RENDERED: AUGUST 20, 2010; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2010-CA-000265-ME

PATTI L. ASHER WILKINS — APPELLANT

v.

APPEAL FROM LAUREL CIRCUIT COURT
HONORABLE DURENDA LUNDY LAWSON, JUDGE
ACTION NO. 09-D-00340

TAMMY L. LAWSON — APPELLEE

OPINION
VACATING AND REMANDING

** ** ** ** **

BEFORE: CLAYTON AND COMBS, JUDGES; LAMBERT,[1] SENIOR JUDGE.

CLAYTON, JUDGE: Patti Asher Wilkins appeals from a domestic violence order (DVO) entered by the Laurel Family Court at the request of Tammy Lavon Lawson, on behalf of her daughter, Briana Wilkins. Patti alleges the evidence did

[1] Senior Judge Joseph E. Lambert sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580.

not support entry of the DVO. After reviewing the record, the brief, and the law, we vacate and remand for entry of an order consistent with this opinion.

On December 17, 2009, Tammy Lavon Lawson, filed a domestic violence petition on behalf of her daughter, Briana Wilkins, against the child's stepmother, Patti Wilkins. Briana was thirteen years old at the time of the filing. The petition alleged primarily that Briana was afraid to return home, that she was fearful of Patti, and that Patti had hit her on one occasion and threatened her with a knife on another. As a result of the petition, an emergency protective order was entered on that same day.

On January 4, 2010, the family court held a domestic violence hearing. At the hearing, Tammy, Patti, and two Cabinet workers testified. Basically, Tammy stated that Briana told her that Patti was mean to her, had once thrown a flip-flop at her, and on another occasion some time ago, had pulled a knife on her. Tammy further testified that Briana was terrified to go home. Tammy also said that Briana told her that Marvin Wilkins, her father, drank all the time and did not protect her from Patti. Tammy, however, had not witnessed any of the above-described incidents and provided no information about any acts of abuse that occurred in her presence.

During Patti's testimony, she informed the family court that Briana had lived with her and her husband, Marvin, for most of the past nine or ten years.

She denied ever laying her hands on Briana, and she wants the child to return home.

The social workers with the Cabinet for Health and Family Services who appeared at the hearing were Erica Bright and Kevin Marcum. Bright had interviewed Patti, Tammy, Briana's great-uncle, and Briana. From her interview with Briana, she learned that, according to Briana, she was afraid of Patti, that Patti had smacked her in the face one time, and that Briana's father drank excessively and would not stand up for her against Patti. Bright contradicted Tammy's rendition about the knife being pulled on Briana. Bright said that Briana told her that Patti had threatened to pull a knife on her. Bright also contradicted Tammy's statements regarding Marvin by reporting that Briana said she felt very safe with her father.

Bright also provided information about Tammy. She testified that Tammy was on parole for a drug charge, had a pending shoplifting charge, and had two recent dirty drug tests. Bright recommended that services be provided the family, in particular, to assess Marvin's drinking. Then, Marcum spoke about the home evaluation that he had performed on Tammy's home. He found the home clean but structurally problematic. Marcum, however, said that since the home evaluation, Tammy told him she was moving. Thus, for Briana to live with her mother, the Cabinet would have to perform another home evaluation.

At the conclusion of the testimony, the family court entered a DVO, finding by a preponderance of the evidence that an act of domestic violence or

abuse has occurred and may again occur. The DVO directed that Patti be restrained from committing further acts of abuse or threats of abuse; be restrained from any contact or communication with Briana; remain at all times and places at least 500 feet away from Briana; and, gave temporary custody of Briana to the Cabinet for Health and Family Services. The DVO was made effective for one year. This appeal followed.

Our review of the family court's decision 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. *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982); Kentucky Rule(s) of Civil Procedure (CR) 52.01; *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Findings are not clearly erroneous if they are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). Substantial evidence is evidence of sufficient probative value that permits a reasonable mind to accept as adequate the factual determinations of the trial court. *Id*. With this standard in mind, we examine the case at hand.

A DVO proceeding is a civil matter that requires that the court find from "a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred and may again occur[.]" KRS 403.750(1). Under the preponderance standard, the evidence must establish that the alleged victim was more likely than not to have been a victim of domestic violence. *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky. App. 2005). A trial court may issue a DVO after a full evidentiary hearing if it finds by a preponderance of the evidence that an act or acts

of domestic violence and abuse have occurred or may reoccur. *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007). Furthermore, the preponderance of the evidence standard requires that the evidence believed by the fact-finder be sufficient that the petitioner is more likely than not a victim of domestic violence. *Com. v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996).

