

RENDERED: DECEMBER 12, 2014; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky
Court of Appeals

NO. 2014-CA-000510-ME

DARRELL BYRON HURST

APPELLANT

v. APPEAL FROM HARDIN FAMILY COURT
HONORABLE MATTHEW BRENT HALL, JUDGE
ACTION NO. 10-D-00304

BEVERLY JOAN HURST

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: MAZE, THOMPSON, AND VANMETER, JUDGES.

MAZE, JUDGE: Appellant, Darrell Hurst, appeals from the Hardin Family Court's entry of a Domestic Violence Order (DVO) against him following an incident between himself and Beverly, his estranged wife and the Appellee in this case. Darrell also appeals from additional conditions the trial court entered

regarding counseling. However, finding no error in the trial court's entry of these orders, we affirm.

Background

Darrell and Beverly are currently married. On February 14, 2014, Beverly filed a Domestic Violence Petition. In her petition, Beverly alleged that four days prior, she and Darrell argued about his continued use of "spice," an illegal synthetic drug. She stated that when she threatened to call the police, Darrell "became violent slamming items in the home and threatening he would kill me if I called the police." Beverly also stated that she was afraid for her life and that Darrell called her continuously, and had left at least one threatening message. As a result of Beverly's petition, the trial court entered an Emergency Order of Protection (EPO) on February 14, and authorities served Darrell with a summons to appear at a February 24 hearing. In the intervening days, Darrell filed a petition for dissolution of his marriage to Beverly.

Beverly, Darrell, and Darrell's mother testified at the DVO hearing. Beverly affirmed to the court the truthfulness of the allegations in her DVO petition. She stated that after the incident, she called Darrell's mother and informed her that Darrell was using spice again and that he had threatened her. She also testified that Darrell had exhibited a violent temper during their marriage and that she slept in a separate bedroom with the door locked.

Darrell's mother, Colleen Hurst, testified that Beverly called her screaming and hysterical the evening of the incident, stating that Darrell was "in a

temper” and was threatening her. When asked specifically if Beverly told her Darrell threatened to kill her, Ms. Hurst said Beverly did not tell her that. Ms. Hurst stated that she advised Beverly to stay away from Darrell and that she would confront him the next day.

Finally, Darrell testified that after Beverly threatened to call the police, he simply left the home and did not threaten her in any way. He stated that he had no contact with Beverly after leaving the home.

Following this testimony, the trial court entered the DVO against Darrell. The DVO required Darrell to stay away from Beverly, as well as her home and place of employment. In addition, the trial court ordered, and the DVO states, that Darrell must “undergo a substance abuse assessment, domestic violence assessment[,], and a psychosocial evaluation” and follow all recommendations stemming from those services, including the Batterer’s Intervention Program (BIP). It is from the DVO and these conditions that Darrell now appeals.

Standard of Review

On appeal, Darrell’s argument for reversal is twofold. He first argues that the evidence presented during the seventeen-minute DVO hearing was insufficient to justify the trial court’s entry of the DVO. He next argues that KRS¹ 403.750 did not authorize the trial court to impose the additional domestic violence- and substance abuse-related orders.

¹ Kentucky Revised Statutes.

As with any matter heard before a trial court outside the presence of a jury, we review the trial court's factual findings and entry of the DVO for clear error. *See* CR² 52.01; *Caudill v. Caudill*, 318 S.W.3d 112, 114 (Ky. App. 2010) (citing *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986)). A court's findings of fact are clearly erroneous only if they are unsupported by substantial evidence, that is, evidence sufficient to induce conviction in the mind of a reasonable person. *See Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003); *Sherfey v. Sherfey*, 74 S.W.3d 777, 782 (Ky. App. 2002). However, to the extent the trial court was required to interpret KRS 403.750, its decision constitutes a matter of law, and we review that interpretation *de novo*. *Commonwealth v. Montague*, 23 S.W.3d 629, 631 (Ky. 2000) (quoting *Floyd Cnty. Bd. of Educ. v. Ratliff*, 955 S.W.2d 921, 925 (Ky. 1997)).

