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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000443-ME

DUSTIN THURMAN APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 17-D-00113-004

JENNIFER THURMAN APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: COMBS, JONES, AND L. THOMPSON, JUDGES.

JONES, JUDGE: Dustin Thurman appeals from the Campbell Family Court's grant of a domestic violence order (DVO) against him in favor of Dustin's former spouse, Jennifer Thurman, for a period of three years. Having reviewed the record in conjunction with all applicable legal authority, we affirm the family court's order.

I. BACKGROUND

Jennifer and Dustin were married and had one minor child in common upon divorcing in 2015. In January 2017, the parties attempted to reconcile, with Jennifer and the child moving in with Dustin at his home in Campbell County, Kentucky. Following Jennifer's allegations relating incidents of domestic violence by Dustin, the parties ceased cohabitating in September 2017.

Beginning in the summer of 2017, Jennifer filed a series of petitions with the family court asking for DVO protection against Dustin following incidents wherein she alleged domestic violence; the prior petitions were either dismissed or abandoned.[1] In a hearing before the family court, Jennifer gave testimony regarding the incident that caused her to file the prior petitions.

First, at some point in June 2017, Dustin was "in a rage" and began breaking Jennifer's personal items in such a way as to make Jennifer afraid for her personal safety. Next, at some point in July 2017, Jennifer was leaving for work when Dustin got angry and picked her up by the bib apron of her uniform. Dustin threatened to slit Jennifer's throat and then threw her two or three feet down a hallway. In so doing, Dustin lost his balance and fell on top of her. Jennifer suffered red marks on her neck from where the straps of the apron contacted her

[1] Dustin attached some portions of the prior cases to his brief; however, only the last petition in this case, 17-D-00113-004, is actually contained as part of the certified record on appeal.

skin. She also suffered slight scratches on her leg resulting from her collision with the wall of the hallway. Jennifer left the house and telephoned police. When police arrived, however, they only informed her she ought to move out. No criminal charges were filed relating to the incident. Jennifer took photographs of the marks on her neck and her injured leg, which she later presented as evidence during the family court hearing. In an incident during August 2017, Jennifer was in the process of moving from Dustin's house when she noticed the doors to her entertainment center were missing. She believed Dustin had burned the doors, because she found hinges in the firepit in the backyard. As she was leaving, Jennifer took her child's diaper bag, and Dustin attempted to take the diaper bag away from her by force. When Jennifer did not release the diaper bag, Dustin put her in a headlock, with his forearm against her throat, and tried to throw her to the ground.

At some point between the August 2017 incident and October 2017, there was another event that began as a dispute over their child's diaper bag. Dustin had driven his vehicle to Jennifer's workplace in order to drop off their child. When Jennifer opened the vehicle's door to retrieve the diaper bag, Dustin responded by shutting the door. Jennifer tried again to open the door, and Dustin again shut the vehicle door. Dustin then pushed Jennifer, and she fell to the ground. Jennifer was holding their child in her left arm at the time.

In January 2018, Dustin sent Jennifer a text message in which he called her "worthless," told her she "suck[s] at life," and repeatedly wished for her to die – "the sooner the better." After urging her to die, Dustin also stated their child "is going to be so much better off without you showing her your terrible ways."

Finally, in March 2018, Jennifer drove her vehicle to pick up their child from Dustin's house. Dustin began talking to Jennifer about their court proceedings, but Jennifer did not wish to discuss those matters with him due to his past behavior. She hurriedly put their child, then three or four years old, in the rear car seat and told the child to buckle up. Jennifer drove to the end of the road on Dustin's street, which had no outlet, to turn around and leave. When she began to pass Dustin's house again, he stepped out in front of her car in such a way that she had to stop the vehicle and demanded that she ensure the child's car seat was buckled. He held on to Jennifer's side mirror, tried to open the rear passenger door, and began pounding on the rear passenger window. Apparently, the child had clicked the top portion of her safety belt but had not yet clicked the bottom portion. When the child buckled the bottom portion, Dustin stepped aside and allowed Jennifer to drive away.

Interspersed with these incidents, Jennifer filed a series of petitions with the family court requesting the protection of a DVO. Dustin alleges these

petitions were filed on June 15, 2017 (which he refers to as "Trailer 1"); August 29, 2017 ("Trailer 2"); and October 30, 2017 ("Trailer 3"). These previous petitions are not contained within the record. The exhibits to Dustin's brief indicate that the first petition was dismissed because neither party appeared at the hearing, and that the second petition was dismissed at Jennifer's request. The third petition, however, resulted in the entry of a DVO. Dustin appealed the DVO to our Court. Upon review, we vacated the DVO and remanded the matter for further proceedings because Dustin was not properly served prior to its entry. *See Thurman v. Thurman*, 560 S.W.3d 884 (Ky. App. 2018). On remand, Jennifer voluntarily dismissed the petition. The reason for this is not entirely clear. However, it appears most likely she did so in anticipation of filing another petition aimed at more recent events. Indeed, a few days prior to dismissal, Jennifer had filed a fourth petition ("Trailer 4"). This petition included allegations contained in some of the previous petitions as well as allegations related to Dustin's more recent conduct toward her that was not contained in the prior petitions.

