

Commonwealth of Kentucky

Court of Appeals

NO. 2012-CA-000964-ME

HEATHER L. HARMON

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY COURT DIVISION

v. HONORABLE PATRICIA WALKER FITZGERALD, JUDGE
ACTION NO. 12-D-500999

JOHN MICHAEL WEDDING

APPELLEE

OPINION
AFFIRMING

** ** *

BEFORE: DIXON, LAMBERT, AND TAYLOR, JUDGES.

TAYLOR, JUDGE: Heather L. Harmon brings this appeal from an April 30, 2012, order of the Jefferson Circuit Court, Family Court Division, dismissing her petition for a Domestic Violence Order (DVO). We affirm.

Heather L. Harmon and John Michael Wedding are married and have two children. On April 15, 2012, a domestic dispute occurred at the parties' home.

It is uncontroverted that Harmon and Wedding engaged in a verbal disagreement and during the disagreement, Wedding reached into his pocket to start an audio recorder.¹ Harmon saw the recorder and attempted to take it out of Wedding's hand. The parties disagree regarding the details of the events that followed.

Harmon testified that when she attempted to take the recorder, Wedding lunged at her and pushed her to the ground. Harmon related that Wedding then slammed her head on the ground and also bit her hand. Harmon further testified that Wedding continued to hold her down by sitting on her legs. Harmon then instructed their four-year-old daughter to go to the neighbor's house for assistance. According to Harmon, Wedding then turned Harmon from her side to her back, held her wrists down with his hands, and pressed his knees into Harmon's stomach. By contrast, Wedding denied pushing Harmon to the ground. Instead, Wedding maintained that the two "wrestled" and then accidentally fell to the ground. Also, Wedding admitted that he sat on Harmon and held her hands down. Wedding denied that he slammed Harmon's head on the ground or put his knees into her stomach.

It is generally agreed that Wedding released Harmon when their daughter opened the door to go to a neighbor's house. Upon being released, Harmon then picked up her four-year-old daughter from near the door and ran to the neighbor's house. Wedding followed Harmon while carrying their one-year-

¹ John Michael Wedding testified that he had been recording his wife, Heather L. Harmon, for some five years without her knowledge. Wedding had even recorded the couple's marriage counseling sessions without the counselor's knowledge.

old daughter. The neighbor allowed Wedding to stay but asked Harmon to return home. While at the neighbors, Harmon called the police, and Wedding was subsequently arrested. Harmon obtained an emergency protective order against Wedding and also filed a petition for DVO. Following an evidentiary hearing, the family court dismissed Harmon's petition for DVO by order entered April 30, 2012. This appeal follows.

Harmon contends that the family court erred by dismissing her petition for DVO. Harmon alleges that the evidence was overwhelming that Wedding committed an act of domestic violence and abuse as set forth in Kentucky Revised Statutes (KRS) 403.750(1).

Domestic violence is governed by KRS Chapter 403. KRS 403.750(1) particularly provides that the trial court may enter 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 again occur." KRS 403.750(1). "Domestic violence and abuse" is defined as:

[P]hysical 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). And, "[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.'" *Baird v. Baird*, 234 S.W.3d 385, 387 (Ky. App. 2007) (quoting *Com. v. Anderson*, 934 S.W.2d 276, 278 (Ky. 1996)).

Our review of a trial court's decision to grant or deny 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). An abuse of discretion occurs only where the court's decision is "unreasonable, unfair, arbitrary or capricious." *Caudill v. Caudill*, 318 S.W.3d 112, 115 (Ky. App. 2010). And, the family court's findings of fact are upheld unless clearly erroneous. Kentucky Rules of Civil Procedure (CR) 52.01; *Moore v. Asente*, 110 S.W.3d 336 (Ky. 2003). It is within the sole provision of the family court to judge the weight and credibility of evidence. CR 52.01; *B.C. v. B.T.*, 182 S.W.3d 213 (Ky. App. 2005).

In this case, the evidence presented was both contradicting and conflicting. Harmon testified that Wedding pushed her onto the ground, thrust her head upon the floor, and impaled his knees into her stomach. On the other hand, Wedding denied that he did so and maintained that they both accidentally fell to the floor while competing for control of his recorder. Wedding only admitted to holding Harmon down against her will. The family court noted at the hearing that both Harmon and Wedding's behavior was deplorable. However, the court concluded that Wedding's actions did not cause Harmon to suffer an assault or physical injury or the fear of same as required by the statute. Given the evidence presented to the family court, we cannot conclude that its findings were clearly erroneous or that its ruling constituted an abuse of discretion.

While this Court could view the evidence differently, it was entirely within the discretion of the family court to view Wedding's version of events as more credible. Accordingly, we conclude there exists substantial evidence supporting the family court's findings and that the family court did not abuse its discretion by dismissing Harmon's petition for domestic violence order.

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

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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