NOT DESIGNATED FOR PUBLICATION

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NUMBER 2016 CA 1626

LYDIA MCCOY

VERSUS

JOSEPH PAUL MCCOY

Judgment Rendered: SEP 15 2017

Appealed from the
Twenty-third Judicial District Court
In and for the Parish of Ascension, Louisiana
Docket Number 112,474

Honorable Jessie M. LeBlanc, Judge Presiding

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Lydia McCoy
Baton Rouge, LA

Plaintiff/Appellant, *pro se*

Scott S. McCormick
Baton Rouge, LA

Counsel for Defendant/Appellee,
Joseph Paul McCoy

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BEFORE: WHIPPLE, C.J., McDONALD, AND CHUTZ, JJ.

WHIPPLE, C.J.

This case is before us on appeal by Lydia McCoy from the trial court's judgment denying her permanent spousal support. For the following reasons, we affirm.

FACTS AND PROCEDURAL HISTORY

Lydia and Joseph Paul McCoy were married on December 11, 2009, in Phoenix, Arizona. They moved to Louisiana in June 2010, residing in Ascension Parish for the duration of their marriage. No children were born of their marriage; however, shortly before they were married, Joseph became the legal guardian of his niece, following the death of his step-sister. Joseph's niece, who was nine years old at the time Joseph became her guardian, resided with the couple.

The parties physically separated on March 11, 2015, when Lydia left the matrimonial domicile. Thereafter, on March 19, 2015, Lydia filed a petition for divorce. In her petition, she contended that she was free from fault in the dissolution of the marriage and that she was entitled to final spousal support.[1] Joseph contested Lydia's entitlement to final spousal support, disputing her claim that she was free from fault in the breakup of the marriage.

A judgment of divorce was rendered on October 26, 2015. Prior to that judgment, however, a hearing was held on Lydia's claim for final spousal support. By judgment signed August 16, 2015, the trial court denied Lydia's request, finding that she had failed to establish that she was free from fault in the dissolution of the marriage.

Lydia then filed the instant appeal, listing twelve errors, which can be combined into the following issues for review: (1) whether Joseph's counsel

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[1]Lydia also prayed for and was awarded interim spousal support.

engaged in dishonest and improper conduct which created a negative image of Lydia with the trial court; (2) whether Lydia's former attorney failed to offer crucial evidence and testimony at trial; (3) whether the trial court committed various evidentiary errors; (4) whether the trial court erred in finding Lydia at fault in the dissolution of the marriage; and (5) whether the trial court erred in denying her final spousal support where she cannot support herself and Joseph is financially cable of providing her with support.[2]

DISCUSSION

Issue No. 3: Alleged Evidentiary Errors (Lydia's 5th, 6th & 7th Listed Errors)

We first address Lydia's contention that the trial court committed various evidentiary errors, because an evidentiary error can affect this court's standard of review. See Breitenbach v. Stroud, 2006-0918 (La. App. 1st Cir. 2/9/07), 959 So. 2d 926, 930. First, Lydia contends that the trial court erred in allowing Joseph's witnesses to testify when they had improperly discussed the case among themselves and with Joseph's attorney during trial.

Pursuant to LSA-C.E. art. 615(A), the court on its own motion may, and on the request of a party shall, order that the witnesses be excluded from the courtroom and refrain from discussing the facts of the case with anyone other than counsel in the case. The purpose of sequestration is to assure that a witness will testify as to his own knowledge of the events, to prevent witnesses from being influenced by the testimony of others, and to strengthen the role of cross-

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[2]We note that Lydia's motion for appeal lists the date of the judgment denying her motion for new trial as the date of the judgment she seeks to appeal. However, when a motion for appeal refers by date to the judgment denying a motion for new trial, but the circumstances indicate that the appellant actually intended to appeal from the final judgment on the merits, the appeal should be maintained as being taken from the judgment on the merits. Byrd v. Pulmonary Care Specialists, Inc., 2016-0485 (La. App. 1st Cir. 12/22/16), 209 So. 3d 192, 195. Because it is clear from her listed "errors of judgement" that Lydia intended to appeal from the judgment denying final spousal support, the merits of that judgment are properly before us.

examination in developing the facts. State v. Lutcher, 96-2378 (La. App. 1st Cir. 9/19/97), 700 So. 2d 961, 971, writ denied, 97-2537 (La. 2/6/98), 709 So. 2d 731; see also Johnson v. E. I. DuPont deNemours & Company, Inc., 08-628 (La. App. 5th Cir. 1/13/09), 7 So. 3d 734, 741.

