

Commonwealth of Kentucky
Court of Appeals

NO. 2016-CA-000034-ME

JEFFREY MAINKA

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY COURT DIVISION
v. HONORABLE DONNA DELAHANTY, JUDGE
ACTION NOS. 12-D-500252-003

DANA ROBINSON

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: ACREE, DIXON, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Jeffrey Mainka brings this appeal from a December 14, 2015, Domestic Violence Order (DVO) of the Jefferson Circuit Court, Family Court Division. We affirm.

Mainka and Dana Robinson were previously married and have two children, Andrew and Sophie. The parties separated in 2011 and the marriage was

dissolved by the Jefferson Circuit Court, Family Court Division, on May 6, 2013. Since the parties' separation, they engaged in extensive litigation contesting virtually all issues arising in the divorce, and continuing the same after entry of the decree.

The facts leading to the issuance of the DVO are vigorously disputed by the parties. It is, however, uncontroverted that Mainka arrived at Robinson's home on November 26, 2015, to pick up Andrew and Sophie for a scheduled visitation.¹ The testimony also reveals that both Andrew and Sophie physically entered Mainka's vehicle. After this point, the evidence is conflicting.

According to Andrew, Mainka demanded to inspect Andrew's wallet and became furious when Mainka discovered less money than he expected. Andrew testified that Mainka screamed at him concerning the money and pushed him. Andrew became frightened and fled into Robinson's home. Soon thereafter, Sophie also left Mainka's vehicle and returned to the home. Once inside, Andrew became even more frightened after Mainka started yelling, pounding on the front door, and pacing outside the front door. It was around this time that Andrew told Robinson that he feared Mainka and that Mainka kept a loaded gun in the glove compartment of his vehicle. Andrew believed that Mainka was going to shoot Robinson, Sophie and/or him.

¹ At this time, Andrew was eleven years old, and Sophie was nine years old.

Sophie also testified that Mainka started screaming at Andrew concerning the lack of money in his wallet and that both children went back into the home. Sophie stated that Mainka came to the front door and started banging on the door. She particularly observed that Andrew was very scared and that she was afraid that Mainka would come into the home to hurt her mother or Andrew.

Robinson testified that Andrew came back into the home and was very frightened. She stated that Mainka came to the front door and was enraged; he was banging on the door, pacing back and forth, and yelling at her and the children. Robinson related that she was very frightened that Mainka was going to shoot her or the children. Robinson also stated that she called the police because of her fear of Mainka that day.

Conversely, Mainka testified that he never got angry or upset. He sent Andrew back into the home to get the money missing from his wallet and sent Sophie to find him. Andrew stated that he never yelled or banged on the front door. He could not believe that Andrew was “throwing daddy under the bus” and that Andrew was lying.

Officer William Duncan testified that he responded to the call and was told by dispatch that yelling was overheard when Robinson made the call to the department. Officer Duncan observed that Mainka was agitated and that Robinson was visibly shaking because she was so fearful. Also, Officer Duncan relayed that

Andrew was crying and very upset. Officer Duncan told Mainka to leave and Mainka complied with the officer's request.

On November 30, 2015, Robinson filed a DVO Petition upon her and her children's behalf.² In the petition, it was alleged:

The most recent incident occurred on Thursday, November 26th. I have sole custody of our children, and [Mainka] is allowed time with them. [Mainka] came over to my home to pick up our children as per our custody arrangement. When he arrived, the kids went out to his car. Our son came back in and was very upset. He told me that [Mainka] was yelling at him and told him to grab his saved money. Our son told me he didn't want to do this. While I was having a conversation with our son, our daughter came in as well to get our son. I opened the door to talk to [Mainka] and ask him why he was doing this on Thanksgiving. While I was doing that, both of our kids were telling me to close the door and get inside. I want to add that [Mainka] started yelling at me, the children were hysterically screaming and told me that he had a loaded gun and to close the door. They told me that they didn't want to go with him because he was angry and had a loaded gun which was the first that I had heard of. The kids then told me that he has had it about a month. They also told me that he has at least three more guns in his apartment, one of which is loaded, and that they all watch 48 Hours on TV and that they are afraid he will kill them and me and that [Mainka] watches that show so that he can kill us so that no one will know it (learning tricks on how to kill us and hide it). [Mainka] started banging on the door and threatened to call the police, while both of our kids were screaming to call the police because they were scared. The officer arrived and found the loaded gun in [Mainka]'s car, but he had a permit. After the officer talked to me, [Mainka], and our kids, they sent [Mainka] on and told me that I should

