

RENDERED: DECEMBER 19, 2008; 2:00 P.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2008-CA-000800-ME

RICHARD BADIE

APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 06-D-501822

KENITA BADIE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MOORE, TAYLOR, AND VANMETER, JUDGES.

MOORE, JUDGE: The matter before this Court involves a Domestic Violence Order (DVO) entered by the Jefferson Circuit Court against the Appellant Richard Badie.¹ Upon a thorough review of the record, we affirm.

¹ An appellee brief was not filed in this matter. While Kentucky Rules of Civil Procedure (CR) 76.12 (8)(c) provides penalty options which an appellate court may, in its discretion, impose for failure to file a brief, we do not believe this failure alone warrants a reversal. *Flag Drilling Co., Inc. v. Erco, Inc.*, 156 S.W.3d 762, 766 (Ky. App. 2005).

I. FACTUAL AND PROCEDURAL BACKGROUND

A series of events occurred in March 2008, which prompted Kenita Badie to file for an Emergency Order of Protection and a Domestic Violence Petition. Kenita was temporarily separated from her husband Richard. She resided in the couple's apartment with their child and an additional child from a previous relationship. Kenita claimed that Richard grabbed her face and spat on her. She alleged that on another date Richard choked her, grabbed her face, slammed her head down by grabbing her hair, and pinned her body down. Kenita further alleged that later, when Richard was either unable or unpermitted to enter the apartment, he threatened her life and the lives of her family.

In considering Kenita's Domestic Violence Petition, the Jefferson Circuit Court heard testimony from Kenita, Richard, and Richard's mother, Renata Badie.² The circuit court found that Richard's actions caused Kenita to be in fear of imminent future harm and entered a DVO ordering Richard be restrained from committing any future threats or acts of abuse against Kenita and prohibiting all contact with Kenita or her family.³ This appeal followed.

II. STANDARD OF REVIEW

² Richard also filed a Domestic Violence Petition against Kenita. Finding that Richard was not in fear of imminent physical harm by Kenita, the circuit court did not grant his petition. Richard did not appeal that finding.

³ The circuit court did not find that any domestic violence had occurred involving the couple's minor child and granted Richard parenting time with this child.

In reviewing the decision of the trial court the test is whether the trial court's findings were clearly erroneous or that it abused its discretion. *Gomez v. Gomez*, 254 S.W.3d 838, 842 (Ky. App. 2008). Abuse of discretion occurs when a court's decision is unreasonable or unfair. *Id.* (Citations omitted).

III. ANALYSIS

Richard claims that the trial court judge abused its discretion in finding that Kenita was in fear of imminent physical harm and in finding her credible due to his claims of discrepancies in her petition regarding whether the parties were separated. Furthermore, Richard claims that the trial judge's actions of limiting his witness's testimony to the events in March 2008 discouraged Richard from examining his witness or calling an additional witness for examination.

Kentucky Revised Statutes (KRS) 403.720(1) defines domestic violence and abuse as “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[.]” Before issuing a DVO, a trial court must conduct a hearing and find by a preponderance of the evidence “that an act or acts of domestic violence and abuse have occurred and may again occur” KRS 403.750(1). This preponderance of the evidence standard is met if sufficient evidence establishes that the alleged victim “was more likely than not to have been a victim

of domestic violence.” *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

Ultimately, it is within the discretion of the trial court to make the final determination regarding the credibility of a witness.

“[T]he trier of fact has the right to believe the evidence presented by one litigant in preference to another. The trier of fact may believe any witness in whole or in part. The trier of fact may take into consideration all the circumstances of the case, including the credibility of the witness.” *Bissell v. Baumgardener*, 23 S.W.3d 24, 29-30.

In the present case, the decision of the trial judge in granting the DVO was based on the credibility of the parties. After hearing the testimony from Kenita, Richard, and Renata Badie, the trial court chose to believe Kenita’s version of events, concluding that an act of domestic violence had occurred against Kenita. Kenita testified that Richard had threatened her and her family, that Richard had been physically violent with her in the past, and that she was fearful of him. The trial court having found Kenita to be credible, we find no error. We agree she established by a preponderance of the evidence “that an act or acts of domestic violence and abuse have occurred and may again occur.” KRS 403.750(1).

Richard asserts that the court’s actions of limiting his mother’s testimony to her knowledge of the events that occurred in March discouraged him from asking further questions or calling additional witnesses; however, Richard was specifically given the opportunity, after the judge’s questioning of Renata Badie, to ask any additional questions or present any other witnesses. Richard

responded that he did not wish to do so.⁴ Renata Badie's testimony only consisted of her opinion regarding Richard and Kenita's living arrangements. Her testimony could not address whether any act of domestic violence or abuse had occurred because she was not present. Thus, given the evidence presented, the trial court's credibility determination and issuance of the DVO was not clearly erroneous.

In this matter, we must defer to the decision of the trial court as to the credibility of the witnesses who testified at trial. Because the circuit court's decision was not clearly erroneous or an abuse of discretion, we affirm the Jefferson County Circuit Court's issuance of the DVO.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jan R. Waddell
Louisville, Kentucky

BRIEF FOR APPELLEE:

N/A

⁴ Richard represented himself in the trial court.