

RENDERED: DECEMBER 9, 2011; 10:00 A.M.  
NOT TO BE PUBLISHED

**Commonwealth of Kentucky**

**Court of Appeals**

NO. 2010-CA-002247-ME

FRANK MAYS, SR.

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT  
FAMILY COURT DIVISION  
v. HONORABLE HUGH SMITH HAYNIE, JUDGE  
ACTION NO. 10-D-503368

LAKISHA R. CALVERT

APPELLEE

OPINION  
VACATING AND REMANDING

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BEFORE: TAYLOR, CHIEF JUDGE; ACREE AND VANMETER, JUDGES.

TAYLOR, CHIEF JUDGE: Frank Mays, Sr., brings this appeal from a November 16, 2010, Domestic Violence Order of the Jefferson Circuit Court, Family Court Division, restraining Mays from contact with Lakisha R. Calvert and her two children. We vacate and remand.

Lakisha R. Calvert filed a domestic violence petition on behalf of her minor children alleging that her step-father, Mays, sexually abused the minor children, ages ten and three. In particular, she claimed:

I AM FILING OBO MY 2 CHILDREN, AGE 10 AND 3. HE IS MY STEP-FATHER. ON OCTOBER 7, 2010, MY 10YO DAUGHTER INFORMED ME THAT MY STEPFATHER HAD BEEN TOUCHING HER INAPPROPRIATELY. SHE TOLD ME THAT HE SAID HE WAITED TO PLAY WITH HER. SHE TOLD HE WOULD RUB ON HER CHEST AND TELL HER HOW TO MAKE HER BREAST GROW AND MAKE SEXUAL ADVANCES TOWARDS. ON OCTOBER 8, 2001, I TOOK MY DAUGHTER TO THE HOSPITAL. THE HOSPITAL CONTACT[ED] CPS AND CACU. THE DETECTIVE CALLE[D] ME ON OCTOBER 22, 2010[,] TO TELL ME THAT MY STEP-FATHER WAS ARRESTED. MY 10YO DAUGHTER HAS EXPRESSED SHE FEELS UNCOMFORTABLE AROUND. I AM AFRAID FOR MY CHILDREN'S SAFETY. I WANT HIM TO STAY AWAY AND LEAVE THEM ALONE.

Both Mays and Calvert proceeded *pro se* before the circuit court. Ultimately, the circuit court rendered a Domestic Violence Order (DVO) restraining Mays from further contact with the two minor children or Calvert. This appeal follows.

Mays contends the circuit court committed error by rendering the DVO. Specifically, Mays claims that the circuit court erroneously informed him that any testimony he provided could be used against him in a companion criminal proceeding. He further claims that the circuit court lacked sufficient evidence to base its findings of abuse by him against the children, and that the court erred by failing to conduct a full evidentiary hearing.

Both parties appeared *pro se* at the hearing on the DVO. However, the circuit court only heard testimony from Calvert. After Calvert's testimony, the circuit court informed Mays that any testimony offered by him could be used in a companion criminal proceeding, inferring that he could incriminate himself regarding the alleged sexual abuse of Calvert's children. Consequently, Mays declined to testify in his defense at the DVO hearing.

Kentucky Revised Statutes (KRS) 403.780 expressly provides:

Testimony offered by an adverse party in a hearing held pursuant to the provisions of [KRS 403.745](#) shall not be admissible in any criminal proceeding involving the same parties.

Pursuant to the specific provisions of KRS 403.780, any testimony by a defendant in a DVO hearing is inadmissible in a criminal proceeding involving the same parties. The purpose in the filing of this petition was for and on behalf of the two minor children who would subsequently be involved in any related criminal proceeding, along with appellee. As such, the circuit court erroneously informed Mays that his testimony at the DVO hearing could be used against him in any related criminal proceeding.<sup>1</sup>

However, this error was not preserved for appellate review. An unpreserved error may still be reviewed and relief granted if it results in manifest injustice.

Kentucky Rules of Civil Procedure (CR) 61.02. To warrant relief under CR 61.02, appellant must demonstrate that his substantial rights were affected, resulting in

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<sup>1</sup> We do not address the constitutionality of Kentucky Revised Statutes 403.780, as such issue is not before us in this appeal.

manifest injustice, and this manifest error was the result of action taken by the circuit court. *Fraley v. Rice-Fraley*, 313 S.W.3d 635 (Ky. App. 2010).

At the DVO hearing, the circuit court only heard testimony from Calvert. Mays did not testify and offered no defense. It is beyond cavil that Mays' testimony would have offered the circuit court opposing facts to weigh in its decision to issue the DVO. Under these unique circumstances, we are compelled to conclude that manifest injustice resulted from the circuit court's error and that Mays is entitled to an evidentiary hearing pursuant to KRS 403.745. *See Fraley*, 313 S.W.3d 635. The emergency protective order rendered by the circuit court on October 25, 2010, shall remain in effect pending further action by the circuit court.

We view Mays' remaining contentions to be meritless or moot.

For the foregoing reasons, the Domestic Violence Order of the Jefferson Circuit Court, Family Court Division, is vacated and this case is remanded for proceedings consistent with this opinion.

ALL CONCUR.

BRIEF FOR APPELLANT:

NO BRIEF FOR APPELLEE.

Mark Hyatt Gaston  
Louisville, Kentucky