RENDERED: APRIL 12, 2002; 10:00 a.m.
NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 2000-CA-002324-MR
AND
NO. 2000-CA-002624-MR

BENJAMIN JONES, JR. — APPELLANT/APPELLEE

v.

APPEAL FROM ROCKCASTLE CIRCUIT COURT
HONORABLE DANIEL J. VENTERS, JUDGE
ACTION NO. 99-CR-00051

COMMONWEALTH OF KENTUCKY — APPELLEE/APPELLANT

OPINION
AFFIRMING
** ** ** ** **

BEFORE: BUCKINGHAM, McANULTY, AND TACKETT, JUDGES.

McANULTY, JUDGE: Benjamin Jones (hereinafter appellant) appeals his conviction in the Rockcastle Circuit Court following a jury trial. The facts of the case are as follows: On Sunday, August 15, 1999, appellant had been riding a four-wheeler for most of the day with his former father-in-law, Glen. He returned to the home he shared with his ex-wife, Nell Jones, and their daughter Amanda. Ms. Jones was preparing dinner. When appellant walked in the door, Ms. Jones noted that he was angry. She could also tell that he had been drinking. She questioned appellant about his drinking, and they argued about it. Ms. Jones asked

appellant where her father, Glen, was. Appellant answered that he was at someone else's house. Ms. Jones responded that her sister had called and said that her father wanted to come home, and that appellant needed to go get him. Appellant threw a plate of food. Ms. Jones said that she would leave until appellant sobered up, and appellant responded that she would not have to, he would leave.

Appellant went to the bedroom, and Ms. Jones called her sister. Appellant emerged from the bedroom with a rifle and asserted that he was going to kill himself. He placed the rifle in his mouth. Amanda ran screaming to the bathroom. Ms. Jones got off the phone and went to get Amanda from the bathroom. Appellant messed up the living room, then grabbed Ms. Jones by the hair and dragged her outside. He forced her onto the four-wheeler. Amanda came running out the door and got onto the four-wheeler with them on her own. Appellant drove off, still carrying the rifle, with Ms. Jones and Amanda on the four-wheeler.

By this time, it had grown dark and the only light available to them was the light on the four-wheeler. Appellant drove a mile or two to Cut Gap, an isolated area in the woods where only four-wheel drive vehicles were used. On the way to Cut Gap, appellant asked Ms. Jones how she wanted to die. Once they were in the woods, appellant dragged Ms. Jones off the four-wheeler by her hair and face, and told her that she was going to have to die. Appellant beat her with his hand and with the rifle. Amanda jumped in front of him and begged him not to shoot

her mother. Appellant knocked Ms. Jones down, and proceeded to hit Amanda on her backside and tell her that Ms. Jones had to die. Appellant then seated Amanda on the four-wheeler. While in the woods, appellant would ask Ms. Jones who he was, and when she would say his name, he would say no, that he was Glen, and for her to address him as that.

After some time passed, the light from the four-wheeler went out. Ms. Jones and Amanda tried backing away from appellant into the woods. Appellant demanded that they return, and began shooting the rifle. Ms. Jones stated that he was shooting "everywhere," while Amanda believed that appellant only fired into the air. Ms. Jones yelled to appellant that if he stopped firing, they would return to him. They walked back, and appellant grabbed and beat Ms. Jones again.

At various times during this ordeal, appellant would tell them that he was taking them home and tell them to get on the four-wheeler. Yet after they drove a few feet, he would stop, drag Ms. Jones off, and resume beating her. Eventually by doing this, however, appellant edged them out of the woods. When they were back on the road, they saw headlights. Ms. Jones realized it was her sister's husband who was looking for them, and she screamed to him for help. Appellant told them to jump off the four-wheeler. They did, and ran to the truck. Appellant drove off, threatening to kill himself. By then, it was after midnight; they had been in the woods for several hours.

On May 17 and 18, 2000, appellant was tried by a jury, which found him guilty of one count of assault in the second

degree, two counts of unlawful imprisonment in the first degree and two counts of menacing.

On appeal, appellant first argues that the trial court erred in failing to instruct the jury on the lesser included offense of assault under extreme emotional disturbance. "Extreme emotional disturbance" has been defined in this Commonwealth as follows:

> Extreme emotional disturbance is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as defendant believed them to be. McClellan v. Commonwealth, Ky., 715 S.W.2d 464, 468-9 (1986).

