

Commonwealth of Kentucky

Court of Appeals

NO. 2011-CA-002214-ME

JOSH REYNOLDS

APPELLANT

v.

APPEAL FROM DAVIESS CIRCUIT COURT
HONORABLE JAY A. WETHINGTON, JUDGE
ACTION NO. 11-D-00072

DAVID WAYNE HEAD, ON
BEHALF OF A.H.; AND A.H.

APPELLEES

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: DIXON, MOORE, AND THOMPSON, JUDGES.

DIXON, JUDGE: Josh Reynolds appeals from a Domestic Violence Order entered against him by the Daviess Circuit Court pursuant to a petition filed by David Wayne Head. We affirm.

On April 5, 2011, David filed a domestic violence petition on behalf of his eight-year-old son, A.H., against Josh, the live-in boyfriend of A.H.'s

mother, Jennifer Karnes. At the time the petition was filed, A.H. lived in the home shared by Jennifer and Josh.¹ In his petition, David alleged Josh had bruised A.H.'s chest, which prompted an investigation by social services. David sought to restrain Josh from having any contact with A.H. Based on the petition, the court issued an EPO and set a date for an evidentiary hearing.

At the hearing, the court heard testimony from David and Josh. David testified that he was concerned for the safety of A.H. and that he believed Josh had inflicted the bruises on A.H. David introduced photographs of the bruises, noting the photos were part of the record in the companion custody case. On cross-examination, David acknowledged that he did not witness any violent acts occur between Josh and A.H.

Josh testified that he had lived with Jennifer for two years. Josh denied physically striking A.H.; however, he admitted leaving a small bruise on A.H.'s chest as a result of horseplay. Josh asserted that he might have been too rough when playing with A.H., explaining that he sat on A.H. and tickled him. Josh also admitted that he had seen bruises on A.H. within the past six months.

At the conclusion of the hearing, the court issued a one-year DVO against Josh. The order restrained Josh from having any contact with A.H. and required him to vacate the residence during A.H.'s visits with Jennifer. In

¹ David also initiated an action for an emergency change of custody in light of the allegations of abuse. The court granted David temporary custody of A.H. following a hearing on April 22, 2011.

November 2011, the trial court denied Josh's motion to vacate the DVO, and this appeal followed.

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). Pursuant to KRS 403.720 (1), "'Domestic violence and abuse' means physical injury, serious physical injury . . . or the infliction of fear of imminent physical injury . . . between family members or members of an unmarried couple[.]" The statute further explains, "'Family member' means . . . any other person living in the same household as a child if the child is the alleged victim[.] KRS 403.720(2).

To satisfy the preponderance standard, the evidence believed by the fact-finder 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).

Josh challenges the sufficiency of the evidence relied on by the court to support its finding of domestic violence.² Josh acknowledges that the

² In his brief, Josh improperly offers extrajudicial information regarding an investigation by the Cabinet for Health and Family Services. Our review concerns only the issues 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).

photographs indicated A.H. suffered bruises; however, Josh contends there was no evidence that he caused the bruises. This argument obviously overlooks Josh's own testimony that he left a bruise on A.H.'s chest.

Josh admitted sitting on the child and engaging in rough horseplay, and he acknowledged seeing other bruises on A.H. during the preceding six months. Furthermore, while David did not directly observe any violent acts committed by Josh, David testified that he was concerned for A.H.'s safety around Josh as a result of the bruises.

Although Josh characterized the bruise as the result of horseplay, Josh nevertheless admitted that the injury occurred. We reiterate that the family court was in the best position to judge the credibility of the witnesses and weigh the evidence presented. *Id.* After careful review, we are satisfied the court did not abuse its discretion by finding that A.H. was more likely than not a victim of domestic violence.

For the reasons stated herein, the order of the Daviess Circuit Court is affirmed.

MOORE, JUDGE, CONCURS.

THOMPSON, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

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