

RENDERED: SEPTEMBER 16, 2016; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2015-CA-001160-ME

JAMES THOMAS TRENT

APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT  
HONORABLE KATHY STEIN, JUDGE  
ACTION NOS. 09-D-00910 & 09-D-00910-003

TEENA LEE TRENT

APPELLEE

OPINION  
VACATING IN PART  
AND REMANDING

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BEFORE: KRAMER, CHIEF JUDGE; ACREE AND MAZE, JUDGES.

MAZE, JUDGE:<sup>1</sup> James Trent appeals from a Domestic Violence Order (DVO) which the Fayette Family Court entered against him. We agree with James that the trial court improperly relied, at least in part, upon allegations of domestic violence which were rejected in a previous DVO proceeding. Therefore, we must set aside the DVO in part and remand for additional factual findings on whether the remaining evidence was sufficient to support entry of a DVO.

James and Teena Trent were divorced by a decree of the Rowan Circuit Court in 2010. Pursuant to that decree, the parties shared joint custody of their daughter, Z.T. The child lived primarily with James during the school year. Since 2010, Teena has filed several complaints against James with the Cabinet for Health and Family Services. She has also filed several petitions for Emergency Protective Orders (EPOs). Up to the current action, none of those petitions have resulted in entry of a DVO.

Most significantly, in April 2014, Teena filed a petition for an EPO in Rowan District Court, alleging James's physical abuse of herself and Z.T. following an incident at a softball field in Morehead, Kentucky. Following a

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<sup>1</sup> Pursuant to CR 73.08, CR 76.03, CR 76.12, and the policy of this Court, cases concerning child custody, dependency, neglect, abuse, and support, as well as domestic violence, are to be given priority, placing them on an expedited track through our Court. That did not occur in this case.

Both human error and obsolete case management software resulted in an administrative delay in assigning this case to a merits panel for decision. On June 24, 2016, after discovering the administrative error, the Clerk of the Court informed the Chief Judge and Chief Judge-elect who, together, assigned the case to a special merits panel of sitting Court of Appeals Judges who have given it the highest priority to offset any delay to the greatest extent possible. Additionally, the Court has sent a letter of explanation and apology to the parties and placed that letter in the record. Finally, the Court has undertaken efforts to put into effect procedures to ensure that such an error is not repeated.

hearing, the district court found that no domestic violence or abuse had occurred, and denied the petition for a DVO. Teena appealed from this order, but the record does not disclose the outcome of that appeal.

Thereafter, Teena filed a complaint with the CHFS, alleging that Z.T. had disclosed sexual abuse by James. While that investigation was pending, Teena filed a dependency action in the Fayette Family Court based on those allegations. On October 29, 2014, the Family Court granted Teena temporary custody of Z.T. until the investigation was completed.

On November 17, 2014, James filed a post-decree motion in the Rowan divorce action asking that Z.T. be re-enrolled in the Rowan County school system. In response to this motion, Teena filed the current domestic violence petition, again asserting the allegations of sexual abuse. The trial court granted the EPO on November 21, 2014. The record includes a nearly-identical petition and EPO issued on May 12, 2015.

The dependency and domestic violence matters were consolidated and the matters were scheduled for a hearing on July 1, 2015. On the morning of that hearing, James entered into an agreed order, stipulating to Z.T.'s dependency based upon the child's unwillingness to have contact with him. He also agreed to have no contact with Z.T. except as initiated by the child's counselor.

The trial court then proceeded to take evidence in the domestic violence matter. Teena testified that, in July 2014, Z.T. admitted to James that she had been cutting herself. In subsequent discussions, Z.T. told Teena that, on

multiple occasions, James had come into the bathroom and watched her while she showered. Z.T. later accused James of inappropriate touching. The trial court also conducted an *in camera* interview with Z.T., where she repeated the allegations. James denied any sexual abuse or improper contact, but he admitted that he had gone into the bathroom several times while Z.T. was showering.

On cross-examination, James's counsel asked Teena about the allegations relating to the 2014 domestic violence hearing. Teena repeated the allegations regarding the ballfield incident. Subsequently, over James's objections, Teena introduced copies of photographs and text messages relating to the 2014 incident.

Z.T.'s counselor confirmed that Z.T. had made similar allegations about James coming into the bathroom while she was showering. The trial court appointed a psychiatrist, Dr. Sarah Shelton, to evaluate Z.T., Teena and James. Dr. Shelton noted that Z.T. had been influenced by Teena's negative attitudes toward James. Dr. Shelton also stated that Z.T. had exhibited some signs of manipulative behavior and exaggeration. However, Dr. Shelton's findings concluded that Z.T.'s allegations were generally consistent and credible. Dr. Shelton also found that Z.T. had suffered considerable distress and fear. Based on this determination, Dr. Shelton concluded that Z.T. is at "an unacceptably high risk for future sexual abuse." Dr. Shelton also stated that forced contact with James would be psychologically distressing to Z.T.

