

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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000298-ME

DAVID M. TICKE, JR.

APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE CAMERON J. BLAU, JUDGE
ACTION NO. 17-D-00271-001

JULIA A. CABRERA

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: CLAYTON, CHIEF JUDGE; COMBS AND JONES, JUDGES.

COMBS, JUDGE: Appellant, David M. Ticke, Jr. (Ticke), appeals from a January 18, 2018, Domestic Violence Order (DVO) entered against him by the Campbell Circuit Court. Finding no error, we affirm.

Ticke and the Appellee, Julia A. Cabrera (Cabrera), were in a relationship for eight years and have three children together. They never married. On December 15, 2017, Cabrera filed a petition for an order of protection against Ticke, alleging as follows:

We have been split since January [*sic*], although we do have 3 kids together, everyday just about I am harassed by David. He is very verbally abusive and has been physical in the past to where the cops were called. I have tried my best to be civil, but he doesn't know how to. He has showed up at my house in the middle of the night hanging outside my house so much so that my neighbor has had to call the police. I fear he is too unstable to be around our family right now, as his behavior is steadily worsening. I have solely been raising the children and can not [*sic*] much more of this as I have already lost a lot of weight and sleep due to stress. There have also been incidents at school.

On December 15, 2017, the court issued an Emergency Order of Protection (EPO). On January 4, 2018, the court continued the EPO and scheduled a hearing for January 18, 2018. Cabrera appeared *pro se*. Ticke was present and was represented by counsel.

Cabrera testified, *inter alia*, that Ticke has followed her and has shown up at places where she was -- two separate times at a bar and twice outside her work. Once at her work place, Ticke appeared and began banging on the window of her van while she was driving off. Cabrera explained that although she does not think Ticke is the type of person who might seriously injure her, he becomes very aggressive when he is angry.

Cabrera testified that in December 2017, Ticke ripped gallery-wrapped canvas pictures off the wall at her house and threw them at her. They nearly hit her. Ticke refused to leave and called Cabrera a variety of insulting

names. The children were present and witnessed the episode. After that incident, Cabrera called the police.

The court asked Cabrera if she had felt the need to call the police on any other occasion. Cabrera testified that she went to the police station following a confrontation at Ticke's mother's house when she went to pick up the children. Cabrera believed that that particular event occurred in November 2017.

Cabrera testified about another incident in November 2017. She was driving home from work when Ticke blocked the road with his car so that she could not pass him. It was approximately 12:30 a.m. Ticke was "literally sitting in the dark" on the side of the road where he would have had no reason to be. Ticke came over to Cabrera's car, opened the door, grabbed her wrist, and began fighting with her over a "little jar of weed" in the car. Cabrera testified that Ticke "went ballistic." She had red marks on her arms from his grabbing her. Ticke called Cabrera names -- the "typical stuff . . . like a whore."

Cabrera submitted text messages as an exhibit showing the names that he called her. We have reviewed them. They are ranting and obscene.

Kerry Dee, Cabrera's sister, also testified. The court asked Dee if she had witnessed any of the incidents about which Cabrera had testified. Dee testified that she was on the telephone with Cabrera when Ticke came in and started throwing the pictures in December 2017. Dee heard the kids yelling. Ticke was

screaming. Dee has known Ticke since he started dating her sister and is very familiar with his voice. Dee testified that her sister was crying and must have dropped the phone because Dee could still hear “all this commotion.” Dee heard Ticke say, “I’m going to get you.” She explained she could hear “things hitting.”

Ticke testified that he only recalled going to Cabrera’s workplace on one occasion. His workplace is located across the street. Cabrera had said that she was on the way home. Ticke saw her van when he was driving by. He hit the window once because Cabrera was in the vehicle with “multiple guys” smoking marijuana. Cabrera then drove away.

Ticke denied following Cabrera to a bar. He testified that he had arrived at a bar next to work. Cabrera was there with two females having a drink outside. Ticke testified that he “cussed, and kind of threw a fit and . . . left.” Asked why he did that, Ticke testified that Cabrera should have been at home or that if she had wanted to come out, he could have picked up the children.

Ticke denied throwing the pictures in December 2017. He testified that the language that he had used in the text messages was sometimes provoked and that Cabrera also called him names.

