a manner that indicated that she wished to ask Doe questions, but the district court declined to allow her to call Doe at that time.[1] Doe's mother declined to ask any questions of T.L.C. Later, out of order, Doe's mother was permitted to ask T.L.C. why he did not tell his mother right away about Doe slapping him[2] and T.L.C. explained that he told about a week later after a friend was going to tell his mother.

When it was the defense's turn, the following exchange took place between the district court judge and Doe's mother:

Judge: [Doe's mother], who is it you want me to hear from?

Doe's mother: Actually, [Doe] would like to testify.

[1] Doe's mother stated, while touching Doe on the arm, "Actually I would like for him [Doe]," but was cut off by the district court which clarified, "No, of this boy [T.L.C.]"

[2] This was an allegation in the petition that T.L.C. did not testify about.

> Judge: And you understand he has a Fifth Amendment right not to incriminate himself and you still want him to testify? That anything he says can be used against him in a court of law and I don't know what he is going to say, and the answer can be that you still want him to testify, but I need to make sure you understand that anything he says can be used against him.
>
> Doe's mother: No, no testify.

Doe's mother called her daughter and sister to testify that Doe never yelled at T.L.C. about getting suspended from school. Doe's mother also tried to introduce the school disciplinary report, which was excluded as hearsay.

The district court stated that Doe's witnesses were not credible and pointed out that there was no counter testimony about what happened on the bus. The district court explained it believed Doe crossed boundaries and it would grant the no-contact order. Then the following exchange took place:

> Doe's mother: I'm confused with, he didn't want to incriminate himself, but he does want to prove he didn't say those things.
>
> Judge: He can testify or not testify, I mean but anything he says can be used against him in a court of law, so, you know.
>
> Doe's mother [to Doe]: Doe, maybe it would be best if you testify.
>
> Doe: [No audible response, silence].

The district court proceeded to explain the order.

When it appeared the hearing was over, a person approached Doe's mother; they talked, and Doe's mother became upset and began to cry. The district court asked the parties to stay and clarified that Doe could not contact T.L.C. through social media. Doe's mother then engaged with the district court:

> Doe's mother: They are terminating my tenancy; I'm going to lose my home.
>
> Judge: I am sorry, Ma'am.
>
> Doe's mother: I should have had him testify because he said he moved his hand away from him because he would hit him.

The order of protection, entered on March 1, 2018, only contained the check-marked findings: "For the Petitioner against the Respondent in that it was established by a preponderance of the evidence that an act(s) of stalking [and] sexual assault has occurred and may occur again." Doe was ordered to remain 500 feet away from T.L.C. and from going within 500 feet of the apartment complex where they both lived and the school they both attended for three years.

The docket sheet did not contain any relevant findings, only listing the plaintiff's counsel, and stating that the defendant was "w/ M[other] & child present" and "Petitioner adopted stmt as her testimony. Two witnesses for [defendant] – [K.C.]"

Doe obtained counsel and appealed to the Jefferson Circuit Court. Initially, the circuit court reversed on the basis that Doe was not competent to

represent himself, his mother was not competent to represent him, the juvenile court had exclusive jurisdiction, and the district court erred in preventing Doe from testifying with an inaccurate warning where Doe's testimony could not be used against him in a later criminal proceeding, there was no proof that Doe and T.L.C. were in a dating relationship, no proof of stalking, and the conduct while sexual in nature did not rise to the level of sexual assault. However, T.L.C.'s mother filed a motion to alter, amend, or vacate pursuant to Kentucky Rules of Civil Procedure (CR) 60.02, arguing that counsel was not served. The circuit court subsequently vacated its previous order.

On July 25, 2018, the circuit court affirmed the district court's order in a two-and-one-half-page opinion. The opinion and order misstated key facts[3] and only summarily addressed Doe's arguments. The circuit court stated that Doe could properly be represented by his mother as she was his guardian, he had no right to counsel in a civil proceeding, there was no need to hear this matter in juvenile court, the application of the IPO statute to juveniles demonstrates capacity, the district court's admonitions about Doe testifying were clearly

[3] Among these misstatements were that T.L.C. testified that Doe said "F*** me baby" a few times (this was taken from the petition which was excluded as hearsay and not testified to by T.L.C.); that Doe's mother presented four witnesses (she presented two); and that Doe was represented by a law student, a licensed attorney, and his mother (it was T.L.C. who was represented by the law student and licensed attorney, while Doe was only represented by his mother).

appropriate perjury warnings, and the IPO could properly be granted on the basis of sexual assault including sexual abuse, which included the touching of the leg.