James's expert, Dr. Diana McCoy, disagreed with Dr. Shelton's assessment of Z.T.'s credibility. Dr. McCoy testified that Z.T.'s allegations were strongly influenced by Teena's animosity toward James, and by Z.T.'s desire to live with her mother. However, Dr. McCoy agreed that Z.T. was adversely affected by the conflict between her parents, and recommended that visitation between Z.T. and her father be conducted only after Z.T. is ready and after completing therapy.

At the conclusion of the hearing, the trial court granted the DVO for a period of two years. In its oral findings, the trial court stated that it did not believe that James had sexually abused Z.T. However, the court indicated that Z.T. believed James's actions to have been inappropriate and causing Z.T. fear and distress. The court also found that domestic violence and abuse had occurred, referring to the evidence relating to the 2014 ballfield incident. In addition, the court stated that it believed that officials in Rowan County were deferential to James based upon his standing there. The court went on to suggest that Z.T. was being harmed by the continued conflict between her parents, and suggested that Teena should not pursue any criminal charges against James. This appeal followed.

The central issue in this appeal is whether Teena met her burden of proof for entry of a DVO. KRS<sup>2</sup> 403.740(1) provides that "if a court finds by a preponderance of the evidence that domestic violence and abuse has occurred and

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<sup>2</sup> Kentucky Revised Statutes.

may again occur, the court may issue a domestic violence order . . . .” 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.” *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). 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[.]”<sup>3</sup>

As an appellate court, we review the trial court’s issuance of a DVO to determine “whether the court’s findings were clearly erroneous or . . . it abused its discretion.” *Holt v. Holt*, 458 S.W.3d 806, 812 (Ky. App. 2015). In making this determination, we must be mindful of the trial court’s opportunity to assess the credibility of the witnesses. CR<sup>4</sup> 52.01. However, this Court will engage in a *de novo* review with regard to the trial court’s application of law to those facts. *Buddenberg v. Buddenberg*, 304 S.W.3d 717, 720 (Ky. App. 2010).

James primarily focuses on the trial court’s reliance on evidence relating to the 2014 DVO proceedings. Since the Rowan District Court expressly found no domestic violence or abuse, he argues that this finding is *res judicata* and precluded the trial court from re-evaluating that evidence. Teena responds that

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<sup>3</sup> In its 2015 session, the General Assembly amended KRS 403.720(1) to include “stalking” in the definition of domestic violence and abuse. 2015 Ky. Laws Ch. 102, § 2. The amendment became effective on January 1, 2016.

<sup>4</sup> Kentucky Rules of Civil Procedure.

James opened the door to that evidence by questioning her about the allegations. She also argues that KRS 403.741 permitted the trial court to consider that evidence in determining whether domestic violence and abuse had occurred.

We agree with Teena that James clearly opened the door to admission of the evidence. Generally stated, “opening the door” is a form of waiver that occurs when one party’s use of inadmissible evidence justifies the opposing party’s rebuttal of that evidence with equally inadmissible proof. *Commonwealth v. Stone*, 291 S.W.3d 696, 701-02 (Ky. 2009), citing *Purcell v. Commonwealth*, 149 S.W.3d 382, 399 (Ky. 2004). While James raised the matter to challenge Teena’s and Z.T.’s credibility, Teena was entitled to present evidence showing that the determination in the previous DVO proceeding did not impair their credibility in this action.

However, whether the trial court was entitled to rely on this evidence to find that domestic violence and abuse had occurred is a separate question. At the time of the hearing,<sup>5</sup> KRS 403.741 permitted the trial court to review the respondent’s criminal history and history of previous EPOs or DVOs. KRS 403.741(1). The statute also permitted the court to consider that history to assess the risk of future domestic violence and to determine the sanctions necessary to protect the petitioner. KRS 403.741(2).

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<sup>5</sup> The General Assembly repealed KRS 403.741 during its 2015 session. 2015 Ky. Laws, Ch. 102, § 51. The repeal became effective on January 1, 2016. Similar provisions were incorporated into the current version of KRS 403.735(1).

