RENDERED: JULY 1, 2016; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2015-CA-001302-ME

ROBERT JONES — APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE PAULA F. SHERLOCK, JUDGE
ACTION NO. 15-D-501578-001

CONSTANCE JONES — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, DIXON, AND STUMBO, JUDGES.

DIXON, JUDGE: Appellant, Robert Jones, appeals from a Domestic Violence Order ("DVO") issued by the Jefferson Family Court. Finding no error, we affirm.

On July 3, 2015, Appellee, Constance Jones, filed a petition for a DVO in the Jefferson Family Court against Appellant, her husband. Therein, Appellee alleged that on June 30, 2015, she and Appellant got into an argument

during which he struck her and told her to pack her belongings and leave their house. Appellee stated that while she was packing, Appellant pointed a gun at her while their sixteen-month-old daughter was in another room. Appellee claimed that Appellant had hit her, as well as threatened her with a gun on numerous previous occasions. Appellee stated that she was afraid for her and her daughter's safety.

Based on the allegations contained in the petition, the Jefferson Family Court issued an Emergency Protection Order ("EPO") on the same day, restraining Appellant from having any contact with Appellee and awarding temporary custody of their child to Appellee.

Apparently, after Appellant was served with the EPO on July 3rd, he went to the Domestic Violence Intake Center in Jefferson County and filed for a protective order against Appellee. That EPO was issued and Appellant was granted temporary custody of the child. Although the record is not entirely clear as to the sequence of events that followed, it appears as though Appellant, his mother, and sister went to Appellee's location around the same time as police went to serve the EPO on Appellee. However, Appellant ended up being arrested for violating Appellee's EPO against him. On July 7, 2015, Appellant filed for a second EPO on behalf of the parties' child.

A domestic violence hearing on Appellee's petition was scheduled for July 14, 2015. On that date, however, the family court indicated to the parties that it was aware of an investigation being conducted by the Cabinet for Health and

Family Services ("Cabinet"), presumably the result of the second petition for an EPO filed by Appellant, and offered to continue the hearing until a final investigation report was filed.[1] The parties agreed to a continuance and the hearing was rescheduled for July 28, 2015.

A full domestic violence hearing was held on July 28, 2015. The family court noted that it had received a final report from the Cabinet indicating that it was closing its case, having found no indication of child neglect. The family court further read into the record both Appellee's petition and Appellant's two petitions.[2] The family court heard testimony from each of the parties, as well as Appellant's mother. At the close of the hearing, the family court dismissed both of Appellant's petitions, finding that they failed to assert any legitimate claims of past or present violence by Appellee, and that the Cabinet had found no evidence supporting his claims of neglect. The trial court concluded that Appellee had established by a preponderance of the evidence that domestic violence and abuse had occurred and was likely to occur again in the future. A DVO was entered accordingly. Appellant thereafter appealed to this Court as a matter of right.

[1] To clarify, however, the family court explained that it was willing to proceed with the hearing if the parties so wished because it would not consider the CHFS report pertaining to allegations of neglect because such was not relevant to whether domestic violence had occurred between the parties.

[2] The family court questioned Appellant's veracity as to whether he had told authorities there was an EPO against him at the time he filed the petition for an EPO against Appellee. The family court commented that it was not aware of a previous instance where an EPO petition did not specifically reference that the individual filing for protection had an order of protection entered against him or her. The family court stated that it believed Appellant had likely misled the issuing court and that his EPO was nothing more than a retaliatory act against Appellee.

Kentucky Rules of Civil Procedure ("CR") 52.01 provides that a trial court's "findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *See also 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). Substantial evidence is evidence of sufficient probative value that permits a reasonable mind to accept as adequate the factual determinations of the trial court. *Id.* A reviewing Court must give due regard to the trial court's judgment on the credibility of the witnesses. *Id.*

Kentucky Revised Statutes ("KRS") 403.720(1)[3] provides that " '[d]omestic violence and abuse' means 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." The express purpose of the domestic violence statutes is "[t]o allow persons who are victims of domestic violence and abuse to obtain effective, short-term protection against further violence and abuse in order that their lives will be as secure and as uninterrupted as possible." KRS 403 .715(1).[4]

[3] Effective January 1, 2016, KRS 403.720(1) now provides that "[d]omestic violence and abuse" means physical injury, serious physical injury, stalking, 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;

[4] Effective January 1, 2016, KRS 403.715 now provides reads in relevant part:

> (1) Allow victims to obtain effective, short-term protection against further wrongful conduct in order that their lives may be as secure and as uninterrupted as possible;

A trial court may issue a DVO after a full evidentiary hearing "if it finds 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).[5] *See Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007). The preponderance of the evidence standard requires that the evidence believed by the fact-finder be sufficient that the petitioner is more likely than not a victim of domestic violence. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

Relying on several decisions from this Court, Appellant first argues that he was denied a fundamentally fair hearing because the family court prematurely made the decision to grant the DVO. Appellant points to the fact that prior to hearing all of the evidence and testimony, the family court commented that he would be in serious trouble if he violated the DVO.

