

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000226-ME

STEVEN A. BALL

APPELLANT

v.

APPEAL FROM BOURBON CIRCUIT COURT
HONORABLE TAMRA GORMLEY, JUDGE
ACTION NO. 09-D-00084

STACEY D. BALL

APPELLEE

OPINION
REVERSING

** ** * * * * *

BEFORE: CLAYTON AND LAMBERT, JUDGES; HENRY,¹ SENIOR JUDGE.

LAMBERT, JUDGE: Steven Ball appeals from a domestic violence order (DVO) entered on January 21, 2010, by the Bourbon Family Court. After careful review, we reverse.

Steve Ball filed a petition on July 6, 2009, in the Nicholas Family Court, to dissolve his marriage to Stacey D. Ball. That same night, an altercation

¹ Senior Judge Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

occurred between the parties at their home. On July 8, 2009, Stacey filed for an emergency protective order (EPO) in Nicholas Family Court and asked for temporary custody of the parties' minor children. The Nicholas Family Court conducted a hearing on the matter on July 21, 2009, determined that the July 6, 2009, incident was not an instance of domestic violence as defined by Kentucky Revised Statutes (KRS) 403.720, and dismissed Stacey's petition.

On August 11, 2009, the Nicholas Family Court issued a joint and mutual restraining order prohibiting the parties from contacting each other except for issues pertaining to exchanging possession of their children. At this time the family court ordered that the parties were to have joint custody of their children with essentially equal periods of visitation. Since the entry of that restraining order, neither party has been found to have been in violation of said order. On September 17, 2009, the Nicholas Family Court entered an order denying Stacey's motion for a modification of custody and granting Steve exclusive use of the marital residence.

On November 9, 2009, the children became sick while in Steve's possession and required a visit to the doctor. Steve contacted Stacey and advised her of the status of the children and gave her a choice of his taking the children to the doctor at 3:00 p.m. or her taking them at 5:00 p.m., as she was supposed to take possession of the children at 4:00 p.m. Stacey decided she would take them to the doctor and asked Steve to bring the children to her mother's home in Paris, Kentucky. Steve agreed to this deviation and brought the children, along with his

mother, to Stacey's mother's home as the parties had agreed. Mary Webb, Stacey's mother, was also present at this exchange.

Following this exchange, which will be more fully discussed below, Stacey requested an Emergency Protective Order in Bourbon Family Court instead of seeking relief from the Nicholas Family Court under the mutual restraining order that had been put into place. On November 19, 2009, December 17, 2009, and January 21, 2010, the Bourbon Family Court conducted hearings on this matter, and ultimately entered a Domestic Violence Order on January 21, 2010.

At the hearing on November 19, 2009, counsel for Steve requested that that Bourbon Family Court transfer the matter back to the Nicholas Family Court, as the parties had been before the Nicholas Family Court the prior day, and the court had indicated that it would be willing to hear the case. The Bourbon Family Court denied this request, but entered an order that changed custody of the parties' minor children back to the joint custody established in the Nicholas Family Court orders.

Stacey testified that on November 9, 2009, the school called her because her son was sick. After discussing the situation with Steve, he brought the children to her mother's house. Stacey testified that as she got her daughter out of the car, she noticed her bangs had been cut and asked if their son had cut them. An argument then escalated, and Stacey testified that Steve used curse words regarding the children. Stacey testified that Steve touched her mother and that Ms. Ball exited the vehicle and asked Ms. Webb if she had a problem. Stacey testified

that on a different occasion, Steve told her she better enjoy taking her son to school because it would be her last time taking him, and that she perceived this as a threat on her life.

Regarding the events of November 9, 2009, Steve testified that he had had his daughter's bangs trimmed and that Stacey and her mother, upon observing the haircut, were upset and asked him why he had cut her hair. Steve testified that at this time he stated he was not going to argue about a haircut, and Stacey took their daughter and stood on her mother's porch. Steve testified that Ms. Webb then came down and proceeded to yell at him and essentially started an altercation, pushing his car door into him and yelling at his mother, who eventually got out of the car. Ultimately, Steve testified that Stacey took their daughter inside, and he and his mother left with his son to seek the advice of his attorney.

Ms. Ball testified at the hearing on January 21, 2010, that she accompanied Steve in the car on November 9, 2009, to exchange the children. She testified that Stacey was upset about the haircut and grabbed her granddaughter from Steve. Ms. Ball also testified that Ms. Webb started yelling at Steve and eventually started calling her (Ms. Ball) names. At this point, Ms. Ball yelled back at Ms. Webb. Eventually Ms. Webb went inside with her daughter, leaving Steve, Ms. Ball, and the parties' minor son still in the car. Ms. Ball and Steve then went to Steve's attorney's office to inquire about how to properly exchange the parties' minor son.

Ms. Webb testified similarly to Ms. Ball and Steve. She stated that Steve and Stacey got into an argument when he arrived because Stacey noticed their daughter had had a haircut. Ms. Webb stated that Steve stated, "I'm not gonna stand here and argue over getting a haircut." Ms. Webb described that at this time Stacey went to the porch of the house, and she and Steve had a heated discussion outside. Ms. Webb described that she and Steve were not screaming, and that he "barely touched her." She stated that at some point, Ms. Ball got out of the vehicle and attempted to enter into a conflict with her, but that Steve went over and made Ms. Ball get back into the car. Ms. Webb then testified that at this time she turned and went back into the house, and a few minutes later Steve and his mother left.

