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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2016-CA-000262-ME

STEPHEN MARCHESE — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE ANGELA JOHNSON, JUDGE
ACTION NO. 16-D-500129-001

ALLISON ABERSOLD — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: KRAMER, CHIEF JUDGE; D. LAMBERT AND J. LAMBERT, JUDGES.

J. LAMBERT, JUDGE: Stephen Marchese (Stephen) brings this appeal of a Domestic Violence Order (DVO) filed against him by Allison Abersold (Allison) and issued in the Jefferson Family Court. He alleges that the trial court erred when it *sua sponte* took judicial notice of out-of-state court records. Because we find

that the trial court erred in doing so, but that the error was harmless, we affirm the entry of the DVO.

Stephen and Allison were formerly in a relationship but were never married. On January 14, 2016, Allison filed a petition for a DVO in Jefferson Family Court, seeking an Emergency Protective Order (EPO) against Stephen. The court entered an EPO the same day, and a hearing was held on the matter on January 27, 2016.

Both parties represented themselves at the hearing. Allison testified that Stephen had never hit her, but that Stephen had shoved her when he was drinking. She also testified that Stephen had waited for her in her driveway when the EPO had been in place, had asked third parties to contact her, sent text messages to her mother threatening to post "inappropriate" pictures of Allison and him on the internet, and had repeatedly contacted her through social media. Allison testified that on the day the EPO was entered, Stephen had immediately broken it when he sent her a message through Snapchat saying that he could not wait for court. She also stated that Stephen was very controlling and manipulative.[1]

Allison's mother, Whitney Abersold (Whitney), also testified. Whitney testified that she had repeatedly asked Stephen to leave her daughter alone, that Stephen would prevent her from talking to her daughter because he would answer her phone, and that he had threatened to post pictures of himself and Allison engaged in sexual acts on the internet.

[1] Allison's petition, which she adopted as her testimony at the hearing, states that "[w]e have been apart for a few days now and he will not leave me alone, he is stalking me showing up in my driveway at night…" There is no indication as to how many times Allison alleges this happened.

Stephen testified that he had threatened to post those pictures online. Furthermore, Stephen testified that he had "made a pact" with Allison to "not give up on each other" and that that was why he had repeatedly tried to contact her. He testified he "may have answered her phone once or twice," but that she usually kept her phone "on safeguard." Stephen also stated that he had never contacted her through a third party. Though he had asked his friends about her, he testified he never directly asked them to talk to her about him. Stephen also stated that he would be moving to New Hampshire soon and did not have any desire to contact Allison.

Stephen's brother Paul Marchese (Paul) also testified. He stated that he had never seen any domestic violence occur between Allison and Stephen and that Stephen had never been violent. Paul also testified that Stephen's work schedule would not allow Stephen to stalk Allison. Amy Green, who had lived with Stephen, also testified that she had never seen any domestic violence and that Stephen's work schedule would not allow him to stalk Allison.

After the testimony in the case had concluded, the court stated that it would take a brief recess. When the court reconvened, it stated that it had become aware of Stephen's prior conviction for assault and battery in Virginia Beach. Stephen stated that the charges should have been dropped. The court noted that Paul had previously testified that Stephen had never been violent. After Stephen attempted to speak concerning the charge, the court instructed him to stop. It then entered the

DVO and instructed Stephen to wait outside. The Court's written order made the following findings:

> 1) Respondent has exerted controlling behavior over Petitioner, limiting her contact with family and friends; 2) Respondent uses humiliation tactics to control Petitioner; 3) Respondent stalked Petitioner, parking in her driveway at night and inquiring of her through third parties after DVO was entered; 4) Respondent shoved Petitioner while drunk and threatened her; 5) Respondent has a history of domestic violence; 6) [Domestic violence] could occur in the future.

This appeal now follows.

As a preliminary matter, we note that Allison has chosen not to file an appellee brief in this case. Kentucky Rule of Civil Procedure (CR) 76.12(8)(c) "provides the range of penalties that may be levied against an appellee for failing to file a timely brief." *St. Joseph Catholic Orphan Soc'y v. Edwards*, 449 S.W.3d 727, 732 (Ky. 2014). At our discretion, we may "(i) accept the appellant's statement of the facts and issues as correct; (ii) reverse the judgment if appellant's brief reasonably appears to sustain such action; or (iii) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case." CR 76.12(8)(c). In this instance, we choose to accept Stephen's statements of facts and issues as correct.

An appellate court reviews the trial court's issuance of a DVO for "whether the court's findings were clearly erroneous or [whether] it abused its discretion." *Holt v. Holt*, 458 S.W.3d 806, 812 (Ky. App. 2015), quoting *Gomez v. Gomez*, 254 S.W.3d 838, 842 (Ky. App. 2008). Kentucky Revised Statutes (KRS) 403.740(1)

states that "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 . . . ." Furthermore, "[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.'" *Valentine v. Horan*, 275 S.W.3d 737, 739 (Ky. App. 2008), quoting *Commonwealth v. Anderson,* 934 S.W.2d 276, 278 (Ky. 1996).

