RENDERED: DECEMBER 13, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001639-ME

JULIE LOCKE APPELLANT

v.

APPEAL FROM JEFFERSON FAMILY COURT
HONORABLE DENISE DEBERRY BROWN, JUDGE
ACTION NO. 14-D-502548-001

MATTHEW SALLEE APPELLEE

OPINION
AFFIRMING

** ** ** ** **

BEFORE: JONES, KRAMER, AND TAYLOR, JUDGES.

JONES, JUDGE: Julie Locke appeals from an October 11, 2018, decision of the Jefferson Circuit Court, Family Division, denying her motion to extend a domestic violence order (DVO) against her former spouse, Matthew Sallee. We affirm.

I. Background

In October 2014, the family court granted Locke's request for a DVO against Sallee.[1] The DVO contains no findings and the record before us does not contain video footage of the proceedings,[2] but the parties seem to agree that the DVO was granted due to Sallee being verbally and/or physically abusive to Locke. In September 2016, the family court extended the DVO until September 2018.

In August 2018, Locke filed a motion to extend the DVO for an additional three years due to "testimony on the record of [Sallee] violating the current DVO (no contact) as well as a current CPS [Child Protective Services] case against [Sallee]." Record (R.) at 150. This motion was assigned to family court judge Denise DeBerry Brown for adjudication. The family court held an evidentiary hearing on Locke's motion on September 12, 2018. Locke briefly testified that she still feared for her physical and emotional safety, but Sallee's counsel objected to Locke attempting to testify about the CPS investigation because it was based upon alleged conduct which occurred outside Locke's presence. Sallee offered to stipulate that CPS had found no substantiation, an offer Locke's counsel rejected.

---

[1] Judge Joseph O'Reilly issued the DVO.

[2] Exhibit 3 to Locke's brief purports to be a transcript of portions of the 2014 DVO hearing. However, the record before us does not contain either video footage of the 2014 proceedings or a certified transcript thereof. We thus decline to give any weight to the exhibit.

After some back and forth between counsel, the family court interjected to say CPS had told the family court that day that it had "no concerns." Locke's counsel said he had not received that update, to which the family court said it routinely got reports from CPS in cases with open investigations. When Locke's counsel asked to see the report, the family court said it did not have an actual report because it had contacted CPS on the phone. CPS apparently responded to the family court's inquiry by email because the family court noted that it had just read CPS's response.

Eventually, Locke reiterated that she was concerned for her physical and emotional safety. After the family court sustained Sallee's objection to Locke attempting to testify as to her child's feelings towards Sallee, Locke's counsel asked to present that evidence by avowal. The family court granted counsel permission but warned that avowal testimony would have to wait until the completion of the family court's docket. When Locke's counsel noted that the hearing had begun an hour late, the family court apologized and then remarked that Locke's counsel was "not really managing anything."[3] Video Record (VR) 9/12/18 at 2:59:30 *et seq*.

[3] It is unclear why the family court made this statement; it was perhaps made because the family court was attempting to manage its docket to prevent further delays.

Sallee's counsel declined to cross-examine Locke, whereupon the family court asked Sallee if he had any evidence to present. Sallee then testified that there had been no formal allegations that he had violated the DVO. Immediately after Sallee finished his brief testimony, the judge asked family court personnel when CPS would complete its investigation. The family court then *sua sponte* continued the hearing until October 10 to afford CPS time to finish its investigation. No party objected, and Locke did not ask to cross-examine Sallee. There is no indication Locke later took any evidence by avowal.

The roughly ten-minute October phase of the hearing was contentious. The family court opened the hearing by stating that the prior hearing had been continued to allow the parties to question CPS about the email update it had provided the family court in September. The family court then called the CPS investigator to testify.

The family court asked the witness, whose name is difficult to discern on the record, if CPS had completed its investigation, to which the witness responded in the affirmative. The family court then asked what the investigation determined, and the witness said the allegations were unsubstantiated. Locke's counsel then obtained confirmation that the investigation stemmed from alleged incidents at a Red Robin restaurant between Sallee and one of the parties' children, but the family court sustained Sallee's objection to Locke asking for confirmation

that Locke was not the complainant. The family court ruled that counsel could only ask the witness questions about the results of her investigation. When Locke asked what the allegations were, the witness said they involved Sallee asking his daughter for Locke's passwords.

The family court sustained Sallee's objection to Locke's question about whether the parties' daughter had told the witness that Sallee had asked for the passwords. When Locke then stated that the daughter was prepared to testify, the family court said it would not permit testimony from the children. The family court then asked if the investigation confirmed any of the allegations, and the witness responded that Sallee admitted asking if his daughter had an iTunes account. The family court then asked if the investigation had shown that Sallee had asked the children for information about Locke, to which the witness responded, "No, ma'am."

Soon thereafter, in response to a question by Locke, the witness said she had not interviewed anyone from Red Robin. Locke then asked whether, without revealing his/her name, the witness had spoken to the complainant. The witness non-responsively responded that she had spoken with the maternal grandmother. Locke then asked, "The maternal grandmother wasn't the complainant?" VR 10/10/18 at 10:05:23. Sallee's counsel objected, and the video of the proceedings shows a person in the gallery making a throat-slashing "stop"

gesture. The family court finished explaining that it had granted the objection because the complainant was to remain anonymous and admonished the gallery to not "try to communicate with anyone." *Id.* at 10:05:35 *et seq*.