Doe raises a myriad of errors, all of which were unpreserved before the district court but were raised before the circuit court.[4] Doe seeks palpable error review on all issues raised on appeal and any other irregularities. We consider the following issues: (1) whether this matter should have been heard in juvenile court; (2) whether the district court's warning about self-incrimination was accurate, and whether a faulty warning violated Doe's due process rights by preventing him from presenting evidence in his own defense; (3) whether necessary factual findings were made in the district court's order; and (4) whether the IPO could be granted based upon the evidence adduced during the hearing. However, because the

[4] Doe specifically argues: (1) the district court erred by allowing Doe's mother to represent him and commit the unauthorized practice of law and the circuit court erred in affirming this; (2) the district court erred by trying Doe without determining his competency and capacity to be sued or to represent himself, and the circuit court erred in its reasoning that when the IPO statute was created the General Assembly determined that minors are competent to represent themselves; (3) the district court erred and the circuit court erred in not reversing when the district court admonished Doe not to testify because his testimony could be used against him when, by statute, the use of his testimony is only permitted for impeachment purposes; (4) the district court erred by applying the gun restrictions using the Jefferson County pre-printed forms in violation of Kentucky Revised Statutes (KRS) 456.020(2) and the circuit court erred in not considering this issue; (5) the district court erred and the circuit court erred in sustaining the findings that Doe committed the crimes of stalking and sexual assault; (6) Doe should have been charged and tried in the juvenile court and had an attorney appointed for him; (7) the district court erred by not conducting a *Faretta* (*Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975)) hearing; and (8) the district court should have considered that there is a presumption of incapacity or diminished capacity because Doe is a child.

district court lacked subject-matter jurisdiction, we will only address the other issues briefly to give guidance should these issues reoccur.

Before we delve into the substance of these specific errors, it is appropriate to review the purposes of filing an IPO petition and the context in which an IPO petition can be filed against a child. Kentucky has long had domestic violence statutes which allow for domestic violence orders; however, it failed to protect persons from domestic violence which arose from a dating relationship in which the couple did not formerly live together or share a child. Repeatedly, our courts had to reverse DVOs because, despite the fact that the evidence was clear that the acts committed would constitute domestic violence, the victim and perpetrator did not qualify as being members of an unmarried couple. *See Barnett v. Wiley*, 103 S.W.3d 17 (Ky. 2003); *Randall v. Stewart*, 223 S.W.3d 121 (Ky.App. 2007). Consequentially, proposals to remedy this limitation were repeatedly introduced in the Kentucky General Assembly. *See generally* Sarah Lawson, Note, *Expanding the Scope of Who May Petition for Domestic Violence Protective Orders in Kentucky*, 102 KY. L.J. 527, 544-45 (2014).

Ultimately, the General Assembly enacted the IPO statutes, effective January 1, 2016. 2015 Kentucky Laws Ch. 102 § 52 (HB 8). However, rather than enact statutes that dealt exclusively with the problem of dating violence, the

General Assembly also added protection for victims who were never in a dating relationship with the perpetrator but who were stalked or sexually assaulted:

> An IPO allows a victim of dating violence and abuse, as well as victims of stalking or sexual assault (regardless of the presence of a past or current dating relationship), or an adult on behalf of a minor victim, to petition for protection against their perpetrator. KRS 456.030(1). The IPO statutes are codified in KRS 456. If the court "finds by a preponderance of the evidence that dating violence and abuse, sexual assault, or stalking has occurred and may again occur, the court may issue an interpersonal protective order." KRS 456.060(1).

Halloway v. Simmons, 532 S.W.3d 158, 161-62 (Ky.App. 2017) (footnote citation omitted). Interestingly enough, the definition for "[d]ating violence and abuse" includes stalking and sexual assault. KRS 456.010(2).

