

Commonwealth of Kentucky

Court of Appeals

NO. 2013-CA-000873-MR

DENVER GOLDEN STURGILL

APPELLANT

v. APPEAL FROM LEWIS CIRCUIT COURT
HONORABLE JEFFREY L. PRESTON, JUDGE
ACTION NO. 12-CI-00149

ELINOR E. STURGILL

APPELLEE

OPINION
AFFIRMING

** ** * * * * *

BEFORE: LAMBERT, STUMBO AND THOMPSON, JUDGES.

STUMBO, JUDGE: Denver Sturgill appeals from an evidentiary ruling from the Lewis Family Court in an action for divorce. Mr. Sturgill argues that the trial court erred when it excluded the testimony of some of his witnesses. We find no error and affirm.

Mr. Sturgill and Elinor Sturgill were married on September 10, 1985, and separated in May of 2012. A final hearing for the dissolution of the marriage was held on April 18, 2013. Before the hearing began, the trial judge ordered the witnesses who were to testify to leave the courtroom pursuant to Kentucky Rules of Evidence (KRE) 615. KRE 615 states in pertinent part that “[a]t the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses and it may make the order on its own motion.” Mr. Sturgill’s witnesses left the courtroom, but his counsel instructed two people to remain. One of those people was Barbara Bohannon.

After Ms. Sturgill concluded her case in chief, her counsel informed the court that one of the witnesses, Neal Oren, observed Ms. Bohannon in the hallway talking to Mr. Sturgill’s witnesses about Ms. Sturgill’s testimony. Counsel for both parties and the trial judge questioned Mr. Oren about what he heard. He testified that he heard Ms. Bohannon state that the pictures used as exhibits looked staged¹ and that Ms. Bohannon said something about \$170,000.

Ms. Bohannon was then questioned. She stated that she left the courtroom to go to the bathroom and spoke with the witnesses waiting outside. She stated that she told the witnesses that Ms. Sturgill had testified that she believed the pictures had been staged. She also testified that she mentioned the \$70,000.²

¹ The pictures in question depicted the marital home being filthy and in disrepair.

² \$70,000 is the figure Ms. Sturgill testified about, not \$170,000 as stated by Mr. Oren. Ms. Sturgill testified that she gave Mr. Sturgill \$70,000 to put in a safe in the marital home. What Ms. Bohannon told the witnesses about the \$70,000 was not revealed.

Ms. Sturgill's counsel moved to have the witnesses excluded. The court granted the motion. Mr. Sturgill's counsel did not object to the exclusion, nor did he offer an alternative to exclusion.

The proper standard for review of evidentiary rulings is abuse of discretion. *Goodyear Tire and Rubber Co. v. Thompson*, 11 S.W.3d 575, 577 (Ky. 2000). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Commonwealth v. English*, 993 S.W.2d 941, 945 (Ky. 1999). Furthermore, because Mr. Sturgill's counsel did not object to the exclusion of the witnesses, we must ultimately review this issue for palpable error.

A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error.

Kentucky Rules of Criminal Procedure (RCr) 10.26. "[I]f upon consideration of the whole case the reviewing court does not conclude that a substantial possibility exists that the result would have been any different, the error complained of will be held to be nonprejudicial." *Jackson v. Commonwealth*, 717 S.W.2d 511, 513 (Ky. App. 1986) (citation omitted).

We do not believe that the trial court abused its discretion in excluding Mr. Sturgill's witnesses or that manifest injustice has occurred. The error alleged concerns the exclusion of evidence; therefore, Mr. Sturgill's counsel was required

to “make known to the court ‘the substance of the evidence’ sought to be presented, unless the substance ‘was apparent from the context within which questions were asked.’ ” *Slone v. Commonwealth*, 382 S.W.3d 851, 856 -857 (Ky. 2012) (citing KRE 103(2)(a)). Trial counsel could have done this by avowal testimony or by giving the court a summary of the anticipated testimony. This was not done. We cannot say whether manifest injustice occurred because we do not know what the witnesses’ testimony would have been.

The specific purpose of the separation of witnesses rule is to prevent witnesses from hearing the testimony of other witnesses:

The reason for the adoption of the rule is to prevent the witnesses excluded from hearing the testimony of other witnesses with the possible result that the testimony of the others might lead the witness to answer in such manner as to conform with other testimony, even though, as is often the case, the witness herself is not conscious of this subtle influence.

Smith v. Miller, 127 S.W.3d 644, 646 (Ky. 2004) (citing *Speshiots v. Coclans*, 311 Ky. 547, 552, 224 S.W.2d 653, 656 (1949)). Although KRE 615 does not contemplate this specific scenario, a non-witness who discusses Ms. Sturgill’s testimony with witnesses waiting to testify and who are outside the courtroom, the trial judge has discretion over evidentiary matters. In this case, the judge questioned Mr. Oren and Ms. Bohannon and found that Mr. Sturgill’s witnesses had been tainted. We find no error.

For the foregoing reasons, we affirm the judgment of the Lewis Family
Court.

ALL CONCUR.

BRIEF FOR APPELLANT:

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BRIEF FOR APPELLEE:

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