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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000295-ME

HOWARD GORBATY — APPELLANT

v.

APPEAL FROM MCCRACKEN CIRCUIT COURT
HONORABLE DEANNA WISE HENSCHEL, JUDGE
ACTION NO. 16-D-00005-001

MELISSA RODRIGUEZ — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; CLAYTON AND TAYLOR, JUDGES.

CLAYTON, JUDGE: Howard Gorbaty appeals the McCracken Family Court's interpersonal protective order. No appellee brief was filed on behalf of Rodriguez in this action. After a careful review of the record, we affirm. Sufficient evidence supported the family court's finding of stalking, and the family court exercised reasonable control over the scope of cross-examination.

BACKGROUND

Melissa Rodriguez filed a petition for an order of protection in McCracken Family Court. Seven days before Rodriguez filed the petition, Gorbaty came out of his home, approached Rodriguez's residence, and shot a gun twice at Rodriguez and a friend. Rodriguez alleged in her petition:

> Over a year ago I asked him repeditively [repeatedly] to leave me alone. During this time [,] he sent me multiple texts, fb [Facebook] messages and phone calls demanding things, threatening me. Most days he comes outside when I come and go and walks to me to harass me … He was convicted last spring of harassing communications. I believe he has my phone pinged and has cameras pointed towards my house constantly. Today he is out on bond for shooting at me and no words describe the terror I'm in now.

A temporary interpersonal protective order (TIPO) was entered against Gorbaty. The order provided that Gorbaty be restrained from going within 500 feet of Rodriguez.

A hearing was held on February 3, 2016. The family court noted in its findings that Rodriguez testified that Gorbaty stands at his window and fondles himself; is constantly watching her; and, every time she walks outside he is there. He yells out private and personal things about her. Because he is constantly watching her, Rodriguez is fearful and has called the police numerous times. Gorbaty did not testify.

At the conclusion of the hearing, based on the testimony and evidence, the family court entered findings of fact and granted Rodriguez an

interpersonal protective order (IPO). The order is effective until February 3, 2019, and provides that Gorbaty is to remain at least 500 feet away from Rodriguez, and the order specifically lists her home, workplace, and the Community Kitchen for him to remain 500 feet away.

On February 11, 2016, Gorbaty filed a Kentucky Rules of Civil Procedure (CR) 60.02 motion to vacate based on newly discovered evidence. Gorbaty appeared at the hearing without counsel, and Rodriguez did not appear. The family court denied the motion.

On March 2, 2016 Gorbaty appealed the IPO. He contends that the family court's finding stalking occurred is not supported by the evidence and that the family court did not permit counsel to cross-examine Rodriguez during the IPO hearing.

STANDARD OF REVIEW

The standard of review for factual determinations is whether the family court's findings, or lack thereof, were clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01. And the rule further instructs: "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." *Pasley v. Pasley*, 333 S.W.3d 446, 448 (Ky. App. 2010). A family court's findings are not erroneous if they are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

Moreover, an appellate review of a family court's decision is not whether the Court "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). A trial court abuses its discretion when its decision is unreasonable, unfair, arbitrary or capricious. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994) (citations omitted).

ANALYSIS

Grounds for an IPO are found in Kentucky Revised Statutes (KRS) 456.030(1), which stipulates that a petition for an IPO may be filed by a victim of dating violence or abuse; a victim of stalking; a victim of sexual assault; or, an adult on behalf of a victim who is a minor and qualifying for relief under the statute. Under the IPO statutes, the term "'[s]talking' refers to conduct prohibited as stalking under KRS 508.140 or 508.150." KRS 456.010(7). These two statutes explain what behavior constitutes first-degree and second-degree stalking.

In the present case, the facts relate to stalking in the second degree. "A person is guilty of stalking in the second degree when he or she intentionally: (a) [s]talks another person; and (b) [m]akes an explicit or implicit threat with the intent to place that person in reasonable fear of: 1. [s]exual contact, 2. [p]hysical injury; or 3. [d]eath." KRS 508.150(1).

Stalking means to engage in an intentional course of conduct that is directed at a specific person, which seriously alarms, annoys, intimidates, or harasses the person, and which serves no legitimate purpose. KRS 508.150(1)(b). The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress. KRS 508.130(1). And "'[c]ourse of conduct'

means a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose." KRS 508.130(2).

"Following a hearing under KRS 456.040, if a court finds by a preponderance of the evidence that dating violence and abuse, sexual assault, or stalking has occurred and may again occur, the court may issue an interpersonal protective order." KRS 456.060(1)

Here, the family court found, by a preponderance of the evidence, that Gorbaty's behavior satisfied the elements of stalking. Rodriguez testified that Gorbaty intentionally stalked her and made explicit and implicit threats, which placed her in reasonable fear of sexual contact, physical injury, or death. She noted that constantly Gorbaty watched her, walked past her house an inordinate amount of times, yelled personal things at her, fired shots toward her apartment while she and a friend were outside; and finally, she stated she was terrified of him. In fact, Gorbaty fired a gun two times at Rodriguez and a friend. Usually, someone firing a weapon at another puts one in fear of physical injury or death. Further, the police were called for that incident and many more.

Gorbaty maintains that the firing his weapon in this case was not unlawful since it is protected by KRS 503.055(3). This statute provides:

> A person who is not engaged in an unlawful activity and who is attacked in any other place where he or she has a right to be has no duty to retreat and has the right to stand his or her ground and meet force with force, including deadly force, if he or she reasonably believes it is necessary to do so to prevent death or great bodily harm

> to himself or herself or another or to prevent the commission of a felony involving the use of force.

