NO. COA09-912

NORTH CAROLINA COURT OF APPEALS

Filed: 7 September 2010

ANNE SANDER,
Plaintiff,

v. Henderson County
No. 09 CVD 593

LAWRENCE DAVID SANDER,
Defendant.

Appeal by defendant from order entered 3 April 2009 by Judge Peter Knight in Henderson County District Court. Heard in the Court of Appeals 10 March 2010.

No brief filed on behalf of plaintiff-appellee.

Lawrence David Sander, pro se, defendant-appellant.

Per curiam.

Lawrence David Sander ("defendant") appeals from a Domestic Violence Order of Protection ("domestic violence order" or "DVPO") filed 3 April 2009, the terms of which remained in effect until 2 April 2010. Defendant proceeds *pro se* and plaintiff has declined to file an appellee brief. After careful review, we dismiss defendant's appeal.

Background

In attempting to set out the facts in this case, we note that the record on appeal does not provide a complete factual or procedural background. Additionally, the transcript of the hearing

held in this matter is not contained in the record. The record tends to establish that Anne Sander ("plaintiff") and defendant are married, but separated, and have four minor children. Plaintiff maintained primary physical custody of the children after the parties separated. A temporary custody order was entered 11 July 2008, which set out the visitation rights of defendant. The order stated that as of 30 August 2008, "the Defendant shall have the children every other weekend from Saturday at 11:00 a.m. until Sunday at 6:30 p.m."

In an email dated 17 March 2009, defendant set out a conversation he allegedly had with plaintiff in which the two agreed that defendant would pick up the children from plaintiff's office on the evening of Friday 27 March 2009 and that the children would remain with defendant until Sunday 29 March 2009. The record does not reveal the relationship of the recipients of this email to the parties involved in this case.

On 30 March 2009, plaintiff filed a Complaint and Motion for Domestic Violence Protective Order in which she alleged:

> Lawrence Sander came to my house after being told not to. . . . [He] tr[ied] to break the window with his fist, then he tried to break the door down. He was yelling that he wanted his children. I told him I had called the police and he continued to try and break the windows and ring the door bell. He continue[d] to rage until the police arrived a little after 10:10. . . . I was afraid he would hurt all of us. He was out of control and yelling at the top of his lungs. I feared for my safety and the children and stayed with [a] friend for the rest of the weekend. I am still afraid to go home.

Defendant claims in his brief that on 27 March 2009, plaintiff called him and stated that instead of picking up the children at her office, he could pick them up at her house in Hendersonville, North Carolina. Defendant further claims that when he arrived at plaintiff's home, he could see plaintiff and her boyfriend through the window, but plaintiff refused to open the door or allow the children to exit the house. Defendant then "repeatedly rang the doorbell, knocked on the door, and tapped on the window." Defendant asserts that he "was doing nothing violent, destructive, disruptive, or threatening."

On 3 April 2009, the trial court held a hearing in this matter and subsequently issued a DVPO. The trial court found as fact that defendant "placed [plaintiff] in fear of imminent serious bodily injury" and concluded as a matter of law that defendant "has committed acts of domestic violence against the plaintiff." The trial court ordered that, *inter alia*: (1) defendant have no contact with plaintiff; (2) defendant "shall not commit any further acts of abuse or make any threats of abuse"; (3) defendant shall stay away from "any place where the plaintiff shall be, and any place where the minor children shall be [including the children's school and daycare] except pursuant to any order entered now or hereafter in the separate action of the parties, which relates to custody"; (4) defendant could call plaintiff's residence for the purpose of speaking with his children; and (5) defendant's concealed handgun permit be suspended. This order was to remain in effect until 2

April 2010. Defendant timely appealed to this Court.[1] Plaintiff has not filed a brief with this Court.

Standard of Review

"Where the trial court sits as the finder of fact, 'and where different reasonable inferences can be drawn from the evidence, the determination of which reasonable inferences shall be drawn is for the trial [court].'" *Brandon v. Brandon*, 132 N.C. App. 646, 651, 513 S.E.2d 589, 593 (1999) (quoting *Electric Motor & Repair Co. v. Morris & Assocs.*, 2 N.C. App. 72, 75, 162 S.E.2d 611, 613 (1968)). "Accordingly, where the trial court's findings of fact are supported by competent evidence, they are binding on appeal." *Id.* at 652, 513 S.E.2d at 593. "The trial court's findings of fact must support its conclusions of law." *Id.* at 653, 513 S.E.2d at 594.

Discussion

Defendant primarily argues that the trial court erred in concluding as a matter of law that defendant committed an act of domestic violence against plaintiff. We disagree.

A trial court may grant a protective order for the purpose of "restraining the defendant from further acts of domestic violence." N.C. Gen. Stat. § 50B-3(a) (2009). N.C. Gen. Stat. § 50B-1 (2009) lists multiple acts that qualify as acts of domestic violence, including "[p]lacing the aggrieved party or a member of the

[1] As a preliminary matter, we note that although the DVPO issued in this case expired on 2 April 2010, defendant's appeal is not moot. *See Smith v. Smith*, 145 N.C. App. 434, 436-37, 549 S.E.2d 912, 914 (2001).

aggrieved party's family or household in fear of imminent serious bodily injury . . . ." N.C. Gen. Stat. § 50B-1(a)(2). "The test for whether the aggrieved party has been placed 'in fear of imminent serious bodily injury' is subjective; thus, the trial court must find as fact the aggrieved party 'actually feared' imminent serious bodily injury." *Smith*, 145 N.C. App. at 437, 549 S.E.2d at 914 (quoting *Brandon*, 132 N.C. App. at 654, 513 S.E.2d at 595).

