

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000768-DG

KELLI ADAMS

APPELLANT

ON DISCRETIONARY REVIEW FROM NELSON CIRCUIT COURT
v. HONORABLE CHARLES C. SIMMS, III, JUDGE
ACTION NO. 16-XX-00001

TRAVIS SCOTT ADAMS

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: J. LAMBERT, MAZE, AND NICKELL, JUDGES.

LAMBERT, J., JUDGE: This matter is on discretionary review from the opinion and order of the Nelson Circuit Court affirming the Nelson District Court's entry of a domestic violence order (DVO) on behalf of Travis Scott Adams against his former wife, Kelli Adams. We affirm.

Travis and Kelli are former spouses, and one child was born of their marriage in 2011. Kelli lives in London, Ohio, where she is employed as a

dispatcher for the London Police Department. In September 2015, Travis filed a petition with the district court seeking an emergency protection order (EPO) and a DVO on behalf of himself and the minor child. As grounds, Travis provided the following information:

When I picked up [the child] from her mothers [sic], I returned home and noticed 30 bruises head to toe. Most were in uncommon areas, which included the inner thighs, just above her genital areas, under her eyes and around her throat. She then began acting out, while playing. She used dolls to simulate vulgar acts. When I asked about it she informed me her mother hurt her, smacks her face, drags her by her hair, whips and punches her daily. When questioned about the inner thighs, she refrains from answering. Kelli has also been threatening my life as well as [the child's.] She has become enveloped with this idea. She has many unregistered weapons at her mother's [address omitted], and has threatened that no one would know.

Travis stated that Kelli had a handgun and a concealed carry license. In addition, Travis requested temporary custody of their child. The district court entered an EPO on August 30, 2015, in which it granted Travis temporary custody of the child.

The district court held a DVO hearing on September 9, 2015. Kelli testified that she and Travis had a custody arrangement in place through the Ohio court system. Exchanges took place at the London Police Department in Ohio, where she worked. On August 14, 2015, the date of the incident referenced in Travis' petition, Travis and his mother arrived to pick up the child from Kelli. The exchange was different from previous ones because it was in the parking lot rather

than in the building, where there are cameras. Kelli did not have any contact with Travis or his mother that day, and she denied that the child had any bruises on the day of the exchange.

Kellie denied ever telling Travis that she wanted to have him killed or that she had hired anyone to kill him. She had not hired anyone affiliated with a gang in Louisville. She said she knew Rebecca Stevens (a later witness at the DVO hearing) through the Marine Corps. Kelli contacted Rebecca through Facebook in June 2015 because Rebecca had sent messages to Kelli's boyfriend and his mother about her. Kelli continued to speak with Rebecca by phone after contacting her on Facebook. She said she offered Rebecca money to pay Rebecca's phone bill that month, but she did not pay it. She admitted to sending Rebecca a text message regarding a check being returned to her. Kelli denied ever telling Rebecca that she had hired anyone to kill Travis or that she would kill their daughter if she lost custody to Travis. She admitted that she suffered from anxiety and depression. Kelli denied ever harming or abusing the child, including smacking her, pulling her hair, throwing her into a wall, or locking her in a closet or room.

Charlotte Adams testified next. Travis is her son. She accompanied Travis to the August 14, 2015, exchange, and she observed bruises on the child when they picked her up. She had recently noticed more aggression in the child. After the August exchange, the child wet her pants and yelled for Travis after Charlotte told her to be careful eating a donut on her couch.

Rebecca Stevens testified next. She knew Travis and Kelli through the Marine Corps. Kelli initiated contact with her in June 2015, after which they had many conversations. They spoke a couple of times per week until that ended at the end of August. Kelli told her she had hired someone in Louisville to kill Travis and that she would kill the child if she lost custody of her. Kelli offered her money to fabricate evidence and would pay her by check for her time. Kelli said she would mail the check to her. Rebecca received a letter in the mail, which she returned unopened to Kelli's return address. She received a text message from Kelli a week later stating that the letter had been returned. During their telephone conversations, Rebecca heard Kelli hit the child on the mouth, and Kelli told her "to hold on while she locked the little brat in the closet." She could hear the child crying in the background. Kelli told Rebecca about a game called "jail" that she played with the child, where Kelli would lock the child in her room until she let her out. Kelli told her she had hired a private investigator, Steve O'Daniel, from Louisville. She said he was "dirty." Kelli told her she was afraid she was going to lose custody of the child.

