

**Commonwealth of Kentucky**  
**Court of Appeals**

NO. 2016-CA-000532-ME

MARCO GARCIA

APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT  
HONORABLE ANGELA J. JOHNSON, JUDGE  
ACTION NOS. 16-D-500470 AND 16-D-500470-001

KARLA BARAHONA

APPELLEE

OPINION  
AFFIRMING

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BEFORE: ACREE, J. LAMBERT AND THOMPSON, JUDGES.

THOMPSON, JUDGE: Marco Garcia appeals from the Jefferson Family Court's domestic violence order (DVO) restricting him from contact with Karla Barahona.

Garcia and Barahona were never married but formerly lived together.

On February 22, 2016, Barahona filed a petition for an emergency protective order

(EPO) against Garcia based on the events that occurred at the Coconut Beach night club, alleging as follows:

On Saturday into Sunday this past weekend we were in the disco, [Garcia] threw himself on top of me and was hitting me, and security guards had to take him outside. When I later went outside he was waiting for me in the parking lot with several people. He began hitting me again. He also gave his [girlfriend's sister]<sup>1</sup> and current girlfriend . . . objects to hit me with (mainly a large set of metal keys). They repeatedly hit me with these objects, injuring me all over (I am covered in bruises). Friends of my current boyfriend arrived, managed to get them off of me, and I was passed out and vomiting due to the injuries. He had also said earlier that he would kill both my boyfriend and myself. An ambulance arrived, I was taken to the hospital, and they treated me for the hits to my eyes and head ([Garcia] and his friends hit me a lot and I hurt all over). I was then advised to file for a protection order. [Garcia] has pushed me and pulled me in the past and it now feels like things are escalating. He had also strangled me once in the past. [Garcia] drinks very frequently. He had previously been arrested when he lived in Honduras . . . . I am afraid of what he will do and I want him to stay away from me, not to contact me, and not contact me through third parties (including through my current boyfriend or the people he had attack me).

The family court granted Barahona an EPO.

The family court heard extensive testimony at the two-hour DVO evidentiary hearing. Barahona testified she was dancing when the girlfriend's sister started hitting her and then Garcia, the girlfriend and the girlfriend's sister

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<sup>1</sup> We note that Barahona's petition for an emergency order of protection and all testimony during the evidentiary hearing was translated by a Spanish-English interpreter. Barahona, Garcia and his witnesses testified about the actions that Garcia's "sister-in-law" took. It appears the reference to Garcia's sister-in-law should have been translated as the girlfriend's sister and we recite the relevant testimony with this amendment.

started assaulting her. A security guard took Garcia off her and escorted him outside. She stayed at the disco for another thirty minutes and then left to go home because her head was hurting from her hair being pulled.

Barahona testified when she went outside, the girlfriend and the girlfriend's sister were waiting for her. Garcia gave them keys to use as a weapon and they began hitting her. Garcia hit her in her mouth and threatened to kill her. Pictures of her face and body showing bruises were admitted into evidence, one of which showed an injury to her lip.

Barahona testified she did nothing to provoke Garcia and was afraid of him. She believed Garcia wanted to kill her that night and feared the violence would continue without a protective order.

She also testified as to a previous incident in which he grabbed her by the neck and pushed her to the floor. The week following the attack, she had neck pain.

Garcia, Damaris Morioso<sup>2</sup> and the girlfriend's sister testified. Garcia testified his group of friends were dancing when Barahona pushed the girlfriend's sister and she responded. Barahona hit Garcia on his head and pulled the girlfriend's sister's hair. His girlfriend then pulled Barahona's hair. A security guard separated them twice and then removed his girlfriend from the club. No one took him out of the club because he was only trying to separate them and was not involved in the fight. He left the club because his girlfriend did not want to leave

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<sup>2</sup> The spelling of Damaris Morioso's name was not provided either during her testimony or elsewhere in the record.

without him. He and his girlfriend went to their car across the street and waited for his girlfriend's sister. About two minutes after they left the club, Barahona started yelling at them, calling them names and arguing with his girlfriend's sister.

