

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2007-CA-001519-ME

J.D.Y., THE FATHER

APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT  
HONORABLE MATTHEW B. HALL, JUDGE  
ACTION NOS. 07-D-00173

B.H.D., THE MOTHER;  
B.H.D., ON BEHALF OF T.E.Y,  
L.J.Y., AND J.W.Y, MINOR CHILDREN

APPELLANTS

OPINION  
AFFIRMING

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BEFORE: ACREE, STUMBO, AND THOMPSON, JUDGES.

THOMPSON, JUDGE: J.D.Y., (the father), appeals from two domestic violence orders of the Hardin Family Court. For the reasons stated herein, we affirm.

On June 14, 2007, on behalf of herself and her three minor children, B.H.D., (the mother), filed a petition for a domestic violence order (DVO) and for

an emergency protection order against the father. The mother alleged in the petition that the father sexually abused their fifteen-year old child, (the child), by touching and fondling the child's genitalia. The child reported this incident to the mother on March 21, 2007. The petition further provided that the father informed the mother that he was going to commit suicide in the presence of their children. The family court issued an emergency protective order on the day the petition was filed.

On June 25, 2007, the family court held a domestic violence hearing. Before any testimony was given, the father objected to the mother's testimony and her statements in the petition regarding the alleged sexual abuse on the basis that such evidence constituted inadmissible hearsay. Stating that the mother's testimony was not hearsay because it was not offered to prove the truth of the matter asserted but rather her reason for filing the petition, the family court overruled the father's objection. The mother then testified in accordance with the statements she made in the domestic violence petition.

The mother's next witness, Fort Knox Criminal Investigator Giuseti, testified that there was an ongoing investigation regarding the sexual abuse allegation and that she observed the forensic interview of the child. After the father's hearsay objection was overruled, Vine Grove Police Officer Karr next testified that his department was conducting an investigation of the child's allegation. He testified that the child completed a forensic interview, and he hoped the parties' other two children could be forensically interviewed as well. Officer

Karr concluded at the end of his testimony that he had probable cause to charge the father with sexual abuse. Invoking his Fifth Amendment privilege against self-incrimination, the father did not testify.

At the conclusion of the hearing, based on the allegations in the petition and the testimony given at the hearing, especially Officer Karr's belief regarding probable cause to charge and the father's threat to commit suicide in front of the children, the court stated that "[it believes] there is a threat of domestic violence and abuse in the future, and also a potential sexual abuse in the past and in the future. Therefore, I will issue a DVO in this matter." This appeal followed.

The father contends that the family court erred by permitting the mother to testify on behalf of their child regarding the alleged sexual abuse. Specifically, citing Kentucky Rules of Evidence (KRE) 802, the father contends that the mother's testimony constituted inadmissible hearsay evidence because her testimony was nothing more than a recitation of what their child allegedly informed her. Thus, the father contends that the mother's testimony regarding their child's sexual abuse allegation should have been excluded.

KRE 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Although these types of out-of-court statements are generally inadmissible, there are several well-established exceptions to the hearsay rule. *Wells v. Commonwealth*, 892 S.W.2d 299, 301 (Ky. 1995). These exceptions permit otherwise inadmissible hearsay evidence to be admitted under

the theory that the character and context of the out-of-court statement adds sufficient reliability of truthfulness to permit admission. *Id.*

Denying the father's hearsay objection to the mother's testimony, the family court stated that her testimony was not hearsay because it was not offered to prove the truth of the matter asserted but offered merely to explain her reasoning for filing the domestic violence petition. Despite the family court's ruling, the mother's testimony regarding her child's allegation of sexual abuse constituted hearsay. The mother's asserted reasons for filing the petition were uncontested; thus, the only other reason for the mother's testimony was to establish that her child had been sexually assaulted by the father.

Additionally, the mother's testimony did not come within one of the well-recognized exceptions to the hearsay rule. In relevant part, KRE 803 provides that the hearsay exclusionary rule is inapplicable to an available declarant's statement if the statement establishes one of the following: his present sense impressions; his excited utterances; his then existing mental, emotional, or physical condition; or his statements for purposes of medical treatment or diagnosis. The child's statements were not made in the context of any of these exceptions. Therefore, the statements were inadmissible hearsay.

The father next contends the family court erred by admitting the domestic violence petition for the purpose of establishing that he committed domestic violence against the child. Specifically, he contends that the mother's allegations in the petition regarding the alleged sexual abuse were inadmissible

hearsay and could not be used to establish that he committed domestic violence and abuse. We agree.