KRS 503.055(3). We disagree with Gorbaty that his actions were protected by the statute. A plain reading of the language shows that it does not protect a party advancing away from his home toward other people and firing a gun at them. Further, Gorbaty maintains that any action taken by a party in a "stand your ground" situation would not justify the issuance of the IPO. He is incorrect. Here, the family court had sufficient evidence, beside the discharge of his weapon, to support the issuance of a IPO based on stalking.

Gorbaty also contends that since he was not charged or convicted of stalking, his actions were not illegal, and he did not intend to cause distress. A perusal of the statutes governing civil protective orders does not necessitate any criminal conviction. First, the statutes refer to "civil" protective orders. Under KRS 456.040, the standard for evidentiary proof of stalking is preponderance of the evidence that stalking has occurred and may again occur. Clearly, this standard is not the one used in criminal matters. To conclude, the family court's findings, by a preponderance of the evidence, that stalking occurred or may occur again, are not clearly erroneous.

The second argument proffered by Gorbaty is that the family court did not allow his counsel to cross-examine Rodriguez during the IPO hearing. A review of the video of the hearing establishes that Gorbaty's counsel was permitted to ask questions of Rodriguez. However, at a certain point in the cross-

examination, the family court deemed that counsel's questioning was becoming a fishing expedition and ended it. We disagree with Gorbaty's assertion that this action on the part of the family court improperly eliminated his right to cross-examine Rodriguez.

Gorbaty mischaracterizes his right to cross-examination. The Sixth Amendment right encompassing the right to cross-examine another does not apply to civil cases. *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 345 (Ky. 2006). A civil litigant's right of confrontation and cross-examination is grounded in the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id*. However, "due process is flexible and calls for such procedural protections as the particular situation demands." *See Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

Moreover, a trial court judge is authorized to control the questioning of parties. As explained in Kentucky Rules of Evidence (KRE) 611, "[t]he court shall exercise reasonable control over the mode and order of interrogating witnesses" and "the trial court may limit cross-examination." KRE 611(a) and (b). Indeed, the scope and duration of cross-examination is within the sound discretion of the trial judge. *Moore v. Commonwealth*, 771 S.W.2d 34 (Ky. 1988) (*abrogated on other grounds by McGuire v. Commonwealth*, 885 S.W.2d 931 (Ky. 1994)). Therefore, having determined that Gorbaty had sufficient ability to question Rodriguez, the family court did not violate his due process or abuse its discretion in limiting Gorbaty's cross-examination.

Gorbaty proffers that his right to cross examine Rodriguez was also hampered at the hearing on the motion to alter the IPO. A review of the certified record shows only one motion to alter, amend, or vacate, which was proffered on Febuary 11, 2016. After a hearing, which Rodriguez was not present, the trial court denied the motion. The family court judge explained that CR 60.02 is not intended as an additional opportunity to relitigate the same issues which could reasonably have been presented by direct appeal. *McQueen v. Commonwealth*, 948 S.W.2d 415, 416 (Ky. 1997). Rather, the rule is intended to bring before the trial court, which entered a judgment, any ostensible errors that were presented, passed on, or could not have been known. *Kentucky Retirement Systems v. Foster*, 338 S.W.3d 788, 796 (Ky. App. 2010) (citations omitted)). Hence, the CR 60.02 hearing was about a procedural matter and did not implicate the substantive facts of the original hearing. Further, the notice of appeal only indicates that Gorbaty is appealing the IPO and does not implicate an appeal of the denial of the CR 60.02 motion.

Finally, we point out that a major deficiency in Gorbaty's brief. He provides no citations to the record. Although there are several references to the videotape, these references are not to the original IPO hearing. These citations are apparently to a re-taping of the video since the references of 18:38; 13:30; and, 15:20 are irrelevant to the official trial record. It is axiomatic that the civil rules require a party to make "ample references to the specific pages of the record, or

tape and digital counter number in the case of untranscribed videotape or audiotape recordings." CR 76.12(4)(c)(iv).

Our options in dealing with a procedurally defective brief are to ignore the deficiency and proceed with the review; to strike the brief or its offending portions (CR 76.12(8)(a)); or, to review the issues raised in the brief for manifest injustice only. *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). However, since we did proceed with the review and ignored the procedural deficiencies, we decline to utilize the standard of review of manifest injustice.

In addition, we are particularly perplexed by the following statement on page 4 of Gorbaty's brief:

> …Appellee did not show up for the hearing on August 22, 2016. Judge Henschel phoned the Appellee to question her absence. Appellee stated she had been sick and was working, and or to attend the hearing. Counsel for Appellant advised the Judge that we needed her present for cross on her prior inconsistent statements. The Judge then proceeded to listen to the inconsistent statement given by the Appellee on the video and ruled that the statements were not contradictory.

The certified record on appeal has nothing related to this hearing. The official record is 42 pages and the last entry is on June 12, 2016.

CONCLUSION

The family court's finding of stalking was not clearly erroneous, and the family court did not abuse its discretion in limiting Gorbaty's cross-examination. Accordingly, we affirm the interpersonal protective order of the McCracken Family Court.

KRAMER, CHIEF JUDGE, CONCURS.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

BRIEF FOR APPELLANT:

George S. Powers
Murray, Kentucky

NO BRIEF FOR APPELLEE.