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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000628-ME

AMANDA DUNCAN — APPELLANT

v.

APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 10-D-00004

ZACHARY TILLIS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: LAMBERT, MOORE AND NICKELL, JUDGES.

NICKELL, JUDGE: Amanda Duncan appeals the dismissal of a domestic violence petition by the Family Division of the Lewis Circuit Court. Upon review of the briefs, the record and the law, we affirm.

Duncan and Zachary Tillis were involved in a relationship in Indiana that produced a daughter, Brooklyn, in May of 2009. The relationship was not harmonious. While in Indiana, Tillis yelled, screamed and shoved Duncan onto a

couch causing her arms to ache for about one hour. Tillis also slapped or tapped the couple's daughter lightly on the mouth when she cried. In early November of 2009, Duncan returned to her native Kentucky. Tillis followed Duncan to Lewis County, Kentucky, where both parties now reside separate and apart.

On February 17, 2010, Duncan filed a domestic violence petition alleging:

> Zachary S. Tillis called my house threatening to come and take my daughter. He said that he didn't care who tried to stop him, he would f*** anyone in his way up. So I ask him to stop calling. He proceeded to call me 6 more times. I didn't answer the phone. Then on the 13th he continued to try and call from his cell phone number so I blocked that number then he started calling me from the B-mart so I blocked that number. He keeps calling me from different numbers. I called and let the sherriffs (sic) office know. He is still calling and threatening me. He told me the last time that he called and I answered because he called from a different number, that him and his mom know people that wouldn't hesitate to kill me and my family and if Brooklyn got hurt in the process o (sic) well that is something I would have to live with if I lived becaused (sic) I shouldn't be such a b****.

An emergency order of protection was entered on February 25, 2010.

Both Duncan and Tillis testified at a hearing held on March 4, 2010. Duncan testified that: Tillis had been threatening her; Tillis had twice "smacked" their daughter on the mouth, once when she was about three months of age and again when she was nearly six months old; Tillis scares her; in a phone call, Tillis said he and his mother knew people who would hurt Duncan if she did not allow Tillis to see his daughter; Tillis has threatened to kill her; she did not feel safe after

Tillis pushed her onto a couch in Indiana; she did not seek medical attention after being shoved onto the couch, her head did not hit the wall, and her back did not hurt; and, also while in Indiana, Tillis threw things and punched a hole in a closet door.

When Tillis took the stand, he admitted shoving Duncan onto a couch during a quarrel when the couple resided in Indiana. He explained that, while at arm's length, he had pointed his finger at Duncan and she had slapped his hand away. When he pointed his finger at her again, he put his hands on Duncan's shoulders and pushed her onto the couch, at which point she got up from the couch and took Brooklyn to the bedroom. Tillis denied ever smacking Brooklyn on the mouth, but admitted lightly tapping her mouth on one occasion to show her it was not okay to bite.

At the conclusion of the hearing the trial court made numerous findings of fact. One of those findings was that Tillis and Duncan satisfied the prerequisites for the filing of a petition as they had been in a relationship, lived together and had a child together.

The trial court correctly noted that domestic violence and abuse, as defined in KRS[1] 403.720(1), requires proof of "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." "Physical injury," as defined in KRS

[1] Kentucky Revised Statutes.

500.080(13), requires "substantial physical pain or any impairment of physical condition." "Assault," as defined in KRS 508.025, requires one to cause or attempt to cause physical injury.

The trial court proceeded to find that the only proof coming close to meeting the definition of domestic violence was the push onto the couch that had occurred in the Indiana apartment sometime previous to Duncan's return to Kentucky in early November of 2009. The court stated Duncan could complain in Kentucky about the push in Indiana so long as she was a Kentucky resident at the time of her complaint. Duncan testified her arms ached for about an hour after being pushed onto the couch.

The trial court also characterized as "iffy" the credibility of Tillis's threat that, if Duncan did not allow him to see his child, he knows people who would hurt Duncan. The trial court did not consider the statement to be a present threat. Finally, while the trial court was convinced Tillis had a volatile personality, it found Duncan had not met her burden of proving the occurrence of domestic violence. As a result, the court stated on the record it was dismissing the domestic violence petition. On the court calendar, the court wrote, "Dismissed court does not find that Domestic violence per statute has not[2] been proven." This appeal followed.

On appeal, Duncan argues the trial court erred in concluding she did not prove by a preponderance of the evidence that Tillis committed acts of

[2] The word "not" was placed above a caret on the original handwritten notation.

domestic violence.[3] Tillis responds that Duncan simply disagrees with the trial court and does not argue that it ignored the law or misapplied it.

Before entry of a domestic violence order, the trial court must 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 satisfied when sufficient evidence establishes the alleged victim was more likely than not to have been a victim of domestic violence. *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007). The standard of review for factual determinations is whether the family court's finding of domestic violence, or lack thereof, was clearly erroneous. CR 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). When supported by substantial evidence, the trial court's findings are not clearly erroneous. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). "[I]n reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion." *Cherry v.*

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[3] In support of her argument, Duncan cited an unpublished case and included a copy of it in both the Brief for Appellant and her reply brief. We take this opportunity to remind counsel of Kentucky Rules of Civil Procedure (CR) 76.28(4)(c) which states in relevant part:

> Opinions that are not to be published shall not be cited or used as binding precedent in any other case in any court of this state; however, unpublished Kentucky appellate decisions, rendered after January 1, 2003, may be cited for consideration by the court if there is no published opinion that would adequately address the issue before the court.

We encourage all counsel to satisfy the requirements of CR 76.28(4)(c) before citing an unpublished decision.

Cherry, 634 S.W.2d 423, 425 (Ky. 1982) (citation omitted). A trial court abuses its discretion when its decision is unreasonable, unfair, arbitrary or capricious. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (citations omitted).

"[D]omestic violence statutes should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic violence[,]" *Barnett v. Wiley*, 103 S.W.3d 17, 19 (Ky. 2003), however, that "construction cannot be unreasonable." *Id*. (citing *Beckham v. Board of Education of Jefferson County*, 873 S.W.2d 575, 577 (Ky. 1994)). Further, while we give much deference to a family court's decision, we cannot condone actions that are arbitrary, capricious or unreasonable. *See Kuprion*, 888 S.W.2d at 684.

In light of the foregoing, we have reviewed the hearing numerous times and, like the trial court, have heard no testimony of "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" as is required for a finding of domestic violence and abuse. At most, there was one shove, more than three months before the filing of the petition, from which Duncan quickly recovered without seeking medical attention. Additionally, the petition was based upon a series of phone calls and mentioned nothing about the shove onto the couch. In listening to the recorded phone calls, the trial court was unimpressed. In listening to the phone calls, which were subpoenaed and introduced by Tillis, we heard nothing but a father seeking information about his daughter. In reviewing the evidence and the statutory definition of domestic

violence and abuse, we cannot say there was substantial evidence to support entry of a domestic violence order.

For the foregoing reasons, the dismissal of the petition by the Lewis Circuit Court is affirmed.

ALL CONCUR.

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