Hence, our inquiry is whether the court's decision, which found by a preponderance of the evidence that domestic violence occurred or may occur again, was based on sufficient evidence. Kentucky statutory law defines '"[d]omestic violence and abuse' [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 or members of an unmarried couple." KRS 403.720(1). The evidence relied on by the family court must be sufficient to show that the person is more likely than not a victim of domestic violence.

A DVO petition is subject to the same hearsay evidentiary standards as other forms of evidence. *Dawson v. Com.*, 867 S.W.2d 493, 496-497 (Ky. App. 1993). Kentucky Rule(s) of Evidence (KRE) 801(c) defines hearsay as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." The only evidence regarding the domestic violence against the daughter was based on third-party testimony by Tammy and a social worker at the hearing and in the allegations in the domestic violence petition, which was written by Tammy. This evidence is

hearsay and should not have been admitted into evidence. Moreover, although Tammy informed the family court that Briana was willing to testify, no effort was made to procure her testimony.

Notwithstanding the improper admission of the hearsay testimony, we must apply harmless error analysis and determine whether the errors violated the stepmother's substantial rights. *Davis v. Fischer Single Family Homes, Ltd.,* 231 S.W.3d 767, 776 (Ky. App. 2007). Under this analysis, if the outcome of the trial would have been different without the inadmissible evidence, the decision of the family court will be vacated. *Id*. After reviewing the record, we conclude that the admission of the hearsay evidence did deprive Patti of her substantial rights. First, the only other evidence at the hearing, besides Tammy's and Patti's testimony, was the testimony of two Cabinet social workers. Marcum's testimony was about the suitability of Tammy's home for Briana. He never discussed the alleged domestic violence. Bright's testimony was that Briana was afraid of Patti but her understanding of Briana's statements actually disputed parts of Tammy's rendition. For example, Bright recounted that Briana said that Patti threatened to pull a knife rather than that she did pull a knife. Moreover, and more importantly here, is the fact that Bright's testimony was hearsay, too.

Another consideration about the evidence propounded is that the allegations in the petition are vague. To enter a DVO, the court must find that there is an immediate and present danger of domestic violence. "[A]t a minimum, the statute requires the following: (a) specific evidence of the nature of the abuse;

(b) evidence of the approximate date of the respondent's conduct; and (c) evidence of the circumstances under which the alleged abuse occurred." *Rankin v. Criswell*, 277 S.W.3d 621, 626 (Ky. App. 2008). In our view, after the evidentiary hearing, Tammy did not provide sufficient evidence that, under the preponderance of the evidence standard, Patti inflicted physical injury, serious physical injury, assault or fear of imminent or serious physical injury to support the domestic violence order.

The evidence in this case did not provide specific evidence about the nature of the abuse, the approximate date or dates of the conduct, or clarity about the circumstances of the abuse. The alleged abuse was not described with any sense of immediacy or present danger. Tammy sought the emergency protective order when her daughter began to cry because she did not want to leave Tammy and go back home. Tammy admitted that she was aware of the so-called knife incident long before she filed a petition on behalf of her daughter. The articulated abuse remains inchoate and unsupported. In fact, no person, including the petitioner, Tammy, testified at the hearing to witnessing any abuse. Also, Patti provided some testimony and argument that Tammy's motivation for seeking a DVO was purely self-serving. In sum, without the hearsay evidence, the family court would not have been able to find that domestic violence had occurred or may occur again.

To conclude, our review of the evidence, in light of the statutory definition of domestic violence and abuse, does not permit us to find that the family court had substantial evidence of physical injury, serious or otherwise,

sexual abuse, assault, or the infliction of fear of any of the foregoing. At most, there were merely hearsay allegations by a thirteen-year old adolescent that she did not want to return to her home because her caretaker was mean and she was afraid of her. That alone does not satisfy the definition of domestic violence and abuse as stated in KRS 403.720(1). Because the entry of the DVO was not supported by substantial evidence it cannot stand.

Thus, the Laurel Family Court erred in finding that, by a preponderance of the evidence, an act of domestic violence or abuse had occurred and may occur again. Accordingly, the January 5, 2010, DVO entered against Patti Asher Wilkins by the Laurel Family Court is vacated and remanded for further proceedings. Some time has passed since the entry of the order, and if the Cabinet or the parties deem that it would be appropriate now to file a petition for dependency, neglect, and abuse, nothing in this opinion prevents them from doing so.

ALL CONCUR.

BRIEF FOR APPELLANT:

Fred F. White
London, Kentucky

NO BRIEF FILED FOR APPELLEE.