RENDERED: NOVEMBER 19, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000912-ME

JACK PATRICK HARRIS — APPELLANT

v.

APPEAL FROM WARREN CIRCUIT COURT
HONORABLE CATHERINE R. HOLDERFIELD, JUDGE
ACTION NO. 10-D-00127

PAMELA K. HARSTON — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: COMBS AND DIXON, JUDGES; ISAAC,[1] SENIOR JUDGE.

COMBS, JUDGE: Jack Harris appeals from the Domestic Violence Order (DVO) issued against him by the Warren Family Court. After carefully reviewing the record and the law, we vacate the DVO and remand.

Jack moved to Bowling Green to live with his brother and sister-in-law in May 2009. He had been an attorney in Louisiana, but he retired due to disability and is no longer licensed to practice law. He is proceeding in this case *pro se*.

[1] Senior Judge Sheila R. Isaac sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

Pam Harston, a physician, is a neighbor of Jack's brother. In July 2009, Jack moved in with Pam. She had recently been evicted from a medical practice and was commencing her solo practice while engaged in litigation with her former partners. Jack worked in her office assisting in administrative matters and working on her lawsuit. He also spent time on research for a prospective book.

The record indicates that Jack and Pam had no serious difficulties in their relationship until March 2010. At that point, the facts are somewhat disputed. Jack suffers from bipolar disorder, and Pam alleges he experienced a manic delusional episode in March of 2010. Pam was going to a wedding in Florida and invited both Jack and another man to accompany her. Jack alleges that the other man was a drug addict and that Pam provided him with marijuana during the trip. The record shows that Jack felt slighted by Pam during the trip.

Upon returning to Bowling Green, Jack went back to his brother's house. The record contains numerous email and text messages exchanged between Pam and Jack during this time. Jack was clearly very upset about the events that had occurred during the Florida trip. He accused Pam of unethical practices and behavior relating to her duties as a physician. In fact, Jack went as far as to mail a letter to opposing counsel in Pam's litigation reporting that Pam had improperly shredded mail, including a check for twenty thousand dollars. Jack sent copies of the letter to a circuit judge, a U.S. Attorney, and others.

The prolific emails and text messages between Pam and Jack continued. The record indicates that they spent the night together on more than one occasion.

On April 16, when Pam declined to undergo psychiatric treatment that Jack had determined she needed, he told her that their romantic relationship was finished. Nonetheless, the communications did not end. Jack continued to send emails to Pam pointing out how she had been at fault in the last days of their relationship. He accused her of unethical practices.

On April 17, 2010, Jack sent a memorandum to the Department of Drug Enforcement (DEA), detailing allegations of how Pam had behaved unethically. That same evening, Jack sent Pam a barrage of text messages telling her that she would be arrested and would be unable to practice medicine. He called her names and indicated that he knew that she was out in her daughter's car while her daughter was at home. In his final message, he stated, "you [are] history as a physician; and your suit is over."

That night, Pam obtained an Emergency Protection Order (EPO) against Jack. On the petition, Pam complained that Jack: had entered her home uninvited; had expressed violent thoughts about her; had a history of mental illness; texted excessively; and indicated that he would like to "blow my head off." Because the EPO ordered Jack to stay 1000 feet away from Pam, he was forced to move out of his brother's home. Between the issuance of the EPO and the hearing on the DVO, Jack reported Pam to the Cabinet of Health and Family Services, alleging that she had abused the KASPER[2] system. He filed a grievance against her with the Kentucky Board of Medical Licensure.

[2] Kentucky All Systems Electronic Reporting, a system designed to trace prescription drugs from pharmacy to pharmacy.

On May 3, 2010, the Warren Family Court held a hearing on Pam's petition for a DVO. After hearing the testimony of Jack, of Pam and her psychiatrist, and of Jack's sister-in-law, the court issued a DVO against Jack that prevented him from contacting or coming within one thousand feet of Pam. This appeal follows.

Our standard of review is governed by Kentucky Rule of Civil Procedure (CR) 52.01. *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. 1980). (CR 52.01 applies to domestic cases). When reviewing an action taken by a court without a jury, we may not reverse its findings of fact unless they were clearly erroneous. Clear error only occurs when there is not substantial evidence in the record to support the trial court's findings. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998). Substantial evidence is that which is "proof sufficient to induce conviction in the mind of a reasonable person." *Rearden v. Rearden*, 296 S.W.3d 438 (Ky. App. 2009). (citation omitted).

Kentucky Revised Statute[s] (KRS) 403.750 authorizes a family court to issue a domestic violence order "if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur[.]" The definition of domestic violence and abuse is "physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members[.]" KRS 403.720(1). KRS 503.010(3) provides as follows: "'Imminent' means impending danger, and, in the context of domestic violence and abuse as defined by KRS 403.720, belief that danger is imminent can be inferred from a

past pattern of repeated serious abuse." *See Fraley v. Rice-Fraley*, 313 S.W.3d 635, 640 (Ky. App. 2010).

