

Commonwealth of Kentucky

Court of Appeals

NO. 2006-CA-000982-ME

LOWELL G. ARNETT

APPELLANT

v. APPEAL FROM MAGOFFIN FAMILY COURT
HONORABLE JULIE PAXTON, JUDGE
ACTION NO. 02-D-00101-02

KATHY ARNETT

APPELLEE

OPINION AFFIRMING

** ** * * * **

BEFORE: WINE, JUDGE; BUCKINGHAM AND HENRY, SENIOR JUDGES.¹

BUCKINGHAM, SENIOR JUDGE: Lowell G. Arnett appeals from the entry of a domestic violence order (DVO) against him by the Magoffin Family Court based upon a petition filed by his ex-wife, Kathy Arnett. Lowell also appeals from the denial of a DVO petition he filed against Kathy. For the reasons stated below, we affirm.

On March 27, 2006, Kathy filed a domestic violence petition alleging that Lowell had engaged in acts of domestic violence. Specifically, the petition alleged that

¹ Senior Judges David C. Buckingham and Michael L. Henry sitting as Special Judge by assignment of the Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and KRS 21.580.

[a]t 9 pm on 3/26/05 I had to leave church because Lowell had called County and State police accusing our 14 year old son of stealing his 2 motorcycles which was purchased for our son in 2002 and 2005. The motorcycles were locked with Robert's [their son] chain and lock, which he cut off because the key was missing. The Sheriff informed my daughter that he was afraid Lowell will burn my house with me inside. He has made these threats before. He has entered my home without permission. He calls me names "whore" "trashy whore" and "slut" in the presence of our child. He has said if I ever had a man in the house "he would send us both down the road in body bags." In January 2006 the Sheriff and Trooper Cramer had come to the resident to make him leave. Trooper Cramer advised me to get an EPO at that time.

Lowell informed me if I got any orders on him he would "take care of me." He is court ordered not to come to my work place or call. He has harassed me and my co-worker. He has made threats against us both. Lowell is mentally unstable. I am afraid for myself and my son.

On 3/26/06 in the afternoon Lowell ordered Robert and my nephew to park the motorcycles. Robert got back on his motorcycle and went up the road to hide from his father. Lowell chased him in his car up and back down the road. Robert hides from his father in the woods and Lowell calls the police and makes a report that the motorcycles are stolen. Lowell punishes Robert when he is angry at me or my family.

Based on the petition, on March 27, 2006, the Magoffin Family Court entered an Emergency Order of Protection (EPO) on behalf of Kathy and against Lowell. The EPO set a hearing date for April 4, 2006. On March 31, 2006, counsel for Kathy filed a motion to continue the hearing because of a scheduling conflict. The family court granted the motion and entered an order rescheduling the hearing for April 11, 2006.

Lowell, “fearing that something funny was about to happen”, nevertheless appeared in court on April 4, 2006. Kathy and her attorney were present, and the court called the case. The court asked Lowell whether he was ready to proceed, and he responded that he didn't have an attorney and couldn't afford one. The court informed him that it could not appoint him one. The court then began the proceedings, but it interrupted itself to again ask Lowell if he wanted to hire an attorney. Lowell again stated that he couldn't afford one. The question originally asked - whether he was ready to proceed - was never specifically answered, nor did Lowell object to proceeding once the hearing began.

The family court then heard evidence from Lowell, Kathy, and the sheriff concerning events which occurred on March 26, 2006. Kentucky State Trooper Cramer was also present but did not testify. Kathy gave testimony consistent with the statements in her petition. The testimony of Lowell and the sheriff focused primarily on the motorcycle aspects of the controversy; however, Lowell denied Kathy's allegations of domestic violence and contended that she was being untruthful. At the conclusion of the hearing, the court entered a three-year DVO against Lowell. The DVO, however, also permitted Lowell to be in the vicinity of Kathy's residence at certain designated times to feed his horses, during which times Kathy was to be absent from the residence.

