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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000162-ME

JOHN COOK — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JOAN L. BYER, JUDGE
ACTION NO. 12-D-503504

TONI LYNN BRAUN; AND
TONI LYNN BRAUN ON
BEHALF OF MINOR
CHILDREN, A.B-C. AND N.B. — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: MAZE, STUMBO AND TAYLOR, JUDGES.

STUMBO, JUDGE: John Cook appeals from a domestic violence order (DVO) of protection restraining him from any contact with Toni Lynn Braun and her minor

children and from prohibiting him from having visitation with the parties' minor child.[1] We find no error and affirm.

Mr. Cook and Ms. Braun are an unmarried, former couple with one child in common, Child 1. At all times pertinent to this case Child 1 was 3 years old and Child 2 was 14 years old. Both parties acknowledge that Mr. Cook is the natural father of Child 1, but there had not been a paternity or custody case filed prior to the entry of the DVO. Child 1 has resided with Ms. Braun since birth.

On December 15, 2012, Braun filed a domestic violence petition wherein she sought the entry of a protective order against Cook. In her petition, Ms. Braun stated that on December 14, 2012, Ms. Braun's sister was babysitting Child 1 and Child 2 at Ms. Braun's house. Ms. Braun was not at home. At 9:30 p.m., Mr. Cook appeared unannounced. She stated that he began beating on the door wanting to see Child 1. Ms. Braun's sister told Mr. Cook to come back the next day or to wait for Ms. Braun to return. It is unclear from the record what happened next, but the police were called and Mr. Cook left without seeing Child 1. Ms. Braun also alleged in her petition that Mr. Cook had threatened to kill her in the past and that Mr. Cook had threatened to kill himself multiple times. She also alleged that Mr. Cook would stalk her by often driving by her house and workplace. Finally, she alleged that in August of 2012, she was picking up Child 1

[1] There are two minor children pertinent to this case: a minor child of Cook and Braun (hereinafter referred to as Child 1) and a minor child of Braun's from a previous relationship (hereinafter referred to as Child 2).

from Mr. Cook in the parking lot of a K-Mart and Mr. Cook became angry and punched the door panel of her car. Ms. Braun stated that she is afraid of Mr. Cook.

A hearing was held on December 20, 2012. During the hearing, Ms. Braun testified that the statements made in the petition were correct. She also testified that on December 16, 2012, the day after she filed her domestic violence petition, but before it was served on Mr. Cook, Mr. Cook returned to her residence unannounced. Ms. Braun called the police again. The police spoke with Mr. Cook and Ms. Braun. The police asked Ms. Braun if she would bring Child 1 outside so Mr. Cook could see him. Ms. Braun did so, but Child 1 was reserved and not very responsive to Mr. Cook. Ms. Braun also testified that Mr. Cook's contact with Child 1 has been inconsistent. On cross-examination, Ms. Braun acknowledged that Mr. Cook had never physically assaulted her or Child 1 and that she had never sought protection from the courts prior to this action.

Mr. Cook testified that he never threatened to harm Ms. Braun or the children. He also testified that he had threatened suicide once in the past after the death of his mother. Further, he testified that he visited Child 1 about 3 or 4 times a week. Finally, he testified that he did not remember the incident described by Ms. Braun wherein he allegedly hit the door panel of her car.[2]

At the end of the hearing, the trial court entered a three-year order of protection which restrained Mr. Cook from any contact with Ms. Braun and Child

[2] Initially, Mr. Cook stated that this incident did not occur. Later, he stated that he did not remember it happening.

1. It also required Mr. Cook to attend a counseling program for anger management and domestic violence. Mr. Cook's counsel moved for visitation with Child 1, but the trial court denied the motion. The court indicated it would be willing to revisit the visitation issue after Mr. Cook completed the counseling program. This appeal followed.[3]

Mr. Cook makes two arguments on appeal: that the trial court's finding that an act of domestic violence had occurred and may occur again was clearly erroneous and that the trial court erred in failing to award any visitation with Child 1. We find no error and affirm.

> 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). The preponderance of the evidence standard is satisfied when sufficient evidence establishes the alleged victim was more likely than not to have been a victim of domestic violence. *Baird v. Baird,* 234 S.W.3d 385, 387 (Ky. App. 2007). The definition of domestic violence and abuse, as expressed in KRS 403.720(1), 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[.]" The standard of review for factual determinations is whether the family court's finding of domestic violence was clearly erroneous. CR 52.01; *Reichle v. Reichle,* 719 S.W.2d 442, 444 (Ky. 1986). Findings are not clearly erroneous if they are supported

[3] Subsequent to filing this appeal, Mr. Cook filed a petition for custody, visitation, and support in regard to Child 1. In this action, the parties have agreed to amend the DVO. The modification allows Mr. Cook to have contact with Child 1 and to have weekly supervised visitation. All other matters concerning custody, visitation, and support are still in the process of being addressed.

> by substantial evidence. *Moore v. Asente,* 110 S.W.3d 336, 354 (Ky. 2003).

Caudill v. Caudill, 318 S.W.3d 112, 114 -115 (Ky. App. 2010).

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore, 110 S.W.3d at 354 (citations omitted).

> "[I]n reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion." *Cherry v. Cherry,* 634 S.W.2d 423, 425 (Ky. 1982) (citation omitted). Abuse of discretion occurs when a court's decision is unreasonable, unfair, arbitrary or capricious. *Kuprion v. Fitzgerald,* 888 S.W.2d 679, 684 (Ky. 1994) (citations omitted).

Caudill, 318 S.W.3d at 115.

We find that there was substantial evidence to support the trial court's finding that Ms. Braun, more likely than not, had been a victim of domestic violence. In this case, because there was no physical violence, the domestic violence being complained of is the fear of injury. Here, Mr. Cook came to Ms.

Braun's residence unannounced on two occasions. Both times the police were called. Ms. Braun also testified that Mr. Cook had threatened to kill her on a prior occasion, hit her car door panel during a fit of anger, and had been keeping tabs on her whereabouts by driving by her house and workplace. Mr. Cook denied that he ever threatened to kill Ms. Braun and he testified that he did not remember the incident in the K-Mart parking lot. Mr. Cook admitted that he did come to Ms. Braun's residence two days in a row. The trial judge is in the best position to determine the credibility of the witnesses. In this case, the judge determined Ms. Braun was more credible and she believed that version of the events. There is no error.

As for Mr. Cook's second allegation of error, we find that issue moot. Mr. Cook argues that the trial court erred by denying him visitation with Child 1. Since the filing of this appeal, the parties have agreed to allow Mr. Cook visitation with Child 1. The DVO has been modified to reflect this fact.

Based on the foregoing reasons, we affirm.

ALL CONCUR

BRIEF FOR APPELLANT:

Bryan Gowin
Louisville, Kentucky

BRIEF FOR APPELLEE:

Sarah A. Huyck
Justin R. Key
Louisville, Kentucky