The family court held a hearing on the issues alleged in Trailer 4 on February 14, 2019, in which the parties were the only two witnesses. During the hearing, Jennifer testified to the aforementioned incidents relating to Dustin's acts. She also produced photographs of her injured neck and leg, a copy of Dustin's text message in which he desired her death, and a video recording of the March 2018

incident in which he prevented her from driving away from his residence.

For his part, Dustin denied putting Jennifer in a headlock or threatening her. Dustin admitted sending the text message to Jennifer, but he denied the message was a threat; instead, he contended the message was part of a larger disagreement regarding the parenting of their child. Dustin denied Jennifer was afraid of him, stating there were occasions when she had "gotten in [his] face" and assaulted him. Finally, Dustin asserted the March 2018 vehicle incident was due to his concern for their child's safety. He alleged Jennifer had been in at least three car accidents, and Dustin stated he did not want Jennifer to drive with the child's car seat unbuckled.

At the conclusion of the hearing, the family court found Jennifer had met her burden of showing she was entitled to a DVO by a preponderance of the evidence. The family court explained there was a pattern of problems between the parties, and Jennifer's testimony had been consistent on her issues with Dustin. The family court recited the history of the relationship. Jennifer asserted her fear from the June 2017 incident, when Dustin was breaking her things. She filed a petition after that incident but dismissed it. The family court then acknowledged the July 2017 incident, in which Dustin picked Jennifer up, threatened to cut her throat, and threw her down a hallway. The family court specifically mentioned the photographs showing red marks on Jennifer's throat, which the court interpreted as

supporting her account. The family court also cited the incident in which Dustin put Jennifer in a headlock and threw her to the ground. The family court believed Jennifer when she stated she was afraid of Dustin. Ultimately, the family court found Jennifer had presented sufficient evidence supporting entry of a DVO for a three-year period. This appeal followed.

II. ANALYSIS

Dustin presents two issues on appeal. First, he argues issue preclusion should have barred the family court from considering testimony and evidence regarding acts from the summer of 2017 in the current proceeding. Second, Dustin argues Jennifer did not meet her burden of proving a DVO was necessary by a preponderance of the evidence.

We are guided by the following standards in reviewing the family court's entry of a DVO:

> Domestic violence orders are a statutory creation, their issuance governed by Kentucky Revised Statute (KRS) 403.740. That provision, in relevant part, reads: "Following 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 403.740(1).

Walker v. Walker, 520 S.W.3d 390, 392 (Ky. App. 2017). "On appeal, we review the trial court's factual findings for clear error, and legal conclusions for abuse of

discretion." *Id*. (citing *Caudill v. Caudill*, 318 S.W.3d 112, 114-15 (Ky. App. 2010)).

For his first issue on appeal, Dustin contends the family court should not have considered incidents from the summer of 2017 as part of Jennifer's fourth petition. He argues the incidents should have been barred by *res judicata*, specifically issue preclusion, because Trailer 2 was dismissed with prejudice. Dustin asserts a dismissal with prejudice has the effect of a judgment on the merits of the dismissed action in his favor. "A dismissal with prejudice, of course, acts as a bar to again asserting the cause of action so dismissed. It thus has the effect of a judgment on the merits constituting the cause res judicata." *Polk v. Wimsatt*, 689 S.W.2d 363, 364 (Ky. App. 1985). Therefore, Dustin argues the family court should not have considered, in the present action, the incidents from the summer of 2017 which formed the basis for Trailer 2.

As a primary matter, we note that the records for Trailers 1, 2, and 3 are not contained within the certified record. Dustin attached the petitions for these prior proceedings as appendices to his brief and has attempted to argue the merits by citing to his own appendices. This is contrary to CR[2] 76.12(4)(c)(vii), which states, "[e]xcept for matters of which the appellate court may take judicial notice, materials and documents not included in the record shall not be introduced

[2] Kentucky Rules of Civil Procedure.

or used as exhibits in support of briefs." It is improper to include extraneous documents in a brief's appendix which are not part of the certified record on appeal. *See Ray v. Ashland Oil, Inc.*, 389 S.W.3d 140, 144 (Ky. App. 2012). "Matters not disclosed by the record cannot be considered on appeal." *Id.* at 145 (quoting *Montgomery v. Koch*, 251 S.W.2d 235, 237 (Ky. 1952)). "If evidence is missing from the record, we must assume that the trial court's decision is supported by the record." *King v. Commonwealth*, 384 S.W.3d 193, 194 (Ky. App. 2012) (citing *Smith v. Smith*, 235 S.W.3d 1, 5 (Ky. App. 2006) and *Commonwealth v. Thompson*, 697 S.W.2d 143, 145 (Ky. 1985)).

