

RENDERED: DECEMBER 16, 2011; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2010-CA-002270-ME

DERRICK SCOTT WHITT

APPELLANT

v. APPEAL FROM MORGAN CIRCUIT COURT
HONORABLE DAVID D. FLATT, JUDGE
ACTION NO. 10-D-00053

STACEY MARIE WHITT

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, STUMBO AND VANMETER, JUDGES.

DIXON, JUDGE: Derrick Scott Whitt appeals from a Domestic Violence Order entered against him by the Morgan Family Court pursuant to a petition filed by Stacey Marie Whitt. We affirm.

On October 28, 2010, during the pendency of the parties' divorce, Stacey filed a domestic violence petition against Derrick. Stacey alleged Derrick

made several threatening phone calls to her home, stating he was going to “straighten” her out. As a result of Derrick’s behavior, Stacey feared for the safety of herself and their two children. Based on the petition, the court issued an EPO and set a hearing for November 1, 2010.

At the hearing, Stacey and Derrick appeared *pro se*. Stacey testified consistently with the statements in her petition, explaining that Derrick called her repeatedly, at least twenty times. Stacey testified that Derrick told her he was coming to her house and that she was “next.” Stacey advised the court she interpreted Derrick’s statements as threats, and she called police when she saw Derrick outside her house. Stacey further advised the court she had been harmed by Derrick on prior occasions. In turn, Derrick admitted calling Stacey several times, but denied threatening her or going to her house. Derrick explained he was trying to apologize to Stacey, but she hung up on him each time he called.

The court issued a three-year DVO against Derrick, restraining him from contacting Stacey. Thereafter, Derrick filed a motion to vacate the DVO, challenging the sufficiency of the evidence and alleging he was denied procedural due process. The court amended a portion of the DVO relating to child custody, but otherwise denied the remaining issues in Derrick’s motion to vacate. This appeal followed.

Derrick asserts there was insufficient evidence to issue a DVO and that he was denied procedural due process. 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).

Derrick contends the court erred in issuing a DVO because there was insufficient evidence for the court to conclude that “domestic violence . . . occurred and may again occur[.]” KRS 403.750(1). Derrick points to his own testimony that he did not threaten Stacey, and he opines that there was no evidence he caused Stacey to fear imminent physical injury.

At the hearing, the court heard Stacey’s testimony regarding threatening behavior perpetrated by Derrick. Specifically, Stacey testified Derrick called her at least twenty times, told her she was “next,” and he was going to “take care of it” with her. Stacey stated she believed Derrick was threatening her, and she advised the court she had been involved in harmful situations with Derrick in

the past. Further, Stacey testified she contacted police that evening when she saw Derrick approach her property. In contrast, Derrick claimed he did not threaten Stacey, although he admitted calling her repeatedly.

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. Here, Derrick and Stacey gave conflicting accounts of the dispute. As the fact-finder, the court relied on Stacey's testimony and found her to be a more credible witness. Based on the evidence presented, we conclude the court's finding of domestic violence was not clearly erroneous.

Next, Derrick contends he was denied procedural due process because he could not fully present a defense. Specifically, Derrick contends he did not receive the first two pages of the EPO setting forth Stacey's allegations of domestic violence; consequently, he asserts he did not have adequate notice of the charges prior to the hearing. Derrick also asserts the court denied him a full hearing because he was not given the opportunity to call witnesses or cross-examine Stacey.

The record indicates the judge conducted the hearing in a manner that allowed each party to address the court freely. Following Stacey's initial statements, the court asked Derrick to explain his version of events. Derrick testified regarding the events in question, and he did not indicate he was unprepared to proceed or needed a continuance. The court allowed the parties to speak openly regarding the allegations of domestic violence, and neither party

objected to the court's method of conducting the hearing. Furthermore, during his testimony, Derrick stated he did not approach Stacey's house on the night in question, and he advised the court that he had witnesses who would support his testimony, which the court noted.

In *Lynch v. Lynch*, 737 S.W.2d 184, 186 (Ky. App. 1987), this Court stated, “[d]ue 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).

The record reveals the court conducted the hearing in a full and fair manner, and we are not persuaded the court's methods prejudiced Derrick's defense. Despite Derrick's argument to the contrary, we are satisfied he was afforded procedural due process.

For the reasons stated herein, the judgment of the Morgan Family Court is affirmed.

VANMETER, JUDGE, CONCURS.

STUMBO, JUDGE, DISSENTS.

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