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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2023-CA-1285-ME

JOHN PAUL KUTTER — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE TRACI H. BRISLIN, JUDGE
ACTION NO. 22-D-01539-002

TARA KUTTER; A.E., A MINOR CHILD; J.L.K., A MINOR CHILD; AND S.K., A MINOR CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, CHIEF JUDGE; ACREE AND CALDWELL, JUDGES.

ACREE, JUDGE: Appellant, John Paul Kutter, appeals the Fayette Family Court's October 12, 2023 entry of a Domestic Violence Order (DVO) against him. Despite the family court's failure to strictly comply with KRS[1] 421.350(2) – the statute

[1] Kentucky Revised Statutes.

enabling child victims to testify from a remote access room – we determine the error was harmless. We affirm.

BACKGROUND

John and Tara were married and divorced in 2019. The parties have two children together, J.L.K. and S.K. Tara also has A.E., an older daughter from a prior marriage. On April 18, 2023, Tara filed her petition for an order of protection against John based on allegations of sexual and physical abuse of J.L.K and S.K. The family court later amended the petition to include allegations of sexual abuse of A.E. The family court conducted an evidentiary hearing on the petition on October 12, 2023.

Rather than have A.E. testify in the courtroom, the family court informed the parties that A.E. would testify from a remote access room; instead of questioning her directly, the parties would provide questions for the judge to ask A.E. The parties could see and hear what took place in the room and, when a party objected to a question, a bailiff would relay the objection so that the objection would be preserved. John's attorney objected. Relevant to this appeal, he argued this procedure would violate John's constitutional right to confront witnesses.

A.E. testified first. She testified from the remote access room with the family court judge and her guardian *ad litem* present. A.E. testified that she formerly lived with John and Tara, and that both parties would drink a lot. When

she was in the first grade, the parties and the three children lived on a farm. She and the other children were in the car when John shot and killed a snapping turtle in the driveway. Though John objected to the relevance of this testimony, the family court overruled the objection because witnessing such an event could cause a child to be fearful.

A.E. testified that John would wait for Tara to go to sleep, enter A.E.'s room, tell her to take her clothes off, and sexually abuse her. She testified that this occurred between five and ten times. She believed the abuse occurred when she was in the fourth grade. She asked Tara to pick her up from school instead of John so that she would not be alone with him. A.E. also testified that she observed John yell at and strike the other two children, and that she had to prevent the two children from going to John's bedroom in the middle of the night. A.E. testified John had spanked her using items such as a shoe and a belt.

When asked how old she was when John abused her, A.E. testified that she was around six years old – which would make her testimony that the events occurred when she was in the fourth grade incorrect. On cross-examination, A.E. acknowledged she would lie to John when she was younger to avoid getting in trouble, and that she had discussed with her therapist how to regain her father's trust after she had lied to him about a boyfriend.

Tara testified as to what she observed after the children returned from timesharing with John. She said that in October of 2022 S.K. was in pain after returning from timesharing. After S.K. used the restroom, Tara observed blood on the toilet paper and in the toilet. That November, Tara observed the same after J.L.K. used the restroom. She took S.K. and J.L.K. to the hospital, where forensic photographs were taken because J.L.K. had a torn anus and fingerprint bruises on his bottom.

Tara testified that John had been sexually and physically abusive to her since 2017 and that she witnessed multiple instances of physical abuse toward the children. She witnessed John hold J.L.K. upside-down by his ankles, shaking and repeatedly hitting him. She also testified that on an occasion when S.K. was sleeping in John's bed, John elbowed S.K. in the face because S.K. was grinding her teeth.

She testified that she locked herself in a bathroom closet because John had become angry while drunk, and that John had kicked a hole in the closet wall. The children were present during that incident. She also testified that she and John went to a concert in 2019, and over the course of the night John became increasingly drunk and aggressive; after a disagreement regarding a phone, John grabbed Tara's wrist, leaving bruises and causing pain.

She also testified as to her concern regarding the way John disciplined the children. She testified the children would return from staying with John with cuts and bruises. She took pictures of bruises on J.L.K.'s face.

John testified that Tara was not honest with him and that she had a problem with her temper. He denied having perpetrated any sexual abuse and testified that A.E. was dishonest. He denied abusing or bruising S.K. and J.L.K. but acknowledged spanking them and being a strict disciplinarian. He testified there had been no finding of penetration of either child. He did not believe the children were fearful of him, and that they were welcome to sleep in his bed. He acknowledged on cross examination that the Cabinet for Health and Human Services had sent him a letter in 2003 substantiating sexual abuse pursuant to an investigation.

He did not remember whether he had caused Tara's injury at the concert. He noted he had received no criminal allegation of domestic violence or sexual abuse. He testified that he believed Tara's petition was an effort to obtain sole custody of the children.