Even if we were to take judicial notice of the prior proceedings, however, we find no merit to Dustin's arguments. The family court allowed testimony concerning the prior events to place the parties' relationship in the proper context; the new allegations in Trailer 4, which occurred in 2018 and were not contained as part of any prior petitions, are sufficient in and of themselves to justify entry of a DVO. The family court allowed testimony regarding the prior incidents, but its DVO was not issued solely because of those incidents.

Moreover, we have previously held that issue preclusion does not apply in other contexts relating to a DVO proceeding. "KRS 403.735 expressly allows courts to look back and consider prior protective orders. . . . KRS 403.740 only requires a court determine whether domestic violence has occurred at some

point in the past." *Walker*, 520 S.W.3d at 392. These statutes are in place 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[.]" *Id*. at 393 (quoting KRS 403.715(1)). Although *Walker* considered a different question, *i.e.*, "whether the proof sufficient for the issuance of one DVO can be considered as proof for a subsequent DVO[,]" *id*. at 392, we are persuaded by its reasoning in this case as well. Based on these principles, we discern no error by the family court in considering Jennifer's testimony on episodes of domestic violence which occurred during the summer of 2017.

In his second issue on appeal, Dustin contends the family court erroneously granted a DVO despite Jennifer's failure to produce evidence amounting to a preponderance of the evidence that a DVO was necessary in this case. Specifically, he contends (1) any evidence of domestic violence prior to September 7, 2017, was barred by issue preclusion; (2) the January 2018 text messages did not constitute a threat; and (3) the March 2018 incident involving Jennifer's vehicle was not domestic violence.

We review a trial court's findings of fact for clear error. CR 52.01. Such factual findings are not clearly erroneous if they are supported by substantial evidence. *Owens-Corning Fiberglas Corp. v. Golightly*, 976 S.W.2d 409, 414 (Ky. 1998). "Substantial evidence has been conclusively defined by Kentucky courts as

that which, when taken alone or in light of all the evidence, has sufficient probative value to induce conviction in the mind of a reasonable person." *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007) (citations omitted). Additionally,

> [a] family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it. A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous.

Id.

The family court may issue a DVO if it "finds by a preponderance of the evidence that domestic violence and abuse has [sic] occurred and may again occur[.]" *Walker*, 520 S.W.3d at 392 (quoting KRS 403.740(1)). "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." *Caudill*, 318 S.W.3d at 114 (citing *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007)).

As discussed previously, the family court did not err in considering Jennifer's testimony on incidents occurring during the summer of 2017 to place the parties' relationship in the proper context. Many of the described incidents included acts of physical violence; *e.g.*, picking Jennifer up and throwing her down the hallway, pushing Jennifer down, and placing Jennifer in a headlock. At one

point, Dustin threatened to slit Jennifer's throat, which could reasonably be construed as inflicting fear of imminent physical injury. Even if not based on these incidents as demonstrating an act of domestic violence, they tended to establish that Jennifer had reason to fear Dustin. Additionally, the acts that occurred in 2018 are sufficient to show an act of domestic violence. Dustin sent text messages to Jennifer suggesting that she should die. When viewed in combination with his past actions, these are indicative of threatening behavior. Moreover, in the final incident, Jennifer testified that Dustin stepped in the road preventing her from leaving after he confronted her in an angry manner; he then held on to the side mirror of her vehicle, tried to open the rear passenger door, and began pounding on the rear passenger window. Given Dustin's prior physical assaults on Jennifer, we believe the family court acted well within its discretion in finding this conduct constituted the infliction of fear of imminent physical injury or serious physical injury.

"The definition of domestic violence and abuse, as expressed in KRS 403.720(1), includes 'physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members[.]'" *Id*. The family court considered Jennifer's testimony recounting the incidents and found she had met her burden of

presenting a preponderance of evidence justifying entry of a DVO. We discern no error.

III. CONCLUSION

For the foregoing reasons, we affirm the domestic violence order entered by the Campbell Family Court on February 14, 2019.

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Kevin J. Moser Fort Mitchell, Kentucky	Brandie M. Ingalls Covington, Kentucky