A review of the colloquy that Appellant complains of reveals that following the completion of the parties' testimony, Appellee's counsel sought to call an additional witness to testify about several social media posts which allegedly evidenced Appellant's violations of the EPO that was in place. Appellant's counsel responded that the issue would be more appropriately addressed in the parties' forthcoming divorce matter. In lieu of calling the witness, Appellee's counsel then requested that the parties be admonished about future

---

> (2) Expand the ability of law enforcement officers to effectively respond to further wrongful conduct so as to prevent future incidents and to provide assistance to the victims[.]

[5] Effective January 1, 2016, this provision was re-enacted under KRS 403.740(1).

violations of the protection order. In delivering said admonishment, the family court noted that Appellant had, in fact, violated the EPO on several occasions and stated "You're going to end up doing some serious time if you violate the EPO – or, what I'm going enter actually is a DVO – if you violate it."

We are of the opinion that the cases cited by Appellant are inapposite. In *Wright v. Wright*, 181 S.W.3d 49, 53 (Ky. App. 2005), a panel of this Court examined two cases on appeal and determined that neither trial court had held a "full hearing" as required by KRS 403.750(1). However, in the first matter, the trial court entered a DVO without any testimony being taken from either party. In the second matter, the trial court did not permit the petitioner to complete her testimony, interrupted her attorney, and dismissed the case after only three questions had been asked on direct examination. As a result, this Court concluded that the evidence taken in each of the limited proceedings was insufficient and remanded both matters for a "full hearing' as contemplated by the statute, comprised of the full testimony of any appropriate witnesses sought to be presented." *Id.*

Similarly, in *Abdur-Rahman v. Peterson*, 338 S.W.3d 823 (Ky. App. 2011), the trial court issued a DVO after refusing to permit the respondent to call witnesses. On appeal, this Court held that the trial court had denied the respondent a full hearing by the exclusion of one of the witnesses[6] and remanded the matter for a full hearing including all relevant testimony. *Id.* at 828.

[6] This Court concluded that exclusion of the second witness was not an abuse of discretion because the proposed testimony would not have added any relevant evidence. *Id.*

Finally, in *Rankin v. Crisewell*, 277 S.W.3d 621 (Ky. App. 2008), the trial court's issuance of an EPO was based upon statements in the written petition as well as the content of two dependency files that were not admitted into evidence. This Court determined that the seven-minute hearing, which was devoid of testimony by the Petitioner, was inadequate. *Id.* at 625-26.

Unlike the litigants in *Wright, Abdur-Rahman,* and *Rankin*, Appellant was given an extensive hearing with no limitations on the presentation of testimony and other evidence. Appellee offered detailed testimony about the violence she alleged that Appellant committed against her. Appellant not only testified himself but also called his mother to testify on his behalf. While the family court certainly indicated the direction it was leaning in giving the admonishment, it in no manner foreclosed the presentation of any additional evidence or testimony. In fact, Appellant's counsel thereafter questioned his mother, who testified that she never personally observed Appellant point a gun at Appellee. We are of the opinion that even if the family court erred in indicating that it was going to issue the DVO prior to Appellant's mother's testimony, any error must be deemed harmless. There simply is no suggestion that the family court did not fully consider all of the evidence presented during the hearing.

We similarly find no merit in Appellant's claim that the family court misinterpreted the facts. Significantly, much of Appellant's argument pertaining to the family court's factual determinations is based on the Cabinet's findings in the report. However, those petitions and the family court's ruling thereon are not the

subject of this appeal. Appellant filed a motion in the family court to supplement the record to include his EPO petitions and Cabinet's report. However, the family court denied the motion, noting that the report was not admitted into evidence during the domestic violence hearing, and because the social worker who authored the report was not called to testify and thus was not subject to cross-examination, her statements were hearsay. Appellant thereafter moved this Court to order the family court to supplement the record and attached the report and an email document from the social worker. By order entered December 17, 2015, this Court denied the motion and ordered the report and email stricken from the record herein. Nevertheless, in his brief, Appellant quotes substantial portions of the Cabinet's report. As both this Court and the family court specifically excluded the report, we will not consider Appellant's arguments that pertain to the facts therein.

Similarly, we cannot conclude that the family court made impermissible inferences with respect to an incident that occurred immediately prior to Appellee seeking the EPO. Specifically, Appellee testified that after the argument occurred June 30, 2015, she returned home the following day because the parties' child was still there. Subsequently, on July 2, 2015, the parties had gone to a Kmart store to shop. During the time period that Appellee and their child were inside the store, Appellant fired a gun at someone in the parking lot. Appellant was thereafter arrested and Appellee sought the EPO the following day while Appellant remained in custody.

