

RENDERED: OCTOBER 7, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001520-ME

JULIE RUBIN

APPELLANT

v. APPEAL FROM KENTON CIRCUIT COURT
HONORABLE LISA BUSHELMAN, JUDGE
ACTION NO. 15-D-00208-001

CAROL SCHMITT

APPELLEE

OPINION
VACATING AND REMANDING

** ** * * * * *

BEFORE: DIXON, J. LAMBERT, AND NICKELL, JUDGES.

NICKELL, JUDGE: Julie Rubin brings this appeal of a Domestic Violence Order (DVO) filed against her by Carol Schmitt and issued by the Kenton Circuit Court. She alleges the trial court abused its discretion in finding domestic violence had occurred and might recur. Because Schmitt failed to file an appellee brief,

however, we choose to “regard the appellee’s failure as a confession of error and reverse the judgment without considering the merits of the case,” pursuant to CR¹ 76.12(8)(c)(iii), and remand this matter to the trial court for entry of an appropriate order vacating the DVO.

FACTS

Schmitt is Rubin’s mother. On July 2, 2015, Schmitt petitioned for a DVO in Kenton County Family Court, seeking an Emergency Protective Order (EPO) against Rubin. The trial court granted Schmitt’s request for an EPO. A hearing was held regarding the matter on August 24, 2015, at which time the trial court heard evidence and granted Schmitt’s request for a DVO.

Schmitt represented herself at the hearing. She provided a different factual version of the events than the other witnesses.

Schmitt testified she had just returned from a trip on June 24, 2015, with Leslie Brown (Brown)² and Chuck,³ Brown’s boyfriend. Richard Adams⁴ (Adams) was waiting when they arrived at Schmitt’s house. Schmitt began unloading her luggage. Adams told Schmitt he didn’t want to hurt her, but he would. Schmitt told Adams to leave. Chuck had to prevent Adams from hitting Schmitt. Rubin then pulled up in a black rental vehicle, almost running over Schmitt. Rubin took

¹ Kentucky Rules of Civil Procedure.

² Brown is Schmitt’s niece and Rubin’s cousin.

³ Chuck’s last name is not included in the record. He did not testify at the hearing.

⁴ Adams is involved in a relationship with Rubin. Schmitt stated at the hearing she believes Adams and Rubin are also half-siblings.

Schmitt's luggage and threw it in the Adams's car. Adams told Schmitt "if you hit her I'll let you have it," and at some point, Rubin grabbed Schmitt by her throat. Rubin subsequently entered Adams's car. When Schmitt reached inside the vehicle to retrieve her luggage, Rubin hit the accelerator and braked, causing Schmitt to hit her head.⁵ Adams called the police. Upon arrival, the police began yelling at Adams and Rubin, who then returned Schmitt's luggage, though not everything. Thereafter, on July 1, 2015, Schmitt received a FedEx package containing bed bugs. On cross-examination, Schmitt admitted she called Rubin at least once to inquire about the bed bugs. Schmitt also suggested Adams and Rubin had spray-painted her garage, but admitted she had not witnessed anyone do it.

Brown testified she was present throughout the entire incident and left only after the police arrived. Except for Schmitt grabbing Rubin to prevent her from driving away, Brown testified no other physical contact occurred, Adams never threatened Schmitt, and Chuck never restrained Adams from hitting Schmitt. Brown did not witness Rubin and Brown take the luggage from Schmitt. Instead, Brown testified Adams requested Rubin's belongings from Schmitt, and Schmitt refused Adams' request.

Adams testified he was at Schmitt's residence to retrieve Rubin's belongings. He called the police because Schmitt became aggressive and tried to push him. When Rubin tried to leave, Adams testified Schmitt tried to attack her

⁵ Six days later, Schmitt went to the hospital where she was diagnosed with a head injury.

through the van door. Adams denied sending a package containing bed bugs to Schmitt's house.

Rubin testified she had gone to Schmitt's house to retrieve her belongings. Rubin testified she took one of Schmitt's bags believing it to be her own. She explained the two owned the same type of luggage. She denied any physical altercation, but testified Schmitt had hit her. Rubin also recalled Schmitt had previously "jumped" her and placed her in a chokehold when the two had vacationed together.

This appeal followed the trial court's issuance of the DVO at the hearing on August 24, 2015.

STANDARD

In general, appellate review of a trial court's decision regarding issuance of a DVO "is not whether we would have decided it differently, but whether the court's findings were clearly erroneous or that it abused its discretion." *Holt v. Holt*, 458 S.W.3d 806, 812 (Ky. App. 2015) (citations omitted). Findings of fact will not be set aside unless they are clearly erroneous, that is, unsupported by substantial evidence. *Id.* (citations omitted). The trial court may issue a DVO if it finds from a preponderance of the evidence "an act or acts of domestic violence and abuse have occurred and may occur again." *Id.* (citations omitted). The preponderance of the evidence standard is met when sufficient evidence establishes the alleged victim "was more likely than not to have been a victim of domestic violence." *Id.* (citations omitted). Domestic violence is defined 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.” *Id.* (citations omitted). An unwanted touching, without more, is insufficient to establish domestic violence. *Caudill v. Caudill*, 318 S.W.3d 112, 115 (Ky. App. 2010).

ANALYSIS

Of relevance to this case, “CR 76.12(8)(c) provides the range of penalties that may be levied against an appellee for failing to file a timely brief.” *St. Joseph Catholic Orphan Society v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). In such circumstances, an appellate court may, in its discretion, “(i) accept the appellant’s statement of the facts and issues as correct; (ii) reverse the judgment if appellant’s brief reasonably appears to sustain such action; or (iii) regard the appellee’s failure as a confession of error and reverse the judgment without considering the merits of the case.” *Id.* Schmitt chose not to file an appellate brief. In exercising our discretion as an appellate court, under the facts of this case, we choose to “regard the appellee’s failure as a confession of error and reverse the judgment without considering the merits of the case.” CR 76.12(8)(c)(iii). Thus, we remand this matter to the trial court for an order vacating the DVO.

Even had we chosen to accept Rubin’s statement of facts and issues as correct, as summarized above, under the lesser penalty allowed under CR 76.12(8)(c)(i), the result would have been the same. Rubin’s testimony clearly

failed to establish a preponderance of evidence establishing she committed an act or acts of domestic violence and abuse and that such act or acts might recur. Rubin—and Schmitt—both testified concerning the tumultuous nature of their relationship, but neither described any act of domestic violence by Rubin against Schmitt other than that Schmitt alleged in the instant petition—but which without Schmitt’s statement of facts remains unsubstantiated. Likewise, testimony offered by Adams and Brown provided no support for a finding of domestic violence by Rubin. Neither witnessed anything that could reasonably be characterized as domestic violence. Thus, even if this matter were decided based solely upon Rubin’s statement of facts and issues, the trial court’s issuance of a DVO would be unsupported by substantial evidence, and therefore clearly erroneous. CR 52.01; *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003); *Guenther v. Guenther*, 379 S.W.3d 796, 802 (Ky. App. 2012); and *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998).

For the foregoing reasons, the Kenton Circuit Court’s DVO entered on August 24, 2015, is hereby reversed and this matter is remanded for an appropriate order vacating the DVO issued against Rubin.

DIXON, JUDGE, CONCURS.

J. LAMBERT, JUDGE, DISSENTS.

BRIEF FOR APPELLANT:

NO BRIEF FILED FOR APPELLEE

Paul J. Dickman
Covington, Kentucky