The sole issue that Stephen raises on appeal addresses the propriety of the family court's decision to take judicial notice of inadmissible out-of-state court records in issuing its ruling.[2]

There is some question as to the preservation of this issue. CR 46 provides that "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him." In *Cardine v. Commonwealth*, 283 S.W.3d 641, 652 (Ky. 2009), our Supreme Court discussed a situation involving the criminal counterpart to this rule:

> …[Kentucky Rule of Criminal Procedure] RCr 9.22 states that if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice that party. This rule is almost identical to Federal Rule of Criminal Procedure 51(b), which provides, in part, that if a party does not have an opportunity to object to a ruling or

[2] Stephen also argues that the records are inadmissible as hearsay. We agree. The public records exception to the hearsay rule provides that records are inadmissible if "the sources of information or other circumstances indicate lack of trustworthiness[.]" Kentucky Rules of Evidence (KRE) 803(8). Because the records relied upon by the trial court were not admitted into the record, we cannot determine whether these sources were trustworthy.

> order, the absence of an objection does not later prejudice that party. Therefore, when "the very first time there was mention of [a mistrial was] when the court [declared a mistrial,] [i]t was clear ... that the time for argument was over [and the Appellant] simply could not [have] waive[d][his] opportunity to object when [he] was never given such an opportunity." [*Radford v. Lovelace*, 212 S.W.3d 72, 77 (Ky. 2006) overruled on other grounds by *Cardine v. Commonwealth*, 283 S.W.3d 641 (Ky. 2009)] (alterations in original). Since the Appellants in this case also failed to object to the trial court's abrupt sua sponte declaration of a mistrial, *Radford* controls. Therefore, as in *Radford*, the Appellants in this case did not consent to the trial court's declaration of a mistrial, nor were they required to object.

Id. at 652, quoting *Radford,* 212 S.W.3d at 77.

In the present case, the first time that the trial court mentioned the out-of-state records was directly before it made findings based upon those records and entered a ruling. Stephen apparently began to protest that ruling, but the trial court instructed him not to speak. Shortly thereafter, the trial court instructed Stephen to wait outside the courtroom. It might be argued that Stephen could have made his objection for the first time in a motion to alter, amend or vacate. The Kentucky Court of Appeals (at that time the state's high court) has previously held that such a motion is not necessary to preserve an issue for appeal, when the appellant had not been provided with an earlier opportunity to object:

> Claimant contends that by the employer's failure to make a motion to alter, amend or vacate the judgment as provided by CR 59.05 the error was not properly preserved for appellate review. We do not so construe the rule. The record does not contain a motion or any pleading requesting the circuit court to enter a money judgment. The employer, therefore, had no opportunity

> to object prior to the rendition of the judgment. While the employer could have moved to alter, amend or vacate the judgment (CR 59.05), such motion was not a prerequisite to appeal. . . .

Queen City Dinette Co. v. Grant, 477 S.W.2d 808, 811 (Ky. 1972). *See also Parker v. Commonwealth*, 291 S.W.3d 647, 659 n.18 (Ky. 2009) ("Obviously, an objection after the conclusion of a trial is insufficient to preserve an issue for appellate review.").

Because the trial judge in this instance effectively denied Stephen an opportunity to make an objection, and because CR 46 provides that "if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him[,]" we shall consider the claim of error Stephen raised in his brief.

KRE 201 provides in pertinent part:

> (b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either:
>
> > (1) Generally known within the county from which the jurors are drawn, or, in a nonjury matter, the county in which the venue of the action is fixed; or
> >
> > (2) Capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.
>
> . . . .
>
> (e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.

A court may take judicial notice of "unimpeachable sources," including "encyclopedias, calendars, maps, medical and historical treatises, almanacs, and public records." *Stokes v. Commonwealth*, 275 S.W.3d 185, 188 (Ky. 2008) quoting Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 1.00[3][c], at 10 (4th ed. 2003) (internal quotation marks omitted). Our Supreme Court has also been careful to distinguish the types of public records which may be subject to judicial notice:

> Under KRE 201 … it may be appropriate to notice court records for the occurrence and timing of matters reflected in them—the holding of a hearing, say, or the filing of a pleading—but it will generally not be appropriate to notice the truth of allegations or findings made in another matter, since such allegations or findings generally will not pass the "indisputability" test. *See Meece v. Commonwealth*, 348 S.W.3d 627, 692–93 (Ky. 2011) (upholding trial court's decision to take notice that a criminal charge had been dismissed, but not to take notice of the purported reason for the dismissal).

Rogers v. Commonwealth, 366 S.W.3d 446, 451-52 (Ky. 2012). *See also M.A.B. v. Commonwealth Cabinet for Health & Family Servs.*, 456 S.W.3d 407, 412 (Ky. App. 2015) ("[I]t is a well-established principle that a trial court may take judicial notice of its own records and rulings, and of all matter patent on the face of such records, including all prior proceedings in the same case.").

The family court's decision to take judicial notice of the fact that Stephen had an out-of-state assault and battery charge in this case is problematic for several different reasons.

