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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-000802-ME

JA'QUALLA TAPSCOTT APPELLANT

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE CHRISTINE WARD, JUDGE
ACTION NO. 15-D-500355-001

RA'SHAUNA ORDWAY APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, D. LAMBERT, AND MAZE, JUDGES.

MAZE, JUDGE: Ja'Qualla Tapscott (Tapscott) appeals from a Domestic Violence Order (DVO) the Jefferson Family Court entered against her. Tapscott argues that insufficient evidence existed in the record to support a finding that domestic violence occurred and may occur again. Tapscott also appeals from the trial court's decision to overrule two post-judgment motions. Because we hold that

sufficient evidence existed in the record to support a finding of domestic violence, and because Tapscott was not entitled to post-judgment relief, we affirm.

Background

Appellee, Ra'Shauna Ordway[1] and Tapscott are former romantic partners and roommates. On February 9, 2015, Ordway filed a petition for a DVO against Tapscott alleging that during one incident, Tapscott had yelled at her, "was threatening to attack" her, and actually tried to punch Ordway but missed. Additionally, Ordway stated that Tapscott called her at work to yell at her[2] and had repeatedly tried to contact her through social media. Ordway's petition also alleged prior incidents, including that Tapscott had twice "put [Ordway] out of [Tapscott's] car and left [Ordway] in the middle of nowhere" because Tapscott was upset with her, and that Tapscott once locked Ordway out of her home. At the February 19, 2015 hearing on Ordway's petition, Ordway appeared *pro se* and adopted the information provided in her petition as her testimony. Tapscott did not appear, though the record reflects that she was on notice of the hearing. The trial court entered the DVO based upon Ordway's petition and brief testimony.

Through counsel, Tapscott filed a motion to set aside the DVO, alleging that she was unable to come to court for the first hearing because she had

[1] We note that Ordway chose not to file an Appellee brief in this case. While CR 76.12(8)(c) permits this Court, at its discretion, to impose sanctions upon Ordway, up to and including summary reversal, we decline to do so in a case involving domestic violence.

[2] The record shows that Tapscott never went to Ordway's workplace. However, Ordway's petition states that "I was concerned that [Tapscott] was threatening to attack me when she came up to my workplace so I reported it to my workplace and at one point she was on speaker phone yelling at me in front of my coworkers."

broken her knee, and that her attorney was unable to appear due to inclement weather. Tapscott's counsel stated that she attempted to file a motion for a continuance prior to the hearing, but that her office mistakenly contacted the wrong court. On March 26, 2016, the trial court agreed to set aside the DVO and hold a second hearing.

At the second DVO hearing, Ordway again adopted her petition as her testimony, including that Tapscott tried to hit her but missed. However, on cross-examination, Ordway seemed to contradict her petition, saying, "Yes, she has … threatened me, but she has never actually physically swung at me."

Tapscott testified that she never threatened or attempted to hit Ordway. Rather, Tapscott testified that Ordway said that she was going to "swing on" her, but that Ordway's mother tried to hold Tapscott from behind so that Ordway could hit Tapscott. A third witness, testified that she was present with Tapscott and Ordway on the day of the primary incident in question, and that she had not seen any threats or domestic violence. However, she also testified that she left during several intervals.

At the conclusion of the hearing, the trial court stated that she did not believe Tapscott's testimony, and it once again entered the DVO against Tapscott. Tapscott filed a motion under CR 59.01, arguing that she had not entered records concerning her phone, social media accounts, and mental health at trial. Tapscott filed a second motion in which she claimed that Ordway perjured herself during the DVO hearing. The trial court denied both motions, writing that CR 60.02(d)

"specifically excludes perjury as grounds [for vacation]" and that Tapscott had failed to state grounds for granting the motion under CR 59.01. This appeal follows.

Analysis

Tapscott's arguments on appeal may be reduced to the following: 1) the trial court's finding of domestic violence constituted clear error, and entry of the DVO constituted an abuse of discretion, as the proper remedy was a no contact order; 2) the trial court erred when it denied Tapscott a new hearing under CR 59.01; and 3) the trial court erred when it denied her motion pursuant to vacate the DVO under CR 60.02 on the grounds that Ordway perjured herself. We address each of Tapscott's arguments in-turn.

I. Entry of the DVO

KRS[3] 403.720(1) defines "domestic violence and abuse" as "physical injury, serious physical injury, stalking, 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 403.740(1) provides that "if a court finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur, the court may issue a domestic violence order…." "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

[3] Kentucky Revised Statutes.

S.W.2d 276, 278 (Ky. 1996) (citation and quotation marks omitted). Finally, we review the trial court's issuance of the DVO to determine "whether the court's findings were clearly erroneous or … it abused its discretion." *Holt v. Holt*, 458 S.W.3d 806, 812 (Ky. App. 2015).

Tapscott argues that, in light of Ordway's inconsistent testimony concerning the one altercation between them, the finding of domestic violence was unsupported and constituted clear error. However, other evidence revealed on the record supported the findings that domestic violence occurred and may occur again.

