

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-001146-ME

RANDY K. BUSSELL

APPELLANT

v. APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE MARCUS VANOVER, JUDGE
ACTION NO. 16-D-00027-001

ERICA JANELLE JONES

APPELLEE

OPINION
AFFIRMING

** ** * ** * ** *

BEFORE: COMBS, ACREE AND NICKELL, JUDGES.

COMBS, JUDGE: Appellant, Randy K. Bussell (Randy), appeals from entry of a Domestic Violence Order of the Rockcastle Circuit Court. Finding no error, we affirm.

On May 15, 2016, Appellee, Erica Janelle Jones (Erica), filed a Petition for Order of Protection against Randy. At the time, the parties were in a

relationship and Erica was pregnant with Randy's child. Both parties have children from previous relationships. The Petition sets forth, in relevant part, as follows:

That morning [Sunday, May 8, 2016,] I had tried getting Randy up from bed. I needed help with the children because of some messes my son and his son had made upstairs. I had already gotten on to my son and had him sitting in time out while his son was standing in the hallway waiting on his dad to get out of bed because I don't discipline his children. I was cleaning up part of the bathroom mess when I heard Randy getting out of the room and starting to fuss at his son. When I came out of the bathroom, everyone was in the boys['] room and Randy was yelling at both boys. He was getting more and more upset. He then pulled his son's pants down and spanked him numerous times and put him on the top bunk afterwards. After yelling he seen a bag of markers (which are usually kept downstairs in the craft area) on the bed beside his son, grabbed them, wrestled with them ripping them open. They flung all over the room and what didn't come out of the bag, he slung across the room. Gradually turning into screaming and yelling asking questions like, 'why don't you listen?', 'why won't you min?' [sic], 'who got the markers?', 'HUH HUH HUH', 'WHYYYYYYYYY?!!!!!!'. Eyan, Randy[']s son then told Randy that my son had gotten the markers. Randy then got into my son[']s face screaming and yelling "WHY DID YOU GET THE MARKERS?" He would ask over and over not letting him answer. Getting louder and angrier with each question. At that point I put my hand on Randy[']s shoulder telling him that he needed to stop and calm down. But he wouldn't stop. He kept screaming saying things like, "They just don't listen. They never learn." Then he directed the attention back onto the boys. During that time he hit the walls twice with open hands and threw the bedside table half way across the room putting trash all over the floor. At that point I grabbed my son, him crying hysterically and trembling and told Randy to take his son home to his mother[']s. I went to my room with Marcas and locked

the door. A few minutes later he came wanting in to get his wallet and keys. Once he came in, I was still holding and consoling my son. He tried to get me to get my son to go and pick up the markers he had threw all over the room. I told him no and then he began to criticize my parenting ethics in front of my son. He left after saying what he wanted to say.

May 14th, 2016

After my daughter[']s party was coming to an end, Randy pulled up into the parking lot where my mom, our friends, and their children and I were talking. He started asking about a mattress that I previously purchased from my friends Lisa and Jeff Smithern. He was trying to accuse me of stealing it and demanding to know where it was at. I told him that it wasn't his, reminding him that I bought it with my tax money. He kept accusing me of stealing it. I told him I don't have it anymore that I don't know where it was at. He then began to yell and say in front of everyone, "I can[']t believe you left me without a fucking bed. How fucking dare you? I[']ll be at your place to get any of my other stuff tonight." He then spun off.

I left shortly after to drop my kids off with a sitter to go and get a EPO with my mom and one of the witnesses from the scene he made. After dropping off my kids, we came to town and country to wait on a police officer to get the process started. Before the officer arrived, Randy was continuously threatening to go to my apartment and call the cops on me. He also let me know where I was [*sic*]. And he informed me that he knew when the police officer was arriving. Less than 2 minutes later the police officer was there. He let me know that Randy was parked at the city parking lot. So he had been following me for sometime because I didn't go directly to town and country. Once the officer was inside town and county, Randy called at&t and deactivated my cell phone deleting all documentations after Thursday at 9:06pm from when the phone last did a [*sic*] automatic update.

The matter was heard on June 7, 2016. Erica testified that she and Randy were in a dating relationship, that Randy had lived with her for about three months, and that she was pregnant with his child -- due in July (2016). Erica testified about the events that she had alleged in the EPO Petition. With respect to the May 8, 2016, incident involving the markers, Erica testified that Randy got in her son's face and was screaming and yelling at him. Erica described Randy's behavior as intimidating. Erica testified that Randy hit the wall twice, picked up a table, and threw it in the direction where her four-year-old son was standing. She testified that the table came within inches of hitting her son.

Erica also testified about the May 14, 2016, incident in the parking lot involving the mattress. In addition, she testified that Randy made threats that he would "call the cops" if she did not let him inside her home to get his belongings. Erica explained that she lives in public housing and that she could be evicted if the police were called. Erica introduced an exchange of text messages between the parties dated May 9, 2016, as an exhibit. Erica read some of the texts relating to the March 8, 2016, incident, including one in which Randy admitted losing control. In another, Erica stated that Randy had scared her. According to Erica, there were subsequent text messages after May 9. But Randy had gotten into her phone and deleted them. Erica testified that Randy had also deactivated her router so she could not adjust the smart thermostat in her apartment, which was freezing for several days.