The evidence must establish an event triggering the explosion of violence on the part of the defendant which is sudden and uninterrupted. Foster v. Commonwealth, Ky., 827 S.W.2d 670, 678 (1992), cert. den. 113 S. Ct. 337, 121 L. Ed. 2d 254 (1992). Evidence of extreme emotional disturbance must be definite and nonspeculative. Henley v. Commonwealth, Ky., 621 S.W.2d 906, 909 (1981). The burden of proving the mitigating factor of extreme emotional disturbance is on the defendant. Engler v. Commonwealth, Ky., 627 S.W.2d 582 (1982).

We do not find that the evidence in this case established that appellant was acting under extreme emotional

disturbance. Appellant did not testify at trial. The only evidence as to appellant's mental state from the beginning was the testimony of Ms. Jones and Amanda. Ms. Jones testified that appellant was angry as soon as he entered the house. Amanda testified that her parents began arguing after Ms. Jones asked where her father was. We agree with the trial court that there was no triggering event to establish extreme emotional disturbance. The defense provided no evidence to show why an apparently ordinary domestic disagreement brought on such violence and abuse. Furthermore, there was nothing which provided a "reasonable explanation or excuse" for appellant's violent actions.

Appellant asserts that it was Ms. Jones' demand that appellant go get her father, whom appellant describes on appeal as his "nemesis," that triggered appellant's actions. Appellant argues that it was the prospect of having to see his ex-father-in-law again that brought on his behavior.

First, we find these assertions to be more speculative than definite as required to establish extreme emotional disturbance. Further, we note that extreme emotional disturbance is not proved by mere hurt or anger. Talbott v. Commonwealth, Ky., 968 S.W.2d 76 (1998). Additionally, the evidence of appellant's relationship with Glen did not show sudden provocation. Rather, the witnesses described appellant's relationship with Glen as an ongoing source of aggravation. Amanda said that her grandfather would pick on appellant and hit him on the head, which would get on appellant's nerves. Ms.

Jones testified that in the days and weeks before the incident, appellant had become frustrated with her father, as well as other people. Her brother-in-law agreed "somewhat" that around this time appellant and Ms. Jones' father had had their problems. Moreover, there was no indication that appellant feared Glen. Ms. Jones testified that her father was of slight build, weighed about eighty pounds, had suffered a debilitating brain infection, and was crippled by one leg being shorter than the other.

It is insufficient for the defendant to claim extreme emotional disturbance based on duress or a gradual victimization from his environment, unless the additional proof of a triggering event is sufficiently shown. Id. Since there was no showing of a triggering event for appellant's explosion of violence, we agree with the trial court that appellant failed to establish that he was acting pursuant to extreme emotional disturbance. The trial court correctly denied an instruction to appellant on the lesser offense.

Second, appellant argues that the trial court erred in instructing the jury on the offense of unlawful imprisonment in the first degree of Amanda, because the statute is unconstitutionally overbroad as applied to the parent-child relationship. Appellant contends that his constitutional right to parent and control his child, citing Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000), prevents the state from criminalizing a parent's restraint on that child. A statute is overbroad when it prohibits conduct that is impermissible as well as conduct that is constitutionally

protected and therefore permissible. Commonwealth v. Foley, Ky., 798 S.W.2d 947 (1990).

It is necessary to examine the offense as a whole to determine whether the conduct which is prohibited is constitutionally protected. In doing so, we indulge a presumption that the statutory scheme is constitutional. Sasaki v. Commonwealth, Ky., 485 S.W.2d 897, 904 (1972). Courts must construe statutes in a manner that saves their constitutionality whenever possible, consistent with reason and common sense. Commonwealth v. Kash, Ky. App., 967 S.W.2d 37, 44 (1997).

A person is guilty of unlawful imprisonment in the first degree when he knowingly and unlawfully restrains another person under circumstances which expose that person to a risk of serious physical injury. KRS 509.020(1). Restrain is defined in KRS 509.010(2) as follows:

> "Restrain" means to restrict another person's movements in such a manner as to cause a substantial interference with his liberty by moving him from one place to another or by confining him either in the place where the restriction commences or in a place to which he has been moved without consent. A person is moved or confined "without consent" when the movement or confinement is accomplished by physical force, intimidation, or deception, or by any means, including acquiescence of a victim, if he is under the age of sixteen (16) years, or is substantially incapable of appraising or controlling his own behavior.

A parent's restraint of a child, in and of itself, is not a criminal act. The statutes prohibit *unlawful* restraint which places a child at risk.