In rebuttal, Cabrera testified that she was standing outside at her work-place with two co-workers smoking a cigarette. When she saw Ticke, she got into her vehicle. Cabrera disputed that Ticke was just driving by. She explained

that he would have had to go around the block and make an extra turn even to see where her car would be at work. With respect to the incident at the bar, Cabrera testified that Ticke saw her car, peeled into the bank, and then turned around. He caused a “huge scene” outside the bar and she left.

At the close of the hearing, the court concluded that “based on the totality of the circumstances,” acts of domestic violence had occurred and might again occur. Specifically, it noted that in December 2017, there was an altercation at the home in front of the children with the pictures being taken off the wall and thrown in Cabrera’s general direction. It also focused on the explosive behavior about which there was testimony which was reflected as well in the text messages. Finally, it alluded to the November 2017 incident on the road when Ticke was waiting for Cabrera and manhandled her. With respect to the incidents at the bar and at work, the court observed that Ticke showed a lack of restraint which would place anyone in fear of imminent physical injury. The court commented that Ticke was still in love with Cabrera, that he could not get her “off of [his] brain,” and that he lashed out due to his jealousy. The court restrained Ticke from any unlawful conduct with Cabrera.

On January 18, 2018, the court entered a DVO on a Form AOC-275.3 effective until January 17, 2019, having found “[f]or the Petitioner against the

Respondent in that it was established, by a preponderance of the evidence, that an act(s) of domestic violence and abuse . . . has occurred and may again occur[.]¹

On February 19, 2018, Ticke filed a notice of appeal to this Court.

Before us, he argues that there was no substantial evidence that any of the incidents -- not the text messages, Ticke's presence at Cabrera's place of employment, his presence at the bar, his throwing the pictures, or his residual feelings of jealousy towards Cabrera -- created a fear of imminent physical injury, serious physical injury, or sexual abuse or assault pursuant to KRS² 403.720(1). Ticke sets forth each incident as a separate issue.

Before we address Ticke's arguments, we note that Cabrera did not file a brief. Although CR³ 76.12(8)(c) allows us to impose penalties where the appellee has not filed a brief, that decision lies within our discretion. *Roberts v. Bucci*, 218 S.W.3d 395 (Ky. App. 2007). We elect to consider the appeal on its merits.

KRS 403.720(1) defines domestic violence and abuse as "physical injury, serious physical injury, stalking, sexual abuse, assault, or the infliction of

¹ We consider the court's written findings on the AOC-275.3 coupled with its oral findings, to be sufficient for our review. *See Robbins v. Meeker*, 2016-CA-000302-ME, 2017 WL 242671, at *3 (Ky. App. Jan. 20, 2017) (The trial court's oral findings of fact on the record sufficient for this Court to determine the bases for trial court's rulings and to conduct meaningful appellate review of the sufficiency of evidence).

² Kentucky Revised Statutes.

³ Kentucky Rules of Civil Procedure.

fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple[.]” KRS 403.715(1) mandates that “KRS 403.715 to 403.785 shall 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[.]”

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” KRS 403.740(1). “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.” *Gomez v. Gomez*, 254 S.W.3d 838, 842 (Ky. App. 2008) (internal quotation marks and citation omitted). 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.” *Id.*

We first address the issue that Ticke raised last. The court did not find that Ticke’s jealousy constituted an act of domestic violence. Instead, in the context of admonishing Ticke about his behavior, the court attributed his lashing-out to jealousy.

We consider the remaining arguments together. As to each incident, Ticke maintains that the court’s findings were not supported by substantial

evidence. We disagree. Ticke essentially reargues his case before us. After conflicting evidence the court believed Cabrera. “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). Cabrera’s testimony constitutes substantial evidence to support the trial court’s findings. *Bjelland v. Bjelland*, 408 S.W.3d 86 (Ky. App. 2013).

Ticke’s inability to restrain himself was not limited to text messages and to causing scenes in public. He also exhibited physically aggressive behavior toward Cabrera. As she alleged in her petition, his behavior was steadily worsening. In November 2017, Ticke waited for Cabrera in the dark as she drove home from work, blocked her route, and manhandled her; in December 2017, Ticke tore pictures off the wall and threw them at Cabrera in front of the children. “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). That is precisely what the court did in the case before us. We find no abuse of discretion.

We affirm the January 18, 2018, Domestic Violence Order.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE

Robert A. Winter, Jr.
Fort Mitchell, Kentucky