Randy acknowledged that he threw the markers, but he denied that they hit the children. He testified that he spanked his own son. He denied throwing a table.

Based upon the May 8, 2016, incident with the markers, the court concluded that an episode of domestic violence had occurred and that it may again occur. In relevant part, the court explained as follows:

So the question becomes was the incident with the markers and the table enough to create a reasonable fear of imminent physical injury and is it likely that this may occur again? The court is going to find that based upon [Randy's] behavior -- the acknowledged behavior -- the testimony of [Erica] and the statements of [Erica] in the text message that she had reasonable fear of injury, because of the anger and the behavior of Mr. Bussell at that time, . . . the court is going to find that due to the ongoing conflict of the personal property and the impending childbirth, the relationship between the parties that it is likely that another incident [of domestic violence] may occur

On June 7, 2016, the court entered a DVO against Randy which remains in effect until June 7, 2017. The Order, issued on a Form AOC 275.3, reflects that the court found that “it was established, by a preponderance of the evidence, than an act(s) of domestic violence and abuse . . . has occurred and may again occur[.]” The Order restrains Randy from any contact or communication with Erica except for court appearances and requires that he remain at least 300 feet away from her except for court appearances. The June 7, 2017, docket sheet order contains the following additional findings:

- 1) finding of d.v. requires finding of injury, stalking, sexual assault or infliction of fear of physical injury or assault
- 2) no finding on stalking b/c that requires infliction of harm, there was no testimony that she feared he would harm her
- 3) testimony about him coming to get belongings w/law enforcement, b/c fear was of eviction, not physical injury.
- 4) changing passwords – not enough testimony
Resp. was responsible
- 5) Note this is not filed on behalf of children
- 6) Q is was incident with markers enough to creat [sic] reasonable fear of imminent physical injury and is it likely may occur again.
- 7) Ct. finds Pet'r had reasonable fear of injury b/c of incident w/markers and table,
- 8) Due to ongoing conflict over personal property and impending childbirth, ct finds likely that another incident may occur.

On June 17, 2016, Randy filed a Motion to Alter, Amend, or Vacate which the trial court denied by Order entered on July 6, 2016. On August 5, 2016, Randy filed a Notice of Appeal to this Court.

Randy raises two issues on appeal. He contends that: (1) there was no evidence that Erica was in fear of imminent physical danger as required by statute; and (2) there was no evidence that domestic violence and abuse occurred or that it may occur again.

A court may issue a DVO following an evidentiary hearing if it “finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur” KRS¹ 403.740(1). “The preponderance of the evidence standard is met when sufficient evidence establishes that the alleged victim was

¹ Kentucky Revised Statutes.

more likely than not to have been a victim of domestic violence.” *Gomez v. Gomez*, 254 S.W.3d 838, 842 (Ky. App. 2008) (internal quotation marks and citation omitted). The act of domestic violence and abuse is defined 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[.]

KRS 403.720 (1). When we review a DVO, “the test is not whether we would have decided it differently, but whether the court's findings were clearly erroneous or that it abused its discretion.” *Gomez* at 842.

Erica’s testimony about the May 8, 2016, incident with the markers and the May 9, 2016, text messages regarding that incident established that she was indeed fearful of Randy. “Deciding which witness to believe is within the sound discretion of the family court as fact-finder; we will not second-guess the family court, which had the opportunity to observe the parties and assess their credibility. CR 52.01.” *Hunter v. Mena*, 302 S.W.3d 93, 98 (Ky. App. 2010). Erica’s testimony provides a substantial evidentiary foundation for the trial court’s determination that an act of domestic violence had occurred. In *Hohman v. Dery*, 371 S.W.3d 780 (Ky. App. 2012), a court found an adequate basis to support a DVO where a former boyfriend’s conduct caused the victim fear of imminent physical injury; the girlfriend testified that she felt threatened when he clenched his fists and yelled at her through gritted teeth. She believed that the boyfriend was unable to control his emotions or his temper. Thus, pursuant to *Hohman*, the

evidence must merely suffice to satisfy the substantial discretion of the court issuing the DVO.

Randy also argues that there was no evidence that domestic violence and abuse would occur again as required by KRS 403.740(1). We disagree. “The predictive nature of the standard requires the family court to consider the totality of the circumstances and weigh the risk of future violence against issuing a protective order.” *Pettingill v. Pettingill*, 480 S.W.3d 920, 925 (Ky. 2015). In *Boone v. Boone*, 501 S.W.3d 434, 440 (Ky. App. 2016), this Court explained:

Kentucky courts have liberally construed our statutory scheme in order to afford relief. KRS 403.715(1) mandates that the domestic violence statutes be interpreted to “[a]llow 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[.]” Conduct which can reasonably be inferred to cause fear of imminent physical injury has been deemed to satisfy the statutory definition of domestic violence under Kentucky law *Hohman v. Dery*, 371 S.W.3d 780, 783 (Ky. App. 2012).

In concluding that domestic violence might again occur, the trial court properly considered the totality of the circumstances -- including the impending birth of the parties’ child and the ongoing conflict between them. We find no abuse of discretion.

We affirm the June 7, 2016, and July 6, 2016, Orders of the Rockcastle Circuit Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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