Travis was the next witness to testify. He lives in Nelson County. He testified that his relationship with Kelli had been difficult since January. For some time, Kelli had not let him exercise visitation with the child, and in June 2015 the Ohio court permitted him to make up his lost visitations. He said that Kelli made verbal threats to him, starting at the beginning of the year and ending when the EPO petition was filed. She told him she wished he was dead.

Travis testified that Kelli had also made threats about the child. At the July exchange, Kelli said that if the child came back the same way she did the prior time, she would beat her. Travis made a complaint to the Washington County Sheriff's office that year. Regarding the August 14th pick up, the exchange took place outside of the London Police Department. He did not have any contact with Kelli that day. Travis carried the child to the car, and he noticed that her legs were bruised. Photographs he took when they arrived home were introduced showing bruises on various parts of the child's body, including her face, neck, and legs. He contacted child protective services in Kentucky and Ohio. Travis said he was afraid of Kelli and believed she would harm him. He was also afraid for his daughter's safety and believed she would harm her again if the court did not grant the EPO. He knew that Kelli had access to weapons based on what he learned during their marriage.

Kelli was not represented by counsel at the hearing, but the court permitted her to tell her side of the story. She believed that Travis was forum shopping by filing actions in different jurisdictions when he was unsuccessful in an earlier one. She said none of the threats he had alleged were substantiated by prior investigations. Kelli denied ever hurting the child.

On cross-examination, Travis questioned Kelli about text messages sent to him from her cell phone in October 2014. Screen shots of the text messages were introduced into evidence and read as follows:¹

¹ We did not correct any errors in the messages.

As for next Friday don't bother. The chief has worked with the department for 25 years and called me as soon as he got off the phone with you mommy to warn me. Go ahead tell him whatever you want it hearsay and he will never believe you. Everyone at LPD and the sheriff department are my friends so good luck trying to get them to help you.

It took you weeks to even get through dispatch to his voicemail. You really think they are going to help you get [the child?] I think not. Exactly why I pursued a job with the police department! Security and complete control of [the child] knowing no one here will help you. The laws and rules do not apply to me as long as I am employees with LPD.

As for you exposing my medical history good luck with that. He will never believe you. You are required to take a lie detector and polygraphs. Clearly I have trained myself to pass them both. My discharge from the national guards and release from the marine corps was not asked about directly, so not reported! No one but you would ever share my medical information with them. I have ruined your name around here and no one will believe you. Like I said hearsay so good luck with that.

Your POS fucking attorney comes in work all the time. Nice lady but she is also on my side. Didn't you enjoy our final divorce hearing. I did since I was friends with the magistrate. I laugh every time I sit on your furniture. You know the stuff I burned due to mold. The money in my saving was my favorite. She believed it was all spent. You deserved it. Fucking dumb bitch. I'm sorry it has to be this way but you brought it on yourself.

Kelli denied sending the text messages and said they were made on a "spoofing" application. She said they were the subject of an internal investigation.

Travis also testified about the text messages, stating that he had received them from Kelli's phone number on October 7, 2014. He did not respond to the

messages. Travis then called Al Farris, who was a retired sergeant with the Louisville Metro Police Department. Sgt. Farris testified about his educational background and his 29½ years of law enforcement experience. Travis hired him for purposes of the Ohio custody matter to analyze cell phone records. Sgt. Farris authenticated the screen shots of the text messages and explained what he did in his analysis, including examining the signal strength, the cell phone carrier, the date and time zone, among other considerations. This information was matched to Travis' account. He also considered the content of the messages based on his experience as a detective, and he described these messages as somewhat threatening and intimidating in nature. He testified that Kelli thought she was above the law and was trying to be intimidating.

At the conclusion of the hearing, the district court found that Travis had established by a preponderance of the evidence that an act of domestic violence or abuse had occurred and may again occur. Therefore, the court entered a three-year DVO on behalf of Travis (not the child), restraining Kelli from committing further acts of abuse or threats of abuse and from any contact or communication with Travis. The court ordered Kelli to remain 500 feet away from Travis except during child exchanges. The court granted Travis temporary custody of the child through September 23, 2015; the time was limited to two weeks due to the ongoing custody matter in Ohio. In addition, Kelli was ordered to surrender her firearms and turn over her concealed carry license to the Nelson County Sheriff's Office that day.