However, the mere fact that witnesses talk to one another does not establish a violation of the sequestration order. State v. Doleman, 2002-0957 (La. App. 4th Cir. 12/4/02), 835 So. 2d 850, 858, writ denied, 2002-3101 (La. 9/19/03), 853 So. 2d 633. The trial judge is in the best position to determine whether a violation of the sequestration rule has occurred resulting from any irregularity or ignorance of the sequestration rule or whether the violation was intentional. Cory v. Cory, 43,447 (La. App. 2nd Cir. 8/13/08), 989 So. 2d 855, 862. Moreover, the trial court may, in its discretion, refuse to disqualify an errant witness or impose any other sanction for a violation if the purpose of the sequestration has not been thwarted, or if there is no evidence that the witness's testimony has been tainted. Cory, 989 So. 2d at 861; see also State v. Marchese, 430 So. 2d 1303, 1306 (La. App. 1st Cir. 1983).

At the beginning of trial, the trial court granted the request made by Lydia's attorney that the witnesses be sequestered. The court then instructed the witnesses present at that time not to discuss the matter amongst themselves or with anyone else. Counsel for Lydia later objected to the testimony of Joseph's witnesses on the grounds that they had violated the court's sequestration order by discussing prior testimony with Joseph's counsel. Joseph's counsel denied that he had discussed any testimony with the witnesses, stating that he had informed the

witnesses generally when one witness had finished testifying and who would be called next.[3]

At the request of Lydia's counsel, the trial court then questioned Joseph's witnesses as to whether they had discussed the case with anyone. While one witness testified that she had not, Joseph's niece stated that she had discussed one matter with "the two people that just arrived." When asked by the judge if the conversation was about whether they would be allowed to testify, the niece acknowledged that it was, but also stated that they had discussed "something that may have happened" that she did not remember. However, when asked if she discussed any particulars of any testimony that may have taken place in the courtroom, she responded, "[n]o," and she also denied that either Joseph or his counsel had discussed any matters with her about the case.

The trial judge indicated that her only concern at that stage was the statement by Joseph's niece that these potential witnesses had discussed something that she may not have remembered happening and whether that was an event that was going to be used in rebuttal. However, when the judge then questioned John and Tonya Disotell, the two potential witnesses who had just arrived, they both indicated that they had not discussed anything with regard to any testimony they may give or that had been given in the hearing with anyone outside the courtroom. Apparently satisfied with their responses, the judge then instructed the Disotells, as she had done earlier with the other witnesses, not to discuss the case among themselves or with anyone else and allowed the witnesses to testify.

Based on the testimony of record, it is not clear that a violation of the

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[3]Nonetheless, we note that, as stated above, LSA-C.E. art. 615 authorizes the trial court to order the witnesses to refrain from discussing the facts of the case with anyone **other than counsel in the case.**

sequestration order occurred. Moreover, given that the Disotells were not present at the time the other witnesses were instructed by the trial court not to discuss the matter among themselves or with anyone else, there has been no showing that any potential violation was intentional. Likewise, our review of the testimony of these witnesses does not indicate how any discussions may have affected their testimony, thereby thwarting the purpose of the sequestration order, given that their testimony about particular incidents did not overlap. The trial judge had the opportunity to assess the credibility of these witnesses as to whether any violation of the sequestration order occurred, and, on review, we cannot say that the trial judge abused her discretion in allowing these witnesses to testify. See generally Silvio v. Rogers, 580 So. 2d 434, 438 (La. App. 2d Cir. 1991), and Cory, 989 So. 2d at 861-862.

