RENDERED: MARCH 22, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001514-ME

JEREMY RAFUS — APPELLANT

v.

APPEAL FROM CAMPBELL CIRCUIT COURT
HONORABLE RICHARD A. WOESTE, JUDGE
ACTION NO. 18-D-00164-002

AUBREY RAFUS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: CLAYTON, CHIEF JUDGE; ACREE AND TAYLOR, JUDGES.

CLAYTON, CHIEF JUDGE: Jeremy Rafus appeals from the Campbell Circuit Court's issuance of a Domestic Violence Order ("DVO") against him. Upon review, we affirm.

BACKGROUND

Jeremy and Aubrey Rafus were married and had two children together, one child born in 2007 and the other child born in 2010. Aubrey originally filed a petition for an order of protection ("DVO Petition") against Jeremy on July 2, 2018 in the Campbell Circuit Court ("DVO Petition #1"), stating that the following events had occurred on June 30, 2018:

> Jeremy was drunk and got upset with me for wanting the truth about being with or talking to another woman. He the [sic] followed me into the kitchen grabbed me by my neck and chocked [sic] me for a few seconds. In doing this he dug his nails into the back of my neck. He then put his hand up to punch me and I covered my head. He then went into the living room and started throwing objects and taking apart my computer. He went upstairs to lay down and I grabbed the children and left.

The circuit court entered an emergency protection order ("EPO") containing instructions that Jeremy was not to contact Aubrey. Aubrey failed to appear at the hearing for DVO Petition #1, and the trial court ultimately dismissed DVO Petition #1 without prejudice.

Aubrey filed a second DVO Petition against Jeremy on August 9, 2018 ("DVO Petition #2). In DVO Petition #2, Aubrey alleged that the following events occurred: "Jeremy was drunk and upset. Chocked [sic] me and broke my computer. I Grabbed [sic] my children and left the house. Dug his nails into my neck."

The trial court held a hearing on DVO Petition #2 on September 13, 2018, at which both Jeremy and Aubrey were present. At the hearing, Aubrey clarified that she was referring to the same incident in DVO Petition #2 as she had in DVO Petition #1. She indicated that she had failed to attend the hearing on DVO Petition #1 because she had gone to the incorrect courtroom, and that she had filed DVO Petition #2 after the trial court dismissed DVO Petition #1.

At the hearing on DVO Petition #2, Aubrey introduced a photo of red scratch marks on an individual's neck, to which Aubrey testified that she was the individual in the photograph, and that the photograph was a fair and accurate depiction of the injuries to her neck inflicted by Jeremy. Further, Aubrey testified that, due to the injuries she sustained during the alleged incident, she went to the hospital on July 2, 2018, and was diagnosed with soft tissue damage to her neck.

Aubrey further testified at the hearing that abuse had occurred throughout the parties' relationship, and she introduced a Facebook message from Jeremy to Aubrey dated July 20, 2018, a time during which he was subject to the EPO. The message stated, among other things, that she was "a disgusting human." Aubrey further testified at the hearing that Jeremy had called her over 500 times using a "splicer" – a computer program whereby an individual can continuously call someone using various phone numbers that are not their own – also during time periods under which he was subject to the EPO. These continuous phone

calls resulted in Aubrey having to change her phone number twice. In conclusion, Aubrey testified that if the DVO was not issued that she believed that Jeremy would attempt physical contact with her again and that such contact could become harmful.

Jeremy also testified at the hearing and denied that the entire incident had occurred, including him making the marks on Aubrey's neck as shown in the photograph. He further denied Aubrey's allegations that he had called her numerous times using the splicer and denied having ever stalked or threatened Aubrey in any other way or at any other time.

On September 13, 2018, the Campbell Circuit Court entered a three-year DVO against Jeremy on a Form AOC-275.3 restraining Jeremy from committing further acts of abuse or threats of abuse, stalking, or sexual assault, requiring Jeremy to stay 500 feet away from Aubrey, and mandating that any communications be made through Aubrey's mother. Under the order's heading, "**ADDITIONAL FINDINGS**" (emphasis original), the court found that Aubrey had established by a preponderance of the evidence that an act or acts of domestic violence and abuse had occurred and may again occur. Additionally, the family court made handwritten notations on the docket sheet order entered September 13, 2018, which stated that the trial court had made a finding that Jeremy had choked Aubrey, left markings on her neck, and that an assault had occurred. Further, at the

closing of the evidence at the hearing, the family court orally indicated that it found Aubrey's testimony that an assault had occurred credible and additionally found that domestic violence was likely to occur again due to the tumultuous nature of the parties' relationship and the fact that they had children together. Jeremy thereafter filed this appeal, arguing that the preponderance of the evidence failed to establish that an act of domestic violence or abuse occurred or may occur again.

