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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2014-CA-000543-ME

KYLE RAINER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT, FAMILY DIVISION
HONORABLE KATHY STEIN, JUDGE
ACTION NO. 03-D-00589-003

BRANDY BUCHANON
AND
BRANDY BUCHANON, ON BEHALF OF
B.L.G.R., MINOR CHILD — APPELLEES

OPINION
REVERSING
** ** ** ** **

BEFORE: ACREE, CHIEF JUDGE; JONES AND NICKELL, JUDGES.

JONES, JUDGE: This appeal arises from an order of the Fayette Circuit Court, Family Division, granting Appellees Brandy Buchanon and her minor child a domestic violence order ("DVO") against Appellant Kyle Rainer. Appellant argues that there was insufficient evidence to support entry of the DVO. Having

reviewed the record below, we agree. Accordingly, for the reasons more fully explained below, we REVERSE.

I. Background

The Appellant, Kyle Rainer ("Father") and the Appellee, Brandy Buchanan ("Mother"), have a daughter in common, the Appellee, B.L.G.R. ("Child").[1] Mother and Father were never married and do not reside together. During the relevant time period, the parties operated under an informal custody agreement whereby Child lived with Mother, but visited Father on Sundays.

On January 15, 2014, Mother filed a domestic violence petition / motion in Fayette Circuit Court. Mother's petition alleged the following:

> Beginning 12/22 Kyle called in an upset manner about a gift his mother sent for my daughter. I told him I couldn't talk right now. Because my phone had low minutes. He continued to call back over the next 3 days over 10 times. When I did not respond to calls he came over at least 3 to 4 times banging on my door. Scaring my daughter. When I did confront him outside my apartment he was very angry and mean. He scared me and my daughter by yelling. I believe my daughter was head-butted one time 12-30 by him. Sunday January 5th she visited him from 1:00 to 4:30 p.m. That evening she complained to me in the bath that "Daddy head-butted her 2 times and told her to keep it a secret from Mommy." She also complained of him hitting/hurting her mouth and gums trying to make her eat food. Her front 2 adult teeth are growing in so she was extremely sensitive. January 14th she said she was also head-butted that day at Kroger.

[1] At the time of the underlying proceedings, Child was six years old.

Based on these allegations an emergency order of protection ("EPO") was entered restraining Father from "committing further acts of abuse or threats of abuse" and limiting Father's contact with Mother and Child to the telephone.

On January 23, 2014, the family court conducted a hearing on Mother's motion seeking to convert the EPO into a DVO. This hearing lasted approximately six minutes. Mother was the only witness to testify at the hearing. Mother's testimony consisted primarily of recounting the allegations in her petition. Mother also testified that she had a history of domestic violence with Father. From a review of the record, it appears that this included past orders of protection being issued against Father in 2003 and 2004.

Father attended the hearing, but did not offer any testimony on his behalf other than to comment that he denied the charges and was retaining an attorney to contest them.

Following the hearing, the family court entered a DVO for a term of two years restraining Father from "committing further acts of abuse or threats of abuse" against Mother and Child and from any contact with Mother and Child. Father was also ordered to "remain at least 50 feet away from Mother and Child." No written findings of fact accompanied the family court's order.

On January 31, 2014, with the assistance of counsel, Father filed a petition to reconsider with the family court. In his motion, Father asked the family court to allow him to testify in his defense and to call witnesses who will "testify that the act of 'headbutting' that has been characterized as abuse is a game that he

plays with his daughter, that is playful and in no way aggressive or hostile toward her." In light of this "new evidence," Father asked the family court to "lift the no contact DVO against him as to his daughter."

Father's motion came before the family court for a hearing on February 13, 2014. At the hearing, upon Father's request, the family court entered an amended DVO correcting a typographical error whereby Father had been restrained from coming within 50 feet of his own residence. However, due to the fact that one of Father's witnesses did not appear, the family court rescheduled the evidentiary portion of the hearing.

