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TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000467-ME

DAVID Q. PETRIE — APPELLANT

APPEAL FROM HENDERSON CIRCUIT COURT
FAMILY DIVISION
v. HONORABLE SHEILA NUNLEY-FARRIS, JUDGE
ACTION NO. 19-D-00027-001

JENNIFER L. BRACKETT;
AND J.P., A MINOR — APPELLEES

OPINION
REVERSING AND REMANDING

** ** ** ** **

BEFORE: GOODWINE, LAMBERT, AND K. THOMPSON, JUDGES.

GOODWINE, JUDGE: David Q. Petrie ("David") appeals from a domestic violence order ("DVO") entered against him by the Henderson Family Court. After careful review of the DVO statutes, we reverse and remand.

BACKGROUND

David and Jennifer Brackett ("Jennifer") are divorced. J.P. is their sixteen-year-old son. David and Jennifer agreed to joint custody. Initially, each parent believed J.P. should reside primarily in their care and have visitation with the other parent. However, on June 11, 2015, the family court ordered the parties to continue joint custody of J.P. and for him to continue to reside with each parent on a weekly basis with said transition occurring on Monday at the conclusion of the school day.

On February 8, 2019, Jennifer, on behalf of J.P., filed a petition/ motion for order of protection alleging:

> David poked [J.P.] in the cheek with his finger so hard it moved his whole head. [J.P.] pushed his father back off him 3xs. He kept coming towards him aggressively to where it scared [J.P.]. [J.P.] hit his father. David kept repeatedly hitting [J.P.] in his ribs. David eventually hit [J.P.] in his privates and [J.P.] hit the floor. David grabbed [J.P.] by the neck to hold him down, leaving marks all the way across [J.P.] neck. He pinched his throat and said, 'See, I could kill you right now.'

Record ("R.") at 1. Based on the petition, the family court entered an emergency protective order against David and summoned him to appear in court on February 18, 2019.

David appeared *pro se*. Jennifer and J.P. were represented by counsel. J.P. testified during the domestic violence hearing as follows:

> I stood up and I pushed him three (3) times telling him to back up and he kept getting in my face. So, at that point, I was pretty much scared, I hit him first . . . skip forward to me hitting him a few more times . . . he grabbed me up to get me down on the ground, he held me there until the cops came.

(Video Record ("VR") 2/18/19, 9:43:41).

Following J.P.'s testimony, the family court discerned that the petition was a carefully crafted, subversive (and "free") effort by Jennifer to modify the parties' custody/parenting time arrangement. (VR 9:50:19 and 10:04:33). J.P. admitted that he no longer wished to live with David on a weekly basis. David admitted there was a physical altercation between he and J.P., but that the altercation became unavoidable after J.P. hit him.

David testified the altercation began when he confronted J.P. about his poor grades, his disrespectful actions towards his teachers, recent discipline notice(s) he received from J.P.'s school, and "unsatisfactory" conduct in five out of six classes. (VR 9:54:03-9:57:27). J.P. did not want to hear what David had to say. J.P. pushed David three times and then struck him in the chest. David restrained J.P. and asked his girlfriend to call 911 and get the "cops" to the residence. (VR 9:55:18).

The family court lectured both David and J.P. about not putting their hands on each other and walked them down memory lane recalling the history it had with the family, including Jennifer's abuse allegations against her mother. At

no time, however, did the family court make a finding that what David did by restraining J.P. resulted in a physical injury or constituted an act of domestic violence. Though it never verbally stated that an act of domestic violence had occurred and was likely to occur again, the family court simply stated it was granting the petition and issuing the domestic violence order and asked Jennifer how long she wanted it in effect. Though Jennifer said three years, the family court noted J.P. would turn eighteen before three years expired and it could not extend past J.P.'s eighteenth birthday.

David then inquired about the joint custody order and his visitation. The family court informed David that he would not have any contact with J.P. except through joint counseling sessions, which it included in its February 18, 2019 order of protection. R. at 13-15. This appeal followed.

