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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000956-ME

DENNIS JUSTICE — APPELLANT

v.

APPEAL FROM RUSSELL CIRCUIT COURT
HONORABLE VERNON MINIARD, JR., JUDGE
ACTION NO. 03-CI-00358

KIM JUSTICE — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: DYCHE, HENRY, AND TACKETT, JUDGES.

HENRY, JUDGE: Dennis Justice appeals from the entry of a Domestic Violence Order (DVO) against him by the Russell Circuit Court on March 15, 2004, just less than a month after that court entered a Decree of Dissolution ending Dennis's fourteen-year marriage to Kim.

Kim filed a domestic violence petition against Dennis in Russell District Court on November 19, 2003. That petition was resolved by the filing of an agreed order, signed by counsel for both parties, which didn't specifically restrain contact

between the parties, but set an interim visitation schedule and provided that Dennis could have telephone contact with the children once each evening. No domestic violence hearing was held and no DVO was issued as a result of the November 19 petition.

On January 20, 2004, Kim filed another petition. In it, she alleged that the earlier Emergency Protective Order (EPO) had expired without the issuance of a DVO because of the transfer of the case to circuit court.[1] She also alleged that Dennis had been verbally abusive to her at church, causing her to become apprehensive. Again, an agreement was reached (this time in circuit court because a dissolution action had been filed), and no domestic violence hearing was held and no DVO was issued. This time, however, a restraining order[2] was issued by the circuit court directing the parties to have no contact with each other "except for matters of an emergency nature involving the two minor children of the parties."

On February 25, 2004, Kim filed a third domestic violence petition alleging very serious acts of domestic

[1] The Russell District Court docket for December 1, 2003, the date set for the hearing, noted that the case was passed to December 15, 2003 by agreement. The EPO was reissued, to be effective until December 15. In the meantime, on December 5, 2003, the Russell District Court entered an Agreed Order. The December 15 docket for the case said, "Dissolution filed-Case now in Circuit Court."

[2] The order is captioned "Restraining Order". It is not a Domestic Violence Order. The terms of the order were negotiated by counsel for the parties. There is no record of a hearing in connection with issuance of the order.

violence against Dennis which had occurred “previously,” and that Dennis had violated the restraining order the previous night. On March 12, 2004, the Russell Circuit Court conducted a two-hour hearing. At the conclusion of the hearing the judge issued a DVO, effective until March 12, 2007, and found Dennis in contempt for violating the February 16 Restraining Order. Dennis was sentenced to sixty days in jail, to serve five days, with service of the remaining days held in abeyance.

On appeal, Dennis asks us to vacate the DVO entered by the Russell Circuit Court. He contends that the underlying EPO was issued in error because Kim didn’t make allegations required by the statute for issuance of an EPO, and that the resulting DVO should therefore be vacated. He also argues that the court’s findings were not sufficient to support issuance of a DVO; that the court improperly allowed evidence of past instances of domestic violence; and that evidence offered by Dennis was improperly excluded.

IMPROPER ENTRY OF EPO

When a trial court reviews an EPO petition pursuant to KRS 403.735 and determines that domestic violence or abuse exists, the court “shall utilize one of the alternatives provided in KRS 403.740 or 403.745”; that is, the court must either issue an EPO pursuant to KRS 403.740, or issue summons and set the case for hearing pursuant to KRS 403.745. Either

way, if domestic violence is found to exist the case must be set for hearing.

The statement written on Kim's February 25 domestic violence petition said:

> Respondent has choked the Petitioner previously, Petitioner is afraid of Respondent; Respondent has a restraining order restraining him from contacting the Petitioner and has violated that order on the above date; Respondent held a gun to Petitioner (sic) head previously and constantly has threatened her with physical abuse; and has threatened to kill the boys.