In handwritten findings on a docket sheet, the family court determined insufficient evidence existed to demonstrate John had sexually abused S.K. or J.L.K. However, the family court found A.E. to be a credible witness and did not expect a child to remember exactly when she experienced sexual abuse. The court

also determined A.E. had little motivation to lie on Tara's behalf because they do not appear to have a close relationship.

As its written findings reflect, the family court largely relied on Tara's testimony. The court believed Tara and the children had been victims of physical abuse for many years. It specifically noted the injury John caused to Tara after the concert, the incident involving John kicking a hole in the wall, and John's sexual abuse of Tara during their relationship, among others. As to the children, the family court found John injured J.L.K. when holding him upside down and elbowed S.K. in the face.

The family court entered a DVO against John with a duration of three years and included Tara and all three children in the DVO. The family court also continued Tara's temporary sole custody. On its AOC-275.3 form, the family court incorporated its handwritten findings and checked a box indicating it determined upon a preponderance of the evidence that an act or acts of domestic violence and abuse occurred and may again occur.

John now appeals.

STANDARD OF REVIEW

Our review of a family court's issuance of a DVO is not a determination of "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) (citing *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982)). A factual finding is not clearly erroneous if it is supported by substantial evidence, meaning evidence of sufficient probative value to induce conviction in reasonable minds. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). A trial court abuses its discretion when its decision "was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999) (citations omitted).

ANALYSIS

"Following a hearing ordered under KRS 403.730, 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[.]" KRS 403.740(1). The statute defines domestic violence and abuse as "physical injury, serious physical injury, stalking, sexual abuse, strangulation, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, strangulation, or assault between family members or members of an unmarried couple." *Id*. In DVO proceedings, "[t]he 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)). Though the domestic violence statutes should be construed liberally to protect domestic

violence victims, such construction cannot be unreasonable. *Caudill v. Caudill*, 318 S.W.3d 112, 115 (Ky. App. 2010).

John's primary challenge to the family court's DVO is his argument that insufficient evidence exists to support the family court's determination that an act of domestic violence occurred and may occur again. However, as our jurisprudence makes clear, "[a] family court operating as finder of fact has extremely broad discretion with respect to testimony presented, and may choose to believe or disbelieve any part of it." *Bailey v. Bailey*, 231 S.W.3d 793, 796 (Ky. App. 2007). "A family court is entitled to make its own decisions regarding the demeanor and truthfulness of witnesses, and a reviewing court is not permitted to substitute its judgment for that of the family court, unless its findings are clearly erroneous." *Id*.

The family court was within the bounds of its broad discretion in evaluating and relying upon the testimony presented during the hearing on Tara's petition. It heard testimony from A.E. that John sexually assaulted her multiple times when she was younger and that John physically abused J.L.K. and S.K.; however, even if A.E.'s testimony was not before the family court, as discussed further below, substantial evidence would still support the family court's ruling.

The family court was presented with testimony from Tara that John physically abused both J.L.K. and S.K. by striking S.K. in the face with his elbow

and by holding J.L.K. upside-down by his ankles while shaking him. Tara testified that she observed cuts and bruises on S.K. and J.L.K. after they had stayed with John. Tara testified as to the sexual abuse John perpetrated against her and as to at least one incident when John grabbed her wrist hard enough to cause injury.

This testimony constitutes substantial evidence to support the circuit court's determination that domestic violence has occurred and may occur again upon a preponderance of the evidence. Therefore, the family court's findings are not clearly erroneous. And, because its decision was not arbitrary, unreasonable, unfair, or unsupported by sound legal principles, the family court did not abuse its discretion.

John also argues the family court did not make a specific finding that domestic violence may occur again as KRS 403.740(1) requires. The family court did check the box on its AOC-275.3 form indicating that it made such finding. "A family court is obligated to make written findings of fact showing the rationale for its actions taken under KRS Chapter 403, including DVO cases, even if the rationale may be gleaned from the record." *Thurman v. Thurman*, 560 S.W.3d 884, 887 (Ky. App. 2018). However, the family court stamped on its AOC-275.3 form that "all written and oral findings included in court record are hereby incorporated." In our view, the list of incidents handwritten on the family court's

docket sheet sufficiently demonstrate its rationale as to its determination that domestic violence may occur again.