STANDARD OF REVIEW

Under Kentucky law, a court may enter a DVO if it "finds by a preponderance of the evidence that domestic violence and abuse has occurred and may again occur[.]" KRS[1] 403.740(1).

> The preponderance of the evidence standard is satisfied when sufficient evidence establishes the alleged victim was more likely than not to have been a victim of domestic violence. . . . The standard of review for factual determinations is whether the family court's finding of domestic violence was clearly erroneous. Findings are

[1] Kentucky Revised Statutes.

> not clearly erroneous if they are supported by substantial evidence.

Caudill v. Caudill, 318 S.W.3d 112, 114-15 (Ky. App. 2010) (citations omitted).

ANALYSIS

Before reaching the merits of David's arguments, we must address a significant deficiency in his brief. "There are rules and guidelines for filing appellate briefs. . . . Appellants must follow these rules and guidelines, or risk their brief being stricken, and appeal dismissed, by the appellate court." *Koester v. Koester*, 569 S.W.3d 412, 413 (Ky. App. 2019) (citing CR[2] 76.12). David's brief fails to make "reference to the record showing whether the issue was properly preserved for review and, if so, in what manner" as required by CR 76.12(4)(c)(v).

An appellant's compliance with this rule allows us to undergo "meaningful and efficient review by directing the reviewing court to the most important aspects of the appeal[,] [such as] what facts are important and where they can be found in the record[.]" *Hallis v. Hallis*, 328 S.W.3d 694, 696 (Ky. App. 2010).

David's brief does not state how he preserved any of his arguments in the family court,[3] contravening CR 76.12(4)(c)(v), which states:

[2] Kentucky Rules of Civil Procedure.

[3] We note that the record on appeal is 29 pages and the hearing was less than one hour (VR 9:42:19 to 10:19:34). We have reviewed the entire record and watched the entire hearing. None of David's issues were properly preserved.

> An "ARGUMENT" conforming to the statement of Points and Authorities, with 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.
>
> CR 76.12(4)(c)[(v)] in providing that an appellate brief's contents must contain at the beginning of each argument a reference to the record showing whether the issue was preserved for review and in what manner emphasizes the importance of the firmly established rule that the trial court should first be given the opportunity to rule on questions before they are available for appellate review. It is only to avert a manifest injustice that this court will entertain an argument not presented to the trial court. (citations omitted).

Elwell v. Stone, 799 S.W.2d 46, 48 (Ky. App. 1990) (quoting *Massie v. Persson*, 729 S.W.2d 448, 452 (Ky. App. 1987)). We require a statement of preservation:

> so that we, the reviewing Court, can be confident the issue was properly presented to the trial court and therefore, is appropriate for our consideration. It also has a bearing on whether we employ the recognized standard of review, or in the case of an unpreserved error, whether palpable error review is being requested and may be granted.

Oakley v. Oakley, 391 S.W.3d 377, 380 (Ky. App. 2012).

Failing to comply with the civil rules is an unnecessary risk the appellate advocate should not chance. Compliance with CR 76.12 is mandatory. *See Hallis*, 328 S.W.3d at 696.

> It is a dangerous precedent to permit appellate advocates to ignore procedural rules. Procedural rules "do not exist for the mere sake of form and style. They are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination. Their importance simply cannot be disdained or denigrated."

Id. (quoting *Louisville and Jefferson County Metropolitan Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 536 (Ky. 2007)).

"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[.]" *Id.* (citation omitted).

David did not request a review for palpable error. However, "the impact of having an EPO or DVO entered improperly, hastily, or without a valid basis can have a devastating effect on the alleged perpetrator." *Wright v. Wright*, 181 S.W.3d 49, 52 (Ky. App. 2005). Thus, we will review for manifest injustice only. *See Elwell*, 799 S.W.2d at 48. "[T]he required showing is probability of a different result or error so fundamental as to threaten a [party's] entitlement to due process of law." *Martin v. Commonwealth*, 207 S.W.3d 1, 3 (Ky. 2006).

