

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-002071-ME

KENNETH DOYLE

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DONNA DELAHANTY, JUDGE
ACTION NO. 08-D-503120

SHANNON DOYLE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CAPERTON, KELLER, AND LAMBERT, JUDGES.

KELLER, JUDGE: Kenneth Doyle (Kenneth), appeals from the Jefferson Family Court's entry of a Domestic Violence Order (DVO), and Emergency Protective Order (EPO), filed against him by Shannon Doyle (Shannon). On appeal, Kenneth asserts that the entry of the DVO was clearly erroneous and was not supported by substantial evidence and that the trial court erred in granting the EPO. For the following reasons, we affirm.

FACTS

The parties have cited to the video record in their briefs. We were not provided a copy of the video record and the following facts are derived from the parties' briefs and appear to be undisputed.

On September 29, 2008, Shannon filed a Domestic Violence Petition against Kenneth in the Jefferson Family Court. In the Petition, Shannon stated that:

Kenneth & I are married but separated with no children in common. This morning my landlord called me & told me that my home had been vandalized. I went & the police were present when I arrived. My home had been destroyed & there were china cups & saucers, that I had left at the previous home I had shared with Kenneth, setting [sic] very neatly on the cabinet shelf. A report #8008074602 was taken & I was advised to file this epo [sic]. On Sept. 26, I saw Kenneth's car drive by my house & he shined a spotlight in my window. He continues to call & harass me, send me emails & he won't leave me alone. On one of the emails he sent, he told me that he loves me & would never leave me. One also said I would regret leaving him. I want him to stay away.

On October 13, 2008, the court held a hearing, heard evidence and entered a DVO against Kenneth. The evidence was based exclusively on Shannon's testimony and supporting photographs. Kenneth did not testify. Therefore, there was no evidence contradicting Shannon's testimony. Shannon testified that she had vacated the parties' marital residence in February 2008, moving to what one party referred to as a condo (the condo). In September 2008, Shannon moved from the condo to a new residence, leaving behind only some

cleaning supplies. Sometime after Shannon left the condo, it was vandalized. Shannon submitted as evidence photographs of the extensive damage and destruction to the condo. The photographs showed, in the midst of the destruction, china cups and saucers that Shannon was certain she left in Kenneth's possession placed precisely on a shelf. On September 29, 2008, Shannon filed an EPO against Kenneth.

STANDARD OF REVIEW

With the preceding standards of review in mind, we now analyze the issues raised by Kenneth. When reviewing an entry of a DVO, our standard of review is whether the trial court abused its discretion. "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). A reviewing court may not substitute its findings of fact for the trial court unless they are clearly erroneous. *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979). A factual finding is not clearly erroneous if it is supported by substantial evidence. "'Substantial evidence' is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people." *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). Furthermore, The Kentucky Rule of Civil Procedure (CR) 52.01 instructs: "Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses."

ANALYSIS

In order to issue a DVO, the trial court must first conduct a hearing and find “from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur” Kentucky Revised Statute (KRS) 403.750(1). The preponderance of the evidence standard is met when sufficient evidence establishes that the alleged victim “was more likely than not to have been a victim of domestic violence.” *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). Domestic violence and abuse is defined as “physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple.” KRS 403.720.

Kenneth argues that the entry of the DVO was supported by insufficient evidence and therefore, clearly erroneous. Kenneth asserts that Shannon’s petition and testimony at the hearing provided no proof that domestic violence and abuse had occurred and may occur again.

As stated previously, this Court can only reverse if the trial court abused its discretion and if its finding’s are clearly erroneous and not supported by substantial evidence. After reviewing Shannon’s petition, her uncontradicted testimony, and the photographs, we find that the family court did not abuse its discretion and there was sufficient evidence to satisfy the preponderance of the evidence standard. Shannon stated that Kenneth would not leave her alone, drove by her residence and shined a light in her window, and continued to call, email and harass her. Shannon’s condo was destroyed in a violent manner and the only items

left amidst the destruction were some china cups and saucers that had been in Kenneth's possession. Due to the extent and nature of the damage to the condo, as well as previous incidents involving Kenneth, she feared imminent physical injury. The preceding was substantial evidence to induce conviction in the minds of reasonable people that Shannon was more likely than not the victim of domestic violence. Therefore, based upon the evidence, we cannot conclude that the family court's finding of domestic violence was clearly erroneous, arbitrary, unreasonable or unfair.

Kenneth also argues that the family court erred in granting the EPO. Kenneth asserts that there was no imminent danger to Shannon and finds it significant that Shannon waited three days to take out a petition.

The court may issue an EPO, "If, upon review of the petition, as provided for in KRS 403.735, [it] determines that the allegations contained therein indicate the presence of an immediate and present danger of domestic violence and abuse, the court shall issue, upon proper motion, ex parte, an emergency protective order" KRS 403.740(1). "Domestic violence statutes should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic violence." *Barnett v. Wiley*, 103 S.W.3d 17, 19 (Ky. 2003).

We are not persuaded that Shannon's delay of three days in filing the petition means that she was not in imminent and present danger of domestic violence and abuse. There is no statutory time requirement that an EPO be issued immediately after a domestic violence incident occurs. Due to the violent

destruction of the condo, as well as the prior incidents involving Kenneth, the court could have reasonably concluded Shannon was in fear of imminent danger. Since there was sufficient evidence in Shannon's petition to warrant the entry of an EPO; we discern no error.

CONCLUSION

For the foregoing reasons, we hold that the family court did not abuse its discretion when entering a DVO and EPO against Kenneth. The evidence does not compel a finding to the contrary. Therefore, we affirm the order of the Jefferson Family Court.

LAMBERT, JUDGE, CONCURS.

CAPERTON, JUDGE, DISSENTS AND FILES SEPARATE
OPINION.

CAPERTON, JUDGE, DISSENTING: Appellant argues, and I agree, that the evidence presented could not substantiate the finding by the trial court that domestic violence has occurred and may again occur, necessitating the issuance of a domestic violence order.

While crimes against property amidst couples are reprehensible, and may give rise to criminal or civil liability, a review of KRS 403.720(1) reveals that such actions do not constitute domestic violence.¹ While a trial court can order the

¹ It was not argued that the alleged crime against property was committed in such a way as to "send a message" to the alleged victim of the imminent infliction of physical injury, abuse or assault.

parties not to damage property, pursuant to KRS 403.750(c), it can only do this after it finds that domestic violence and abuse has occurred and may again occur.

The remedy given the trial court in KRS 403.750(c) to enter an order protecting the property of the parties does not enlarge the definition of domestic violence and abuse set forth in KRS 403.720(1) to include the destruction of property.

I would reverse the decision of the trial court.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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