The General Assembly contemplated that both the victim and the perpetrator may be minors as KRS 456.050(1)(b) states that:

> If the petitioner or respondent is a minor, the court shall inquire whether the parties attend school in the same school system to assist the court in imposing conditions in the order that have the least disruption in the administration of education to the parties while providing appropriate protection to the petitioner.

However, besides allowing an adult to file on behalf of a minor victim and the provision regarding making inquiries as to whether the parties attend the same school, the only other provision relative to minors is that "[a] court shall order the omission or deletion of . . . the address of any minor children from any orders or

documents to be made available to the public or to any person who engaged in the acts complained of in the petition." KRS 456.070(9).

Although we generally treat children differently in the court system, the lack of additional statutory guidance about how courts should address IPO petitions where the respondent is a child leads to many unanswered questions. Therefore, we are left to rely upon general provisions in our statutes.

Doe argues that it was improper for his case to be heard before the regular district court on its IPO docket, rather than before the juvenile session of the district court (juvenile court). Doe states that this error is significant in that his full name was used in all court records and he did not receive the confidentiality he was entitled to as a juvenile. Doe's argument is, essentially, that the district court lacked subject-matter jurisdiction to hear the IPO case against him because the juvenile court was the only court with jurisdiction.

"Subject-matter jurisdiction refers to a court's authority to determine 'this kind of case' as opposed to 'this case.'" *Privett v. Clendenin*, 52 S.W.3d 530, 532 (Ky. 2001) (quoting *Duncan v. O'Nan*, 451 S.W.2d 626, 631 (Ky. 1970)). "It is understood that if a court does not have subject matter jurisdiction, the court has no 'power to do anything at all.'" *Commonwealth Health Corp. v. Croslin*, 920 S.W.2d 46, 48 (Ky. 1996) (quoting *Duncan*, 451 S.W.2d at 631).

"[A]n alleged lack of subject-matter jurisdiction is one of those issues that 'may be raised at any time, even by the court itself.'" *Commonwealth v. Steadman*, 411 S.W.3d 717, 721 (Ky. 2013) (quoting *Kentucky Employers Mut. Ins. v. Coleman*, 236 S.W.3d 9, 15 (Ky. 2007)). Lack of subject-matter jurisdiction cannot be waived by the parties. *Gaither v. Commonwealth*, 963 S.W.2d 621, 622 (Ky. 1997).

"The District Court is a court of limited jurisdiction; it has original jurisdiction in all matters specified in KRS 24A.110 to 24A.130." KRS 24A.010(1). "The juvenile jurisdiction of District Court shall be exclusive in all cases relating to minors in which jurisdiction is not vested by law in some other court." KRS 24A.130. Similarly, KRS 610.010(1) states in relevant part:

> Unless otherwise exempted by KRS Chapters 600 to 645, *the juvenile session of the District Court of each county shall have exclusive jurisdiction in proceedings concerning any child living or found within the county who has not reached his or her eighteenth birthday* or [public offenders under age eighteen exempting children sixteen or older who commit motor vehicle offenses.]

(Emphasis added.) The rest of KRS 610.010 addresses how various listed actions are to be categorized (public offenses, status offenses, nonoffender actions, and mental health actions), and allows or exempts certain actions from juvenile court jurisdiction. Notably, nowhere are DVO or IPO actions in which the respondent is a minor addressed.

Pursuant to KRS 456.030(6)(a), "[j]urisdiction over petitions filed under this chapter [IPOs] shall be concurrent between the District Court and Circuit Court." Accordingly, because jurisdiction over IPO cases is not vested exclusively in the circuit court, where the respondent is a minor[5] an IPO hearing must take place before the juvenile session of the district court as it has exclusive jurisdiction "in all cases relating to minors in which jurisdiction is not vested by law in some other court[,]" KRS 24A.130, and "in proceedings concerning any child living or found within the county[,]" KRS 610.010(1).

Based on this unequivocal language, Doe was entitled to have this matter heard by the juvenile court with the concurrent confidentiality of such court, with law enforcement and school personnel still receiving appropriate information. KRS 610.070(3); KRS 610.340(1)(a), (3), and (5). The circuit court erred by failing to reverse the district court's decision for lack of subject-matter jurisdiction. Accordingly, we reverse the circuit court's decision.

