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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000758-ME

ZACHARY THOMAS SHELTON — APPELLANT

v.

APPEAL FROM SCOTT CIRCUIT COURT
HONORABLE LISA HART MORGAN, JUDGE
ACTION NO. 15-D-00029

ELIZABETH JADE SHELTON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, KRAMER AND STUMBO, JUDGES.

STUMBO, JUDGE: Zachary Thomas Shelton appeals from a Domestic Violence Order rendered by the Scott Circuit Court, Family Division. He contends that the evidence was insufficient to support the Order, that its entry will result in dire consequences to an otherwise responsible young man with a bright future, and that the Order must be quashed. We find no error, and AFFIRM the Order on appeal.

Appellant Zachary Thomas Shelton and Appellee Elizabeth Jade Shelton were marred for about six years. One child was born of the marriage. The marriage was dissolved in early 2013 after Appellee testified as to a long history of domestic violence between the parties. In late 2013, the parties entered into an Agreed Order providing that Appellant would retain custody of the child and Appellee receiving supervised visitation.

On March 8, 2015, Appellee travelled to Appellant's house to visit the child. According to Appellee's subsequent testimony, she rejected Appellant's attempt to kiss her, after which she went upstairs to play with the child. While Appellee was giving the child a piggy back ride, Appellant pulled her legs out from underneath her causing her to fall. Appellant then told the child, who was 8 years old, that "Mommy likes to be tied up." Appellant then duct taped Appellee's hands and feet together and pulled her across the carpeted floor of the child's room. According to Appellee's testimony, Appellant then forcibly pulled her pants down and yanked on her underwear repeatedly until it ripped. Appellant smacked Appellee's bare stomach several times and told the child to "look at mommy's fat belly."

Thereafter, Appellant grabbed a marker and began writing and drawing on Appellee, whose hands and feet were still duct taped. Appellant drew penises on Appellee's arms and back, and urged the child to join in. The child then wrote the phrase "I'm dumb" on Appellee's bare back. Appellee was able to free herself after about 10 - 15 minutes, and her mother, Pamela Due, then arrived to

pick her up. Ms. Due took Appellee to a police station in Georgetown, Kentucky, where Appellee filed a police report. Appellee told Officer Travis Daniel Hagar that the incident left her feeling humiliated and degraded.

Officer Hagar then went to Appellant's house, where Appellant told the officer that the parties were merely rough housing and that the incident was consensual. During the meeting, Appellant showed a picture to the officer of Appellee face down on the floor with her hands and feed duct taped.

Appellee then obtained an Emergency Protective Order. A hearing was conducted on March 25, 2015, for the purpose of determining whether a Domestic Violence Order should be rendered. At the hearing, the trial court took judicial notice that criminal charges arising from the incident were pending against Appellant, including counts of Kidnapping, Unlawful Imprisonment in the 2nd Degree, Unlawful Transaction with a Minor in the 3rd Degree, and Assault in the 4th Degree. The parties also testified. Appellant stated that the incident was playful and consensual, with the Appellee stating that it was non-consensual.

After taking proof, the trial court noted its belief that Appellant - at least initially - intended to be playful. Ultimately, however, the court determined that Appellee suffered an "injury" and experienced a "fear of imminent physical injury" sufficient to support a Domestic Violence Order. It found that an act of domestic violence or abuse had occurred and may occur again. The court then restrained Appellant from any contact or communication with Appellee for a period of three years. This appeal followed.

Appellant now argues that the evidence was insufficient to support the entry of the Domestic Violence Order (hereinafter "DVO"). While acknowledging that he helped his 8-year-old son duct tape Appellee's wrists and feet, as well as draw and write on her with a marker, he maintains that this evidence is insufficient to sustain the burden of demonstrating that domestic violence occurred. He notes that there was no physical injury other than some rug burns, and Appellee's testimony that her hands were "pretty red". He directs our attention to Appellee's testimony that Appellant gave her the scissors to cut the tape on her ankles. Appellant also states that the alleged victim tried to use duct tape to remove some of Appellant's facial hair, which he contends demonstrates that the parties were engaged in playful conduct rather than domestic violence. In sum, Appellant argues that the evidence did not rise to a level sufficient to support the entry of the DVO, and that the trial court erred in failing to so rule.

In order to issue a DVO, a trial court must 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 the evidence establishes that the petitioner "was more likely than not to have been a victim of domestic violence." *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007) (quoting *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996)). Domestic violence and abuse includes "physical injury, serious physical injury, sexual abuse,

assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault[.]" KRS 403.720(1).

On appeal, we will not set aside a trial court's finding of domestic violence unless it is clearly erroneous. *Caudill v. Caudill*, 318 S.W.3d 112 (Ky. App. 2010). A factual finding is not clearly erroneous if it is supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). The sole issue for our consideration is whether the testimony and evidence presented at the March 25, 2015 hearing was sufficient to establish that it was more likely than not that an act of domestic violence occurred and may occur again. KRS 403.750. We must answer this question in the affirmative. Appellee testified that Appellant bound her wrists and feet against her will, pulled her pants down and ripped her underwear, and encouraged the parties' minor child to participate in making vulgar drawings and writing on her with a marker. The dispositive inquiry for the trial court was whether these acts were merely playful and consensual, or were committed against Appellee's will. While the trial court struggled with this question, it ultimately found Appellee's testimony to be credible. The test for the appellate court is not whether it might have decided the case differently, but whether the findings of the trial court were clearly erroneous or whether there was an abuse of discretion. *Cherry v. Cherry*, 634 S.W.2d 423 (Ky. 1982). Appellee's testimony, in concert with Appellant's acknowledgment that the incident occurred, constitute substantial evidence in support of the trial court's finding that an act of domestic violence or

abuse occurred and may occur again. This finding formed a proper basis for the issuance of the DVO, and we find no error.

For the foregoing reasons, we AFFIRM the Domestic Violence Order of the Scott Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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Georgetown, Kentucky

BRIEF FOR APPELLEE:

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