According to Garcia, Barahona hit his girlfriend's sister with the heel of a shoe and his girlfriend got out of the car and hit Barahona. Garcia testified he got out of the car to separate them and held his girlfriend. Barahona insulted Garcia and then threw her heel at him. In response, the girlfriend grabbed Barahona by the hair and threw her on the ground. Garcia, his girlfriend and the girlfriend's sister then left. Garcia denied ever hitting or threatening Barahona and testified his only role in these fights was trying to separate the women.

Garcia testified after he broke up with Barahona, she called the mother of his children in Honduras to insult her and he blocked Barahona from his social media. He recounted an incident when she showed up at his new apartment demanding her CDs. When he opened the door, she struck him in the face and laughed.

Garcia admitted he previously engaged in some horse play with Barahona after she said she was stronger than him and could over power him. Garcia denied having an arrest record in Honduras.

Morioso testified she was friends with the girlfriend. While she was at the club with them to celebrate her birthday, she saw Barahona speaking with the girlfriend's sister. She saw Barahona hit Garcia and the girlfriend. The girlfriend defended herself and fought with Barahona while Garcia watched.

Security took the girlfriend outside and Morioso went with her. Morioso did not see the altercation in the parking lot.

The girlfriend's sister testified she was dancing and celebrating a friend's birthday when Barahona arrived and pushed Garcia. After security took Barahona away, she ran toward the girlfriend and Garcia and started hitting them. The girlfriend responded and they started fighting. She testified that Garcia did not do anything during the fight. Security separated the girlfriend and Barahona, then took the girlfriend outside, and the girlfriend's sister went with her. The girlfriend asked security to bring Garcia out.

When the girlfriend's sister was walking toward the car that Garcia and the girlfriend were in, she saw Barahona go to her car, get a stiletto and come walking toward her. Barahona was screaming at her and hit her with a shoe. The girlfriend's sister testified she responded by hitting Barahona with keys. The girlfriend got out of the car to help her sister and Garcia grabbed her.

In the family court's written judgment, it granted Barahona a DVO against Garcia after finding that: "(1) [Garcia] instructed his girlfriend and her sister to attack [Barahona]. (2) [Garcia] has been violent in the past. (3) DV [domestic violence] will occur again." The DVO restrained Garcia from any contact or communication with Barahona, whether directly or through third parties for three years and required him to stay 500 feet away from her and not have third parties approach her.

Garcia argues on appeal that the family court's findings were clearly erroneous because there was insufficient evidence of domestic violence. We disagree.

A family court may properly issue a DVO if it finds by a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may occur again. *Guenther v. Guenther*, 379 S.W.3d 796, 802 (Ky.App. 2012). This includes physical injury, assault, or the infliction of fear of imminent physical injury or assault between members of an unmarried couple who have formerly lived together. Kentucky Revised Statutes (KRS) 403.720(1), (5).

“We bear in mind that in reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial court were clearly erroneous or that it abused its discretion.” *Abdur-Rahman v. Peterson*, 338 S.W.3d 823, 826 (Ky.App. 2011).

[D]ue regard shall be given for the trial judge to assess the credibility of witnesses. Findings are not clearly erroneous if they are 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) (internal citations omitted).

It is proper for the family court to decide to believe one witness's version of events over other witnesses' version of events. *Gomez v. Gomez*, 254 S.W.3d 838, 842 (Ky.App. 2008). When there is conflicting credible eye witness testimony, this testimony constitutes substantial evidence which may rationally permit more

than one conclusion and, thus, is legally sufficient to support the family court's decision to either grant or deny the petition. *Hunter v. Mena*, 302 S.W.3d 93, 97-98 (Ky.App. 2010).

Based on Barahona's statement and testimony and the family court's interpretation of the other witnesses' testimony, there was substantial credible evidence to support the family court's decision that Garcia instructed his girlfriend and his girlfriend's sister to attack Barahona, there was past violence, and that without a protective order that domestic violence will occur again. Therefore, the family court's issuance of the DVO was not clearly erroneous.

Accordingly, we affirm the Jefferson Family Court's DVO.

ALL CONCUR

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