We address the next two issues to provide guidance generally in IPO cases, so that these same errors may not occur on remand. Doe argues that the district court erred in advising Doe and his mother that Doe's testimony during the IPO proceedings could be used against him in juvenile or criminal proceedings.

[5] We note that the matter need not be heard before the juvenile session of the district court if the person on whose behalf the petition is filed is a minor.

The IPO statute affirmatively states in KRS 456.070(6): "Testimony offered by an adverse party in a hearing ordered pursuant to KRS 456.040 shall not be admissible in any criminal proceeding involving the same parties except for purposes of impeachment." In interpreting the equivalent statement from a former version of KRS 403.780[6] which did not include the impeachment exception, the Court of Appeals determined that although a crime is an offense against the Commonwealth, brought in the name of the Commonwealth, a reasonable interpretation was that the General Assembly "meant that the testimony given in a domestic violence proceeding by an adverse party shall not be used in a criminal proceeding brought against the adverse party wherein the other parties to the domestic violence proceeding are witnesses or otherwise involved with matters pertaining to the proceeding." *Barnes v. Jevning*, No. 2011-CA-001214-ME, 2012 WL 592411, at *2 (Ky.App. Feb. 24, 2012) (unpublished).[7]

No courts have interpreted whether the phrase "criminal proceedings" in either the DVO or IPO statutes should include juvenile delinquency proceedings. Therefore, while we understand that the wording of this statute might give a district court pause as to whether the prohibition on using testimony offered

[6] The former version of KRS 403.780 provided: "Testimony offered by an adverse party in a hearing held pursuant to the provisions of KRS 403.745 shall not be admissible in any criminal proceeding involving the same parties."

[7] We consider this unpublished appellate decision pursuant to CR 76.28(4)(c) because no published opinion adequately addresses this issue.

by a minor during an IPO hearing (other than for impeachment purposes) can be used in a subsequent juvenile delinquency proceeding, there is no doubt that this prohibition applies to criminal proceedings. We also interpret this prohibition as applying to juvenile delinquency proceedings.

Although "[j]uvenile [delinquency] proceedings are a distinct legal creature, involving aspects of criminal prosecution and civil practice[,]" *R.S. v. Commonwealth*, 423 S.W.3d 178, 183 (Ky. 2014), it is appropriate to extrapolate that the limitation in using testimony by an adverse party pursuant to KRS 456.070(6) also applies to juveniles to allow them to truthfully testify during an IPO hearing without regard for whether they could be charged with public offenses and face juvenile delinquency trials or be criminally tried as adults before the circuit court as youthful offenders for the underlying conduct involved with the IPO.[8]

Although being tried before the juvenile court is not a criminal proceeding, as recognized by the Kentucky Supreme Court in its discussion of *In*

[8] The underlying conduct for IPOs can certainly result in criminal proceedings for juvenile defendants who are categorized as youthful offenders. IPOs are entered upon a finding by a preponderance of the evidence "that dating violence and abuse, sexual assault, or stalking has occurred and may again occur[.]" KRS 456.060(1). "Sexual assault" is defined as including rape, sodomy, sexual abuse, and incest. KRS 456.010(6). First-degree rape can be a Class A or Class B felony depending upon the age of the victim. KRS 510.040(2). Such a charge would make a child fourteen or older eligible to be tried as a youthful offender pursuant to KRS 635.020(2).

re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967), which extended the Fifth Amendment privilege against self-incrimination to juveniles, juvenile delinquency proceedings have criminal conviction style consequences:

> the [United States Supreme] Court found that it would be "entirely unrealistic to carve out of the Fifth Amendment all statements by juveniles on the ground that these cannot lead to 'criminal' involvement," *id.* at 49, 87 S.Ct. [at 1455], because public offense charges can lead to incarceration against one's will, a deprivation of liberty, regardless of what it is called or where the child is housed.

N.C. v. Commonwealth, 396 S.W.3d 852, 859 (Ky. 2013). Therefore, it is appropriate to extend the statutory protection that adults receive under KRS 456.070(6) to all juveniles. This has the salutary effect of allowing the juvenile court to hear testimony from the respondent before making a ruling and, thus, have a fuller picture of what occurred and why, which can only benefit the process. This is needed because of the long-reaching effects of an improvidently granted IPO on the respondent.