Lydia also argues on appeal that the trial court improperly allowed Tonya Disotell to testify because she was not listed on the witness list in the pretrial order. A trial judge has great discretion in conducting a trial, including the admissibility of a witness's testimony, whether that witness is brought in rebuttal or is one not listed on the pretrial order. See LSA-C.C.P. arts. 1551 and 1631; see also Prestwood v. City of Slidell, 2002-1786 (La. App. 1st Cir. 5/9/03), 849 So. 2d 553, 557, and Palace Properties, L.L.C. v. Sizeler Hammond Square Limited Partnership, 2001-2812 (La. App. 1st Cir. 12/30/02), 839 So. 2d 82, 91, writ denied, 2003-0306 (La. 4/4/03), 840 So. 2d 1219. Mrs. Disotell was called as a rebuttal witness to refute Lydia's testimony that she had never hit Joseph's niece, and the trial court specifically limited her testimony on rebuttal to only that particular issue. Because a rebuttal witness need not be listed in the pretrial order, we find no abuse of the trial court's discretion in allowing this testimony.

Lydia next contends that the trial court improperly allowed Joseph's attorney to play a recording at trial where the poor sound quality made identifying the

individual whose voice was recorded impossible, where it is unlawful in Louisiana to record a person without the person's knowledge, and where the recording was not offered into evidence. Joseph's niece identified the recording during her testimony as a recording of Lydia calling her a derogatory name, and the recording was then played for the court. Notably, counsel for Lydia did not object to the recording being played in court.

In order to preserve an evidentiary issue for appellate review, the complaining party must enter a contemporaneous objection to the evidence and state the reasons for the objection. The failure to make a contemporaneous objection during the trial waives the right of a party to complain on appeal that the evidence was improperly admitted at trial. Louisiana State Bar Association v. Carr and Associates, Inc., 2008-2114 (La. App. 1st Cir. 5/8/09), 15 So. 3d 158, 172, writ denied, 2009-1627 (La. 10/30/09), 21 So. 3d 292. Given the lack of a contemporaneous objection on behalf of Lydia, we conclude that Lydia has waived her right to challenge this recording being played at trial.

Issue No. 1: Alleged Improper Conduct by Joseph's Counsel
(Lydia's 2nd, 4th, 8th, & 10th Listed Errors)

Lydia further contends that Joseph's counsel, by filing a pretrial memorandum the day before trial, had an improper *ex parte* communication with the trial judge through which he created a negative image of Lydia. Counsel for Lydia filed a Motion to Strike the pretrial memorandum allegedly filed by Joseph's counsel on the day before trial on the issue of final spousal support.[4] In his motion, which was also filed the day before trial, counsel for Lydia argued that the trial court should strike Joseph's pretrial memorandum because the court had not

[4]The pretrial memorandum is not a part of the record on appeal. We note that upon questioning by the court, Joseph's counsel indicated that he had not actually filed the pretrial memorandum with the clerk of court. Thus, it is unclear whether the memorandum was ever formally filed into the record of this matter.

requested pretrial memoranda, the memorandum was an attempt at an *ex parte* communication with the court, and it contained "impertinent and scandalous" matter and allegations that were "extremely prejudicial" to Lydia.

The trial court addressed the motion to strike the following day during the trial. Joseph's counsel explained to the court that providing the court with a pretrial memorandum had been his practice for years in family cases and that he viewed it as similar to an opening statement. In denying the motion, the court noted that it had not yet read the memorandum, but stated that it did not consider a pretrial memorandum to be an *ex parte* communication. We agree with this assessment.

Regarding improper *ex parte* communications by an attorney with a judge, Rule 3.5(a) of the Louisiana Rules of Professional Conduct provides that an attorney shall not seek to influence a judge by "means prohibited by law." We cannot conclude that simply because the trial court's case management order, which was entered approximately two and one-half months before trial, did not **require** the parties to submit pretrial memoranda, the filing or attempted filing of such a memorandum with the district court would constitute an *ex parte* communication designed to influence the judge "by means prohibited by law." Compare Louisiana State Bar Association v. Harrington, 585 So. 2d 514, 521-522 (La. 1990) (attorney's telephone call to judge to discuss pending case constituted an improper *ex parte* communication attempting to influence the judge by "means prohibited by law," as an effort to induce the judge to violate the Code of Judicial Conduct, which provides that a judge should not permit a private or *ex parte* interview, argument or communication designed to influence his judicial action). Thus, we find no merit to this argument.

We also find no merit to Lydia's complaints on appeal of alleged dishonest or inappropriate conduct by Joseph's counsel in his questioning of Lydia's motives

in marrying Joseph and his alleged portrayal of Lydia in a negative image. Our review of the record does not reveal any inappropriate conduct, but rather the actions of an attorney presenting his client's position in a matter involving conflicting testimony.

