

Commonwealth of Kentucky
Court of Appeals

NO. 2015-CA-001379-ME

TRACY LYNN REVELL

APPELLANT

v. APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DENISE DEBARRY BROWN, JUDGE
ACTION NO. 15-D-501813-001

DIEGO HERNANDEZ

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * ** * **

BEFORE: MAZE, TAYLOR, AND VANMETER, JUDGES.

VANMETER, JUDGE: Tracy Revell appeals the order of the Jefferson Circuit Court declining to enter a Domestic Violence Order (DVO) after finding an act of domestic violence did not occur. For the following reasons, we reverse and remand for entry of an order consistent with this opinion.

I. Procedural and Factual Background

On July 25, 2015, Revell sought and was granted an Emergency Protective Order (EPO) against then live-in boyfriend, Diego Hernandez. The Jefferson Family Court then conducted a hearing on July 31 on Revell's request for a DVO. Hernandez was served on July 26, but did not appear.¹

During the hearing, Revell gave the following testimony under oath. She and Hernandez dated for nine months, and lived together for the latter seven months of their relationship. Revell has two children, but none with Hernandez; the couple no longer lives together. On July 24, 2015, Revell and Hernandez got into an altercation; Hernandez allegedly had been drinking, and had also done several lines of cocaine in the presence of Revell. Revell then asked him to leave since "she does not allow drugs in her home." Revell and Hernandez then began fighting about communications Revell had with Hernandez's family, and Hernandez forcibly took Revell's cell phone. After arguing further over the phone, Hernandez announced that he was leaving. Revell denied him the use of either of the two vehicles because the vehicles were under her name. She began searching for the sole set of keys to her truck to prevent him from driving away in the vehicle. When she denied him access to the truck, Hernandez pushed Revell "onto the bed and jumped on top of [her] and started choking [her]... hands around [her] neck and put his hand on [her] mouth." Revell kicked him backwards off of her,

¹ We note Hernandez did not file a brief with this court. Under these circumstances, the provisions of Kentucky Rules of Civil Procedure (CR) 76.12(8)(c) permit that we may (i) accept Revell's statement of the facts and issues as correct; (ii) reverse the judgment if Revell's brief reasonably appears to sustain such action; or (iii) regard Hernandez's failure as a confession of error and reverse the judgment without considering the merits of the issue. Because the record reasonably appears to support Revell's arguments as set forth below, we reverse.

got up from the bed, and was trying to “get [her] phone out of his pajama pants pocket, where he’d shoved it.” Hernandez would not give Revell her phone, and again shoved her and tried to hit her.

Revell was finally able to exit the bedroom, and Hernandez went down the hallway of the home and down the stairs. As they were both on the stairs, Revell made a move toward the door to exit the home, but Hernandez grabbed her by the neck in a chokehold and tried to ram her into the steps. She was able to duck to avoid any further blows.

After a brief hearing, at which only Revell testified, the trial court made an oral ruling, finding that by a preponderance of the evidence, an act of domestic violence has not occurred, and declined to enter a DVO. From that order, Revell appeals.

II. Standard of Review

Prior to entry of 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[.]” KRS² 403.750(1).³ “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.” *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007) (internal quotations and citations omitted).

² Kentucky Revised Statutes.

³ Effective through January 2016.

The standard of review for factual determinations is whether the family court's finding of domestic violence was clearly erroneous. 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). However, “in 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) (internal 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).

III. Arguments

On appeal, Revell argues her uncontested testimony established that an act of domestic violence occurred. Additionally, she argues the trial court’s finding that an act of domestic violence did not occur was clearly erroneous, and thus the denial of her petition for a DVO was an abuse of discretion.

First, Revell argues that her undisputed testimony established at least five independent acts of domestic violence, and thus she has met the preponderance of the evidence standard required for the court to enter a DVO. As defined by KRS 403.720(1), “domestic violence and abuse” includes “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 Revell testified that Hernandez pushed her, jumped on top of her, and choked her several times. Although the physical marks had faded at the time of the hearing, Revell testified that the incident with Hernandez left a red mark around her neck and some bruises. She further testified she was screaming and crying from “because of what he had done,” and that she is “scared of him and what he may do to me and my children.”

Domestic violence statutes “should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic violence[.]” *Caudill v. Caudill*, 318 S.W.3d 112, 115 (Ky. App. 2010) (citing *Barnett v. Wiley*, 103 S.W.3d 17, 19 (Ky. 2003)). “Furthermore, we give much deference to a decision by the family court, but we cannot countenance actions that are arbitrary, capricious or unreasonable.” *Caudill*, 318 S.W.3 at 115; *See also Kuprion*, 888 S.W.2d at 684.

The trial judge did not enter an order explaining her reasoning for not granting a DVO beyond the mere declaration that she found that by a preponderance of the evidence, an act of domestic violence had not occurred. The trial judge seemed to rely only on the testimony that “they were mutually fighting” and the fact that Revell did not simply allow Hernandez to leave in her vehicle as the bases for this denial.

⁴ The relationship between Revell and Hernandez would be governed under KRS 403.720(5), which defines “an unmarried couple” to include “a member of an unmarried couple who are living together or have formerly lived together.”

Based on Revell's testimony, we cannot say the record supports a finding that an act of domestic violence did not occur, or that no likelihood exists that violence would occur again. Accordingly, the trial court erred in not entering the DVO and therefore abused its discretion.

IV. Conclusion

We do not believe the trial court made sufficient findings or provided adequate support for its decision not to enter a DVO. Accordingly, we reverse and remand for entry of an order consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE:

Sarah L. Caragianis
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