Here, the trial court found as fact that defendant placed plaintiff in fear of imminent serious bodily injury. The trial court expounded upon that finding by stating:

> [Defendant] appeare[d] at the plaintiff's residence between 9:30 pm and 10:00 pm, and being upset because he could not pick up his children from the plaintiff who is their mother, became angered to the point where he pounded on the door and windows of the plaintiff's residence, and repeatedly rang the door bell, all with sufficient force and excitement that it caused the plaintiff to be in fear for her safety.

Defendant assigns error to this finding of fact and argues that he repeatedly "knocked" on the door, "tapped" on the window, and rang the doorbell. He claims that these actions do not constitute an act of domestic violence under the statute.

The version of events described by defendant are quiet different from those alleged in plaintiff's complaint. However, we have no means by which to address the issues raised in this case since defendant failed to file the verbatim transcript of the hearing in this matter and the narrative of the evidence supplied by defendant in the record on appeal is wholly unreliable and does

not address the central issue to be determined by the trial court, namely, plaintiff's subjective fear.

"[A] determination as to whether the trial court's findings are supported by the evidence requires a review of the evidence presented at the hearing." *Miller v. Miller*, 92 N.C. App. 351, 353, 374 S.E.2d 467, 468 (1988). N.C. R. App. P. 9 requires that "the record on appeal contain so much of the evidence, either in narrative form or in the verbatim transcript of the proceedings, as is necessary for an understanding of all errors assigned." *Matter of Botsford*, 75 N.C. App. 72, 74-75, 330 S.E.2d 23, 25 (1985). In lieu of a transcript, defendant filed a "Recitation of the Evidence" pursuant to N.C. R. App. 9(c)(1), which requires that testimony from the trial proceedings

> be set out in narrative form except where such form might not fairly reflect the true sense of the evidence received, in which case it may be set out in question and answer form. Counsel are expected to seek that form or combination of forms best calculated under the circumstances to present the true sense of the required testimonial evidence concisely and at a minimum of expense to the litigants.

Id. (emphasis added).

Defendant's narrative of the evidence presented is clearly intended to frame the evidence in defendant's favor. Defendant states in two pages a summary of the witness' testimony. Defendant has not presented the narrative in "question and answer" format, which would have provided the necessary context, and, more importantly, the parties' choice of words. Defendant claims that plaintiff, plaintiff's boyfriend, and defendant all testified that

defendant repeatedly "*rang* the doorbell, *knocked* on the door, and *tapped* on the window[.]" (Emphasis added). However, without the transcript this Court has no means of testing the veracity of defendant's presentation of the evidence. Plaintiff's complaint states that defendant was "yelling," and that he attempted to break down the door and shatter the window, which would logically require more than mere knocking or tapping. In reviewing defendant's recitation of the testimony, we conclude that defendant has failed to present the evidence in a manner "best calculated under the circumstances to present the true sense of the required testimonial evidence." *Id.* Most importantly, defendant's recitation of the evidence does not in any way address the primary issue in this case, namely, plaintiff's subjective fear.

A narrative is meant to serve as a substitute for the verbatim transcript and should reflect the evidence presented by both parties in such a manner as to aid this Court in determining the issues presented. The narrative presented by appellant simply does not meet the requirements of Rule 9. Consequently, we will not address this assignment of error. *Hicks v. Alford*, 156 N.C. App. 384, 389-90, 576 S.E.2d 410, 414 (2003) ("It is the duty of the appellant to ensure that the record is complete. . . . 'An appellate court is not required to, and should not, assume error by the trial judge when none appears on the record before the appellate court.'" (internal citations omitted)); *West v. G. D. Reddick, Inc.*, 48 N.C. App. 135, 137, 268 S.E.2d 235, 236 (1980) ("The Court of Appeals can judicially know only what appears of

record. . . . Matters discussed in a brief but not found in the record will not be considered by this Court. It is incumbent upon the appellant to see that the record is properly made up and transmitted to the appellate court." (internal citation omitted)), *rev'd on other grounds*, 302 N.C. 201, 274 S.E.2d 221 (1981).

Defendant's remaining arguments are: (1) the trial court was required to find a "course of conduct" by defendant, not one incident of domestic violence; (2) the trial court was required to find that defendant acted with specific intent; (3) the trial court deprived defendant of his constitutional right to bear arms by requiring that he surrender his firearms; (4) the trial court "overreached[ed]" its authority by ordering him to stay away from his children where there were no findings that defendant committed an act of domestic violence against the children; (5) the trial court improperly used an "ultra-strict" application of the subjective standard in determining whether plaintiff actually was in fear; and (6) the trial court did not have authority to make a finding regarding the parties' child custody dispute. Defendant includes several case and statute citations throughout the remainder of his brief; however, none of these citations are applicable to his arguments. Accordingly, we decline to review defendant's remaining assignments of error pursuant to N.C. R. App. P. 28(b)(6) ("Issues not presented in a party's brief, or in support of which no reason or argument is stated, will be taken as abandoned. . . . The body of the argument and the statement of

applicable standard(s) of review shall contain citations of the authorities upon which the appellant relies.").

In sum, we are obliged to dismiss defendant's appeal due to the multiple appellate rules violations that have hampered our review. *See Bledsoe v. County of Wilkes*, 135 N.C. App. 124, 125, 519 S.E.2d 316, 317 (1999) (stating that the Rules of Appellate Procedure are mandatory and "apply to everyone — whether acting *pro se* or being represented by all of the five largest law firms in the state").

Dismissed.

Panel consisting of Judges HUNTER, Robert C., CALABRIA, and HUNTER, Robert N., Jr.

Report per Rule 30(e).