Issue No. 2: Alleged Failure by Lydia's Former Attorney to Offer Crucial Evidence and Testimony (Lydia's 3rd Listed Error)

Lydia also contends that despite her having provided her former attorney with information about additional evidence and testimony to support her claim that she was free from fault in the dissolution of the marriage, he failed to present this crucial evidence and testimony at the trial. Lydia asks this court to "take into consideration the new evidence" and award her spousal support.[5]

Under the broad authority granted to the court pursuant to LSA-C.C.P. art. 2164, this court is empowered to remand a case either for a new trial or for the introduction of additional evidence to prevent a miscarriage of justice. However, such procedure should be sparingly exercised. Bidwell v. Binnings Construction Company, 228 So. 2d 240, 242 (La. App. 1st Cir. 1969). We are satisfied that this case does not justify our resorting to such an extraordinary procedure.

In essence, Lydia argues that her former counsel mishandled her case by refusing to call witnesses and present evidence that would have allegedly supported her position. However, to embrace such a position would require this court to engage in obvious speculation, which we are not permitted to do. Indeed, instead of agreeing with Lydia's contentions, we might just as easily speculate that her former counsel may have prudently decided not to call other witnesses or

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[5]Lydia contends in brief that this "new evidence" was "already introduced" in the trial court when she filed a Motion for New Trial on December 21, 2015. However, the record on appeal reflects that a Motion for New Trial was filed on behalf of Lydia on August 26, 2015, was heard by the trial court on October 26, 2015, and was denied by judgment dated February 24, 2016. No "new evidence" was filed with the motion or offered at the hearing of the motion.

present other evidence for various reasons. We have no reason to impute to Lydia's former counsel improper presentation of her case in the trial court. Moreover, this is a matter which properly addresses itself to the attorney-client relationship and does not warrant remand of the case. See Bidwell, 228 So. 2d at 242.

Issue No. 4: Trial Court's Findings Regarding Fault (Lydia's 1st, 2nd, 8th, 9th, & 10th Listed Errors)

In contending that the trial court erred in finding that she had failed to prove that she was free from fault in the breakup of the marriage, thus precluding her entitlement to final periodic support, Lydia raises several arguments. Specifically, she contends that Joseph was dishonest in his testimony and that the court improperly discounted or diminished the domestic violence he engaged in towards Lydia. Moreover, she contends that her actions could not be construed as fault where she was merely protecting herself by responding verbally to the abuse she experienced from Joseph and his niece.

Louisiana Civil Code article 112 provides that the court may award final periodic support to a spouse who has not been at fault prior to the filing of the petition for divorce and is in need of support. A spouse need not be totally blameless to receive permanent alimony. Hammack v. Hammack, 99-2809 (La. App. 1st Cir. 12/22/00), 778 So. 2d 70, 73, writ denied, 2001-0913 (La. 5/25/01), 793 So. 2d 166. To constitute fault sufficient to deprive a spouse of permanent alimony, the spouse's misconduct must not only be of a serious nature, but it must also be an independent, contributory, or proximate cause of the breakup of the marriage. Hammack, 778 So. 2d at 72. Fault continues to mean misconduct that rises to the level of one of the previously existing fault grounds for legal separation or divorce, i.e., adultery, conviction of a felony, habitual intemperance or excesses, cruel treatment or outrages, public defamation, abandonment, an attempt on the

other's life, status as a fugitive, and intentional non-support. Cauthron v. Cauthron, 2012-0913 (La. App. 1st Cir. 2/15/13), 113 So. 3d 232, 233-234.

With regard to cruel treatment or outrages as a ground of fault, petty quarrels, bickering, and fussing do not constitute cruel treatment within the context of a spousal support claim. See Allen v. Allen, 94-1090 (La. 12/12/94), 648 So. 2d 359, 362-363, Fountain v. Fountain, 93-2176 (La. App. 1st Cir. 10/7/94), 644 So. 2d 733, 738-739, and Voiselle v. Voiselle, 16-540 (La. App. 3rd Cir. 12/7/16), 206 So. 3d 289, 292, writ denied, 2017-0345 (La. 4/7/17), 218 So. 3d 113. Instead, a spouse's mental harassment, nagging and griping must be of such a continued pattern as to make the marriage unsupportable. See Voiselle, 206 So. 3d at 292, and Gilley v. Gilley, 07-568 (La. App. 5th Cir. 12/11/07), 976 So. 2d 727, 728.

