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NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2009-CA-002336-ME

WILLIAM JOSEPH CURRY

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE DURENDA L. LAWSON, JUDGE
ACTION NO. 09-D-00249

JAMES FREDERICK CURRY

APPELLEE

and

NO. 2009-CA-002337-ME

WILLIAM JOSEPH CURRY

APPELLANT

v. APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE DURENDA L. LAWSON, JUDGE
ACTION NO. 09-D-00250

NANETTE CURRY JENSEN

APPELLEE

OPINION
AFFIRMING IN PART
AND
VACATING IN PART

** ** * * * * *

BEFORE: COMBS, CLAYTON, AND MOORE, JUDGES.

COMBS, JUDGE: William J. Curry (Joe) appeals from two domestic violence orders (DVO's) of the Laurel Circuit Court prohibiting contact with his brother and sister, James F. Curry (Rick) and Nanette Curry Jensen (Nanette). After our review, we affirm in part, vacate in part, and remand.

On August 31, 2009,¹ Joe, Rick, and Nanette met for their yearly stockholder meeting in Nanette's office in London, Kentucky, at one of the several businesses jointly owned by the three siblings. After the meeting ended, they discussed some other business. In the course of the discussion, Joe told Rick and Nanette that they love to "sue, sue, sue," referring to three pending civil lawsuits involving some of their business ventures. Rick responded by rising out of his chair and lunging toward Joe; he struck Joe in the head with his fist, which bore a heavy ring.

Joe then pushed Rick back into his chair. As he landed in the chair, Rick struck his head on the edge of a marble windowsill. Joe then continued to hit Rick several times and asked Rick if he was going to stop his assault. Rick at first refused to cease, responding that he "intended to continue beating" Joe.

(Appellant's brief, p.2) When Rick finally said that he would stop, Joe left the room and called the police. The police responded to the call and took statements from all three siblings.

Rick was treated at a local hospital. He required several staples in his head for the gash caused by the windowsill. Upon his release, the police arrested Rick

¹ The appellant's briefs state that the incident occurred on September 1, but the police report in the record is dated August 31. The appellees' briefs do not provide a counterstatement of the facts.

and charged him with fourth-degree assault. Joe also sought medical treatment for ringing in his ears and a strained neck.

On September 10, Nanette and Rick filed petitions for Domestic Violence Orders (DVO's) in Laurel Circuit Court. This case presents a rather unusual situation in which an initial aggressor in an altercation seeks DVO protection from his victim. On November 30, 2009, the court held one hearing and granted both petitions. The DVO's prohibit Joe, the victim of the assault initiated by Rick, from contact with Rick and Nanette. Under the terms of the orders, the siblings may conduct business meetings either in the presence of hired security guards or by videoconference. Joe now appeals.

As a preliminary matter, we note that Rick's and Nanette's briefs fail to comply with Kentucky Rule[s] of Civil Procedure (CR) 76.12, which prescribes the format for appellate briefs. Rick and Nanette also failed to serve Joe with their motion to file a late brief and with copies of their briefs. However, Joe has not requested that we strike Rick's and Nanette's briefs. Despite a number of procedural infirmities, we have nonetheless proceeded to examine the record in order to decide the case on its merits. *See Sanderson v. Commonwealth*, 291 S.W.3d 610, 612 (Ky. 2009).

Kentucky Revised Statute[s] (KRS) 403.750² authorizes a family court to issue a domestic violence order “if it finds from a preponderance of the evidence

² This statute has been amended by Amanda's Law, which took effect July 15. However, we shall proceed under the unamended statute, which was in effect at the time of the incident at issue in this case.

that an act or acts of domestic violence and abuse have occurred and may again occur[.]” The definition of domestic violence and abuse is “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[.]” KRS 403.720(1).

Because of the serious restrictions placed on a person subject to a DVO, trial courts should not enter them lightly. *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 721 (Ky. App. 2010). In hearings for a DVO petition, a trial court must make minimum findings concerning “(a) specific evidence of the nature of the abuse; (b) evidence of the approximate date of the respondent’s conduct; and (c) evidence of the circumstances under which the alleged abuse occurred.” *Rankin v. Criswell*, 277 S.W.3d 621, 626 (Ky. App. 2008).