Kelli appealed the district court's entry of the DVO to the Nelson Circuit Court. In an order entered January 8, 2016, the circuit court remanded the matter to the district court for written findings of fact supporting the DVO. The circuit court also held that Kelli had not properly preserved her argument related to the entry of testimony from Sgt. Farris, who had testified about the authenticity of the text messages. Kelli argued that he was not qualified as an expert witness. The court determined that while Sgt. Farris was not asked about the specific training he had, "his detailed testimony regarding his technical analysis of the messages demonstrates he had been trained to do so."

On February 12, 2016, the district court entered its findings of fact, conclusions of law, and order on remand from the circuit court. The district court detailed the testimony of Travis, Kelli, Ms. Stevens, and Sgt. Farris. The court found "by a preponderance of the evidence that Kelli did in fact hire someone or sought to hire someone to kill Travis. Given this fact Travis certainly would have a fear of imminent harm." Accordingly, the district court ordered that the DVO would remain effective.

Kelli again appealed the district court's DVO. In her statement of appeal, Kelli argued that Travis failed to establish the necessary elements to establish that domestic violence had occurred and may occur again. She stated that Travis did not present any testimony or evidence that he was fearful of imminent physical harm, but merely testified that he was afraid. In his counterstatement of appeal, Travis argued that the district court's ruling was supported by substantial evidence

of record based upon Kelli's threats to kill him, among other evidence. He also disputed Kelli's reliance on *Fraley v. Rice-Fraley*, 313 S.W.3d 635 (Ky. App. 2010).

In an opinion and order entered April 26, 2016, the circuit court affirmed the district court's ruling. The court stated as follows:

At the hearing, the trial court provided great weight to the testimony of Rebecca Stevens (hereinafter "Stevens"). Stevens, who appears to be an uninterested witness, became acquainted with Kelli and Travis while serving in the United States Marine Corps. Stevens traveled from her home in North Carolina to testify to the following: (1) that Kelli initiated telephonic contact with her, (2) **that Kelli told her that she had hired a man from Louisville to kill Travis**, (3) that Kelli offered her money to fabricate evidence, (4) that Kelli later sent her a letter in the mail, (5) that Stevens returned this letter without opening it, and (6) that Kelli subsequently sent her a text about the letter being returned. Although Kelli denies these allegations, she admitted to sending a text in which she acknowledged receipt of the returned letter.

With Stevens having traveled from North Carolina to testify at this EPO hearing, it is apparent that she must have informed Travis about her conversations with Kelli. In addition, Travis provided the following testimony: (1) that in early 2015, Kelli made the statement that she wished he was dead, (2) that he is afraid of Kelli, (3) that he absolutely believes that she will harm him, and (4) that she has access to guns. Based upon all of this testimony, this Court finds that the trial court had sufficient evidence to believe that Travis was in fear of "imminent physical injury, serious physical injury . . . or assault."

Accordingly, the circuit court affirmed the district court's entry of the DVO. This Court accepted discretionary review,² and this appeal now follows.

On appeal, Kelli contends that the district court erred in finding that domestic violence had occurred and that it committed palpable error in relying on hearsay testimony from Ms. Stevens and in permitting Sgt. Farris to give expert testimony without having been qualified to do so. Travis disputes these arguments and asserts that the district court did not abuse its discretion in granting the DVO.

First, we shall consider Kelli's arguments related to the unpreserved errors she raised in her brief. Kentucky Rules of Civil Procedure (CR) 61.02 permits an appellate court to review an error that is not preserved for review under certain circumstances: "A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error." In *Schoenbachler v. Commonwealth*, 95 S.W.3d 830, 836 (Ky. 2003), the Supreme Court explained palpable error review as follows: "A palpable error is one . . . that 'affects the substantial rights of a party' and will result in 'manifest injustice' if not considered by the court, and '[w]hat it really boils down to is that if upon a consideration of the whole case this court does not believe there is a substantial possibility that the result would have been any

² Kelli identified the questions of law in her motion for discretionary review as whether a trial court could enter a DVO pursuant to Kentucky Revised Statutes (KRS) 403.270 based upon an inference that the abuser has inflicted fear of imminent harm and whether that statute requires the infliction of fear to be by the abuser or by a third party.

different, the irregularity will be held nonprejudicial.” (Footnotes omitted). In addition to failing to raise either issue before the district court, Kelli failed to raise these arguments in her second appeal to the circuit court or in her motion for discretionary review. Because we hold that neither issue affects Kelli’s substantial rights or would result in manifest injustice, we decline to review these claims of error.