Therefore, rather than have attorneys and district courts try to guess what a juvenile might be charged with and how that juvenile might be tried, a consistent application of the statute to adults and juveniles will make it easier for defendants to defend themselves or explain what occurred without fear of making criminal admissions.

While it is understandable that the district court wanted to warn Doe about self-incrimination, the district court's explanation was faulty in light of the relevant statute where it omitted an explanation that Doe's testimony could only be used against him for impeachment purposes, should he later be charged with a crime and testify, rather than as party admissions. *See* Kentucky Rules of Evidence (KRE) 801A(b)(1). If we were not reversing for the IPO to be vacated, we would consider this to be a palpable error meriting our review because it deprived Doe of due process.

"Due process requires, at the minimum, that each party be given a meaningful opportunity to be heard." *Lynch v. Lynch*, 737 S.W.2d 184, 186 (Ky.App. 1987) (citations omitted). "[A] party has a meaningful opportunity to be heard where the trial court allows each party to present evidence and give sworn testimony before making a decision." *Holt v. Holt*, 458 S.W.3d 806, 813 (Ky.App. 2015) (citation omitted). This standard applies to DVO and IPO hearings. *See Cottrell v. Cottrell*, 571 S.W.3d 590, 592 (Ky.App. 2019); *Martin v. Connelly*, No. 2018-CA-001728-ME, 2019 WL 6998651, at *7 (Ky.App. Dec. 20, 2019) (unpublished).

"It has been said that no hearing in the constitutional sense exists where a party . . . is not given an opportunity to test, explain or refute." *Utility Regulatory Comm'n v. Kentucky Water Service Co., Inc.*, 642 S.W.2d 591, 593

(Ky.App. 1982) (citation omitted). "Due process is not satisfied when a DVO [or IPO] is granted without a full hearing, such as when testimony is not presented, or testimony is cut short." *Hawkins v. Jones*, 555 S.W.3d 459, 462 (Ky.App. 2018) (citation omitted).

Because the focus is on the "*opportunity* to be heard," this right can be waived if such a waiver is knowingly, voluntarily, and intelligently made. *Department of Revenue, Finance and Admin. Cabinet v. Wade*, 379 S.W.3d 134, 138 (Ky. 2012). Any waiver of a party's right to a full evidentiary hearing before a DVO or IPO is granted must be clear and knowing for a DVO or IPO issued to be upheld. *Clark v. Parrett*, 559 S.W.3d 872, 875 (Ky.App. 2018).

A waiver of Doe's right to present his own testimony as evidence could not be knowingly, voluntarily, and intelligently made where he was given inaccurate advice by the district court. Like a trial court warning a criminal defendant about a potential perjury charge from testifying, which was determined in *Woolfolk v. Commonwealth*, 339 S.W.3d 411, 418 (Ky. 2011), to be an improper threat when the warning was not valid advice as a perjury charge was not a distinct legal possibility, "[w]e find it difficult to conceive that the inaccurate warning, whether in good faith or otherwise, can have any useful effect *except* to dissuade a defendant from exercising his right to testify." The district court's repeated inaccurate warnings certainly dissuaded Doe's mother from calling him, resulting

in a due process violation because Doe was deprived of the opportunity to be heard.[9] This had devastating results as without his testimony, Doe was left with the only relevant evidence of what happened on the bus being T.L.C.'s unrefuted testimony. Even if Doe's testimony confirmed T.L.C.'s account in all its particulars, he could have perhaps explained his motivation for doing so, which could provide a defense, such as that his conduct was not done for the purpose of sexual gratification. In all IPOs whether the respondent is an adult or a minor, the respondent shall be entitled to an appropriate warning about the effect of testifying in accordance with KRS 456.070(6).

