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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-002188-ME

ROBERT A. ROZIER

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE JOSEPH W. O'REILLY, JUDGE
ACTION NO. 06-D-501882

BARBARA J. MOORE

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

ACREE, JUDGE: The issue before us is whether substantial evidence supports a domestic violence order (DVO) entered by the Jefferson Family Court against the appellant, Robert A. Rozier, for the protection of appellee, Barbara J. Moore. For the reasons that follow, we affirm the issuance of the DVO.

Facts and Procedure

In 2005, Moore and Rozier dissolved their marriage. During the divorce proceedings, Moore and Rozier were granted joint custody of their minor child. Shortly thereafter, Moore filed a petition for a DVO against Rozier, claiming he came to her residence, demanded to see the parties' minor child, and engaged in a physical confrontation with Moore's new husband and adult daughter.¹ On July 12, 2006, the Jefferson Circuit Court granted Moore's petition and entered a DVO restraining Rozier from having contact with Moore.

The DVO remained in effect from July 2006 until July 2009. Moore testified she allowed the DVO to lapse because Rozier was not causing any problems at the time. However, on October 20, 2010, Moore filed another petition seeking a DVO to protect herself, the parties' minor child, and her current husband. On November 4, 2010, the circuit court held an evidentiary hearing on Moore's petition. During the hearing, Moore testified that Rozier had been harassing her for the past two months by calling her 15-20 times a day, and leaving messages both demanding that Moore return his telephone calls and dubbing Moore's current husband a "bitch" and a "punk." Moore also testified that Rozier asked her if she needed to be "taken care of because father time can't do it" and Rozier asked Moore's current husband if he liked having sex with her.

Moore explained that, while the visitation exchanges took place at a police station, the building was locked and occupied only by a single dispatcher.

¹ Moore's adult daughter was not also Rozier's child.

Moore also testified that, during the exchanges, Rozier would block in her vehicle and stand in close proximity to her. As a result of Rozier's conduct and the unsecure police station, Moore claimed she was afraid to participate in the visitation transfers. As a result, Moore asked her current husband to participate in the exchanges in her place. Moore further testified that, during the custody exchanges, Rozier has become increasingly aggressive toward her husband and at one point Rozier threatened her husband. Moore claimed that Rozier's multiple telephone calls, threats to her husband, and past domestic violence incidents caused her to fear for her safety.

In contrast, Rozier categorically denied Moore's allegations.²

Particularly, Rozier denied ever threatening Moore with physical violence or harm. Additionally, Rozier testified that while he did call and text Moore, he did not do so excessively and only in the course of normal communications. Rozier also claimed that Moore was abusing the DVO process in an attempt to force Rozier out of his child's life. Rozier further testified that Moore's current husband engaged in repeated confrontations with him during the custody exchange of Rozier and Moore's minor child, and frequently cussed in front of the child.

At the conclusion of this "he said/she said" testimony, the circuit court entered a DVO restraining Rozier from having contact with Moore until November 2012.³ Rozier promptly appealed.

² There is one exception. Rozier admitted he sent Moore a text message requesting that she tell her current husband to stop calling him like a "little bitch."

³ The DVO did not prevent Rozier from having contact with his minor child or Moore's current husband.

Standard of Review

This Court will not set aside the circuit court’s finding of domestic violence unless it is clearly erroneous. *Caudill v. Caudill*, 318 S.W.3d 112, 114-15 (Ky. App. 2010); Kentucky Rules of Civil Procedure (CR) 52.01. A factual finding is clearly erroneous if it is not supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence constitutes evidence of “sufficient probative value [as] to induce conviction” in the mind of a reasonable person. *Id.* With these standards in mind, we examine whether the testimony provided at the evidentiary hearing was sufficient to justify the entry of a DVO.

Analysis

Rozier asserts the circuit court’s finding that an act of domestic violence occurred and may occur again is clearly erroneous because it lacks substantial evidence. As a result, Rozier argues, the circuit court erred when it issued the DVO.⁴ We disagree.

A court may enter a DVO following an evidentiary hearing “if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may occur again[.]” Kentucky Revised Statute (KRS) 403.750(1). The preponderance of the evidence standard is satisfied when

⁴ Interspersed throughout his substantial evidence argument, Rozier appears to argue that this Court should disregard Moore’s testimony as it lacks credibility. However, the circuit court, not this Court, is in the superior position to assess a witness’s credibility and assign the appropriate weight to be given to such testimony. *Kotas v. Commonwealth*, 565 S.W.2d 445, 447 (Ky. 1978); CR 52.01 (“[D]ue regard shall be given to the opportunity of the trial judge to judge the credibility of the witnesses.”). The circuit court, in issuing the DVO, clearly gave Moore’s testimony due consideration and weight, and we are not at liberty to simply discard the circuit court’s determination.

sufficient evidence establishes that the supposed 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). KRS 403.720(1) defines domestic violence and abuse as “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.”

There is no evidence that Moore suffered physical injury or harm at the hands of Rozier. Consequently, the resolution of this matter turns on whether substantial evidence exists to support the circuit court’s conclusion that Rozier inflicted upon Moore a fear of imminent physical injury, sexual abuse, or assault.

As noted, Moore testified that, for the last two months prior to the hearing, Rozier had been calling her 15-20 times a day and leaving her messages both demanding return calls and insulting her current husband. Moore also testified that Rozier made at least one sexually degrading remark directly to her. Additionally, Moore explained that she was afraid to participate in the custody exchange of the parties’ minor child because of Rozier’s aggressive behavior. Moore further testified that she had previously obtained a DVO against Rozier and that he had engaged in a physical confrontation with her adult daughter. Moore concluded that Rozier’s hostile behavior, numerous telephone calls, sexual comment, and prior physical confrontation with her adult daughter caused her to fear for her safety.

We are cognizant that the quantum of evidence in this matter is meager. However, Moore's testimony concerning Rozier's repeated phone calls with demands for return calls and sexually-charged comment, coupled with Rozier's past incident of domestic violence, constitutes sufficient evidence from which the circuit court could reasonably infer that Rozier's conduct caused Moore to fear imminent physical injury, serious or otherwise, sexual abuse, and/or assault. Regardless of whether we may have decided the case differently, *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982), based on the testimony presented we are compelled to conclude that sufficient evidence supports the Jefferson Circuit Court's determination that Moore was more likely than not to have been a victim of domestic violence. *See Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007).

Conclusion

The Jefferson Circuit Court's finding of domestic violence is supported by substantial evidence. Accordingly, we affirm.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas R. Thomas, Sr.
Jeffersonville, Indiana

BRIEF FOR APPELLEE:

J. Bart McMahon
Louisville, Kentucky