ANALYSIS

Upon appellate review of 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 v. Gomez*, 254 S.W.3d 838, 842 (Ky. App. 2008) (citations omitted). A finding made by the trial court is not clearly erroneous if it is "supported by substantial evidence or, in other words, evidence that when taken alone or in light of all the evidence has sufficient probative value to support the trial court's conclusion." *Rupp v. Rupp*, 357 S.W.3d 207, 208 (Ky. App. 2011) (citations omitted). Further, "due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Kentucky Rules of Civil Procedure (CR) 52.01; *see also Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986).

We first note that, because Aubrey did not file a brief, we may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR 76.12(8)(c). "The decision as to how to proceed in imposing such penalties is a matter committed to our discretion." *Roberts v. Bucci*, 218 S.W.3d 395, 396 (Ky. App. 2007) (citations omitted). In this case, if we chose to accept Jeremy's statement of the facts and issues in his brief as correct pursuant to CR 76.12(8)(c)(i), we would still be, in essence, utilizing the same standard of review as we otherwise would, because "[w]here those facts conflict with findings of fact by the trial court . . . we may accept them *only where we can say that the trial court's findings are clearly erroneous*." *Whicker v. Whicker*, 711 S.W.2d 857, 858-59 (Ky. App. 1986) (emphasis added) (citations omitted). Moreover, in an appeal such as this concerning allegations of domestic violence and the court's imposition of a DVO against an individual, we decline to reverse the judgment without an independent review of the record and consideration of the merits of the case.

We also note that, in contravention of CR 76.12(4)(c)(iv), Jeremy's brief failed to include "ample references to the specific pages of the record, or tape and digital counter number in the case of untranscribed videotape or audiotape

recordings, . . . supporting each of the statements narrated in the summary." Further, as required by CR 76.12(4)(c)(v), nowhere can this Court discern in the "Argument" section of Jeremy's brief any specific citations to the record on appeal supporting each of his arguments or references to the record showing whether the issue was properly preserved for review. These shortcomings do not warrant striking Jeremy's brief or reviewing the appeal solely for manifest injustice, as we are permitted to do by both CR 76.12(8)(a) and *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010). However, we emphasize that it is not an appellate court's duty to search the record for applicable evidence. *Baker v. Weinberg*, 266 S.W.3d 827, 834 (Ky. App. 2008).

Turning to the particular facts and applicable law in this case, pursuant to Kentucky Revised Statutes (KRS) 403.740(1), "[f]ollowing a hearing . . . 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[.]" Therefore, pursuant to the statutory language, a trial court must make two separate findings – that domestic violence and abuse has occurred as well as the likelihood of future domestic violence. *Guenther v. Guenther*, 379 S.W.3d 796, 802 (Ky. App. 2012).

Contrary to Jeremy's assertions in his brief, the trial court was required to make the foregoing findings under the "preponderance of the evidence"

standard rather than the "clear and convincing evidence" standard. "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*, 254 S.W.3d at 842 (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).

Regarding evidence that domestic violence may again occur as required by KRS 403.740(1), the Kentucky Supreme Court has observed that "[t]he 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[.]"

In this case, we have examined the record in its entirety and are not persuaded by Jeremy's arguments that the trial court's findings were clearly erroneous or that the trial court abused its discretion. While it is true that the testimonial evidence was contradictory, as previously discussed, "[d]eciding 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." *Hunter v. Mena*, 302 S.W.3d 93, 98 (Ky. App. 2010) (citing CR 52.01). After hearing the testimony from Aubrey and Jeremy, the trial court chose to believe Aubrey's version of events, ultimately concluding that an act of domestic violence had occurred, and that Aubrey was the victim. Aubrey's testimony constitutes substantial evidence to support the trial court's findings. *Bjelland v. Bjelland*, 408 S.W.3d 86, 89 (Ky. App. 2013). Further, based on the totality of the evidence concerning Jeremy continuing to contact Aubrey while the EPO was in effect, the fact that the parties had children together, and the ongoing conflict between them, the trial court's conclusion that domestic violence and abuse may occur again was not clearly erroneous.

In light of the foregoing, the Campbell Circuit Court's September 13, 2018, DVO against Jeremy is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Darrell A. Cox
Covington, Kentucky

NO BRIEF FILED FOR APPELLEE