Locke's counsel asked twice if he could finish a sentence and then asked the person in the gallery who had made the gesture to identify herself. The family court said it had "already handled that" and had seen "a head nod" while addressing the objection. *Id.* at 10:06:16 *et seq*. The family court then directed Locke's counsel to proceed with questioning the witness. When counsel said he wanted to explore the communication from the audience member, the family court repeated that there had been a head nod before forcefully directing counsel to "move on." *Id.* at 10:06:38 *et seq*.

Locke's counsel then asked to be excused. When the family court asked, "Is that gonna be your evidence for today?" counsel responded that he could not "get a word out" and thus could not participate. *Id.* at 10:07:03 *et seq*. When the family court asked counsel if he was closing his case, he responded, "No, ma'am. I'm asking to be excused because the court will not allow me to participate." *Id.* at 10:07:22 *et seq*. The family court refused to excuse counsel and asked if he was done questioning the witness, to which counsel stated he was "respectfully declining to participate further in this proceeding." *Id.* at 10:07:32 *et seq*. When the family court said that was counsel's choice, counsel said it was not

his choice but instead was "brought about by the action of this court." *Id.* at 10:07:37 *et seq*. The family court concluded by stating that it had ruled and that if counsel was not going to participate he consequently had nothing else to say. Sallee's counsel then examined the witness briefly, after which the hearing adjourned.

The next day the family court issued findings of fact and conclusions of law denying Locke's motion. The family court concluded Locke had provided no evidence that Sallee had violated the DVO and the evidence did not "support a rational basis" to conclude that Locke's fears "were based upon a continuing threat of harm . . . ." R. at 164. The family court stated it was familiar with the parties due to their marriage dissolution action and did "not believe domestic violence remains a reasonable probability." R. at 164-65. Locke then filed this appeal.

II. STANDARD OF REVIEW

Ordinarily, we review decisions with respect to DVOs under the clearly erroneous standard. Findings are not clearly erroneous if they are supported by substantial evidence. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). "[I]n reviewing the decision of a trial court the test is not whether we would have decided it differently, but whether the findings of the trial judge were clearly erroneous or that he abused his discretion." *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982) (citation omitted). Abuse of discretion occurs when a court's

decision is unreasonable, unfair, arbitrary or capricious. *Kuprion v. Fitzgerald*, 888 S.W.2d 679, 684 (Ky. 1994).

Full appellate review under the normal standard of review, however, depends on counsel's compliance with our appellate rules for briefing. When there are serious and substantial deficiencies in a party's brief, our ability to perform a proper review is always frustrated, and sometimes made entirely impossible.

In relevant part, Kentucky Rule of Civil Procedure (CR) 76.12(4)(c)(v) requires the argument section of an appellant's brief to contain "ample supportive references to the record and citations of authority pertinent to each issue of law and which shall contain at the beginning of the argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Locke's brief contains no preservation statements, only one citation to the record (a nonspecific cite to the findings of fact and conclusions of law denying the motion to extend the DVO) and no germane citations to authority.[4] In fact, Locke's argument section is so terse that it contains six arguments yet is less than one full page long.

---

[4] In her sixth "argument," Locke cites one published opinion and one unpublished opinion in which we vacated decisions made by Judge Brown, but Locke does not explain how those decisions relate to this case. CR 76.28(4)(c) prevents citation of unpublished cases unless "there is no published opinion that would adequately address the issue before the court." Locke has not shown that there are no published cases on point. In short, the citations are of no material assistance to Locke as merely listing, without explanation, unrelated cases where the same trial judge was reversed does not, standing alone, entitle a litigant to relief.

As we have made plain, "[f]ailing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory." *Jones v. Livesay*, 551 S.W.3d 47, 50 (Ky. App. 2018) (citation omitted). Consequently, "[w]e will not search the record to construct [Locke's] argument for her, nor will this court undergo a fishing expedition to find support for underdeveloped arguments. . . . [T]hreadbare recitals of the elements of a legal theory, supported by mere conclusory statements, form an insufficient basis upon which this Court can grant relief." *Id* at 51-52. In fact, nearly fifteen years ago we warned that "an alleged error may be deemed waived where an appellant fails to cite any authority in support of the issues and arguments advanced on appeal . . . . It is not our function as an appellate court to research and construct a party's legal arguments, and we decline to do so here." *Hadley v. Citizen Deposit Bank*, 186 S.W.3d 754, 759 (Ky. App. 2005) (citations omitted).