On February 17, 2014, the matter came before the family court once again for an evidentiary hearing on Father's motion. Father's current girlfriend and ex-girlfriend both testified at the hearing. Each testified that she had observed Father engage in the headbutting game with Child and did not believe that Father intended to hurt or frighten Child or that he acted out of any anger or hostility toward Child. Father also called Julie Cunnagan, social worker, to testify on his behalf. Cunnagan testified that she investigated Father's conduct on behalf of Child Protective Services and no cause to proceed was found. She indicated that Father admitted to her that he engaged in this type of rough play with Child, but that Father had since determined that it was inappropriate and would avoid it in the future. She further testified that while Mother reported that Child was frightened of Father, Child stated to her that she was not afraid of Father.

Father testified that he did not headbutt Child with any hostile or aggressive intent. Rather, he explained that the incidents of headbutting were intended as a game. He indicated that he now realizes that the headbutting game was inappropriate and too rough. He testified that he would not engage in any similar conduct with Child in the future.

Mother testified again. Her testimony virtually mirrored her previous testimony and the allegations set forth in her petition.

Over Father's objection, Mother was allowed to cross-examine Father regarding certain images that were posted on his Facebook page. Among the images were a picture of a "scary" clown, a photograph of Father's living room where a Walking Dead doll can be seen, and a picture of a head of hair with horns projecting from it.

Prior to allowing introduction of the Facebook images, the family court indicated that it was going to partially grant Father's motion and amend the DVO down from "no contact" to "no violent contact." After considering the Facebook posts, however, the family court denied Father's motion by order entered February 27, 2014.

This appeal followed.

III. Standard of Review

Appellate review of a trial court's decision regarding issuance of a DVO "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). Findings of fact will not be set aside unless they are clearly erroneous, that is, unsupported by substantial evidence. Kentucky Rules of Civil Procedure (CR) 52.01; *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003).

III. Analysis

A. Procedural Issues

Before we address the substantive merits of Father's arguments, we must first consider Mother's request for us to dismiss this appeal. Mother asserts that we should dismiss this appeal because Father did not timely file his notice of appeal and failed to set forth each separate judgment in his notice of appeal.

The family court entered the DVO on January 23, 2014. Father did not file his notice of appeal until March 28, 2014, over thirty days later. However, Father did file a notice of appeal within thirty days of the family court denying his motion to reconsider. Mother argues that Father's motion to reconsider did not operate to toll the finality of the family court's DVO because Father's motion "did not qualify as a Rule 59 motion" as it was based on evidence that could have been discovered at the time of the earlier DVO hearing.

Father filed his motion to reconsider within ten days of the family court's DVO. Father stated in his motion the reasons he was asking the family court to alter, amend or vacate the DVO. While the family court was free to reject those reasons, Father's action in timely filing a motion seeking to amend the prior

order and setting forth the grounds in support thereof was sufficient to toll the thirty-day period for filing an appeal. In other words, Father filed a timely appeal.

Next, Mother argues that Father's appeal should be dismissed because Father's notice of appeal listed only the February 27, 2014, order, which was simply an order denying his motion to vacate, set aside or amend the prior DVO. While Father should have also listed the family court's original DVO entered on January 23, 2014, and the February 13, 2014, amended DVO, we do not believe that this type of error justifies outright dismissal.

We are able to ascertain from the notice of appeal that Father is challenging the family court's entry of a DVO against him; furthermore, we are confident from Mother's brief that she also understood Father's intent. While we do not condone a failure to comply with the rules, dismissal is not warranted in a case such as this where there has been substantial compliance and no prejudice to the opposing party. *See Ready v. Jamison*, 705 S.W.2d 479, 481-82 (Ky. 1986) ("Dismissal is not an appropriate remedy for this type of defect so long as the judgment appealed from can be ascertained within reasonable certainty from a complete review of the record on appeal and no substantial harm or prejudice has resulted to the opponent.").