The testimony in the hearing revealed that all but one of these incidents occurred long before the filing of the petition. Dennis argues that entry of an EPO on Kim's petition was erroneous because the only incident that actually occurred near the time she filed her petition--violation of the restraining order by calling Kim's cellphone--didn't indicate "the presence of an immediate and present danger of domestic violence and abuse" as required by KRS 403.740(1) for the issuance of an EPO.

"Domestic violence and abuse" is defined in KRS 403.720(1) as follows:

> As used in KRS 403.715 to 403.785:
>
> (1) "Domestic violence and abuse" means 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 or members of an unmarried couple;

We will not disturb factual findings of the trial court unless they are clearly erroneous. CR[3] 52.01; Reichle v. Reichle, 719 S.W.2d 442, 444 (Ky. 1986). The trial court's application of the law to the facts will not be disturbed absent an abuse of discretion. Cherry v. Cherry, 634 S.W.2d 423, 425 (Ky. 1982). Abuse of discretion implies that the trial court's decision is unreasonable or unfair. Kuprion v. Fitzgerald, 888 S.W.2d 679, 684 (Ky. 1994).

Judges and trial commissioners do not have the benefit of adversarial hearings when reviewing domestic violence petitions. Their determinations are usually made on the basis of the contents of the petition alone. Nothing in the record indicates that the trial commissioner had any information about when the other incidents alleged in Kim's petition had occurred. The allegations in the petition, standing alone, were more than sufficient to support the issuance of an EPO. We must consider whether the commissioner's decision was reasonable based on the facts available to him from the face of the petition, not based on what is adduced at the hearing two weeks later. There was no abuse of discretion.

May the court properly issue a DVO even if it is revealed at the hearing that an EPO should not have been issued? Dennis argues that if an EPO is improper, a DVO issued as a

[3] Kentucky Rules of Civil Procedure.

result of that EPO must be vacated. We are directed to no authority for such a position in the statutes or cases, and we can find none. To the contrary, KRS 403.745 requires the court to issue summons and set a hearing date if the allegations in the petition do not indicate the immediate and present danger of domestic violence and abuse. KRS 403.750 then requires that the court issue a DVO after that hearing, if there is a finding that domestic violence or abuse has occurred and may occur again. Clearly, the factual determination at the hearing is de novo and is not confined to the contents of the domestic violence petition. If the trial court determines that the EPO was issued based on false or misleading statements, the petitioner's credibility will naturally be adversely affected, and the court may take additional action in its discretion. Nevertheless, even if it turns out that the petition was improperly granted, the court may still conduct a hearing, and if domestic violence or abuse is proved by a preponderance of the evidence, a DVO should be issued. KRS 403.740; 403.745; 403.750.

EVIDENCE OF PAST INSTANCES OF DOMESTIC VIOLENCE

Dennis's next argument is divided into two parts. He first argues that the trial court violated the law of the case by allowing evidence of past violence after having disallowed that evidence in connection with an earlier petition. He then

argues that the evidence should have been excluded under KRE[4] 404(b).

Over Dennis's objection, Kim was allowed to testify that during their marriage Dennis choked her unconscious, stomped her stomach when she was pregnant with the couple's twin boys, held a gun to her head and to his own head and threatened to pull the trigger, was constantly verbally abusive, and committed other violent and threatening acts. Photographs were introduced showing Kim with two black eyes. She testified that the black eyes resulted not from having been struck but from having been held off the ground by her throat and choked by Dennis until she lost consciousness.

