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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-000533-ME

JUAN GERARDO MENDOZA — APPELLANT

v.

APPEAL FROM BOURBON FAMILY COURT,
HONORABLE LISA HART MORGAN, JUDGE
ACTION NO. 18-D-00006-001

ASHLEY WARREN — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; JOHNSON AND KRAMER, JUDGES.

KRAMER, JUDGE: Juan Mendoza appeals from a domestic violence order (DVO) the Bourbon Family Court entered against him in favor of Ashley Warren. After careful review of the record, we affirm.

Juan and Ashley share two children together and have lived together for approximately nine years. Their relationship was filled with animosity and

turmoil from the outset. Eventually, Ashley petitioned for the family court to enter a DVO against Juan. In her petition and at the DVO hearing, Ashley testified to an extensive history of abuse and controlling behavior, dating back to the beginning of their relationship in 2009, some of which occurred in front of the couple's children. The most recent occurrence of abuse centered around a text message Juan received. When Juan thought Ashley was reading the message, he became very angry and an argument ensued. The argument ended when Juan lifted his foot as if he were going to kick Ashley in the face, which led her to fear for her safety. In response, Ashley sought and received an emergency protective order.

At the DVO hearing, the family court heard testimony from Ashley and Juan. The court found Ashley's testimony to be more credible and entered a DVO against Juan in February 2018. Juan timely filed this appeal.

Our standard of review is whether the family court's finding of domestic violence is clearly erroneous pursuant to CR[1] 52.01. *Caudill v. Caudill*, 318 S.W.3d 112, 114 (Ky. App. 2010) (citing *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986)). Findings of fact "are not clearly erroneous if they are supported by substantial evidence." *Id*. at 114-15 (citing *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003)).

[1] Kentucky Rule of Civil Procedure.

On appeal, Juan argues that: (1) the evidence of his past abuse was too remote to be relevant and overly prejudicial concerning its probative value; and (2) the family court's findings were not supported by substantial evidence.

Regarding Juan's first argument, KRS[2] 403.740 permits a family court to issue a domestic violence order "if a court finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur[.]" There is no language in the statute restricting the family court's capacity to hear evidence regarding incidents that occurred in the past. Simply put, evidence of past abuse between the parties to a DVO hearing is relevant, regardless of the timeframe. *See Crabtree v. Crabtree,* 484 S.W.3d 316, 319 (Ky. App. 2016) ("Appellee's allegations were based entirely upon her long history with Appellant[.]").

Juan further argues that even if the past abuse is relevant, it is "too prejudicial considering its probative value" pursuant to KRE[3] 403. For this proposition, Juan primarily relies on *Robey v. Commonwealth*, 943 S.W.2d 616 (Ky. 1997). However, *Robey* is easily distinguishable from the instant appeal. *Robey* was a criminal case wherein the defendant was on trial for rape and sought to exclude evidence of a previous sexual assault against a different victim that

[2] Kentucky Revised Statute.

[3] Kentucky Rule of Evidence.

occurred sixteen years ago. The Kentucky Supreme Court agreed with *Robey* and indicated the evidence of the past assault should be excluded as overly prejudicial.

Here, the past abuse Juan sought to exclude was between Juan and Ashley, not another victim; furthermore, it was the beginning of a pattern of abuse that Ashley testified occurred throughout their relationship. "KRS 403.740 only requires a court determine whether domestic violence has occurred at *some point in the past*." *Walker v. Walker*, 520 S.W.3d 390, 392 (Ky. App 2017) (emphasis added). The family court used the evidence of Juan's past abuse, along with the most recent incident, to determine "that domestic violence and abuse has occurred and may again occur." Therefore, the evidence of Juan's past abuse was not overly prejudicial and was properly admitted into evidence.

Juan's second argument is that the family court's findings are not based on substantial evidence. Substantial evidence is evidence of sufficient probative value that permits a reasonable mind to accept as adequate the factual determinations of the family court. *Moore*, 110 S.W.3d at 354. We are also mindful the family court "has the right to believe the evidence presented by one litigant in preference to another." *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

After hearing the competing testimony from Ashley and Juan, the family court chose to believe Ashley's version of events, ultimately concluding

that an act of domestic violence had occurred and that Ashley was the victim. In addition to the specific acts of abuse, there was testimony from Ashley regarding her fear given the long history of Juan's abusive and controlling behavior. As a result, the family court issued the DVO for Ashley's protection. We have reviewed the entirety of the evidence and conclude the family court did not err in its decision.

In light of the foregoing, the Bourbon Family Court's February 2018 DVO against Juan Mendoza is AFFIRMED.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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