RENDERED: NOVEMBER 2, 2012; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000101-ME

DON BERRY — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 11-D-503286

PATSY BERRY — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KELLER, TAYLOR AND VANMETER, JUDGES.

KELLER, JUDGE: Don Berry (Don) appeals from a domestic violence order (DVO) entered against him by the Jefferson County Family Court. For the following reasons, we affirm.

FACTS

On December 11, 2011, Patsy Berry (Patsy) filed a domestic violence petition in the Jefferson County Family Court seeking an emergency protective order (EPO) against Don. The court granted the request for an EPO and held a domestic violence hearing on December 19, 2011.

Patsy and Don testified to the following at the hearing. The parties had been married for twenty years and resided in Illinois. Both parties agreed that Don had never hit or threatened to hit Patsy. Patsy testified that, in April 2011, she and Don had an argument about a monetary donation she made to her church. Although Don did not hit her or threaten to hit her, Patsy described Don's behavior as "explosive," and she feared for her safety. Patsy further testified that, during this argument, Don stated that if he found out that Patsy was cheating on him, he would be in the penitentiary. Patsy stated that this comment made her believe that he would kill her if he ever thought she had cheated on him.

Don acknowledged that he did make a comment in April that if Patsy ever cheated on him he would go to the penitentiary. However, he stated this comment was made in jest while he and Pasty were watching a television show that involved someone cheating and was not made while the parties were having an argument. Don testified that the argument about Patsy's monetary donation to her church also occurred in April but was a separate incident from the penitentiary comment. Don agreed that, during the argument about Patsy's donation, he "exploded" and raised his voice, but he did not hit Patsy or threaten to hit her.

In October 2011, the parties separated, and Patsy moved to an apartment in Illinois. Both parties acknowledged that, between October and December 2011, they communicated, went to marital counseling, and spent time together.

Patsy testified that Don showed up to her apartment uninvited on several occasions; however, she only described an incident that occurred on December 10, 2011, in detail. According to Patsy, she had been shopping most of that day, and Don kept texting her and leaving her phone messages that were threatening to her and made her fear for her safety. We note that the text messages are not part of the record. However, Patsy played one of the phone messages she received from Don, in which he accused her of cheating. He further stated, "your day is coming."

Patsy returned home after shopping, and when she was leaving for work later that evening, Don was standing on her front steps. Patsy testified that Don had not been invited to her apartment and that he accused her of cheating instead of shopping all day. Don testified that he did not show up unexpectedly to Patsy's apartment on December 10, 2011, because he had told Patsy earlier in the week that he would be stopping by that day to drop off money. According to Patsy, she moved to live with her mother in Jefferson County, Kentucky, that same day because she felt threatened by Don and feared for her safety.

At the conclusion of the hearing, the court determined that an act of domestic violence had occurred because Patsy was in fear of imminent risk of harm, and that acts of domestic violence may occur again. The court then entered a three-year DVO against Don. This appeal followed.

STANDARD OF REVIEW

As stated in *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 720 (Ky. App. 2010):

> Kentucky Revised Statute ("KRS") 403.750 permits a court to enter a DVO following a 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[.]" Under the preponderance standard, the court must conclude from the evidence 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. Kentucky Rules of Civil Procedure ("CR") 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). But with regard to the trial court's application of law to those facts, this Court will engage in a *de novo* review. *Keeney v. Keeney*, 223 S.W.3d 843, 848-49 (Ky. App. 2007).

ANALYSIS

We initially note that Patsy has not submitted a brief to this Court. When an appellee does not file a brief, CR 76.12(8)(c) provides three alternative avenues of action for an appellate court:

> If the appellee's brief has not been filed within the time allowed, the court may: (i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case.

"The decision as to how to proceed in imposing such penalties is a matter committed to our discretion." *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007). We have reviewed the record and will address the issues raised.

On appeal, Don challenges the sufficiency of the evidence relied on by the court to support its finding of domestic violence. Prior to entry of a DVO, the court must find "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). As set forth in KRS 403.720(1), domestic violence and abuse, includes "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 . . . ." Further, "'[i]mminent' means impending danger, and, in the context of domestic violence and abuse as defined by KRS 403.720, belief that danger is imminent can be inferred from a past pattern of repeated serious abuse." KRS 503.010(3).

Because there is no evidence that Patsy suffered physical injury or assault, our inquiry turns on whether there was substantial evidence to support the court's finding that Don caused Patsy to fear imminent physical injury. Based on the record, we conclude that there was. As noted above, Patsy testified that: Don showed up uninvited at her house on December 10, 2011; accused her of cheating; and left her a phone message stating "your day is coming." Patsy testified that she feared for her safety and that is why she moved to her mother's home in Jefferson

County that day. Moreover, Patsy testified that Don's previous comment regarding going to the penitentiary if she ever cheated on him made her believe that Don would kill her if he ever thought she was cheating.

Based on the preceding, we believe there was substantial evidence to support the court's finding that an act of domestic violence had occurred because Don caused Patsy to fear imminent physical injury. We also believe that this evidence supports the court's finding that an act of domestic violence may occur again.

We reiterate that the trial court is in the best position to judge the credibility of the witnesses and weigh the evidence presented. *Buddenberg*, 304 S.W.3d at 720. Don and Patsy gave conflicting accounts of Don's conduct. As the fact-finder, the court relied on the testimony of Patsy and found her to be more credible than Don. Accordingly, the court's finding that an act of domestic violence occurred and may occur again was not clearly erroneous.

Don also argues that he was not given an opportunity to fully explain the incidents that occurred in April. We disagree.

As noted above, Don testified that the comment he made in April about going to the penitentiary if Pasty ever cheated on him was a joke; was made while the parties were watching a television show; and was not made while he was angry or having a disagreement with Patsy. Don then began to explain that, in April, he received a statement that Pasty donated a large sum of money to her church and he also learned that their car insurance had been cancelled. At this point, the trial court directed Don not to focus on incidents that occurred in April and to focus

instead on more recent events. Despite being instructed to do so, Don continued to explain that the penitentiary comment did not occur when the parties had a disagreement about Patsy's donation.

Based on the preceding, we fail to see how Don was denied the opportunity to fully explain the April incidents. Thus, we conclude that this argument is without merit.

CONCLUSION

For the foregoing reasons, we affirm the order of the Jefferson Family Court.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Briana Geissler Abbott Louisville, Kentucky	No brief filed.