

RENDERED: SEPTEMBER 27, 2019; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2018-CA-001698-ME

TYLER MAGINNIS

APPELLANT

APPEAL FROM JEFFERSON CIRCUIT COURT
FAMILY DIVISION NINE (9)
v. HONORABLE GINA KAY CALVERT, JUDGE
ACTION NO. 18-D-502742-001

THOMAS MAGINNIS

APPELLEE

OPINION
REVERSING AND REMANDING

** ** * * * * *

BEFORE: GOODWINE, SPALDING, AND L. THOMPSON, JUDGES.

GOODWINE, JUDGE: Tyler Maginnis (“Tyler”) appeals from a domestic violence order (DVO) entered against him by the Jefferson Family Court. After careful review of the DVO statutes, we reverse and remand.

BACKGROUND

Tyler's parents, Thomas Maginnis (Thomas) and Ninamary Maginnis (Ninamary), separated and were in the middle of a contested divorce when the allegations of domestic violence arose between Thomas and Tyler. Following the separation, Tyler moved back to Kentucky and in with Ninamary to care for her while she recovered from leukemia. Thomas wanted Tyler to testify on his behalf during the divorce proceedings, but Tyler refused.

On July 8, 2017, Tyler filed a petition for a DVO against Thomas. On July 10, 2017, Ninamary filed a petition for a DVO against Thomas. Ninamary received an Emergency Protective Order on the day she filed her petition. After a hearing on July 17, 2017, the family court granted Ninamary a DVO in her favor and against Thomas for three years. Following the hearing, Thomas agreed to entry of a DVO in Tyler's favor, without a hearing, for a period of one year. Said DVO expired on July 17, 2018.

Following the expiration of Tyler's DVO, Thomas began contacting him. The first contact was a happenstance encounter at a traffic light. Thomas pulled up beside a car at the light and looked inside. He recognized Tyler. They exchanged pleasantries ending with each telling the other, "I love you." A short time later, Thomas called Tyler and stated that the U.S. Marshals knocked on his door looking for him. On another occasion, Thomas made a false report to the

Louisville police department stating Tyler was a drug dealer and guns and drugs could be found in his car and at Ninamary's home, where Tyler was staying.

Based on Thomas's call, five police officers arrived at Ninamary's home, conducted a search of the home and his vehicle, and found no drugs or weapons.

Tyler was not arrested nor charged with any crime. After speaking with Tyler, the police left the premises.

On September 15, 2018, Thomas and Tyler exchanged a series of emails:

6:13 a.m.: Thomas emailed Tyler about personal identifying information that was inadvertently filed by Ninamary's attorneys in their divorce action.

11:35 a.m.: Tyler responded, saying, in part, "I have far more fulfilling and important things to focus on, like my goals." Tyler also stated, "Still love ya, pops, but I get the feeling you could use some time to get close to God like me, a debout (sic) Christian."

12:51 p.m.: Tyler emailed Thomas again, stating, "You do not want to push me, dad, I am at the Court house right now renewing the DVO and have blocked all the ways you have of contacting me." Tyler also stated he carried a ".45 [Smith and Wesson] and will be receiving a CCW permit soon." "You need to stop worrying about everyone else. You do you. I do me. Bye, Dad."

Immediately after reading Tyler's 12:51 p.m. email, Thomas went to the courthouse and filed a petition requesting a DVO in his favor against Tyler. The emergency protective order was denied, but the family court issued a summons and scheduled a hearing for September 24, 2018. R. at 12. Tyler was in Alaska at that time and the family court entered an order continuing the hearing to October 15, 2018. R. at 15.

On October 15, 2018, the family court called the case. Video Record No. 1, 10/15/18 (VR 1), 9:56:21. Thomas and his attorney, Grant Helman, were present. Tyler appeared but his attorney did not. The court asked, "Is your attorney coming?" VR 1, 9:56:45. Tyler explained that his attorney's wife had an accident and he believed he was on his way. VR 1, 9:56:48 - 59. Mr. Helman asked the family court if it could enter an EPO. VR 1, 9:58:28. This was a summons. The family court explained that it could not do so without a hearing. VR 1, 9:58:47. Tyler asked the family court for a continuance. VR 1, 9:58:57. The family court denied his request stating, "Well, actually, no. You had your one bite at that. It was rescheduled last time." VR 1, 9:59:00.

The family court asked for Mr. Smith's phone number and tried to reach him by phone. VR 1, 9:59:35. The call went to voicemail. VR 1, 10:00:00. The family court then asked Mr. Helman if he would try and text him to get an ETA. VR 1, 10:00:35. Mr. Helman reached Mr. Smith by phone, and placed the

call on speakerphone. VR 1, 10:01:17. Mr. Smith explained to the court what happened and indicated he could be in court within fifteen (15) minutes. VR 1, 10:01:21- 58. The family court granted a brief recess. VR 1, 10:02:12.

