

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000132-ME

MICHAEL LEWIS

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE STEPHEN M. GEORGE, JUDGE
ACTION NO. 13-D-503334-001

CATHY LEWIS

APPELLEE

OPINION
REVERSING

** ** * * * * *

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

LAMBERT, JUDGE: Michael Lewis has appealed from the entry of a domestic violence order (DVO) by the Jefferson Family Court on December 30, 2013.

Because we agree with Michael that there was an insufficient basis for its entry, we reverse the family court's DVO.

The underlying action began on December 22, 2013, when Michael's wife, Cathy Lewis, filed a domestic violence petition against him in Jefferson Family Court. Cathy described the incident leading to the filing of the petition as follows:

Petitioner says that on on [sic] 12/22/2013 in JEFFERSON County, Kentucky, the above-named Respondent engaged in act(s) of domestic violence and abuse, in that: Respondent is my husband. We have one child in common age 13 yrs. Respondent has been accusing me of cheating on him. On 12/21/2013 I came home and he wanted to know where I had been. I was still in the driveway and he started yelling at me. He left and came right back, jumped out of the car and came at me. I ran around the car and out into the yard. I fell and dropped my phone and keys. He grabbed my phone and I grabbed my keys. He was screaming at me that I needed to stay away from him or he was going to "F" me up. He left again and so did I. I didn't go back to the house. Around 7 am (12/22) he was gone so I went back in the house. When I went in the house I found all my clothes and shoes slashed. There was a hammer and knife on the bed. There was also a knife on the kitchen table. I heard respondent come home and I called the police. They talked to him and took a report. I found respondent had also called a girlfriend of mine and told her if I came back home he would "F" me up. He came and went a couple of times getting his things. I thought he was finished packing and wouldn't be back but he came back one more time. After he left I noticed he had slashed all four tires on my car. I want him to stay away. I don't know what he will do next. I am afraid of him. I have never seen him like this.

In her motion for relief, Cathy also requested that the court issue an emergency protective order (EPO) restraining Michael from committing further acts of domestic violence or abuse; from any contact or communication with her; from

going to or within a specified distance from her home and her work for her safety and job security; and from damaging any of the parties' property. She also requested that Michael be directed to vacate their residence. The family court granted an *ex parte* EPO and issued a summons on December 22, 2013. A hearing was scheduled for December 30, 2013.

At the hearing, Kathy was the first witness to testify. She adopted as her testimony the allegations she made in the petition. The court asked whether she saw Michael slash her tires, and she said that she did not. Cathy said that he admitted that he had done so to their daughter. She denied that Michael had ever injured her physically. However, she stated that she believed Michael was going to hurt her on that date. Cathy then stated that she would not have filed the domestic violence petition based upon the first incident, but when he came back the next day and slashed her tires, she decided to do so. At the same time he slashed her tires, Michael painted the kitchen cabinets and appliances with white paint. He slashed the rest of her clothes and shoes that he had not slashed the day before. He also damaged the television and her work computer. Cathy stated that she had never seen him like this over the course of their sixteen-year relationship. His rage kept continuing. She feared that without the order of protection, Michael would come back and do more damage. She did not know what he would do to her.

In response, Michael stated that none of what Cathy said was true. He only wanted to get his possessions out of the house. He denied slashing her clothing and shoes. As soon as he entered the house, someone called 911, and the police

responded. He also stated that he had never admitted to the daughter that he had slashed anything. Michael said that he had never touched Cathy; he just wanted a divorce and to get his possessions. He did admit to putting the paint on the cabinets.

Cathy explained to the court that this domestic violence incident had taken place over three days starting on Saturday. She said that she had taken photographs of the damage to her clothing and tires, which were on her telephone. She said she had to get a new work computer due to the damage done to it.

Based on the testimony, the court found that Michael had committed the property damage Cathy testified to and that Cathy would not have destroyed her own property; that Michael had committed an act of domestic violence; that Cathy was fearful and had a reason to be fearful of imminent physical injury based on his conduct; and that he was likely to commit an act of domestic violence in the future. Therefore, the court granted a DVO effective for three years.