On cross-examination, Ms. Webb testified that Steve never threatened to hurt Stacey or her and that his only statement was something like, "when I get the kids back, you'll never see them again." However, it was unclear from the testimony whether Ms. Webb was testifying that Steve made this comment during the November 9, 2009, altercation or at some other point. Ms. Webb did not testify that she had ever seen Steve physically harm or threaten to physically harm Stacey, either that day or any other day.

Officer Buckley also testified at the January 21, 2010, hearing. Officer Buckley responded to Stacey and Steve's house on July 6, 2009, after Stacey called the police. Officer Buckley stated that upon arriving, it was clear that there had been some sort of physical altercation between Stacey and Steve,

and that the parties indicated to him that they had both been involved. Officer Buckley testified that Stacey had red marks on her chest and face, and Steve had scratch like marks on his face. He further indicated that neither party wanted to press charges at that time, and he instructed Stacey and Steve that they had to separate for twenty-four hours. Steve agreed to leave the house and packed a bag.

Regarding the July 2009 incident, Steve testified that he and Stacey got into an argument when he told her he had filed for divorce, and she would need to go to the courthouse to get the papers. Steve testified that Stacey came at him while he was sitting in a chair with his dog, turning the chair over and knocking his glasses off. Stacey described that Steve attacked her by sitting on her chest and striking her in the face.

Stacey filed a petition for an EPO in Nicholas County on July 8, 2009, which was subsequently dismissed after a hearing. At that hearing, Stacey attempted to introduce photographs of her injuries that had been taken several days after the incident. The Nicholas County trial court did not allow the photos and dismissed the petition, after finding that the July 6, 2009, incident was not an instance of domestic violence as defined by KRS 403.270.

However, the Bourbon Family Court allowed the photographs to be introduced at the hearings on the subsequent petition for a DVO in that court. At the conclusion of the testimony on January 21, 2010, the Bourbon Family court entered a DVO for a term of two years stating that Steve must maintain a minimum distance of 1000 feet from Stacey and is to have no contact with her except in

medical emergencies. The Bourbon Family Court cited KRS 503.010 as the basis for entry of the order, stating that when determining whether in the context of domestic violence there is impending danger, belief that danger is imminent may be inferred from a past pattern of serious physical abuse. The court determined that the July 2009 incident was evidence of a past pattern of serious physical abuse. The Court focused on the fact that there was a civil restraining order in place when the November 9, 2009, incident occurred and that a DVO was therefore necessary. This appeal now follows.

When reviewing the entry of a DVO, our standard of review is whether the trial court abused its discretion. “The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles.” *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). A reviewing court may not substitute its findings of fact for the trial court unless they are clearly erroneous. *Bennett v. Horton*, 592 S.W.2d 460 (Ky. 1979). A factual finding is not clearly erroneous if it is supported by substantial evidence. “‘Substantial evidence’ is evidence of substance and relevant consequence sufficient to induce conviction in the minds of reasonable people.” *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). Furthermore, The Kentucky Rule(s) of Civil Procedure (CR) 52.01 instructs: “Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.”

In order to issue a DVO, the trial court must first conduct a hearing and find “from 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). The preponderance of the evidence standard is met when 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). Domestic violence and abuse is defined as “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.” KRS 403.720.

In the instant case, the November 9, 2009, incident that preceded the most recent motion for a protective order simply did not involve violence. There was no testimony that Steve touched, assaulted, threatened to assault, or inflicted fear of imminent physical injury on Stacey, or even her mother, Ms. Webb. In fact, the testimony of all the witnesses was that Stacey was upset about her daughter’s haircut and went to stand on the porch and that Steve and Ms. Webb argued, but no violence occurred. Accordingly, the Bourbon Family Court could not rely on this incident to enter the DVO because there was no proof that violence occurred or was going to occur again.

Thus, in order to enter the DVO, the Bourbon Family Court would have had to rely on *other* evidence showing that Stacey was more likely than not to have been a victim of domestic violence or that violence would again occur. The

family court stated orally that it was relying on the July 2009 incident as evidence of a past pattern of serious physical abuse. However, the evidence does not support any pattern of abuse, and the record does not clearly indicate that even the July 2009 incident was an instance of domestic violence.

Specifically, immediately after the July incident, the Nicholas Family Court determined that domestic violence had not occurred in that instance. The testimony in front of both the Nicholas Family Court and the Bourbon Family Court was that both parties admitted that they physically assaulted each other and that they agreed to separate for twenty-four hours but stayed together several nights later in the residence. A finding by the Bourbon Family Court that the July 2009 incident indicates a pattern of serious abuse is not supported by the record, given that immediately after the incident both parties admitted fault, neither pressed charges, and the parties stayed together in the subsequent days following the incident. There is nothing in the testimony or record to indicate a pattern of abuse whatsoever. Therefore, in the context of KRS 503.010, imminent danger cannot be inferred from a past pattern of repeated serious abuse.

Given the lack of any threats, any other violence, or any other evidence justifying a reasonable fear of imminent injury, we simply cannot say that it was more likely than not that Stacey was a victim of domestic violence. The Bourbon Family Court's finding to the contrary is not supported by substantial evidence. Because the family court's findings are not supported by substantial evidence, they are clearly erroneous and are therefore an abuse of discretion.

For the foregoing reasons, we hold that the family court abused its discretion when entering a DVO against Steve Ball. Therefore, we reverse the January 21, 2010, order of the Bourbon Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harry E. Budden, Jr.
Paris, Kentucky

BRIEF FOR APPELLEE:

Rocky L. McClintock
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