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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000108-ME

RANDY SIMON — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 13-D-00129

DONNA CURLESS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Randy Simon appeals from a Domestic Violence Order rendered in Campbell Circuit Court barring him from contact with Donna Curless. He contends that there was an insufficient factual basis to support the Order, and that the court failed to make Findings of Fact that any domestic violence and abuse

had occurred and may again occur. We find no error, and Affirm the Order on appeal.

Appellant Randy Simon and Appellee Donna Curless began living together approximately 22 years ago. The relationship produced one child, who is now approximately 10 years old. On June 3, 2013, Curless filed a petition for a Domestic Violence Order ("DVO") in Campbell County Case No. 13-D-129-001. That petition was later dismissed. The following month, Curless moved for custody of the minor child. On September 9, 2013, the Campbell Circuit Court rendered an Order granting joint custody. The parties lived separately and about one mile apart.

On October 17, 2013, Curless filed another DVO petition setting forth numerous allegations against Simon spanning about 20 years. She alleged in part that Simon put a belt around her neck and raped her, that many years later he raped her again, and that he was now stalking her. She also alleged several incidents involving their respective vehicles, such as Simon sitting in his car and watching her, taking pictures of her car and trying to run his vehicle into the back of her vehicle. Curless alleged that she was afraid of Simon because of these incidents.

A hearing on the matter was conducted, where Curless testified that the alleged rape referenced in her petition occurred about 20 years ago. She also testified that Simon raped her on another occasion, which she did not report to the police or discuss with anyone. When the trial court later made oral findings, Judge Woeste noted that he was perplexed that the latter alleged rape in June 2013, was

not mentioned in the first DVO petition, nor was the alleged first rape ever previously claimed. Accordingly, he did not rely on the rape allegations in support of the court's subsequent issuance of the DVO. Rather, the court found by a preponderance of the evidence that Simon inflicted upon Curless a fear of imminent harm. This finding was grounded on Curless's claim that Simon used his vehicle on four occasions to harass or intimidate Curless. The court determined that Simon admitted that three of the incidents did occur, and it found that Curless's demeanor and testimony caused the court to conclude that Curless was genuinely frightened. The DVO was entered on December 5, 2013, restraining Simon from any further acts of abuse or threats of abuse, and ordering him not to have any contact with Curless. This appeal followed.

Simon now argues that the trial court erred in granting the December 5, 2013 DVO. After directing our attention to KRS 403.750(1), which allows the trial court to render a DVO if it finds by a preponderance of the evidence that an act of domestic violence and abuse has occurred and may occur again, Simon contends that the evidence was insufficient to meet the standard of proof. He argues that after the court chose not to consider the allegations of rape, the remaining four encounters between the parties did not rise to the level of domestic violence and abuse as defined by KRS 403.720(1). Specifically, Simon maintains that none of the four encounters resulted in attempted or threatened harm to Curless, and that those encounters did not provide a sufficient basis for finding that Curless had a fear of imminent harm. Simon also contends that the court should

have taken into consideration the long history between the parties, the unfounded rape allegations, the mental diagnosis of Curless, and the fact that Simon was seeking to gain full custody of the minor child during the pendency of this action. Additionally, Simon claims that Curless pursued the latest DVO solely for the improper purpose of bolstering her position in the custody proceeding. Finally, Simon cites *Pasley v. Pasley*, 333 S.W.3d 446 (Ky. App. 2010), for the proposition that an unfounded fear is insufficient to support the issuance of a DVO.

In sum, Simon maintains that Curless failed to sustain her burden of proof in support of the DVO, and that the trial court erred in failing to so rule.

As the parties are well aware, KRS 403.750(1) provides that the trial court may render a DVO 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. Domestic violence is defined as a "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." KRS 403.720(1)(Emphasis added). The Campbell Circuit Court relied on the "fear" element as a basis for issuing the DVO. The preponderance of the evidence standard is met when sufficient evidence establishes that the alleged victim "was more likely than not to have been a victim of domestic violence." *Gomez v. Gomez*, 254 S.W.3d 838, 842 (Ky. App. 2008)(quoting *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996)).

The issue before us is whether the trial court properly found that it was more likely than not that Simon inflicted upon Curless a fear of imminent physical injury or assault. We must answer this question in the affirmative. Curless alleged four instances where she was in fear of imminent physical injury or assault. These allegations were 1) that Simon sat in his car in front of Curless's residence watching for her, 2) that Simon tried to drive his vehicle into the back of Curless's vehicle, 3) that Simon followed Curless and took pictures of her car, and 4) that Simon walked up to her vehicle while she was sitting in it at the post office, prompting her to call the police. Simon acknowledged three of these incidents, and stated that he did not remember the fourth. He provided what he contends are legitimate explanations for each event, stating for example that he took pictures of Curless's car because it was at a time of day when she was supposed to be picking up their son, and claimed that he did not try to run into her vehicle but rather she intentionally slammed on her brakes in front of him.

On review of a DVO, we give much deference to a decision by the family court but cannot countenance actions that are arbitrary, capricious or unreasonable. *Kuprion v. Fitzgerald,* 888 S.W.2d 679, 684 (Ky. 1994). Additionally, while domestic violence statutes should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic violence, the construction cannot be unreasonable. *Barnett v. Wiley,* 103 S.W.3d 17, 19 (Ky. 2003). When applying these principles to the matter at bar, we conclude that the trial court properly determined that it was more likely than not

that Simon inflicted upon Curless a fear of imminent physical injury or assault, and that such incidents may occur again. The trial court found as credible Curless's contention that Simon caused her to fear physical injury or assault, and this determination is supported by the record. When examining the totality of the record and the law, we cannot conclude that the trial court's actions were arbitrary, capricious or unreasonable, *Kuprion*, *supra*, and accordingly find no error.

For the foregoing reasons, we Affirm the Domestic Violence Order of the Campbell Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

Harry P. Hellings, Jr.
Covington, Kentucky

BRIEF FOR APPELLEE:

Terry D. Towles
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