The burden of proving freedom from fault is upon the claimant spouse. Cauthron, 113 So. 3d at 233. A trial court's findings relative to the issue of fault in domestic cases are entitled to great weight and will not be overturned on appeal absent manifest error. Hammack, 778 So. 2d at 73.

In finding that Lydia had failed to prove that she was free from fault in the breakup of the marriage, the trial court accurately noted that the parties' relationship was "a most dysfunctional situation." The record reveals that in 2009, at the age of 24, Lydia came to the United States from Siberia, Russia, on a J-1 Visa to work as an au pair. She was placed in Joseph's home to care for his then nine-year-old niece in October 2009, and within approximately two months, Joseph and Lydia married.

The record contains testimony of abuse, both verbal and physical, by Joseph against Lydia, by Lydia against Joseph's niece, and by Joseph's niece against Lydia, although much of the testimony was disputed by the parties, particularly by Lydia. Also, there was testimony of verbal harassment by Lydia directed at Joseph. While the trial court specifically found that Lydia was a victim of

domestic violence on the basis of an incident acknowledged by Joseph that occurred a couple of months after the parties were married, wherein Joseph kicked in a bedroom door causing it to strike Lydia, the trial court further found that Lydia was not free from fault in the eventual breakup of the marriage. In finding that Lydia was not free from fault, the trial court specifically noted her relationship with Joseph's niece and the evidence of her mistreatment of the child. And the record supports the finding that Lydia's behavior toward Joseph's niece caused much conflict within the marriage.

On appeal, Lydia argues that her actions and temperament over the course of the marriage were in response to the abuse she experienced from Joseph and his niece and, thus, cannot constitute fault on her part. The jurisprudence has held that conduct which might ordinarily constitute fault will not deprive a spouse of final periodic spousal support when that conduct is a reasonably justifiable response to the other spouse's preceding conduct. See Bourg v. Bourg, 96-2422 (La. App. 1st Cir. 11/7/97), 701 So. 2d 1378, 1381, and Voiselle, 206 So. 3d at 292. However, the trial court obviously did not believe Lydia's testimony that her behavior could be explained as a justifiable reaction to Joseph's conduct.[6] Moreover, Lydia's testimony wherein she denied many instances of her own verbal and physical aggression toward Joseph's niece was contradicted by several witnesses.

The issue of spousal fault turns largely on evaluations of witness credibility. Noto v. Noto, 09-1100 (La. App. 5th Cir. 5/11/10), 41 So. 3d 1175, 1179. Thus, the trial judge, as trier of fact having the opportunity to observe the demeanor of the witnesses, has vast discretion in determining the weight and credibility of

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[6]Indeed, with regard to the audio recordings offered by Lydia that reveal Joseph yelling and using profanity toward Lydia, the trial court noted that Lydia controlled when the recordings started and stopped and, given indications at trial that Lydia may be the aggressor or may have "pushed his buttons," refused to give a "heightened level of credibility" to the recordings, which the court acknowledged, on first blush, seemed "very damning."

witnesses. See Pearce v. Bailey, 348 So. 2d 75, 78 (La. 1977), and Bourg, 701 So. 2d at 1382. In our review, we cannot say that the trial court abused its vast discretion in determining the credibility of the witnesses and the weight to give their testimony, nor can we say that it was manifestly erroneous in finding that Lydia had failed in her burden of establishing that she was free from fault in the breakup of the marriage. Accordingly, we find no merit to Lydia's contention on appeal that the trial court erred in denying her claim for final periodic support.

Issue No. 5: Trial Court's Failure to Award Lydia Final Spousal Support (Lydia's 11th & 12th Listed Errors)

Having found no manifest error in the trial court's finding that Lydia failed to prove that she was free from fault in the dissolution of the marriage, we pretermit her remaining arguments regarding her inability to support herself and Joseph's financial ability to pay final spousal support.

CONCLUSION

For the above and foregoing reasons, the August 16, 2015 judgment, denying Lydia McCoy's request for permanent spousal support, is hereby affirmed. Costs of this appeal are assessed against Lydia McCoy.

AFFIRMED.