B. Evidence of Domestic Violence

The trial court may render a DVO if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may occur again. KRS 403.750(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*, 254 S.W.3d at 842 (quoting *Commonwealth v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996)).

Domestic violence is defined as a "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 or members of an unmarried couple." KRS 403.720(1).

In assessing whether a preponderance of evidence supported the trial court's DVO order, we must first consider the relevance of Father's Facebook posts, if any. The posts concerned some of Father's home interior decorations and some of his personal tastes in television shows and other matters of pop culture. There was nothing to either explicitly or implicitly connect those posts with any prior or future acts of domestic violence by Father. While such matters *might*, depending on the context, be relevant in a child custody action, the family court should not have relied upon them in determining whether to issue a DVO. *See Buddenberg v. Buddenberg*, 304 S.W.3d 717, 721 (Ky. App. 2010) (holding that father's inappropriate contact with other minors and his pornography habits were not properly considered in DVO hearing where there was no allegation that the father had engaged in any inappropriate sexual contact with his own daughters).

On review of a DVO, we give much deference to a decision by the family court but cannot countenance actions that are arbitrary, capricious or unreasonable. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky.1994).

Additionally, while domestic violence statutes should be construed liberally in favor of protecting victims from domestic violence and preventing future acts of domestic violence, the construction cannot be unreasonable. *Barnett v. Wiley*, 103 S.W.3d 17, 19 (Ky. 2003).

With respect to Mother, we cannot find any evidence in the record to support that Father had engaged in an act of domestic violence against Mother as related to the January 2014 petition. *See Fraley v. Rice–Fraley*, 313 S.W.3d 635 (Ky. App. 2010). Mother testified that Father was upset with her regarding a Christmas present his mother purchased for Child and attempted to contact her over the telephone and in person several times in a relatively short period to discuss the matter. Even though Mother testified that Father was upset, nowhere in the record is there any testimony that indicates that Father assaulted or threatened to assault or harm Mother in any way during this period. At most, Mother alleged that Father evoked fear in her when he "yelled" outside her home and that he seemed "angry" and "mean." Certainly, yelling during the course of a disagreement is not to be condoned nor is repeatedly initiating unwanted contact. Without some implicit or explicit threat of harm, however, we do not believe that such conduct, at least as it transpired in this case, constitutes an act of domestic violence. *Pasley v. Pasley*, 333 S.W.3d 446 (Ky. App. 2010).

We next turn to Father's contact with Child. At most, we believe that the testimony supported a finding that Father engaged in an inappropriate, physically rough game with Child that she did not enjoy and that could have been

physically harmful to her. We do not see any evidence in the record to suggest that the headbutting actually caused a physical injury to Child or was undertaken with the intent to do so. Thus, while ill-advised and improper, we do not believe that the headbutting was an act of domestic violence against Child. *See Caudill v. Caudill*, 318 S.W.3d 112, 115 (Ky. App. 2010).

However, even if we were to assume that the headbutting constituted an act of past domestic violence, we do not believe that there was any evidence in the record to support that any act of domestic violence as between Father and Child "may occur again." *See Guenther v. Guenther*, 379 S.W.3d 796, 802 (Ky. App. 2012). Father testified that he now appreciated the wrongfulness of the headbutting game and that he would not engage in that conduct with Child again. Moreover, there was no evidence presented that Father played this game out of hostility or anger. Likewise, nothing in the record would support that Father was unable to control his emotions or actions when he was around Child.

At the end of the day, the evidence shows that Father made a very bad parenting decision to engage in rough play that was not in Child's best interests and could have resulted in serious injury. However, there was simply no evidence put forth before the family court to support that Father physically injured Child, threatened Child with physical injury, or that Father is likely to do so in the future. While we certainly do not condone Father's actions and we appreciate the family court's concern for Child's well-being, we do not believe that the evidence in this matter supported entry of a DVO.

IV. CONCLUSION

For the reasons set forth above, we REVERSE the Fayette Circuit Court, Family Division.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEES:

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