² Dana Robinson had previously filed a Domestic Violence Petition on November 29, 2015, but an Emergency Protective Order was not issued.

leave. However, [Mainka] yelled as he was leaving, saying “you will regret this” and “I will be back.” I went to Somerset, where I am from, with our kids and only got back late on Saturday, November 28th. I am extremely fearful of [Mainka] and for what he might do to me and our children in the future. Our son has told me that [Mainka] has recently installed cameras in his home. There are at least three cameras that [Mainka] controls with his phone. There is one in our son’s room, and also two more in different parts of his home that face our son’s room. [Mainka] says these are for security, but our kids know that is ridiculous since he lives in a gated community and can just get an alarm system. Our son is disturbed that [Mainka] feels the need to watch him all the time. Our children are very disturbed by the bizarre behavior that [Mainka] is exhibiting and now that he has guns they are absolutely hysterical. These things have come out in the past few days as I have talked to them and to their therapists. Our son has told me that [Mainka] has picked him up before and thrown him. Our daughter said that [Mainka] has pushed her and made her hit her head on a chair. [Mainka] has uncontrollable anger and is always angry. He has been angry since we divorced several years ago but his behavior keeps escalating and getting worse. I have also talked with a CPS worker that has been involved with our case and she has never heard of anyone using cameras like this, and also expressed deep concern for [Mainka] having guns. I am going to speak with this CPS worker on Monday, November 30th as well. In the past, I have filed on [Mainka] because of his neglect and because of his sex addiction. [Mainka] still has this problem and is still consumed by his religion. He has very deviant behavior and justifies everything, right or wrong, with his religion. The kids are supposed to go with him on Wednesday and next weekend and are absolutely adamant that they do not want to go with him (they have been terrified all morning ever since they realized that I was not granted the EPO last night and they were afraid to go to school). We are all terrified of [Mainka] and for what he will do in the future and the children do not want any contact with

him. I want him to stay away from us. We want no contact with him. I am also asking that he surrender any firearms he has in his possession. I am also asking that he stay away from the children's schools, my home, and that he have no contact with any of us (he has made the children feel guilty in the past, saying they are his only friends).

On the same day, November 30, the family court issued an Emergency Protective Order (EPO) against Mainka. The family court then conducted a hearing upon the DVO. The hearing lasted some two and one-half hours, and six witnesses were called to testify. The family court made oral findings of fact from the bench at the conclusion of the hearing and also rendered a DVO against Mainka entered of record on December 14, 2015. Succinctly stated, the family court believed that Mainka committed acts of domestic violence against Robinson, Andrew, and Sophie. This appeal follows.

Under KRS 403.750(1), a DVO may be entered only if the family court finds “from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur.”³ Domestic violence and abuse is defined in KRS 403.720(1) as “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.”

Appellate review of the family court's decision to issue a DVO is limited. We review the family court's findings of fact under the clearly erroneous

³ Kentucky Revised Statutes (KRS) 403.720 and KRS 403.750 were amended effective January 1, 2016; however, we utilize the prior versions of these statutes.

standard. *Guenther v. Guenther*, 379 S.W.3d 796 (Ky. App. 2012); Kentucky Rules of Civil Procedure (CR) 52.01. Accordingly, findings of fact will be upheld if supported by substantial evidence of a probative value. *Caudill v. Caudill*, 318 S.W.3d 112 (Ky. App. 2010). And, any issues of law raised on appeal are reviewed *de novo* by this Court.