Dennis cites Hogan v. Long, 922 S.W.2d 368 (Ky. 1995) in support of his argument that the trial court's ruling in an earlier proceeding that evidence of prior acts of domestic violence would not be admitted is the law of the case. The rule discussed in Hogan is that " . . . the opinion on the first appeal becomes the law of the case not only as to the errors there relied upon for reversal but also as to errors appearing in the first record that might have been but were not there relied upon for a reversal." Id. at 370, quoting Aetna Oil Co. v. Metcalf, 300 Ky. 817, 190 S.W.2d 562 (1945). There having been no prior appeal in this case, we find no application here

[4] Kentucky Rules of Evidence.

of the rule of Hogan and Aetna, or of the "law of the case" doctrine. Furthermore, we can find no record of a "hearing on the Petitioner's Second Petition" in the court record as referred to on page 15 of Dennis's brief. A footnote in the brief says, "This ruling was made outside the courtroom and is not on the video record in this case." Suffice to say that a discussion with a judge in the courthouse hallway is not a "hearing," and an unrecorded comment made in the course of that discussion is not a "ruling." As to this issue no "law of the case" exists. See H.R. ex rel. Taylor v. Revlett, 998 S.W.2d 778, 780 (Ky.App. 1999); Commonwealth v. Tamme, 83 S.W.3d 465, 468 (Ky. 2002).

Dennis next argues that evidence of earlier acts of domestic violence should have been excluded by KRE 404(b). KRE 404(b) says:

> (b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible:
>
> (1) If offered for some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident; or
>
> (2) If so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party

Criminal defendants often invoke the rule to exclude the Commonwealth's offer of evidence of prior criminal convictions. Proof of a defendant's criminal history should be excluded as more prejudicial than probative, unless there is some reason to admit the evidence other than to show the defendant's bad character. See Eldred v. Commonwealth, 906 S.W.2d 694 (Ky. 1994), overruled on other grounds by Commonwealth v. Barroso, 122 S.W.3d 554 (Ky. 2003). Evidence of other bad acts is admissible for some purposes, such as to show a pattern of conduct. See, e.g., Lear v. Commonwealth, 884 S.W.2d 657 (Ky. 1994); Tamme v. Commonwealth, 973 S.W.2d 13, 29 (Ky. 1998), cert. den. 119 S.Ct. 1056, 525 U.S. 1153, 143 L.Ed.2d 61. In this case the evidence was admissible to show that Kim had reason to be in fear of imminent physical injury or assault when Dennis called her at 11:30 p.m. the night their divorce became final. See KRS 403.720(1). It was also admissible to show a pattern of intimidation, abuse and control continuing over a period of years. In domestic violence cases such evidence is essential to the fact finder's determination of whether a DVO is warranted and, if so, what kind of protection and assistance should be provided. See KRS 403.750(1); 403.715(1). The evidence was properly admitted.

INSUFFICIENT FINDINGS OF FACT

Dennis claims that the trial court failed to make findings of fact supporting entry of the DVO in this case. He argues that for the court to issue a DVO, a finding was required that an act of domestic violence or abuse occurred on February 24, 2004, and that there had to be a specific finding that Kim's fear of injury was imminent.

As noted above, the trial court's findings of fact will not be set aside unless they are clearly erroneous. CR 52.01; Reichle, 719 S.W.2d at 444. Our review of the record shows that no request for additional findings was made as required by CR 52.04. Failure to bring the omission to the trial court's attention is fatal to appeal of the issue. Vinson v. Sorrell, 136 S.W.3d 465, 471 (Ky. 2004); Eiland v. Ferrell, 937 S.W.2d 713, 716 (Ky. 1997).

IMPROPER EXCLUSION OF EVIDENCE

Finally, Dennis contends that the DVO should be vacated because the trial court neither interviewed the couple's twin sons, nor allowed them to be called as witnesses. Apart from a statement that the boys' testimony could have "shed light on the reasons behind Ms. Justice seeking three separate Emergency Protective Orders," we are not told how Dennis was prejudiced by the court's ruling. "Whether to admit or exclude evidence to ensure the fairness of a trial is within the

discretion of the trial court, and its determination will not be overturned on appeal in the absence of a showing of an abuse of such discretion." Mullins v. Commonwealth, 956 S.W.2d 210, 213 (Ky. 1997). Finding no error, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Matthew B. Leveridge Jamestown, Kentucky	Jeffrey H. Hoover Jamestown, Kentucky