

RENDERED: February 4, 2005; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court of Appeals

NO. 2004-CA-000600-ME

ANGELA F. JOHNSON

APPELLANT

v. APPEAL FROM HARDIN CIRCUIT COURT
HONORABLE JANET P. COLEMAN, JUDGE
ACTION NO. 03-D-00028

CHRISTOPHER J. JOHNSON

APPELLEE

OPINION
AFFIRMING

** ** * * *

BEFORE: BARBER AND VANMETER, JUDGES; HUDDLESTON, SENIOR JUDGE.¹

VANMETER, JUDGE: Appellant Angela F. Johnson appeals from a domestic violence order entered against her by the Hardin Circuit Court. We disagree with her contentions that the trial court abused its discretion by finding that she committed domestic violence, and that the court erred by entering the domestic violence order (DVO) for a period of three years.

Hence, we affirm.

¹ Senior Judge Joseph R. Huddleston sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110.(5)(b) of the Kentucky Constitution and KRS 21.580.

Angela and appellee Christopher J. Johnson married in 1994, and their three children were born in 1994, 1995, and 1998. The parties subsequently separated, and in January 2004 they signed a separation agreement under which they would share joint custody, with Angela serving as the children's primary residential custodian.

Some six weeks later, on February 21, 2004, Christopher filed in the Hardin District Court a domestic violence petition alleging that the two older children

willingly came to me concerned about their mother's alcoholism. Accompanying the alcohol abuse is frequent physical abuse such as frequent biting, yanking hair out by the roots, smothering the children with her hand(s) or body, punching about the face and/or body, striking the children with any object in reach (vodka bottles), physically throwing them about the room, kicking with force on the face and groin area, pinching, grabbing and squeezing the neck, mouth, and nose, restricting breathing of the children with her hand(s), picking them up by the hair of the head, slapping the face and about the body.

An emergency protective order was issued. As the dissolution action was still pending, a hearing was set for February 24 before the Hardin Circuit Court.

During the hearing Angela introduced a September 2003 videotape in which the parties' oldest child, Matthew, alleged that Christopher had physically mistreated him. Matthew then testified, alleging that Angela had abused him and that such

abuse worsened whenever she drank vodka. Matthew subsequently admitted that he had lied when making his videotaped statements about Christopher because he then was mad at his father. Although he admitted that he currently was mad at Angela, he denied that his allegations against her were false.

Next, the parties' middle child testified, making numerous confusing or inconsistent statements. Angela denied the children's allegations, stating that she never had bitten them, and that although she sometimes purchased vodka for social gatherings during the children's visits with Christopher, she usually did not drink due to stomach problems. Angela's testimony was corroborated by two family members who testified that they had seen the children bite one another.

The circuit judge described the case as a very difficult one and opined that the marks on the children did not look like bite marks. The judge, who "entirely" or "pretty heavily" discounted Jessica's statements, commented on Matthew's recanting of his previous allegations of mistreatment by Christopher. The judge indicated that she would like to see psychological evaluations of Matthew or both children, but she declined to find that the children were "totally lying."

The parties and the judge discussed the pending social services investigation, possible alternatives to the entry of a DVO, and the possible option of having supervised visitation

between Angela and the children. The judge stated that she would be helped by additional investigation and by psychological evaluations of the children, that a DVO need not continue for the entire three-year period authorized by KRS 403.750(2), and that the matter would be set for review if further information became available. Commenting that despite her misgivings she needed to protect the children, the judge entered a DVO for three years, finding that "it was established, by a preponderance of the evidence, that an act(s) of domestic violence or abuse has occurred and may again occur." The children were placed in Christopher's custody and Angela was provided with supervised visitation pending further orders. This appeal followed.

Angela first contends that the trial court erred by finding that substantial evidence showed that domestic violence or abuse had occurred and might again occur. We disagree.

KRS 403.720(1) defines domestic violence as including "physical injury, serious physical injury . . . [or] assault, or the infliction of fear of imminent physical injury, serious physical injury . . . or assault between family members," including parents or children. KRS 403.720(2). KRS 403.750(1) provides that if, after a hearing, the court finds by "a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur," it may

restrain the adverse party from having further contact with the petitioner, from committing further violence, or from disposing of the parties' property. Any such order may be effective for no more than three years, as determined by the court, and either party may seek to amend a DVO. KRS 403.750(2) and (3).

A trial court's findings of fact may be set aside only if clearly erroneous, with the dispositive question being "whether or not those findings are supported by substantial evidence."² Substantial evidence is defined as

"[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.³

² *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (footnote omitted).

³ *Id.* at 354 (footnotes omitted) (quoting *Black's Law Dictionary* 580 (7th ed. 1999), *Blankenship v. Lloyd Blankenship Coal Co.*, 463 S.W.2d 62, 64 (Ky. 1970), CR 52.01, and 7 Kurt A. Phillips, Jr., *Kentucky Practice*, CR 52.01, note 55, comment 8 (5th ed. 1955)).

As stated in *Cross v. Clark*,⁴ “[t]he determination of the weight of conflicting evidence and of the credibility of witnesses rests exclusively within the province of” the trier of fact, who “may believe any of the witnesses in whole or in part, and may accept the testimony of one set of witnesses to the exclusion of that of another or the testimony of one witness as against the testimony of a number of witnesses.”

Here, the trial judge clearly struggled with the conflicting evidence, openly expressing her doubts regarding the truth or reliability of the children’s allegations. At the same time, the judge declined to find that the allegations were not truthful. The judge expressed interest not only in psychological evaluations of the children, but also in whether there were feasible alternatives to the issuance of a DVO. The possibility of entering a DVO for only sixty days pending further investigation was rejected when the court entered a DVO for three years, but the judge advised the parties that the matter would be set for review if further information became available.

The evidence certainly did not provide the trial court with overwhelming proof of domestic violence. However, as noted

⁴ 308 Ky. 18, 213 S.W.2d 443, 446 (1948).

by the Kentucky Supreme Court,⁵ “[t]he preponderance of the evidence standard” applicable to domestic violence cases “merely requires that the evidence believed by the fact-finder be sufficient” to show that it is “more likely than not” that domestic violence occurred.

The trial court was entitled to weigh the children’s testimony and to conclude, even after discarding portions of the testimony, that it was more likely than not that the children were victims of domestic violence at the hands of their mother. Although it appears from the record that the court was not overwhelmingly convinced by the evidence, the court did specifically find, by marking the appropriate box on the AOC-275.3 Order of Protection form, that “it was established, by a preponderance of the evidence, that an act(s) of domestic violence or abuse has occurred and may again occur[.]” Regardless of whether members of this panel might have reached different conclusions if sitting as triers of fact below, the trial court was in the best position to evaluate and weigh the testimony of the witnesses, and we cannot say that the evidence was insufficient to show by a preponderance of the evidence that Angela committed domestic violence against the children. We therefore cannot say that the trial court clearly erred in making its findings of fact.

⁵ *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

Next, Angela asserts that the trial court abused its discretion by entering a DVO against her. However, once a court determines that domestic violence has occurred and may again occur, it is entitled to take any of the steps set out in KRS 403.750(1). As we declined above to find that the trial court clearly erred by finding that domestic violence occurred, it follows that the court did not abuse its discretion by entering the DVO. Further, even though the trial court did not specifically order further investigations or evaluations, the record indicates that a social services investigation had begun, that the court specifically expressed an interest in psychological evaluations, and that the court in essence invited the parties to return if further information became available. Under these circumstances we cannot say that the trial court abused its discretion by entering the DVO.

The court's order is affirmed.

ALL CONCUR.

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