

# Commonwealth Of Kentucky

## Court of Appeals

NO. 2003-CA-001717-MR

DONALD LEMONS

APPELLANT

v. APPEAL FROM JEFFERSON CIRCUIT COURT  
HONORABLE BARRY WILLETT, JUDGE  
ACTION NO. 02-CR-001079

COMMONWEALTH OF KENTUCKY

APPELLEE

OPINION  
AFFIRMING

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BEFORE: BARBER, KNOPF, AND TACKETT, JUDGES.

BARBER, JUDGE: Appellant, Donald Lemons (Lemons), appeals his criminal conviction on 2 counts of Wanton Endangerment in the First Degree, Criminal Mischief in the First Degree, Criminal Possession of a Destructive Device, and 3 counts of violation of Protective order. Lemons was found not guilty on a charge of arson. Lemons asserts that the Jefferson Circuit Court improperly excluded witness testimony and documentary evidence. We affirm the court's judgment.

Lemons claims that at the time of the incident he was clinically depressed, and desired to commit suicide. He felt that his ex-wife was tormenting him, and wanted her to watch while he killed himself. Shortly after midnight on May 6, 2002, Lemons doused the back seat of his car with gasoline, set it on fire, and drove it into the porch of his ex-wife's home. Lemons' ex-wife and her boyfriend escaped without injury, but the residence suffered extensive fire damage.

At trial Lemons attempted to call Dr. Michael Harris, a Board certified psychiatrist, as a witness. The court denied Lemons' request, and the report prepared by Dr. Harris was put in the record by avowal. Dr. Harris' report came to the conclusion that Lemons' sole intent was to kill himself, and that he never intended to physically harm his ex-wife. Lemons also submitted by avowal the testimony of the attorney who represented Lemons and his wife in their bankruptcy proceedings, and a neighbor of Lemons. After a request to introduce various documents was denied by the court, Lemons also placed documentary evidence in the record by avowal, including the bankruptcy petition, evidence regarding dower and curtesy rights, the divorce petition, and evidence regarding the value of the property held by Lemons' ex-wife.

Lemons and his ex-wife had an ongoing relationship for 24 years. During that time, they lived at 600 Compton Street.

The house was owned by the father of Lemons' wife, but Lemons and his wife made many improvements to it, including adding a deck, vinyl siding, and interior redecoration. Lemons was employed during the parties' relationship, but his wife handled the family finances. In 1996, the family finances were in poor shape, and they filed for bankruptcy. At that time, Lemons' ex-wife told him that they had to get a divorce. The bankruptcy petition failed to show any equity interest in the marital residence, which was still owned in fee by Lemons' father-in-law. After the bankruptcy and dissolution were final, the house was transferred into the name of Lemons' ex-wife by her father, as he was the sole owner of the property. Lemons claims that he had no idea that this was being done, and would not have consented to such a transfer. Lemons had no legal claim to the property, and had asserted no interest in it before the bankruptcy court; therefore, he cannot dispute the transfer.

Lemons' ex-wife began to date other people. At one point, Lemons threatened to kill her. The ex-wife obtained an EPO, and later a DVO, which stipulated that Lemons could not go within 500 feet of his ex-wife for three years. At that point, Lemons was required to leave the residence where both parties had been residing since the dissolution. Lemons became depressed, and his financial circumstances grew worse. Lemons testified that he decided to drive his car into the porch of the

house. He stated that he did not drive into the house itself, because he did not want to damage it. He claimed at trial that he thought the car would hit the porch, kill him, and bounce back into the yard. The car hit the porch and traveled on, making a hole in the house and setting it on fire. The house suffered structural damage as a result. The car was on fire, and Lemons attempted to prevent himself from being rescued by the neighbors. Lemons suffered minor injury in the burning auto. Once he was removed from the burning car, Lemons walked back to his apartment. He turned himself in to the authorities the next day.

