RENDERED: NOVEMBER 16, 2018; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000268-ME

PHUONG SEARS APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE DENISE DEBARRY BROWN, JUDGE
ACTION NO. 17-D-502479-001

BRADLEY SEARS APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: ACREE, NICKELL AND SMALLWOOD, JUDGES.

SMALLWOOD, JUDGE: Phuong Sears appeals an order of the Jefferson Circuit Court, Family Division, which dismissed her petition for a Domestic Violence Order (DVO). On appeal, Appellant argues that the trial court should have found: that domestic violence had occurred; that the trial court erred in cutting off her trial counsel's cross-examination of Bradley Sears; and, that evidence Appellant tried to

introduce after the DVO hearing should have been admitted. Finding no error, we affirm.

At all times relevant to this case, Appellant and Appellee were married. On July 31, 2017, Appellant filed a petition for an order of protection due to alleged acts of domestic violence which occurred three days prior. In the petition, Appellant claimed that Appellee got upset after she told him she wanted a divorce and grabbed her leg. She then claimed that Appellee threatened to kill her and himself. Appellant stated that she then left the marital home and got in her car. Appellant claimed that Appellee started banging on the car and blocked her from leaving. Appellant was eventually able to leave.

The trial court entered an emergency protection order the same day the petition was filed. After numerous continuances, a hearing on the petition was held on September 20, 2017. Both Appellant and Appellee testified. At the end of the hearing, the trial court did not make a ruling on the issue of the DVO. Instead, the trial court continued the matter in order for the parties to finalize their divorce and see if the matter could be resolved without a DVO. The trial court also left the emergency protection order in place.

A new hearing was set for January 17, 2018. At that hearing, counsel for Appellant requested that the record be reopened in order for three audio recordings to be introduced into evidence. Counsel indicated that the recordings

were of incidents of domestic violence occurring and were discovered after the hearing. Appellee's trial counsel objected and claimed any evidence should have been introduced in September and that Appellee would not have a fair opportunity to respond. The court did not allow the recordings to be placed into evidence.

Thereafter, the trial court entered an order dismissing Appellant's petition. The order stated:

> Proof Heard: Ct. finds by a preponderance of the evidence that Petitioner has not sustained her burden of proof. The parties are in the midst of a contentious divorce action with allegations of infidelity and threats by the parties to make things hard or to bring harm to himself. At some point, the Respondent relocated out of town and currently lives in Western Ky. The credibility of both parties is in dispute. The court is unable to find that an act of DV has occurred and is likely to occur again. A mutual restraining order has been entered in 17CI502661.

This appeal followed.

Appellant's first argument on appeal is that the trial court erred by failing to find an act of domestic violence occurred due to Appellee's threats of suicide. Appellant brings to our attention the case of *Ashley v. Ashley*, 520 S.W.3d 400 (Ky. App. 2017), for the proposition that threats of suicide are domestic violence. To further support her argument, Appellant points to the fact that in the trial court's order, the court indicated that Appellee threatened "to bring harm to himself." In addition, Appellant testified at the hearing that Appellee threatened to

kill himself if she left him, and Appellee testified that he had suicidal ideations, but only discussed them during his therapy sessions, some of which Appellant would participate in. Appellee argues that the trial court did not find that he threatened to harm himself, only that there were allegations that he did so.

> 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[.]" The 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. . . . The standard of review for factual determinations is whether the family court's finding of domestic violence was clearly erroneous.

Caudill v. Caudill, 318 S.W.3d 112, 114 (Ky. App. 2010) (citations omitted).

> "[S]ubstantial evidence" is "[e]vidence that a reasonable mind would accept as adequate to support a conclusion" and evidence that, when "taken alone or in the light of all the evidence, ... has sufficient probative value to induce conviction in the minds of reasonable men." Regardless of conflicting evidence, the weight of the evidence, or the fact that the reviewing court would have reached a contrary finding, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses" because judging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court. Thus, "[m]ere doubt as to the correctness of [a] finding [will] not justify [its] reversal," and appellate courts should not disturb trial court findings that are supported by substantial evidence.

Moore v. Asente, 110 S.W.3d 336, 354 (Ky. 2003) (citations omitted).

Kentucky Revised Statute (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 *Ashley*, a previous panel of this Court found that a threat of suicide met the domestic violence definition of domestic violence because it was the infliction of fear of imminent physical injury. *See also Crabtree v. Crabtree*, 484 S.W.3d 316 (Ky. App. 2016), for a similar holding.

Both parties' interpretation of the court's order regarding Appellee's threats of suicide seem reasonable. It is not entirely clear whether or not the court found that Appellee did threaten to harm himself or only that he was alleged to have done so. Accepting Appellant's claim that the trial court found that Appellee threatened to harm himself, we still find that the trial court correctly dismissed the DVO petition. The trial court's order specifically stated that there was no proof that an act of domestic violence was likely to occur again. This is a requirement to the entry of a DVO. KRS 403.740. The court found that Appellee had moved to Western Kentucky and that a restraining order had been entered in the parties' divorce action. This is substantial evidence that domestic violence is unlikely to happen again; therefore, the court correctly dismissed the DVO petition.

Appellant's second argument on appeal is that the trial court erred by limiting the amount of time Appellant's trial counsel had to cross-examine Appellee. After about 16 minutes of cross-examination, the trial court cut off further cross-examination. The court indicated that the hearing had gone on long enough and that Appellant's counsel was rehashing previous testimony.

This issue was not preserved for review. Appellant's counsel did not object when the court ended the cross-examination, nor did she request to put on avowal testimony. "The Court of Appeals is without authority to review issues not raised in or decided by the trial court." *Regional Jail Authority v. Tackett*, 770 S.W.2d 225, 228 (Ky. 1989); *see also Shelton v. Commonwealth*, 928 S.W.2d 817, 818 (Ky. App. 1996). "[E]rrors to be considered for appellate review must be precisely preserved and identified in the lower court." *Skaggs v. Assad, by and through Assad*, 712 S.W.2d 947, 950 (Ky. 1986) (citation omitted).

Appellant's third and final argument on appeal is that the trial court erred by not allowing her to introduce additional evidence at the follow-up hearing on January 17, 2018. Appellant sought to introduce into evidence three audio recordings from her phone which were alleged to be recordings of domestic violence and arguments taking place. Appellant's counsel indicated that these recordings had been previously deleted, but later recovered. Counsel for Appellee objected and argued that Appellant had the opportunity to present her case at the

original hearing and that Appellee had not previously been informed of these recordings and would be unable to respond. The court did not allow the recordings into evidence.

The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). We find that the court did not abuse its discretion in excluding these recordings from evidence. It was not unreasonable for the court to disallow the introduction of these recordings into evidence because Appellee was not given advanced warning of their existence. In addition, the hearing on the DVO petition had happened about four months prior and that was when this evidence should have been introduced.

Based on the foregoing, we affirm the judgment of the trial court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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