It cannot be alleged that Stephen's out-of-state charge was "generally known" within the community. KRE 201(b)(1). Therefore, the only potential basis through which the trial court could take judicial notice would be if that fact was "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned" under KRE 201(b)(2). Because the trial court did not reveal the source of its information and the charge was not made a part of the record, there is no way of determining whether the accuracy of that source could reasonably be questioned.

Second, this instance seems to fall within the type of cases our Supreme Court discussed in *Rogers*, *supra*, in which the trial court noticed the truth of the findings in another matter. The trial court's order specifically found that Stephen had a "history of violence," and this finding was presumably based entirely upon his out-of-state charge.[3] "It is well settled that extrajudicial evidence, not part of the record, cannot form the basis of a decision." *Carpenter v. Schlomann*, 336 S.W.3d 129, 132 (Ky. App. 2011) quoting *Lynch v. Lynch*, 737 S.W.2d 184, 186 (Ky. App. 1987).

Finally, our Supreme Court has also noted the importance of KRE 201(e)'s requirement to allow the adverse party an opportunity to be heard regarding a judicially noticed fact:

[3] The only other evidence that Stephen was violent in this case was that he shoved Allison while drinking. This Court has previously held that evidence that one person "shoved" another is not sufficient to establish domestic violence. *Telek v. Daugherty*, 376 S.W.3d 623, 628 (Ky. App. 2012).

> The trial judge, in this case, proclaimed judicial notice without request of either lawyer, and then proceeded to dismiss the case in the same motion. There was no opportunity to make a "timely request" for "an opportunity to be heard." …
>
> In a jury trial, when it is requested that judicial notice be taken of a fact, the other party is afforded the opportunity to respond. No less right is afforded parties in a bench trial. Here, there was no opportunity to "reasonably" question the source. "The drafters of KRE 201, following the lead of most commentators, encouraged courts to give advance notification when feasible: 'If a court acts on its own initiative, the parties should be informed of the facts noticed and given an opportunity to respond.' " Lawson, *supra*, § 1.00 [5][e], at 20 (quoting *Evidence Rules Study Committee, Kentucky Rules of Evidence—Final Draft*, p. 16 (Nov. 1989)).
>
> Therefore, it was improper for the court to find judicial notice *sua sponte* and dismiss the case, all in one fell swoop. Judicial notice, as utilized in this case, was inappropriate.

Commonwealth v. Howlett, 328 S.W.3d 191, 194 (Ky. 2010). Here, the trial judge also *sua sponte* took judicial notice of the out-of-state charge, and when Stephen attempted to address the matter the trial judge would not allow him to speak. The trial judge then promptly issued a ruling and requested Stephen to wait outside the courtroom. This was a clear violation of KRE 201(e). However, this does not end our inquiry.

We shall next review Stephen's claim of error under the harmless error rule. "When considering a claim of harmless error under CR 61.01, the court determines whether the result probably would have been the same absent the error or whether the error was so prejudicial as to merit a new trial." *CSX Transp., Inc. v. Begley*,

313 S.W.3d 52, 69 (Ky. 2010) (footnotes omitted). In this instance, we must conclude that the error was harmless.

Our legislature has recently amended the definition of domestic violence in KRS 403.720(1) to include stalking. That statute now defines domestic violence as "physical injury, serious physical injury, stalking, 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 508.150(1) describes the crime of second-degree stalking and reads as follows:

> A person is guilty of stalking in the second degree when he intentionally:
>
> (a) Stalks another person; and
>
> (b) Makes an explicit or implicit threat with the intent to place that person in reasonable fear of:
>
> 1. Sexual contact as defined in KRS 510.010;
>
> 2. Physical injury; or
>
> 3. Death.

KRS 508.130(1) defines stalking as follows:

> (a) To "stalk" means to engage in an intentional course of conduct:
>
> 1. Directed at a specific person or persons;
>
> 2. Which seriously alarms, annoys, intimidates, or harasses the person or persons; and
>
> 3. Which serves no legitimate purpose.

> (b) The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress.

"Course of conduct" is defined in KRS 508.130(2) in relevant part as "a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose."

The record contains evidence that Stephen "showed up in [Allison's] driveway at night[,]" that he repeatedly contacted her through social media, threatened to publish compromising photographs of her, and talked to third parties about potentially contacting her. We also note that Stephen apparently broke the EPO by contacting Allison electronically. Furthermore, the record contains an implicit threat sufficient to place a reasonable person in fear of his or her physical safety, because Stephen told Allison that she "hasn't seen how mean [he] can really be." Accordingly, the family court's reliance on the out-of-state court records is harmless because there is sufficient evidence in the record without that information to support the entry of the DVO. We also do not find compelling Stephen's argument that that error resulted in the denial of due process. *See Holt*, 458 S.W.3d at 813 (discussing due process in the context of a DVO hearing).

In sum, we hold that the trial court's error in *sua sponte* taking judicial notice of out-of-state records was harmless. Therefore, the Jefferson Family Court's Domestic Violence Order is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Jon Heck
Louisville, Kentucky

No brief filed for appellee.