Analysis

I. Entry of the DVO

Darrell first argues that the evidence presented at the hearing failed to establish that he committed an act of domestic violence justifying the DVO. Specifically, he contends that Beverly failed to provide sufficient evidence that he

² Kentucky Rules of Civil Procedure.

threatened to kill her if she called the police. However, the evidence presented at the hearing regarding this important fact was sufficient.

Kentucky law permits a trial court to enter a DVO and impose various restraints and conditions if the court finds, by 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). Chapter 403 defines “domestic violence and abuse” as “physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear or imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple.” KRS 403.720(1).

Darrell argues that Beverly was under no imminent threat of violence because his threat to kill her was conditioned upon her future conduct, *i.e.*, calling the police. Therefore, according to Darrell, Beverly failed to establish that her fear was “predicated on a present threat.” This is a tenuous and wholly unpersuasive theory.

First, we find no fault in the trial court’s apparent interpretation of the alleged threat, “If you call my probation officer and have me arrested, I’ll kill you[.]” as “infliction of fear or imminent physical injury” under KRS 403.720. Rather, it was entirely reasonable for the trial court to find that Darrell’s threat was an imminent one, and one which met the statutory definition of “domestic violence.”

Darrell further argues that the trial court could not have found that domestic violence “may occur again” because he and Beverly were seeking a

divorce at the time of the DVO hearing. This argument is also unpersuasive, as it assumes that the pendency of a divorce action, by itself, makes domestic violence less likely. Rather, it could be argued that domestic violence is abundantly more likely during such times. Nevertheless, nothing in KRS 403.750 or elsewhere prevents a court from finding that domestic violence “may occur again” merely because the parties involved are seeking a divorce.

In addition, Beverly testified at the hearing that Darrell had continuously called her at work, that he would not leave her alone, and that he left at least one message stating that he would “get” her. This testimony supported a finding that domestic violence may occur again in the absence of a DVO.

More generally, the question of sufficient evidence in this case largely reduces to Beverly’s allegations versus Darrell’s version of events. As such, we must keep in mind that,

[r]egardless 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.

Moore, 110 S.W.3d at 354 (citations and quotation marks omitted); *see also Bissell v. Baumgardner*, 236 S.W.3d 24, 29-30 (Ky. App. 2007) (quoting *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996)). This deferential standard reaffirms our conclusion that the trial court’s entry of a DVO based upon the credibility it

apparently assigned Beverly's testimony was both reasonable and supported by substantial evidence of record.

II. Additional Conditions Within the DVO

Darrell next argues that KRS 403.750 did not permit the trial court to require him to undergo a substance abuse assessment, a domestic violence assessment, and a psychosocial evaluation; and it did not permit the court to order him to "follow the therapists' recommendations to include BIP." We disagree.

KRS 403.750(1)(h) states that a trial court may, in addition to restricting contact between the parties, "[d]irect that either or both parties receive counseling services available in the community...." Darrell contends that this language is "plain and unambiguous," and therefore, like the trial court, we may not vary from its express language. Darrell is correct in stating that we are bound to the clear, chosen language of the General Assembly. We agree that the statute's terms are "plain and unambiguous." Indeed, like the trial court, we do not stray from the express language of the statute in concluding that the services the DVO ordered were "counseling services available in the community." Nor do we disagree with the trial court's reasonable conclusion that a substance abuse assessment, a domestic violence assessment, a psychosocial evaluation, and possible participation in BIP are necessary for an individual convicted of drug-related offenses and whose apparent continued use of drugs was the cause of an act of domestic violence.

In sum, we disagree with Darrell's characterization of the trial court's orders as an "expansion" of its authority under KRS 403.750(1)(h). On the contrary, such services fit squarely within the scope of, and intent behind, the General Assembly's directive.

Conclusion

For the foregoing reasons, the Hardin Family Court's entry of the DVO is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Douglas E. Miller
Radcliff, Kentucky