RENDERED: December 10, 2004; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

2004-CA-000438-MR

MATTHEW DEEGAN JOHNSON — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE KATHLEEN VOOR MONTANO, JUDGE
ACTION NO. 04-D-500193-001

LYNN HELTON — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, CHIEF JUDGE; BARBER, JUDGE; MILLER, SENIOR JUDGE.[1]

MILLER, SENIOR JUDGE: Appellant Matthew Deegan Johnson (Johnson) appeals from a Domestic Violence Order (DVO) of the Jefferson Family Court entered January 28, 2004. The question presented is whether there was sufficient evidence of domestic violence and abuse to support the entry of the order. We affirm.

[1] Senior Judge John D. Miller, sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

On January 18, 2004 appellee Lynn Helton (Helton) filed a domestic violence petition against Johnson. The petition alleged:

> The pet and rsp lived together for about three months, and the parties seperated (sic) in 1999. On 01/16/2004 the rsp came over to the pet home, and began banging on the pet daughter's window (age 16). The pet called the police, but the rsp left before the police got there. The police suggested that the pet file for an epo . . . The parties have not talked for a year. The pet states that the rsp used to have a problem with alcohol, and drugs. The pet fears the rsp may be stalking the pet, because the rsp should not know where the pet is. The pet is scared of the rsp behavior. The pet does not want the rsp around the pet, pet daughter, or the pet property.

At the hearing on the petition Helton testified that Johnson knew where she lived because it was the same address where they resided together and that evening Johnson did not speak to Helton or her daughter and left when asked. The family court entered a DVO finding by a preponderance of the evidence that an act of domestic violence or abuse has occurred and may again occur. The DVO directed that Johnson be restrained from committing further acts of abuse or threats of abuse; be restrained from any contact or communication with Helton; be restrained from disposing of or damaging any property of the parties; remain at all times and places at least 1000 feet away from Helton and her daughter and place of employment and that he

not possess, purchase or attempt to possess, purchase or obtain a firearm during the duration of the order. The DVO was made effective for three years. This appeal followed.

Before us, Johnson contends that the trial court erred by entering a DVO against him, arguing that neither the petition nor the evidence established "that an act or acts of domestic violence and abuse have occurred and may again occur." We disagree.

The standard for entry of a DVO is if the trial court finds "from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur." Kentucky Revised Statutes (KRS) 403.750(1). This preponderance of the evidence standard merely requires that the evidence believed by the fact-finder be sufficient that the petitioner was more likely than not to have been a victim of domestic violence. Commonwealth v. Anderson, Ky., 934 S.W.2d 276, 278 (1996). KRS 403.720 defines domestic violence and abuse as:

> [P]hysical 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 or members of an unmarried couple.

Under the above statute, domestic violence and abuse occurs with the infliction of fear of imminent physical injury.

In this case, the petition specifically alleged that although the parties had not lived together for several years and had not talked for a year, Johnson, with a history of drug and alcohol problems, came over unexpectedly to Helton's home and began banging on the window to Helton's sixteen-year old daughter's room. The incident occurred in the early morning hours at the house where the parties formerly resided together and where Helton and her daughter continued to reside. Despite the fact that Johnson left that night upon Helton's request, Helton indicated that she was scared of Johnson's behavior.

Considering Johnson's behavior, we must conclude that there exists substantial evidence upon which to conclude that Helton was in fear of imminent physical injury. The allegations of the petition, coupled with Helton's testimony concerning these allegations, were sufficient to support the issuance of the DVO. We are thus of the opinion that the family court did not commit reversible error by entering the DVO.

For the foregoing reasons, the order of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Udell B. Levy
Louisville, KY 40202

NO BRIEF FOR APPELLEE