While the Constitution recognizes the right of parents to rear their children without undue governmental influence, Kentucky courts have instructed that the right is not inviolate. King v. King, Ky., 828 S.W.2d 630, 631 (1992). Parents have a duty to insure the safety, education, and physical and emotional welfare of their children. Id. Chapter 620 of the Kentucky Revised Statutes, dealing with dependency, neglect, and abuse, states in part that children have "fundamental rights" which must be protected and preserved, including "the right to be free from physical, sexual or emotional injury[.]" KRS 620.010. This statement of a child's rights creates an affirmative duty in parents and guardians to prevent physical injury. Lane v. Commonwealth, Ky., 956 S.W.2d 874, 875 (1997). The use of physical force upon a child is justifiable only when the defendant is a parent or guardian or other person entrusted with the care and supervision of a child and believes that the force used is necessary to promote the welfare of the child. KRS 503.110.

Therefore, we conclude that although a parent has a right of control over a child, a parent's restraint of a child may be unlawful in some circumstances. Certainly, a parent may not abuse their privilege of control over a child to subject that child to felonious acts. If the elements of the offense are met, then the crime of unlawful imprisonment may rightly be brought against a parent.

Appellant contends on appeal that the statute is overbroad because it would make it a crime any time a parent

exercised control over a child in a situation where the child might be injured. Appellant cites as examples of situations which could be criminalized: a mother taking a child on a roller coaster and the child suffering a broken nose, or a father taking a child rock-climbing and the child becoming seriously injured in a fall.

The trial court addressed these concerns in its order. The court found that the statute did not criminalize such conduct as a parent teaching a child to ski or requiring a child to mow a lawn. The trial court correctly viewed the offense within the entire statutory scheme of the criminal code. We agree with the trial court that when the unlawful imprisonment statute is read in context with KRS 503.110 and Chapter 620, it is not overbroad in that it does not criminalize legitimate parental activity. Taking a child to an amusement park or hiking seeks to promote the welfare and enjoyment of the child, yet exposes a child to a minimal risk of injury. The trial court correctly found that the statute was not unconstitutionally overbroad as applied to the parent-child relationship.

The incidents in this case could not be considered to be in the interests of Amanda's welfare, and appellant's actions exposed her to a risk of serious physical injury as found by the jury in this case. In this case, appellant exceeded his lawful authority to control his child, and so his restraint of her was unlawful. The charge against appellant was proper.

Therefore, we affirm the judgment of conviction of the Rockcastle Circuit Court.

* * * * *

NO. 2000-CA-002624-MR

The Commonwealth appeals from the trial court's grant of an appeal bond in this case. The Commonwealth complains that the trial court erred in not allowing the Commonwealth an opportunity to respond. The court stated at the sentencing hearing that once appellant tendered a motion for release on appeal bond, the court would not set it for a hearing but would give the Commonwealth an opportunity to make a response to it. However, appellant tendered the motion for appeal bond on a Friday and the motion was granted on a Monday without the Commonwealth having responded to the motion. The day after it was granted, the Commonwealth filed a motion to reconsider the order which the court denied.

The Commonwealth further argues that the court erred in not holding a hearing to determine the appropriateness of granting bond in this case. The Commonwealth cites Commonwealth v. Peacock, Ky., 701 S.W.2d 397 (1985) as establishing the Commonwealth's right to a hearing. Peacock states, "In all cases involving bail pending appeal, the court shall conduct an appropriate adversary hearing to determine the propriety of such a request." Id. at 398.

We find that the Commonwealth did not specifically request a hearing. Therefore, we do not find that the Commonwealth's argument regarding its right to a hearing was preserved. Additionally, we do not find a denial of due process since the Commonwealth was permitted to argue before the trial

court its request and reasons for denial of the appeal bond, albeit not in the form of a written motion. Accordingly, we conclude that the court acted within its discretion in granting the appeal bond in this case. Peacock, 701 S.W.2d at 398.

BUCKINGHAM, JUDGE, CONCURS.

TACKETT, JUDGE, CONCURS AS TO NO. 2000-CA-002324-MR; AND DISSENTS AS TO NO. 2000-CA-002624-MR.

BRIEF FOR APPELLANT/APPELLEE:

Joanne Lynch
Louisville, Kentucky

BRIEF FOR APPELLEE/APPELLANT:

Albert B. Chandler III
Attorney General of Kentucky

Louis F. Mathias, Jr.
Assistant Attorney General
Frankfort, Kentucky

Christopher M. Brown
Assistant Attorney General
Frankfort, Kentucky