Although neither party raised this issue, there were no written factual findings in this case. We wish to clarify that just as written factual findings are required for DVO cases, they are also required for IPO cases. Therefore, an IPO decision that fails to contain written factual findings will be vacated even if the issue is not raised. *See Castle v. Castle*, 567 S.W.3d 908, 916 (Ky.App. 2019); *Thurman v. Thurman*, 560 S.W.3d 884, 887 (Ky.App. 2018). It is appropriate to treat factual findings in DVO cases and IPO cases the same because "the purpose and intent behind, and the interpretation of, the DVO statutes are almost identical

[9] Of course, we acknowledge that Doe would need to be competent to testify, testify from personal knowledge, and his testimony would need to be relevant. KRE 601; KRE 602; and KRE 402.

to that of the IPO statutes." *Calhoun v. Wood*, 516 S.W.3d 357, 360 (Ky.App. 2017).

Finally, Doe argues that as a matter of law he could not be found to have committed stalking and sexual assault based on the evidence before the district court. As we are not addressing this matter on the merits and the evidence certainly could be different in a new hearing, we make some general comments.

The district court found that T.L.C. was entitled to an IPO because Doe committed stalking and sexual assault. As summarized in *Halloway*, 532 S.W.3d at 162:

> for an individual to be granted an IPO for stalking, he or she must at a minimum prove by a preponderance of the evidence that, an individual intentionally engaged in two or more acts directed at the victim that seriously alarmed, annoyed, intimidated, or harassed the victim, that served no legitimate purpose, and would have caused a reasonable person to suffer substantial mental distress, and that these acts may occur again. KRS 508.130 and KRS 456.060. Additionally, the individual must prove that there was an implicit or explicit threat by the perpetrator that put the victim in reasonable fear of sexual contact, physical injury, or death. KRS 508.150.

This is not a typical stalking case as Doe and T.L.C. shared a seat on the bus together because they were assigned to sit together, and T.L.C. stated that he did not see Doe at school because they were in different grades. It does not appear that Doe ever sought T.L.C. out except for one incident in which Doe

shouted to T.L.C. (without approaching him) that T.L.C. was the reason that Doe was suspended.

In considering the requirements for proving stalking, the juvenile court should consider how such matters differ when two children are involved. This is especially relevent when it comes to considering whether these acts may occur again. Children, unlike adults, are not free agents with complete freedom of movement. At school, school personnel provide supervision and can control children's behavior. At home, parents supervise children. Children may also be more likely to change their behavior upon intervention than adults. The intervention of the school and Doe's mother, and how Doe responded afterwards, should be considered. This is a matter in which the expertise of the juvenile court is uniquely suited.

Similarly, this is not a typical sexual assault case. KRS 456.010(6) states: "'Sexual assault' refers to conduct prohibited as any degree of rape, sodomy, or sexual abuse under KRS Chapter 510 or incest under KRS 530.020[.]" Pursuant to KRS 510.130(1): "A person is guilty of sexual abuse in the third degree when he or she subjects another person to sexual contact without the latter's consent."[10] KRS 510.010(7) provides: "'Sexual contact' means any touching of

[10] Doe's conduct could also be alleged to constitute sexual abuse in the first degree for "subject[ing] another person to sexual contact who is incapable of consent because he or she: . . . Is less than twelve (12) years old[.]" KRS 510.110(1)(b)2.

the sexual or other intimate parts of a person done for the purpose of gratifying the sexual desire of either party[.]" While an actual touching is required, it can be done through the victim's clothes. *Turney v. Commonwealth*, 159 S.W.3d 818, 819 (Ky.App. 2004). "[T]he definition does not include inadvertent or accidental touching of the intimate parts of another person." *Bills v. Commonwealth*, 851 S.W.2d 466, 471 (Ky. 1993). "The 1974 Commentary to KRS 510.010 notes that the contact can be with either the victim or the actor. KRS 510.010 (1974 cmt.)" so it does not matter who touched whom. *Hillard v. Commonwealth*, 158 S.W.3d 758, 762 (Ky. 2005). "[O]ther intimate parts" include thighs and legs but not hips. *Johnson v. Commonwealth*, 864 S.W.2d 266, 277 (Ky. 1993); *Bills*, 851 S.W.2d at 472; *Turney*, 159 S.W.3d at 819.