Next, we shall consider Kelli’s argument that the district court’s finding of domestic violence was not supported by substantial evidence. KRS 403.740(1) provides that “[f]ollowing a hearing ordered under KRS 403.730, if a court finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur, the court may issue a domestic violence order[.]” KRS 403.720(1) defines “domestic violence and abuse” as “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[.]” In *Caudill v. Caudill*, 318 S.W.3d 112, 114 (Ky. App. 2010), this Court explained that “[t]he preponderance of the evidence standard is satisfied when sufficient evidence establishes the alleged victim was more likely than not to have been a victim of domestic violence.” *Id.* at 114, *citing Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007).

Our standard of review is whether the court’s finding of domestic violence is clearly erroneous pursuant to CR 52.01, and findings of fact “are not clearly

erroneous if they are supported by substantial evidence.” *Caudill*, 318 S.W.3d at 114-15, *citing Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003).

“[I]n 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) (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) (citations omitted).

Caudill, 318 S.W.3d at 115. The *Caudill* Court cautioned that “[w]hile domestic violence statutes should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic violence, the construction cannot be unreasonable.” *Id.* (internal quotation marks and citations omitted).

In the present case, the district court did not find that Kelli had assaulted, injured, stalked, or sexually abused Travis. Rather, the court found that Kelli had inflicted in Travis a fear of imminent harm. The court based this conclusion on substantial evidence in the record from the testimony of both Travis and Ms. Stevens. Travis testified that Kelli told him she wished he was dead, that he was afraid of her, that he believed she would harm him, and that she had access to firearms. Ms. Stevens testified that Kelli told her she had hired a person to kill Travis and offered her money to falsify evidence. It was well within the court's discretion to weigh the testimony of the witnesses and to afford Kelli's testimony less weight than that of Travis and Ms. Stevens, in light of both Kelli's demeanor during the hearing and the content of the text messages she sent to Travis. The

evidence presented was sufficient to establish that domestic violence and abuse, as defined by the statute, had occurred and may again occur.

Kelli relies upon this Court's opinion in *Fraleley, supra*, to argue that the district court was precluded from making a finding of domestic violence because the fear of imminent harm was instilled in Travis by a third party, Ms. Stevens. In *Fraleley*, this Court observed,

[Gail] based her alleged fear of Dale on her marriage counselor's uninformed opinion that Dale had sociopathic tendencies and on the fact that her counselor told her Dale had unplugged Gail's telephone to keep her from having outside contact. The family court properly stated that, under the circumstances of this case, it would not consider the opinions that the marriage counselor provided to Gail. However, the court stated that it would consider the "impact" of those opinions on Gail; the court erred in doing so.

It was the marriage counselor who instilled fear in Gail. There were no allegations or evidence that Dale had ever acted violently toward Gail or threatened violent actions toward her. Consequently, the family court erred in finding that the circumstances of this case met the definition of "domestic violence and abuse" because there was no evidence that Dale inflicted the fear of imminent physical injury on Gail. Thus, the family court abused its discretion in entering the DVO against Dale in this case.

Fraleley, 313 S.W.3d at 640. Kelli argues that, because Travis had not produced any evidence that she had acted violently toward him or threatened violent action against him in the past and because his fear of harm arose from Ms. Stevens, the district court abused its discretion in finding that he was entitled to a DVO. We disagree.

As Travis argues in his brief, *Fraley* is distinguishable from the present case. In that case, the Court explained that Gail’s fear of harm was based solely on what the counselor told her. “Gail contradicted herself multiple times in the hearing, stating at times that she was not fearful of Dale and that she did not worry about her safety, and at other times stating that she would feel unsafe if the court did not enter a protection order. Nonetheless, she never alleged that Dale had acted violently toward her in the past, had injured her, or had threatened violence in any way.” *Id.* at 640. In contrast, Travis presented evidence of his fear that Kelli would harm him based upon her statement that she wanted him dead, that he made complaints to law enforcement due to her threats, and that Kelli had access to firearms. Therefore, we find no merit in Kelli’s reliance upon *Fraley*.

For the foregoing reasons, the opinion and order of the Nelson Circuit Court affirming the Nelson District Court’s entry of a domestic violence order is affirmed.

ALL CONCUR.

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