Mainka initially contends that there was insufficient evidence to prove that either Robinson or the children were victims of domestic violence. As to Robinson, Mainka argues that “not a single witness offered direct evidence that there was any act of violence perpetrated against her” and that the “record proves that there was no assault, nor even threat of same.” Mainka’s Brief at 12. As to the children, Mainka asserts that there was “no proof of domestic violence” and “only wildly inconsistent testimony from the children.” Mainka’s Brief at 12.

As noted at the hearing, Robinson testified that she was frightened that Mainka would hurt her or her children that day. She specifically cited to his behavior that day as previously stated. Robinson feared that Mainka would use the gun he had in his car against her or the children. Andrew also testified that Mainka possessed several guns, including the loaded gun in the glove compartment of his vehicle, on the day of the incident. Andrew testified at length to previous instances of mistreatment by Mainka, including Mainka holding a loaded gun in front of Andrew’s face. Clearly, both Andrew and Sophie were fearful of Mainka. And, Officer Duncan testified that Robinson was so fearful of Mainka that she was

visibly shaking and that both children were crying and afraid during his investigation of the incident.

Based upon our review of the record, there was more than substantial evidence that Mainka inflicted upon Robinson, Andrew, and Sophie the fear of imminent physical injury or assault on November 26, 2015. In fact, we would characterize the evidence as compelling. Accordingly, we hold that the circuit court did not commit error by finding that Mainka committed acts of domestic violence on November 26, 2015.

Mainka next argues that the children should not be entitled to a DVO against a parent. Rather, Mainka believes that allegations of physical injury or abuse of children by a parent should only be addressed in a dependency, neglect, or abuse proceeding under KRS Chapter 620. We disagree.

In relation to domestic violence, the language of KRS 403.720(2) plainly defines family members as including both a parent and a child. And, our Supreme Court has recognized that “domestic violence statutes should be construed liberally in favor of protecting the victims from domestic violence.” *Barnett v. Wiley*, 103 S.W.3d 17, 19 (Ky. 2003). In many instances across this Commonwealth, children are victims of domestic violence at the hands of a parent. We cannot fathom any legal reason to restrict the remedies of children. Instead, we view DVO proceedings under KRS Chapter 403.715 *et. seq.* as merely augmenting the dependency, neglect, and abuse proceedings available under KRS

Chapter 620.⁴ We, thus, are of the opinion that children are entitled to a DVO if they are victims of domestic violence by a parent.

Mainka further asserts that “[t]he disparate treatment of the parties by the Family Court mandates reversal.” Mainka’s Brief at 17. Mainka specifically argues that the circuit court committed reversible error by reading aloud the domestic violence petition at the hearing and asking if Robinson adopted it as her testimony. Mainka complains that the petition contained inadmissible hearsay statements. Also, Mainka believes that the family court compounded the error by refusing to enter into evidence his response to the petition.

To begin, the family court was aware of the contents of the petition and the response as both were filed in the record. Although Mainka proceeded *pro se* below, he failed to object to the family court’s reading of the petition at the beginning of the hearing. Nonetheless, the law will presume that “when a judge acts as a fact finder . . . he will be able to disregard hearsay statements.” *G.E.Y. v. Cabinet for Human Resources*, 701 S.W.2d 713, 715 (Ky. App. 1985). After reviewing the entirety of the hearing and relevant law, we simply do not believe that the family court’s reading of the petition’s contents amounted to palpable error. CR 61.01; Kentucky Rules of Evidence 103.

⁴ Our interpretation is buttressed by the recent legislative amendment of KRS 403.715(5), effective January 1, 2016, which specifies that the domestic violence statutes should be interpreted to:

Supplement and not repeal or supplant any duties, responsibilities, services, or penalties under KRS Chapters 209, 209A, and 620.

In summary, we hold that the family court did not commit reversible error by issuing the DVO against Mainka.

For the foregoing reasons, the order of the Jefferson Circuit Court, Family Court Division, is affirmed.

ALL CONCUR.

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