Following the hearing, the family court entered the written DVO, effective until December 29, 2016, restraining Michael from committing further acts of abuse or threats of abuse; from any contact with Cathy; from any contact or communication with Cathy, including through social media; from going within 500 feet of Cathy or her residence and place of work; and from disposing of or damaging any of the parties' property. The court ordered Michael to participate in counseling at the Batterers' Treatment Program and to not possess, purchase, obtain, or attempt to possess, purchase, or obtain, a firearm for the duration of the

DVO. Finally, Michael was ordered to enroll in and complete Domestic Violence Offender Treatment and bring proof of compliance at a court appearance the following February. In the order, the court found that Cathy had established by a preponderance of the evidence that an act of domestic violence or abuse had occurred and may occur again. This expedited appeal now follows.

In his brief, Michael contends that there was insufficient evidence to support the entry of the DVO or the EPO because both were based upon Cathy's fear that Michael would destroy property as opposed to injure her physically.

We note that Cathy has chosen not to file a brief in this matter. Pursuant to CR 76.12(8)(c), "[i]f 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 whether to impose any of these penalties is within the discretion of this Court. *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007). Because the subject matter of this case involves domestic violence, we shall consider the merits of Michael's appeal without imposing any of the penalties.

In order to grant 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). 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[.]”

In *Caudill v. Caudill*, 318 S.W.3d 112 (Ky. App. 2010), this Court addressed the DVO process as well as an appellate court’s standard of review, explaining that, “[t]he 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.” *Id.* at 114, citing *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007). See *Telek v. Daugherty*, 376 S.W.3d 623, 628 (Ky. App. 2012), review denied (Feb. 13, 2013); *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky. App. 2005) (“the Supreme Court of Kentucky [has] defined the preponderance standard as requiring that the evidence be sufficient to establish that the alleged victim ‘was more likely than not to have been a victim of domestic violence.’”).

The standard of review for factual determinations is whether the family court's finding of domestic violence was clearly erroneous. [Kentucky Rules of Civil Procedure (CR)] 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings are not clearly erroneous if they are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). “[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).

Id. at 114-15. The Court recognized that, “[w]hile 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. Furthermore, we give much deference to a decision by the family court, but we cannot countenance actions that are arbitrary, capricious or unreasonable.” *Id.* at 115 (internal citations and quotations omitted).

We have reviewed the record in the case, including the domestic petition and the hearing, and we must agree with Michael that Cathy failed to establish that an act of domestic violence and abuse, as defined by KRS 403.720(1), had occurred and may occur again. Cathy’s testimony almost entirely related to the destruction of property; she admitted that Michael had never harmed her physically, although she stated that she believed Michael was going to hurt her that day. However, this is not enough to establish that an act of, or an imminent fear of, domestic violence or abuse occurred when coupled with Cathy’s testimony that she would not have filed the petition for the incident that took place on Sunday; she only decided to file her petition when her car tires were slashed. As Michael argues in his brief, Cathy’s testimony and the family court’s ruling appear to be based almost solely, if not entirely, on the destruction of property, and destruction of property is not included in the definition of domestic violence or abuse. Rather, destruction of property is something a court may restrain a person from doing upon the entry of

the DVO or EPO. Therefore, we must hold that the family court abused its discretion in entering the DVO.

Michael also argues that the family court abused its discretion in entering the EPO. However, pursuant to KRS 403.740(4), an EPO “issued in accordance with this section shall be effective until the full hearing provided for in this subsection or in KRS 403.745, or until withdrawn by the court.” Therefore, the EPO was no longer effective as of December 30, 2013, the date the domestic violence hearing was held.

For the foregoing reasons, the domestic violence order entered by the Jefferson Family Court on December 13, 2013, is reversed.

ALL CONCUR.

BRIEF FOR APPELLANT:

No appellee brief filed.

Jason A. Bowman
Louisville, Kentucky