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NOT TO BE PUBLISHED

Commonwealth Of Kentucky

Court Of Appeals

NO. 1997-CA-003040-MR

RICHARD WESLEY LUNSFORD — APPELLANT

v.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE GARY D. PAYNE, JUDGE
ACTION NO. 1997-CR-00841

COMMONWEALTH OF KENTUCKY — APPELLEE

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

BEFORE: KNOPF, MILLER, AND SCHRODER, JUDGES.

KNOPF, JUDGE: The appellant, Richard Wesley Lunsford, appeals from a judgment of conviction by the Fayette Circuit Court on the misdemeanor charge of violation of a Domestic Violence Order (KRS 403.763). Finding no reversible error, we affirm.

In early 1997, Lunsford shared a residence with Christina Charles in Lexington, Kentucky. Christina's ten (10) year old son Dakota Charles lived with them.[1] On March 5, 1997, Dakota threw a plastic bottle at a car as it drove past his house. After speaking with the driver, Lunsford took Dakota back

[1] Christina's daughter also lived in the residence.

into the house and reprimanded him. Shortly thereafter, Lunsford spanked Dakota with a wooden paddle. Several days later, Dakota's grandparents called the police after they noticed that the spanking had caused substantial bruising on Dakota's buttocks. Eventually, Lunsford was charged with second degree criminal abuse of Dakota because of this incident.

On March 10, 1997, Christina obtained an Emergency Protective Order (EPO) restraining Lunsford from any contact or communication with Dakota, and ordering Lunsford to vacate the residence shared by the parties. On March 24, 1997, the Fayette District Court entered a Domestic Violence Order (DVO), extending the terms of the EPO until March 23, 2000. On April 29, 1997, Lunsford was arrested at Christina's residence for violation of the DVO.

Prior to trial, Lunsford's counsel moved to sever the charges pursuant to RCr 9.16. The trial court initially agreed with Lunsford, and granted the motion to sever. However, after Lunsford's counsel made a motion in limine to exclude evidence of a pending harassment charge against Lunsford and a violation of bond conditions that he have no contact with the child, the trial court reversed its prior ruling and denied the motion to sever. The matter then proceeded to a jury trial. At the conclusion of the trial, the jury found Lunsford not guilty of the criminal abuse charge, but found him guilty of violating the DVO. The jury fixed his punishment at a fine of $50.00, which the trial court imposed. This appeal followed.

Lunsford's sole ground for appeal is that the trial court erred in denying his motion to sever the charges. Lunsford

argues that he was prejudiced by being forced to defend both the criminal abuse charge and the DVO violation at the same time. He further contends that the evidence regarding the criminal abuse charge was not relevant to the question of whether he violated the terms of the DVO.

RCr 9.16 permits a trial court to order separate trials of offenses named in a multi-count indictment if it appears that a defendant will be prejudiced by a joint trial. Where all of the charges involved criminal occurrences closely related in character, circumstance and time, and the offenses are sufficiently interwoven with each other, and the facts to be proved are overlapping, the trial court is within its discretion to join the various offenses for trial. Hayes v. Commonwealth, Ky. 698 S.W.2d 827, 829 (1985).

In the present case, the charges were marginally relevant to each other because the DVO was issued based on the events that gave rise to the criminal abuse charge. However, the charges were otherwise unrelated in time, character and circumstance. Second degree criminal abuse is a class D felony, KRS 508 110, while violation of a DVO is a class A misdemeanor, KRS 403.763. Furthermore, it was not necessary to prove the circumstances forming the basis for the DVO to prove that Lunsford violated the terms of the DVO. Thus, the events occurring prior to the issuance of the EPO or the DVO were not relevant to the charge.

Nonetheless, we cannot find that Lunsford was prejudiced by joinder of the charges. As noted above, the jury found Lunsford not guilty on the criminal abuse charge. Thus, it

cannot be said that he was prejudiced by admission of the evidence regarding his violation of the DVO. As for the DVO violation, Lunsford's defense was that Christina had invited him to the house to talk about their differences, and that Dakota was not home at the time. He also contends that he was unsure whether the DVO prohibited him from having contact with Christina, or just Dakota. Thus, Lunsford contends that he did not intentionally violate the DVO.

However, KRS 403.760 provides that violation of the terms or conditions of a protective order after service of the order shall constitute contempt of court. "A person is guilty of a violation of a protective order when he intentionally violates the provisions of an order issued pursuant to KRS 403.715 to 403.785 with which he has been served or has been given notice." KRS 403.763(1). At the time Lunsford was arrested, the DVO provided that Lunsford was to have no contact with Dakota. It further provided that he "is not to be around Respondent's Mother or Members of his family."[2] There is no dispute that Lunsford had been served with the DVO and was familiar with its conditions. Thus, the fact that Christina may have invited Lunsford to her house is not an absolute defense to the charge of violating the DVO. The jury obviously considered it to be a mitigating factor, however, since it imposed no jail time and only a $50.00 fine on Lunsford. In light of all of the circumstances of this case, we do not believe that a substantial

[2] The DVO was subsequently amended by agreed order to prohibit Lunsford only from violent contact with Dakota or Christina.

possibility exists that the result would have been different had the trial court granted the motion to sever. Therefore, we conclude that the error, if any, was harmless. RCr 9.24.

Accordingly, the judgment of conviction by the Fayette Circuit Court is affirmed.

ALL CONCUR.

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