In *Hohman v. Dery*, 371 S.W.3d 780, 782-83 (Ky. App. 2012), despite there being "no evidence [the victim] suffered physical injury or assault[,]" we held that the victim's belief that the perpetrator's "aggressive confrontations would escalate 'to the next level'" was sufficient to uphold the trial court's finding of domestic violence. By contrast, in *Caudill v. Caudill*, 318 S.W.3d 112 (Ky. App. 2010), this Court considered a situation in which the respondent "had ignored [the petitioner's] repeated directives to stay away from her workplace and whose verbal abuse caused her to feel very threatened." *Id.* at 114. We ultimately concluded that this did not meet the statutory standard for a DVO. *Id.* at 115.

After reviewing the applicable case law, we believe that, even excluding testimony which Tapscott alleges is perjured or inconsistent, sufficient evidence existed in the record to satisfy the statutory standard for entry of the DVO. The record supported Ordway's allegation that Tapscott threatened

Ordway; and therefore, it supported a finding like that in *Hohman*, that Tapscott's behavior was enough to place Ordway in fear of imminent physical injury.

In determining whether domestic violence may recur, our Supreme Court has stated that "[t]he predictive nature of the standard requires the family court to consider the totality of the circumstances and weigh the risk of future violence against issuing a protective order." *Pettingill v. Pettingill*, 480 S.W.3d 920, 925 (Ky. 2015). Here, the parties had a tumultuous history, including Tapscott's repeated attempts to contact Ordway against her wishes. Considering the totality of the circumstances, we hold that this was sufficient to support the trial court's finding that domestic violence similar to that which had already occurred may occur again.

II. Denial of Tapscott's Post-Judgment Motions

Tapscott next claims that the circuit court erred when it failed to grant her motions for a new trial and to set aside the DVO. We review the trial court's denial of such motions for an abuse of discretion. *Partin v. Commonwealth*, 337 S.W.3d 639, 640 (Ky. App. 2010). A trial court abuses its discretion when its decision was "arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (internal citations omitted).

Tapscott bases her argument concerning her motion for a new trial on the fact that additional social media records and cell phone records she sought to enter into the record at a new hearing contradicted Ordway's testimony. However, the mere existence of conflicting evidence or testimony does not render the trial court's decision to overrule Tapscott's motions an abuse of discretion. Tapscott's counsel challenged Ordway's testimony on cross-examination. Despite this, the trial court, as the trier of fact, was entitled "to believe the evidence presented by one litigant in preference to another … [and] may believe any witness in whole or in part." *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). The trial court made it abundantly clear on the record and on more than one occasion that it found Ordway's testimony to be credible and Tapscott's contrary testimony to be non-credible. We can find no error concerning the motion for a new trial, as the record reflects no such need.

We also disagree that the trial court erred when it overruled her CR 60.02 motion. CR 60.02 relief is available in DVO proceedings. *Roberts v. Bucci*, 218 S.W.3d 395, 398 (Ky. App. 2007). However, as a DVO is a civil matter, Tapscott was required to establish the following before the trial court could vacate the DVO based upon Ordway's testimony:

> … (a) that such evidence was false; (b) that the result was produced thereby; (c) that the successful party participated therein; (d) that its nonexposure then was not due to negligence of the unsuccessful party; (e) that ordinary diligence would not have anticipated it; (f) that diligence was exercised to expose it then; (g) that he can expose it now; and (h) that the means by which it is proposed to expose it now were not available to him then.

Benberry v. Cole, 246 S.W.2d 1020, 1022 (Ky. 1952) (quoting *Norheimer v. Keiper*, 255 Ky. 232, 73 S.W.2d 36, 37-38 (1934)). Again, Tapscott could not meet her burden for necessitating post-judgment relief.

Although the trial court's written order only referenced CR 60.02(d)'s exclusion of perjury and fraud as bases for relief, the court was ultimately correct that Tapscott was not entitled to vacation of the DVO. Contrary to Tapscott's assertions on appeal, the evidence and testimony in the record do not definitively establish that Ordway's testimony was false. As we have already pointed out, the testimonies of Ordway and Tapscott simply portray different versions of the same incidents. Again, because there was evidence to support Ordway's version of events, we defer to the trial court's superior perspective to judge credibility. We

will not accost the finality of a trial court's judgments and grant the extraordinary relief CR 60.02 provides where a record lacks clear evidence of perjury.

Conclusion

In sum, we hold that the Jefferson Family Court's findings that domestic violence has occurred and may occur again had the support of sufficient evidence, notwithstanding Ordway's inconsistent testimony. Additionally, the trial court acted within its discretion when it overruled Tapscott's post-judgment motions. Therefore, the Jefferson Family Court's entry of the DVO is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jan R. Waddell, Sr.
Louisville, Kentucky

NO BRIEF FILED FOR APPELLEE