Preliminarily, we note that Jack has presented a number of arguments alleging evidentiary and constitutional error. He argues that we need not examine the sufficiency of the evidence in light of these other alleged errors that he believes to be dispositive of his case. However, we are persuaded that sufficiency of the evidence is the issue upon which this case turns. Our Supreme Court has explained that:

> [o]rdinarily, this Court confines itself rather closely to deciding only those issues which the parties present. . . . However, we are constrained by no rule of court or constitutional provision to observe this procedure, and on *rare occasions*, the facts mandate a departure from the normal practice. When the facts reveal a fundamental basis for decision not presented by the parties, it is our *duty* to address the issue to avoid a misleading application of the law.

Mitchell v. Hadl, 816 S.W.2d 183, 185 (Ky. 1991). (Emphasis added). We believe this is such a case -- especially because the standard of review *requires* us to examine whether there was substantial evidence to support the trial court's findings.

Our Supreme Court has cautioned us to be reluctant to apply its holding in *Mitchell, supra*. However, it has also admonished that "[s]o long as an appellate court confines itself to the record, no rule of court or constitutional provision prevents it from deciding an issue not presented by the parties." *Priestly v.*

Priestly, 949 S.W.2d 594, 596 (Ky. 1997). In this case, it is the record which reveals that no domestic violence had occurred.

At the hearing, Pam alleged four acts of domestic violence: 1) that Jack threw a king-sized Reese's Cup at her; 2) that Jack grabbed her arm and pushed her away from him; 3) that Jack cornered her in her kitchen without touching her; and 4) that Jack raised his arms while retrieving his personal belongings from her office. She admitted to the trial court that after he cornered her in her kitchen, she invited him to spend the night with her; he accepted the invitation.

We are not persuaded that any of those acts rises to the level of domestic violence contemplated by KRS 403.720 or KRS 403.750. Pam testified under oath that she was never physically injured by Jack. She also failed to prove imminent fear of Jack by evidence of a past pattern of serious abuse. Logic dictates that if she had been fearful of Jack, she would not have invited him to spend the night with her. She alleged that Jack had threatened her, but the record shows that any threats pertained solely to Pam's medical practice and licensure status. Additionally, Pam testified that she had not heard Jack say that he wanted to blow her head off. She told the court that Jack's sister-in-law had told her that Jack had made the comment. However, Jack's sister-in-law testified under oath that he had never made any statement indicating violent intentions toward Pam, including the alleged comment about blowing off Pam's head. Assuming, *arguendo*, that throwing a candy bar and pushing away someone's arm constitute unwanted touching, we have recently held that unwanted touching "alone does not satisfy the

definition of domestic violence and abuse as stated in KRS 403.720(1)." *Caudill v. Caudill*, 318 3W3d 112, 119 (Ky. App.2010).

Our courts do not condone the frivolous practice of obtaining DVO's to use the courts to leverage another party in some other proceeding; *i.e.,* a civil lawsuit. *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky. App. 2005). The record reveals that Pam's true motive was to prevent Jack from reporting her to the DEA and the Kentucky Medical Licensure Board. Immediately after the court announced that it was granting the DVO, Pam asked that the order be less restrictive. She said that she did not want to see him lose his home with his brother. She then asked the court if it could prevent Jack from contacting government agencies concerning her and her medical practice. The court properly told Pam that that sort of protection from harassment does not come within the scope of Kentucky's domestic violence statutes.

We are persuaded that Pam's efforts to obtain a DVO against Jack are inappropriate under these circumstances. The domestic violence laws are intended to provide swift protection to victims of violence as set forth in clear terms by the pertinent statutes. Those statutory elements are wholly absent in this case. Harassing communications involving business relationships do not come within the scope of domestic violence protection.

Our court has recently emphasized that:

> the impact of having an EPO or DVO entered improperly, hastily, or without a valid basis can have a devastating effect on the alleged perpetrator. . . From

> [his] perspective, the fairness, justice, impartiality, and equality promised by our judicial system is destroyed. In addition, there are severe consequences, such as the immediate loss of one's children, home, financial resources, employment, and dignity. Further, one becomes subject to immediate arrest, imprisonment, and incarceration for up to one year for the violation of a court order, no matter what the situation or circumstances might be.

Wright, supra. The serious subject matter of a DVO is absent in this case.

Due to the lack of any evidence – much less substantial evidence – of domestic violence, we vacate the order of the Warren Family Court and remand for entry of an appropriate order dissolving the DVO.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jack Patrick Harris, J.D., *pro se*
Bowling Green, Kentucky

BRIEF FOR APPELLEE:

Pamela K. Harston, M.D., *pro se*
Bowling Green, Kentucky