Finally, John challenges the procedure used to question A.E. as violative of his constitutional right to confront witnesses. KRS 421.350, titled "Testimony of child allegedly victim of illegal sexual activity," provides the procedure employed by the family court in the instant case:

> The court may, *on the motion of the attorney for any party and upon a finding of compelling need*, order that the testimony of the child be taken in a room other than the courtroom and be televised by closed circuit equipment in the courtroom to be viewed by the court and the finder of fact in the proceeding. Only the attorneys for the defendant and for the state, persons necessary to operate the equipment, and any person whose presence the court finds would contribute to the welfare and well-being of the child may be present in the room with the child during his testimony. Only the attorneys may question the child. The persons operating the equipment shall be confined to an adjacent room or behind a screen or mirror that permits them to see and hear the child during his testimony, but does not permit the child to see or hear them. The court shall permit the defendant to observe and hear the testimony of the child in person, but shall ensure that the child cannot hear or see the defendant.

KRS 421.350(2) (emphasis added).

In his brief, John frequently mentions the fact that A.E. was fourteen years old when she testified at the hearing. The statute allows for this procedure when "the act is alleged to have been committed against a child twelve (12) years of age or younger," KRS 421.350(1); the Kentucky Supreme Court determined that

the legislative intent in enacting this statute was protection of child victims who were twelve years old or younger when the sexual abuse occurred and who remain children – meaning, a person who has yet to reach the age of eighteen – at the time they testify. *Danner v. Commonwealth*, 963 S.W.2d 632, 634 (Ky. 1998). Because A.E. was six or seven years of age when the alleged abuse occurred and testified when she was fourteen years old, she fits this description.

KRS 421.350(1) "creates a narrow exception to a constitutional right[.]" *Price v. Commonwealth*, 31 S.W.3d 885, 894 (Ky. 2000); *see also Commonwealth v. Willis*, 716 S.W.2d 224, 228 (Ky. 1986) ("The trial judge paraphrased the issue as to whether the privilege of viewing a witness through a one-way mirror or a video monitor is a constitutionally acceptable substitute for face-to-face confrontation. We believe that it is."). Because the statute creates an exception to a constitutional right, "its provisions should be scrupulously followed." *Price*, 31 S.W.3d at 894.

The same procedure was at issue in *Price*, where the Kentucky Supreme Court reversed the defendant's conviction for attempted first-degree rape because the procedure the trial court employed to have the alleged child victim testify did not strictly comply with KRS 421.350(2). *Id*. at 894. As relevant to the present appeal, the Supreme Court identified the following error:

> No hearing was held nor finding made with respect to whether there was a compelling need to employ the

> procedure in this particular case. The record does not contain a motion by the Commonwealth to permit L.B. to testify outside the presence of Appellant. The procedure described in KRS 421.350(2) may not be utilized absent proof and a specific finding of a compelling need therefor.

Id.

Though the family court in the instant case did note at the outset of the October 12, 2023 hearing that A.E. did not want to testify and that a child would be fearful of testifying in open court, this is insufficient. "The Kentucky statute does not provide a blanket process for taking the testimony of every child witness by TV simply because testifying may be stressful." *George v. Commonwealth*, 885 S.W.2d 938, 941 (Ky. 1994). Here, the appellate record reveals no motion by either party to have A.E. testify by remote access room, and, instead, the family court employed this procedure on its own initiative. Additionally, the family court did not make the required finding as to whether a compelling need existed to have her do so.

However, we must determine whether this error was harmless. Violations of the right to confront witnesses are reviewed for harmless error. *Greene v. Commonwealth*, 197 S.W.3d 76, 83 (Ky. 2006) (citing *Coy v. Iowa*, 487 U.S. 1012, 1021-22, 108 S. Ct. 2798, 2803, 101 L. Ed. 2d 857 (1988)). "An error is harmless where, considering the entire case, the substantial rights of the defendant are not affected or there appears to be no likely possibility that the result

would have been different had the error not occurred." *Id*. at 84 (citing *Scott v. Commonwealth*, 495 S.W.2d 800, 801-02 (Ky. 1972)).

The family court's written findings demonstrate it heavily relied on the testimony of A.E. in entering its DVO. However, it also explicitly stated that sufficient evidence existed to support its ruling even in the absence of A.E.'s testimony regarding her sexual abuse. It specifically relied on Tara's testimony regarding the injury at the concert, the incident when John kicked a hole in the wall of the closet where Tara was hiding, injuries John caused to J.L.K. and S.K., and the sexual abuse Tara experienced. Because we cannot say that a likely possibility exists that the outcome would have been different absent A.E.'s testimony, the family court's failure to abide by KRS 421.350(2) was harmless error.

We take this opportunity, however, to admonish trial courts that the requirements of KRS 421.350(2) are not optional and should be followed to the letter in every instance that an alleged child victim of sexual abuse is to testify via the statute's remote access procedure. If a child is to testify by remote access room, a party must make a motion for such, and the court must make a finding as to why a compelling need requires it. The harmless error standard of review should not serve as a backstop which saves defective trial court proceedings from reversal.

CONCLUSION

Based on the foregoing, we affirm the Fayette Family Court's October 12, 2023 DVO.

ALL CONCUR.

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