Lemons retained Dr. Harris as an expert witness. Dr. Harris reviewed the record, evaluated Lemons, and prepared a report. The Commonwealth made a motion to exclude Dr. Harris' report, asserting that Dr. Harris' conclusion that Lemons' intent was to commit suicide was irrelevant. The court excluded Dr. Harris' report holding that Lemons' intent was not relevant to the charges against him other than the arson charge. Lemons presented the expert's report by avowal. The Commonwealth asserts that the submission of the report did not preserve the doctor's proposed testimony for review.

The purpose of preservation of evidence by avowal is to give the reviewing court access to the information needed to consider the trial court's ruling. Underhill v. Stephenson,

Ky., 756 S.W.2d 459, 461 (1988). The use of physician's reports to summarize their opinion is commonplace in legal actions. Where, as here, sufficient evidence is before the court showing what the testimony would have been, additional avowal evidence is unnecessary. Id., 756 S.W.2d at 461; Commonwealth v. Ferrell, Ky., 17 S.W.3d 520, 521 (2000), holding that submission of an expert report is sufficient to preserve a claim of error regarding exclusion of the expert's testimony.

The Commonwealth asserts that because Lemons was not convicted on the arson count, any error committed by excluding the testimony was harmless. The test for harmless error requires a determination as to whether the result would have been different had the error not been present. Taylor v. Commonwealth, Ky., 995 S.W.2d 355, 361 (1999). Where the defendant was not prejudiced due to exclusion of the evidence, then the conviction cannot be reversed, even if the exclusion was improper. Matthews v. Commonwealth, Ky., 997 S.W.2d 449, 452 (1999). The result in the arson charge could not have been more favorable to Lemons if the evidence had been admitted. He was acquitted on that charge. For this reason, the court's clear error in excluding the expert's opinion was harmless, and does not constitute grounds to reverse.

Lemons argues that he lacked the wanton mental state required for a conviction on a charge of wanton endangerment.

The law provides that wanton endangerment occurs where circumstances manifest extreme indifference to human life on the part of the defendant. KRS 508.060. Wanton endangerment is not an intent offense, and the wantonness of his actions was supported by the uncontroverted evidence. Lemons claims that he did not intend to harm the property, and that his conviction for criminal mischief was improper for that reason. Again, the uncontroverted evidence before the court supported the charge and conviction.

The Commonwealth fails to address the propriety or error of the court's exclusion of the other defense witnesses, or of the documents Lemons placed in the record by avowal. As the charges for which Lemons was convicted did not allow such evidence to diminish Lemon's culpability, there was no reversible error in the court's exclusion.

Lemons objects to the court's failure to give an instruction on temporary mental incapacity. Lemons cited the expert report of Dr. Harris as showing that he was clinically depressed at the time the incident occurred. The court ruled that the defense was essentially one of temporary insanity, also known as extreme emotional disturbance or EED, and that the instructions must be stated according to the statutory requirements. The Commonwealth claims that Lemons failed to introduce any evidence of mental illness, as required by KRS

504.070(1), or to show that he lacked substantial capacity to appreciate the criminality of his act or to conform his conduct to the requirements of the law, as defined in Cecil v. Commonwealth, Ky., 888 S.W.2d 669 (1995). Furthermore, evidence of mental illness or insanity includes evidence that a defendant was acting under extreme emotional disturbance at the time of the offense. Coffey v. Messer, Ky. 945 S.W.2d 944, 945 (1997). Failure to provide such evidence supports denial of an instruction on that issue. McGuire v. Commonwealth, Ky., 885 S.W.2d 931, 934 (1994).

Lemons asserts that the jury was wrongfully denied the right to review the transcript of Lemons' statement as well as the audio recording when they requested that the statement be played for them again during deliberations. During presentation of the Commonwealth's case in chief, the jury was provided copies of the transcript and permitted to read along as the audio was played. The jury requested additional review of the statement while sequestered. Only the audio tape was provided. There is nothing in the record indicating that the jury requested the transcription. Absent such a request, we find there was no reversible error in the court's actions.

The judgment of the Jefferson circuit court is affirmed.

ALL CONCUR.

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