Appellant now takes issue with the fact that the family court referenced the Kmart incident as part of its finding that Appellant had likely pointed a gun at Appellee at some time in the past. Appellant incredulously claims that even though he fired a gun at someone in the store parking lot, there was no evidence that he did anything illegal, and that the family court impermissibly inferred he was criminally culpable and thus guilty of domestic violence against Appellee. We disagree.

Clearly, the family court was not required to make any finding of Appellant's criminal culpability in the Kmart incident to conclude that domestic violence had occurred between the parties. However, it was well within the family court's discretion to find that the incident supported Appellee's testimony about Appellant's violence and threatening her with a gun, as it was "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (*Quoting* BLACK'S LAW DICTIONARY 580 (7th ed. 1999)). As such, this Court will not disturb the family court's findings that are supported by substantial evidence.

Next, Appellant argues that the family court abused its discretion in entering the DVO because Appellee's testimony was obviously false and inconsistent. Specifically, Appellee testified that Appellant was sitting on the bed and was not wearing his prosthetic leg at the time the argument ensued on June 30th. Accordingly, Appellant contends that he could not have obtained his gun and pointed it at Appellee. Further, Appellant points to the fact that Appellee did not

ever tell Appellant's mother that he had pointed a gun at her as an "obvious indication of deceit." Finally, Appellant takes issue with the fact that Appellee told his mother that she was going to stay with her grandmother following the incident, yet she ended up staying some place different. Appellant concludes that based on these inconsistencies in Appellee's testimony, the family court did not have sufficient evidence to find that a DVO was warranted. We disagree.

As is often the case in domestic violence hearings, the parties herein had differing versions of the events in question. The family court had the opportunity to judge the credibility of the witnesses and testimony that was presented during the hearing. In evaluating the parties' testimony, the family court obviously found Appellee to be more credible. As previously noted, the preponderance of the evidence standard requires that the evidence believed by the fact-finder be sufficient that the petitioner is more likely than not a victim of domestic violence. *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996). We conclude that, based on the evidence presented during the hearing, the family court did not abuse its discretion in finding that an act of domestic violence had occurred and was likely to occur again in the future. As such, issuance of the DVO was proper.

Finally, Appellant argues that family court's determinations of temporary custody and supervised visitation must be vacated because there were no allegations that he "ever engaged in any inappropriate conduct toward his child[]." Appellant contends that the family court was required to consider the

criteria set forth in KRS 403.270, KRS 403.320 and KRS 403.822 to determine the least restrictive remedy that affords protection to the child.

KRS 403.750 permits the trial court to extend the protection of a DVO to a minor child of the petitioner if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur.[7] Further, "[w]here parties are restrained from contact with one another due to domestic violence, it is necessary that one party have custody and receive support for the child[] during the effective period of the domestic violence order." *Thompson v. Thompson*, 172 S.W.3d 379, 382 (Ky. 2005). However, when the minor child is the child of the respondent, the court must look to KRS 403.320, which states in relevant part: "(2) If domestic violence and abuse, as defined in KRS 403.720, has been alleged, the court shall, after a hearing, determine the visitation arrangement, if any, which would not endanger seriously the child's or the custodial parent's physical, mental, or emotional health." KRS 403.320(2). Thus, KRS 403.320(2) sets forth a different visitation standard in cases where domestic violence is present in that it does not require a finding that visitation would seriously endanger the child's physical, mental, or emotional health, but conversely, directs the court to make an arrangement in its discretion which would avoid such endangerment to the child *or the custodial parent*. *See Abdur-Rahman*, 338 S.W.3d at 826.

[7] *See* Footnote 5.

The family court herein initially permitted Appellant less restrictive visitation and indicated at the first scheduled hearing date that it did not have an issue with his receiving extended visitation as was suggested by the Cabinet. However, the record reveals that during the interim between the initial hearing on July 14, 2015, and the full hearing on July 28, 2015, Appellant's mother had used the third party exchange of the child to follow Appellee, as well as Appellant's family had participated in his going to Appellee's location while an active EPO prohibited him from having any contact with her. The family court specifically noted that Appellee had been subjected to quite a bit of "bullying" by Appellant's family. Clearly, the visitation arrangement was endangering Appellee's mental or emotional health. We cannot conclude that the family court erred in granting Appellant supervised visitation at a neutral location.

For the reasons set forth herein, the order of the Jefferson Family Court is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Dean Harold Sutton
Louisville, KY

BRIEF FOR APPELLEE:

Benjamin Brock Taylor
Louisville, KY