Our standard of review is governed by CR 52.01. *Ghali v. Ghali*, 596 S.W.2d 31, 32 (Ky. 1980). CR 52.01 applies to domestic cases and provides that when reviewing actions without juries, we may not reverse the trial court’s findings of fact unless they were clearly erroneous. Clear error only occurs when there is not substantial evidence in the record to support the trial court’s findings. *M.P.S. v. Cabinet for Human Resources*, 979 S.W.2d 114, 116 (Ky. App. 1998).

We shall first examine the trial court’s findings concerning Rick’s petition against Joe. Joe argues that it was error for the court to issue this order against him because Rick was the initial aggressor, who has been charged with assault. However, the trial court found that after Rick began the assault, Joe quite

forcefully forced Rick into a seat and stood over him and punched him three times. The court found that Joe had gone “too far.” It noted that Joe could have stopped hitting Rick but that he did not; thus, he clearly used force exceeding what was appropriate or necessary for self-defense. Kentucky’s self-defense statute authorizes use of physical force “when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person.” KRS 503.050(1). Although the court did not make reference to that statute, it essentially applied its reasoning.

The trial court was able to observe Joe and Rick in person. Rick is smaller than Joe and has had a stroke; he is frail in appearance. In contrast, Joe is robust and considerably larger than Rick. After Joe had seated Rick in the chair and had re-gained his footing, he had neither need nor justification to continue striking Rick.

The trial court also examined pictures of both brothers’ injuries (which were not in the record on appeal). It found the photographs of Rick’s injuries “disturbing” and stated that the severity of Joe’s injuries did not compare to Rick’s. We cannot conclude that the trial court erred when it found that Joe had committed domestic violence against Rick. We affirm the trial court on this issue.

Joe contends that no evidence was presented to support a finding that domestic violence might occur again. We disagree. As the trial court acknowledged, Joe and Rick are involved in businesses together, requiring them to be in meetings again – the same setting where the incident precipitating the DVO

occurred. The siblings have a long history of a volatile and contentious relationship. The proceedings leading up to the issuance of a DVO began in September 2009. On October 19, counsel reported to the court that they had agreed to dismiss the EPO petition. However, on November 2, counsel reported that an attempt to reconcile was “falling apart.” The record shows that the siblings were not amiable during the course of the hearing. In fact, at one point, Nanette burst out in sarcastic laughter at Joe’s testimony. Additionally, the siblings are still involved in litigation against one another. Therefore, we believe that there was substantial evidence to support the trial court’s finding and affirm on this issue.

We shall next address Joe’s arguments regarding Nanette’s petition. Joe contends that the trial court erred in granting Nanette’s petition for a DVO because there was no evidence that Nanette has fear of imminent domestic violence and because the DVO is being used for impermissible purposes. We agree.

We reiterate that domestic violence includes “infliction of fear of **imminent** physical injury, serious physical injury, sexual abuse, or assault[.]” KRS 403.720(1). (Emphasis added.) The penal code provides for an analysis of past behavior in order to evaluate the likelihood of future incidents of abuse: “in the context of domestic violence and abuse . . . belief that danger is imminent can be inferred from a past pattern of repeated serious abuse.” KRS 503.010.

At the DVO hearing, Nanette did not allege that Joe had ever committed any acts of domestic violence against her. Nonetheless, she told the court that she feared that he would hurt her in the future. Her fears were related to her job and

business interests; *i.e.*, that Joe will either fire or demote her since he had done so with respect to Rick in the past. She stated that Joe knew what to say to upset her. She recounted an episode that had occurred more than two years before the hearing when Joe took away her keys and cell phone in a fit of temper. We are not persuaded that this behavior equates with the kind of abusive offenses that are the target of the domestic violence statutes.

A DVO is intended to protect victims of domestic abuse. *Manning v. Willett*, 221 S.W.3d 394, 397 (Ky. App. 2007). Our court does not condone the frivolous use of obtaining DVO's to manipulate the courts "in order to get 'one-up' on the other party" in some other proceeding – such as a civil lawsuit. *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky. App. 2005). In this case, there is a lack of any evidence of the behavior contemplated and encompassed by the statute. However, extensive and acrimonious litigation is on-going -- litigation that has Nanette and Joe pitted against one another. Neither factor is a suitable basis for granting a DVO. Therefore, we reverse the order granting the DVO as to Nanette.

In summary, we affirm the finding of the trial court that Joe committed domestic violence against Rick and that it might occur again, warranting issuance of a DVO. However, we vacate the order granting a DVO pertaining to Nanette and remand for entry of an appropriate order.

CLAYTON, JUDGE, CONCURS.

MOORE, JUDGE, CONCURS IN RESULT.

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