"Our options when an appellate advocate fails to abide by the rules are: (1) to ignore the deficiency and proceed with the review; (2) to strike the brief or its offending portions, CR 76.12(8)(a); or (3) to review the issues raised in the brief for manifest injustice only[.]" *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010) (citation omitted). Option one in this case is not entirely possible because Locke's brief is so deficient that it is difficult for us to fully understand the nature of her arguments in the context of this appeal. Striking the offending

portions of the brief would basically leave no brief at all, meaning dismissal of the appeal. While we would be well within our right to strike the brief and dismiss the appeal, we do not believe it is appropriate to do so in this particular case. Because of the importance of DVOs to the well-being and protection of the residents of this Commonwealth, we will instead review for manifest injustice only. *See, e.g.*, *J.M. v. Commonwealth, Cabinet for Health and Family Services*, 325 S.W.3d 901, 902 (Ky. App. 2010) (reviewing issues in a similarly nonconforming brief only for manifest injustice). To constitute manifest injustice, an error must be "shocking or jurisprudentially intolerable." *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006).

III. Analysis

"A domestic violence order shall be effective for a period of time fixed by the court, not to exceed three (3) years, and may be reissued upon expiration for subsequent periods of up to three (3) years each. The fact that an order has not been violated since its issuance may be considered by a court in hearing a request for a reissuance of the order." KRS 403.740(4). The statute does not require proof of additional acts of domestic violence before extending a DVO. *Kessler v. Switzer*, 289 S.W.3d 228, 230-31 (Ky. App. 2009). Rather, a family court may consider all facts and circumstances, including the nature, extent and severity of the original acts of domestic violence, whether the original DVO has

been violated, and any other facts or circumstances that are relevant to the parties in deciding whether there is continuing need for the DVO. *Cottrell v. Cottrell*, 571 S.W.3d 590, 592 (Ky. App. 2019).

At the outset, we note that most of Locke's arguments concern the family court's actions in conducting the hearing(s) prior to deciding whether to extend the DVO. To this end, we note that this Court recently held that "neither the statute nor due process requires an evidentiary hearing prior [to a decision on the] extension of a DVO." *Id.* (citation omitted). In many ways, this moots Locke's arguments with respect to the court's conduct in allowing or disallowing certain testimony at the hearing, a hearing which our case law holds was plainly not required in the first instance. Even so, we will briefly examine Locke's various arguments for the purpose of determining whether any manifest injustice is apparent.

Locke's first "argument" consists of a statement that Judge Brown recused herself from all matters involving Locke after the order denying Locke's motion for an extension of the DVO was entered in this matter. There is nothing in the record to indicate such a recusal. Even if there were, however, the act of recusal does not automatically void or call into question previous orders issued by the judge prior to the recusal. *Petzold v. Kessler Homes, Inc.*, 303 S.W.3d 467,

473 (Ky. 2010). We also note that Locke has not cited, nor have we independently located, any motion she made asking Judge Brown to recuse at any point.

Locke's second argument is that the family court erred by excluding testimony from the parties' minor daughter. Locke fails to specify what the daughter's expected testimony would have been, or how that expected testimony would have impacted the outcome. Indeed, Locke apparently failed to follow up on her promise to present the daughter's testimony by avowal. The DVO was not issued for the protection of her daughter and Locke cites nothing which mandated permitting the daughter to testify. Under these facts, we find no manifest injustice.

Third, Locke argues the family court erred by denying her the opportunity to cross-examine Sallee. It is undeniable that the family court did not explicitly ask Locke if she wished to cross-examine Sallee. The better practice likely would have been for the family court to have asked Locke if she wished to cross-examine Sallee after he testified. But Locke also never asked to do so. There is no absolute, inviolable right to cross-examine witnesses in civil proceedings. *See, e.g.*, *Cabinet for Health and Family Services v. A.G.G.*, 190 S.W.3d 338, 345-46 (Ky. 2006). Where Locke failed to request the family court to allow the cross-examination, and refused all meaningful participation during the hearing, we cannot agree that there was any manifest error in this regard.

Locke's fourth argument is that the family court "engaged in improper *ex parte* communications with CPS" and "gave confusing and contradictory versions of her communications with the Cabinet." While we do not condone any *ex parte* communication, the family court provided an appropriate remedy by continuing the hearing so that the CPS representative could be placed under oath and questioned, in limited fashion, by the parties. The questioning revealed that the family court was given correct information about the investigation. While it would have been better had the *ex parte* communication not taken place, we can see no manifest error in this instance.

Similarly, we reject Locke's related argument that the family court improperly restricted her ability to question the gesturing gallery member. It is highly improper for observers to so communicate with a testifying witness and the family court properly admonished the gallery to refrain from doing so. Because Locke has failed to show how the admonition was insufficient, we conclude there was not sufficient egregious, intolerable conduct to constitute manifest injustice.

Finally, we reject Locke's argument that she is entitled to relief because the family court's written decision "does not reference any of these acts." It is unclear what "acts" Locke refers to, or how the lack of explicit discussion of the "acts" materially impacted the outcome of the case. The family court addressed the necessary legal criteria and Locke did not ask for additional findings.

IV. CONCLUSION

For the foregoing reasons, the Jefferson Family Court's decision to deny Locke's motion to extend the DVO is affirmed.

ALL CONCUR.

BRIEF FOR APPELLANT:

Thomas E. Clay
Louisville, Kentucky

BRIEF FOR APPELLEE:

John H. Helmers, Jr.
Corey Shiffman
Louisville, Kentucky