Lowell subsequently sought to obtain a DVO against Kathy. While, except for the hearing, the record from those proceedings is not contained in the record on appeal, it appears that Lowell's petition was based on the allegation that on April 10,

2006, while Lowell was lawfully in the vicinity of Kathy's residence to feed his horses, Kathy stood in her driveway and waved a gun at him. Following a hearing, on April 18, 2006, the family court entered an order dismissing Lowell's petition.

On appeal, Lowell challenges both the granting of a DVO against him and the denial of a DVO against Kathy.

Lowell does not challenge on the merits the granting of a DVO against him. Rather, he alleges error on the basis that even though the family court had rescheduled the hearing to April 11, the hearing was nevertheless held on April 4. Lowell also contends that because of the changed hearing date, he was deprived of the right to call witnesses and to present pictures concerning the March 26, 2006, incident.

Lowell does not identify the witnesses he was deprived of calling as a result of the hearing being held on April 4 instead of April 11, nor does he identify what their testimony would have been. The Magoffin County Sheriff and the state trooper who responded to the March 26 incident were present at the hearing, and the sheriff gave testimony. Lowell was given the opportunity to call the state trooper as a witness, but he declined to do so.

The pictures to which Lowell refers apparently consist of pictures that purportedly would have proven that his son and Kathy's nephew had cut the lock on his barn to gain access to the motorcycles and had ridden the motorcycles on his farm property. However, the details concerning the taking and riding of the motorcycles are collateral to the allegations supporting the DVO. Even if the motorcycles were taken and

ridden as alleged by Lowell, that does not refute Kathy's allegations concerning threats of violence. Moreover, Lowell was given a full opportunity to present his side of the events, and he aggressively attempted to persuade the court that Kathy was being untruthful in her allegations.

We conclude that any error in holding the hearing on April 4 instead of April 11 was harmless. Lowell was present, and he had a full opportunity to present his side of the matter.

No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Kentucky Rule of Civil Procedure (CR) 61.01. Because the holding of the hearing on April 4 did not affect any substantial right of Lowell's, any error was harmless.

Finally, as previously noted, Lowell does not appeal the family court's decision on the merits. Nevertheless, there is substantial evidence in the record to support the court's finding that “it was established, by a preponderance of the evidence, that an act[s] of domestic violence or abuse has occurred and may again occur[.]” As such, the family court properly entered the DVO against Lowell.

Lowell also contends that the family court erred by denying his petition for a DVO against Kathy. Lowell filed the petition alleging that Kathy had returned home early from work - which she admitted to - during a period when he was entitled to be near her property to feed his horses and that she waived a gun in his direction. A hearing was held on April 18, 2006, following which the court denied Lowell's petition for a DVO.

Kentucky Revised Statute (KRS) 403.750(1) allows the court to enter a domestic violence order “if it finds from a preponderance of the evidence that an act or acts of domestic violence and abuse have occurred or may again occur[.]” “Domestic violence and abuse” is defined in KRS 403.720(1) 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[.]”

In cases tried upon the facts without a jury, “[f]indings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses.” CR 52.01. “The reviewing court may not substitute findings of fact for those of the trial court where they were not clearly erroneous.” *Reichle v. Reichle*, 719 S.W.2d 442, 444 (Ky. 1986). Based upon Kathy's testimony at the April 18, 2006, hearing, the family court's determination that she had not engaged in acts of domestic violence and its dismissal of Lowell's petition in connection therewith was not clearly erroneous, and, accordingly, we may not disturb its decision.

Further, Lowell makes the vague allegation that the April 18, 2006, hearing was not a “full hearing.” However, Lowell was represented by counsel at the hearing, and counsel made no objection to the proceedings, nor did he seek to present additional evidence or testimony. Therefore, this issue is not preserved for our review. “It goes without saying that errors to be considered for appellate review must be precisely preserved and identified in the lower court.” *Skaggs v. Assad*, 712 S.W.2d 947, 950 (Ky., 1986). In any event, we have reviewed the videotape of the hearing and are persuaded that Lowell had a full and fair opportunity to give his side of the alleged April 10, 2006, gun-waving incident.

For the foregoing reasons, the orders of the Magoffin Family Court are affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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