A DVO petition is subject to the same hearsay evidentiary standards as other forms of evidence. *Dawson v. Commonwealth*, 867 S.W.2d 493, 496-97 (Ky.App. 1993). For example, in the context of other official documents, police reports which consist of third-party statements, are not admissible unless they satisfy an exception to the hearsay rule. *Manning v. Commonwealth*, 23 S.W.3d 610, 613-14 (Ky. 2000). DVO petitions are no more protected from our evidentiary rules than police reports. Consequently, because none of the mother's petition allegations regarding the child's sexual abuse fits within a hearsay exception, the domestic violence petition should not have been used against him to establish that he committed domestic violence and abuse.

These two forms of evidence, the mother's testimony and her allegations in the petition regarding the child's alleged sexual abuse, should have never been admitted into evidence for the purpose of finding the father guilty of domestic violence and abuse. Unlike evidence that is admitted to explain a witness' actions, this evidence had only one practical effect which was to make the father's guilt more or less probable. Courts have long shunned the introduction of this type of evidence because it is often unreliable and not subject to adequate cross-examination. *Hawkins v. Rosenbloom*. 17 S.W.3d 116, 120 (Ky.App. 1999) (discussing the consequences of admitting hearsay evidence). Fundamentally, trial courts must protect a defendant's right to cross-examine witnesses that make

statements against him and, to that end, hearsay testimony cannot be permitted that precludes a defendant's "opportunity for effective cross-examination." *Davenport v. Commonwealth*, 177 S.W.3d 763, 767-68 (Ky. 2005).

Notwithstanding the improper admission of the mother's hearsay testimony, we must apply harmless error analysis and determine whether the errors violated the father's substantial rights. *Davis v. Fischer Single Family Homes, Ltd.*, 231 S.W.3d 767, 776 (Ky.App. 2007). Under this analysis, if we are unable to conclude the outcome of the trial would have been any different absent the inadmissible evidence, the decision of the family court will be affirmed. *Id.* See also CR 61.01. After reviewing the record, we conclude that the admission of the hearsay evidence did not deprive him of his substantial rights because other evidence supported the family court's findings as will be explained below.

The father next contends that the mother's testimony that he threatened to kill himself in front of the children was insufficient to establish that he committed domestic violence and abuse against her and their children. Specifically, quoting language from KRS 403.720(1), he contends that his alleged threat to harm himself does not constitute action "between family members." Essentially, the father contends that abusive and threatening acts must target another family member to rise to domestic violence and abuse. Because this contention represents a fundamental misunderstanding of the purpose of our domestic violence statutes, we disagree.

A trial court may issue a DVO after a full evidentiary hearing if it finds by a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred or may reoccur. *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky.App. 2007). The preponderance of the evidence standard requires that the evidence believed by the fact-finder be sufficient that the petitioner is more likely than not a victim of domestic violence. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

Further, KRS 403.720(1) provides that “[d]omestic 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.” The legislature passed the domestic violence statutes “[t]o allow persons who are victims of domestic violence and abuse to obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and as uninterrupted as possible.” KRS 403.715(1). Further, the domestic violence and abuse statutes are intended to “expand the ability of law enforcement officers to effectively respond to situations involving domestic violence and abuse so as to prevent further such incidents and to provide assistance to the victims.” KRS 403.715(2).

The appellate standard of review for a family court’s factual determinations is whether the findings were clearly erroneous. *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings are not clearly erroneous if they are

supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence of sufficient probative value that permits a reasonable mind to accept as adequate the factual determinations of the trial court. *Id.* A reviewing court must give due regard to the trial court's judgment on the credibility of the witnesses. *Id.*

After reviewing the record, the family court's findings that the father committed domestic violence and abuse against the mother and their children were proper. The domestic violence statute cannot be interpreted as narrowly as the father suggests. The father informed the mother that he would commit suicide in the presence of their three children. While the father contends that this threat was not directed at hurting any family members, the inevitable consequence of such a statement is to terrorize the recipients of the information. Moreover, while the children did not hear their father's threat, they necessarily were ensnared in the threat as well. Accordingly, the family court's findings were not clearly erroneous, and the issuance of the domestic violence orders was proper.

The father next contends that Officer Karr's statement regarding his belief that probable cause existed to charge the father with sexual abuse was not sufficient to support the issuance of the DVO. The father contends that this testimony was hearsay and was of a lower evidentiary standing than the preponderance of evidence standard. Having noted the father's contention, we will not address the merits of his claim because the family court had before it other



evidence sufficient to warrant the issuance of the domestic violence orders. Thus, any error would be harmless.

For the foregoing reasons, the two domestic violence orders of the Hardin Family Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

C. Mike Moulton  
Micah I. Shirts  
Elizabethtown, Kentucky

BRIEF FOR APPELLEE:

No brief filed.