Under its clear terms, KRS 403.741 merely permitted a trial court, when entering a DVO, to consider past acts of domestic violence or criminal acts against others. The statute does not permit the court to re-open past allegations which were previously found by a court not to constitute domestic violence and abuse. As James points out, *res judicata* precludes further litigation of issues that were decided on the merits in a prior final judgment. In order for the doctrine to apply, there must be identity of the parties, identity of the causes of action, and the prior action must have been resolved on the merits. *Slone v. R & S Mining, Inc.*, 74 S.W.3d 259, 261 (Ky. 2002). *See also Yeoman v. Commonwealth, Health Policy Bd.*, 983 S.W.2d 459, 465 (Ky. 1998). These factors are met in this case.

Teena fully litigated the allegations regarding the ballfield incident in the 2014 DVO proceeding. The Rowan District Court expressly found that James's actions did not meet the statutory definition of domestic violence. If the district court had found otherwise, James would not be permitted to re-open the matter in a subsequent proceeding. For the same reasons, the trial court in this case was not authorized to re-weigh the credibility of that evidence. Consequently, the trial court clearly erred by relying on that evidence to support a finding that domestic violence and abuse had occurred.

Despite this conclusion, we would still affirm the entry of a DVO if the trial court found other conduct sufficient to constitute domestic violence and abuse. As previously noted, the trial court expressly found that James had not sexually abused Z.T. The court indicated that James's actions caused Z.T. distress



and placed her in fear, but did not state whether this fear arose from the prior conflict or from the allegations which were the subject of the current petition. On the other hand, Dr. Shelton believed that Z.T. was at risk of future sexual abuse.

The definition of domestic violence and abuse includes “the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault . . . .” KRS 403.720(1). For purposes of this section, “imminent” 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 403.010(3). The trial court did not address whether James’s actions met this standard.

James did not file a motion pursuant to CR 52.04 requesting that the trial court make specific factual findings to support its ruling. But since KRS 403.750(1) requires the trial court to make specific findings prior to entry of a DVO, his failure to make such a motion does not preclude our review of the sufficiency of the findings. *Anderson v. Johnson*, 350 S.W.3d 453, 458 (Ky. 2011). Furthermore, the trial court’s oral findings were not sufficient to allow this Court to determine whether it relied on relevant evidence in entering the DVO against James. *See also Boone v. Boone*, 463 S.W.3d 767, 768-69 (Ky. App. 2015).

In the absence of clearer and more specific findings, we must remand this matter to the trial court for additional findings on whether James’s actions inflicted fear of imminent physical injury, sexual abuse or assault upon Z.T.

Nevertheless, we recognize that the DVO serves a significant purpose for the protection of Z.T. Therefore, we will not vacate the no-contact provisions relating to Z.T. until the trial court has the opportunity to address these factual issues. Upon remand, the trial court may consider previous allegations, but only to the extent that they affect the credibility of the current allegations or the likelihood of the recurrence of domestic violence. The court may not base its finding of domestic violence on allegations which were previously found to be insufficient. Furthermore, the trial court should not lightly enter a DVO against the weight of the evidence or merely out of caution. *Buddenberg*, 304 S.W.3d at 717, citing *Wright v. Wright*, 181 S.W.3d 49, 52-53 (Ky. App. 2005).

Finally, James argues that the trial court erred by conducting an *in camera* interview with Z.T. without affording him an opportunity to cross-examine her or to submit questions for the court to present. He contends that the trial court's refusal to allow him to cross-examine Z.T. violated his rights under the Confrontation Clause set out in the Sixth Amendment to the United States Constitution. However, the Confrontation Clause only applies to criminal actions. *Cabinet for Health & Family Servs. v. A.G.G.*, 190 S.W.3d 338, 345 (Ky. 2006). A DVO proceeding is civil in nature. A civil litigant's right of confrontation and cross-examination is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.*

“[D]ue process is “flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

KRS 421.350 permits a court to conduct an *in camera* interview with the child in certain criminal and all dependency matters pursuant to KRS Chapter 620. KRS 403.290 also permits the court to conduct such an interview with the child in custody matters. *See also Addison v. Addison*, 483 S.W.3d 755, 763 (Ky. 2015). In addition, KRE 611(a) authorizes the trial court to exercise reasonable control over the mode of interrogating witnesses in order to protect the witness from harassment or undue embarrassment. Under the circumstances, we cannot find that the trial court's use of this process in a DVO proceeding constituted either an abuse of discretion or amounted to a violation of James's due process rights.

Accordingly, the Domestic Violence Order entered by the Fayette Family Court is vacated in part, with the no-contact provisions relating to Z.T. remaining in force until entry of a new order. This matter is remanded for additional factual findings and an order consistent with this opinion.

ALL CONCUR.

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