We also note Jennifer failed to file a brief. Jennifer's brief was due on or before August 19, 2019. No brief was filed. We have three options when an appellee has failed to file a brief within the time allowed. We may: (1) accept the appellant's statement of the facts and issues as correct; (2) reverse the judgment if

appellant's brief reasonably appears to sustain such action; or (3) regard the appellee's failure as a confession of error and reverse the judgment without considering the merits of the case. CR 76.12(8)(c).

As mentioned above, due to the deficiency in David's brief, and the dire consequences of the ill-advised issuance of a DVO, we review this case for palpable error. *Martin*, 207 S.W.3d at 3.

Domestic violence is governed by KRS 403.715 *et seq.*, which provides that domestic violence petitions must contain "[t]he facts and circumstances which constitute the basis for the petition" alleging domestic violence and abuse. KRS 403.725(3)(c). "Domestic violence and abuse" is defined as:

> physical injury, serious physical injury, stalking, sexual abuse, strangulation, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, strangulation, or assault between family members. . . .

KRS 403.720(1). "'Physical injury' means substantial physical pain or any impairment of physical condition[.]" KRS 500.080(13). It can also mean "[p]hysical damage to a person's body." *Physical Injury*, BLACK'S LAW DICTIONARY (11th ed. 2019).

When entering a DVO, the family court determines a petitioner has shown by a preponderance of the evidence an act or acts of domestic violence has

occurred and may again occur. KRS 403.750(1); *Matehuala v. Torres*, 547 S.W.3d 142, 144 (Ky. App. 2018); *see also Bissell v. Baumgardner*, 236 S.W.3d 24, 29 (Ky. App. 2007). To enter a DVO, the family court must decide a petitioner is more likely than not to have been a victim of domestic violence. *Matehuala*, 547 S.W.3d at 144; *Wright*, 181 S.W.3d at 52.

"A DVO 'cannot be granted solely on the basis of the contents of the petition.'" *Clark v. Parrett*, 559 S.W.3d 872, 875 (Ky. App. 2018) (citation omitted). J.P. testified first and admitted he struck David first. J.P. admitted that he no longer wished to live with David on a weekly basis. David admitted there was a physical altercation between him and J.P., but that the altercation became unavoidable after J.P. hit him. David then restrained J.P. until law enforcement arrived.

The family court did not make a finding that what David did by restraining J.P. resulted in a physical injury or constituted an act of domestic violence. The family court judge simply stated she was granting the petition and issuing the domestic violence order. The family court failed to follow the statutory requirements for issuing a domestic violence order. The family court failed to make specific findings that J.P. was a victim of domestic violence, that domestic violence had occurred in the past, and that it was likely to occur in the future. The family court did not state a basis for entering the DVO against David.

We conclude that the family court's summation of the family's history before the court was insufficient under the law to issue a DVO. KRS 403.740(1). The family court's failure to make a finding of a physical injury, past or present physical threats of abuse, or fear of imminent harm, wholly undermined its decision to grant the DVO. David's act of restraining J.P. from hitting him any further may be deemed improper by some, but it did not rise to the level of domestic violence as that term is statutorily defined.

We are cognizant the issuance of a DVO is a serious matter, as it affords the victim protection from physical, psychological, and emotional harm. However, as noted, "the impact of having an EPO or DVO entered improperly, hastily, or without a valid basis can have a devastating effect on the alleged perpetrator." *Wright*, 181 S.W.3d at 52. We conclude the family court grounded its decision on an improper basis and palpably erred in entering the DVO.

CONCLUSION

For the foregoing reasons, we reverse and remand this matter to Henderson Family Court, with instructions to vacate the DVO entered on February 18, 2019, and to dismiss Jennifer's petition without prejudice pursuant to KRS 403.730(1)(a).

ALL CONCUR.

BRIEF FOR APPELLANT:	BRIEF FOR APPELLEE:
Dax R. Womack Henderson, Kentucky	No brief filed.