

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-000039-ME

MICHAEL HAY

APPELLANT

v. APPEAL FROM BREATHITT CIRCUIT COURT
HONORABLE LARRY MILLER, JUDGE
ACTION NO. 09-D-00098

SEAN NICOLE STRONG

APPELLEE

OPINION
AFFIRMING

** ** * ** * **

BEFORE: ACREE, DIXON AND STUMBO, JUDGES.

DIXON, JUDGE: Michael Hay appeals from a domestic violence order entered by the Breathitt Family Court at the request of his stepdaughter, Sean Nicole Strong.

Finding no error, we affirm.

On December 1, 2009, Nicole filed a domestic violence petition against her stepfather, Michael, alleging that he struck her face during an argument on November 22, 2009. The petition asserted that when Nicole vacated Michael's

residence following the altercation, Michael began parking his vehicle in the driveway of her new residence and watching the house. Based on the petition, the court issued an EPO/Summons and set a hearing for December 9, 2009.

At the hearing, Nicole appeared *pro se*, and Michael appeared with counsel. Nicole testified consistently with the statements in her petition. In turn, Michael admitted striking Nicole during a “very heated” argument because Nicole had asked for money to purchase drugs. The court then heard additional testimony from Nicole regarding the circumstances surrounding the altercation.

At the conclusion of the testimony, the court ruled that domestic violence had occurred and may again occur. At that point, Michael’s attorney addressed the court, offering additional information about the altercation. Counsel contended that Nicole was the aggressor and that Michael was merely attempting to push her in self-defense when he accidentally struck her face. The court then addressed Nicole, who responded affirmatively when asked if she presently feared that Michael would cause her physical injury. Thereafter, the court issued a DVO against Michael, and this appeal followed.

Michael asserts that he was denied procedural due process, that there was insufficient evidence to issue a DVO, and that the court erred by issuing mutual DVOs. After reviewing the record and applicable law, we affirm.

A court may grant a DVO, following a full hearing, “if it finds 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). “Domestic 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 . . . [.]” KRS 403.720(1). To satisfy the preponderance standard, the evidence must show that the 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). “On appeal, we are mindful of the trial court's opportunity to assess the credibility of the witnesses, and we will only disturb the lower court's finding of domestic violence if it was clearly erroneous.” *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 720 (Ky. App. 2010).

At the outset, we note that Michael’s brief fails to comply with our civil rules, as he neither cited the record to support his arguments nor indicated whether he preserved the alleged errors for appellate review. CR 76.12(4)(c)(iv)-(v). Nevertheless, we have reviewed the minimal appellate record in order to decide Michael’s appeal on the merits.

First, Michael contends his right to procedural due process was violated when the court denied him the opportunity “to tell his side of the story.”

The judge conducted the hearing in a manner that allowed each party to address the court freely. Following Nicole’s initial statements, the court asked to hear from Michael. Michael admitted that he struck Nicole during a “very heated” argument, and his attorney subsequently explained to the court the circumstances of the altercation from Michael’s perspective, including that he slapped Nicole accidentally.

In *Lynch v. Lynch*, 737 S.W.2d 184, 186 (Ky. App. 1987), this Court stated, “Due process requires, at the minimum, that each party be given a meaningful opportunity to be heard.” Accordingly, prior to issuing a DVO, “the court must provide a full evidentiary hearing conducted in compliance with statutory and court rules.” *Rankin v. Criswell*, 277 S.W.3d 621, 626 (Ky. App. 2008). We are also mindful that the family court has discretion in how to conduct the hearing and receive evidence. *Pendleton v. Commonwealth*, 685 S.W.2d 549, 554 (Ky. 1985). Here, the court allowed the parties to speak openly regarding the allegations of domestic violence, and there was no objection regarding the court’s method of conducting the hearing. In light of the record before us, we conclude the family court did not violate Michael’s right to procedural due process, as he received a full hearing pursuant to the domestic violence statutes.

Next, we address Michael’s contention that there was insufficient evidence¹ for the court to conclude that “domestic violence . . . occurred and may again occur[,]” KRS 403.750(1), because the evidence established that he inadvertently struck Nicole while trying to defend himself. Further, Michael opines that the proof presented did not support a finding of domestic violence, as it failed to establish “(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

¹ In his brief, Michael improperly offers extrajudicial information regarding an investigation by the Cabinet for Health and Family Services. Our review concerns only the evidence properly made part of the record below; consequently, we do not consider these extrajudicial allegations in reaching our decision. *Baker v. Jones*, 199 S.W.3d 749, 753 (Ky. App. 2006).

circumstances under which the alleged abuse occurred.” *Rankin*, 277 S.W.3d at 626.

Despite Michael’s contention to the contrary, our review indicates that the evidence presented at the hearing satisfied the requirements enunciated in *Rankin*. Furthermore, we reiterate that the family court was in the best position to judge the credibility of the witnesses and weigh the evidence presented. *Buddenberg*, 304 S.W.3d at 720. Although the record reveals conflicting testimony on some issues, Michael clearly admitted striking his stepdaughter during a “very heated” argument. Furthermore, Nicole testified that Michael had been sitting in her driveway and watching her house since she vacated his residence. We understand Michael is dissatisfied that the family court found Nicole’s testimony to be more credible; however, we cannot say the court abused its discretion by finding that Nicole was more likely than not a victim of domestic violence.

Finally, Michael asserts that the court erred by issuing “mutual” DVOs. In the DVO, the family court ordered Nicole, with her consent, not to contact Michael “in order to assist in eliminating future acts of domestic violence.” While we do not necessarily think the court’s admonition to Nicole constituted a “mutual” DVO, Nicole filed neither a responsive brief nor a cross-appeal in this Court. Accordingly, we decline to address this issue. CR 73.02(2).

For the reasons stated herein, we affirm the order of the Breathitt Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

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