The test to determine if part of the body is an "intimate" part requires "an examination of three factors: 1) What area of the body is touched; 2) What is the manner of the touching[;] and 3) Under what circumstances did the touching occur." *Bills*, 851 S.W.2d at 472. Suspicion that intimate parts were touched for the purpose of sexual gratification is not enough; while the purpose can be inferred, sexual gratification must be the probable reason for the action rather than a possible cause. *Pate v. Commonwealth*, No. 2002-SC-000037-MR, 2004 WL 868485, at *3 (Ky. Apr. 22, 2004) (unpublished).

The "[i]ntent [to gratify sexual desire of either party] can be inferred from the actions of an accused and the surrounding circumstances. The [fact-finder] has wide latitude in inferring intent from the evidence." *Anastasi v. Commonwealth*, 754 S.W.2d 860, 862 (Ky. 1988) (citation omitted). *See, e.g., Tungate v. Commonwealth*, 901 S.W.2d 41, 42 (Ky. 1995); *Calloway v. Commonwealth*, 187 S.W.3d 861, 864 (Ky.App. 2006); *Boone v. Commonwealth*, 155 S.W.3d 727, 730 (Ky.App. 2004).

It is making a very large inference to assume, as the district court apparently did, that Doe forced T.L.C. to touch Doe's penis through his pants for sexual gratification. The only evidence of any touching between Doe and T.L.C. came from T.L.C.'s testimony that Doe touched and hit T.L.C.'s hands with Doe's hands. The hands are not an intimate part of the body.

There was no testimony that Doe touched *any* other part of T.L.C.'s body or caused T.L.C.'s hands to touch *any* intimate part of Doe's body. T.L.C. never testified that Doe hitting T.L.C.'s hand caused T.L.C.'s hand to be in contact with Doe's penis, crotch, or thighs through his pants. In the absence of contact with either child's sexual or other intimate parts, Doe's behavior, no matter how distasteful it may have been, could not constitute sexual abuse. Therefore, it would have behooved T.L.C.'s counsel or the district court to inquire more specifically of T.L.C. as to what happened when Doe hit T.L.C.'s hand so that the juvenile court

is not left to infer what did or did not happen from what T.L.C. chose to say or not say.

Additionally, even if some incidental intimate contact took place, it is far from clear from T.L.C.'s testimony that Doe intended for T.L.C. to touch him intimately. T.L.C. did not testify that Doe tried to get T.L.C. to touch his crotch and indeed if this was Doe's intent, slapping T.L.C.'s hand with his hand would seem to be a less effective method of doing so rather than simply taking hold of T.L.C.'s hand and pushing it against Doe's crotch. This is a matter in which Doe's testimony could have been very helpful in clarifying what his intent was.

Finally, other than T.L.C. testifying that Doe said, "beat my meat," the setting and context of this action is certainly not a typical one that easily supports an inference that Doe's conduct was "done for the purpose of gratifying the sexual desire of either party[.]" KRS 510.010(7). Doe's action was not furtively inflicted on a helpless victim. Doe's action took place on a crowded school bus on a seat shared with a third boy. There was nothing private or secret about Doe's actions; he alerted T.L.C. to his conduct by grabbing T.L.C.'s hands and telling him to "beat his meat." This conduct between thirteen-year-old Doe and eleven-year-old T.L.C. could have been engaged in by Doe for the purpose of teasing, embarrassing, and tormenting T.L.C. in front of his peers with crude masturbatory humor instead of for the sexual gratification of Doe or T.L.C. Was

this bullying behavior inappropriate? Yes. Was it sexual abuse? That is a matter to be determined by the juvenile court.[11]

Accordingly, we reverse the Jefferson Circuit Court's opinion and order affirming the Jefferson District Court's grant of an IPO against Doe in favor of protecting T.L.C. and remand with directions for the circuit court to vacate the district court's decision and remand, so that the matter may be heard before the juvenile court. We further direct that the circuit court and district court shall redact Doe's given name from the public record and take all other appropriate measures for his confidentiality.

ALL CONCUR.

BRIEFS FOR APPELLANT:	BRIEF FOR APPELLEE:
Gregory Ward Butrum Louisville, Kentucky	Beth Robinson-Kinney Louisville, Kentucky

[11] We note that given the significant elapse of time between Doe's actions and our decision, that T.L.C.'s mother may not wish to pursue this matter further as, correctly or not, T.L.C. has already benefited from two years of protection from Doe.