Upon recall of the case, all parties were present, and the family court inquired of Thomas if he wished to proceed with the hearing. Video Record No. 2, 10/15/18 (VR 2), 11:11:19. Thomas and Mr. Helman responded affirmatively.

The family court reviewed the file and stated:

Petitioner states on September 15, 2018, above-named Respondent engaged in acts of domestic violence in that: 'I, Thomas [], is filing against my son, Tyler []. My son and wife both have EPO/DVO on me. My son's expired 2 months ago. My insurance policy has just been changed to my wife, and my son lives with her. I saw my son driving and stopped at a stop sign and told him I love him, and he said it back. We then started to exchange emails, which is where he threatened me to say, 'I carry a .45 [Smith & Wesson] and will be receiving a CCW permit soon. This was your only chance to get to know me.' He has also physically assaulted me. He has punched me numerous times. He has also threatened me in the past numerous times. I am fearful for my safety because he made it clear he carries loaded guns with him. I want him to stay away from me and to have no contact with me.'

VR 2, 11:11:31 – 41, R. at 1. "Is there anything about that statement that was incorrect?" VR 2, 11:12:42. Thomas was not placed under oath.

Thomas responded, "No, ma'am." VR 2, 11:12:48. The family court then inquired of Mr. Helman whether he had any additional questions. He proceeded to question Thomas. Again, Thomas was not placed under oath.

Thomas made statements in accordance with the facts set forth above. Mr. Helman asked him, “Had there been domestic violence in the past between your son and you?” VR 2, 11:17:00. Thomas responded. “Yes.” VR 2, 11:17:01. Mr. Smith objected as irrelevant. Mr. Helman responded, “It isn’t because it’s what occurred in the past and what may occur in the future.” VR 2, 11:17:12.

The family court: “Continue on.” VR 2, 11:17:18. Thomas said, “My son has assaulted me in the past.” VR 2, 11:17:19. Mr. Helman asked: “How did you take the sentence in the email – which I will give the court – How did you take that when he said I carry a – Tell me exactly what he said. VR 2, 11:17:20 – 39. Thomas reads the email. “You don’t want to push me dad.” VR 2, 11:17:44. “I carry a [Smith and Wesson] and will be receiving my CCW permit soon. It was your only chance to get to know me and you turned it into trying to make me fearful because of your lies about U.S. Marshals.” VR 2, 11:17:49 – 18:09.

Mr. Helman asked: “Are these the emails that preceded that?” VR 2, 11:18:10. Thomas replied, “Yes.” VR 2, 11:18:14. “As we sit here today, do you fear for your life because of the statement that he carries a gun?” “Yes, I do.” VR 2, 11:18:32. “Did you consider that to be a threat to you in the future?” “Yes, I am afraid of my son.” VR 2, 11:18:38. Mr. Helman gives the emails to the court and it reviews them. VR 2, 11:18:45 – 49.

Mr. Helman, “Are you afraid of him?” VR 2, 11:19:11. “Yes, I am afraid for my girlfriend’s safety and my safety.” VR 2, 11:19:14. Thomas did not call any additional witnesses.

Thereafter, the following colloquial exchange took place:

Mr. Smith: If I may. Tom, your son had previously obtained a domestic violence order against you, is that correct?

Thomas: Yes, that is correct, Robert.

Mr. Smith: And –

The Court: Mr. Maginnis, you’re not going to – It’s Mr. Smith. We’re using first names –

Thomas: Can he call me Mr. Maginnis?

Mr. Helman: No, just –

Thomas: That’s fine. He wanted – We’re friends. I guess he –

The Court: Mr. Maginnis –

Thomas: Yes, Your Honor.

The Court: We are not going to turn this into a circus. I’ve asked that the two of you be addressed by your first names to keep my record very, very clear. That does not give you permission to call anyone in this courtroom by their first name. It is inappropriate and not acceptable.

VR 2,11:20:28 – 11:21:24.

On cross-examination, Thomas stated he and Tyler had several altercations in the past with the last one being in 2013. However, Thomas never

sought a DVO against Tyler. Thomas further testified that since Tyler's DVO expired and he and Tyler resumed communications, Tyler never came up to him with a gun or threatened him in any way. VR 2, 11:23:5 - 24:00.

Following Thomas's testimony, Mr. Smith informed the family court that he was going to call Tyler to testify. At that point, Mr. Smith asked the family court, "Has he been sworn?" VR 2, 11:24:52. The family court responded, "I think I swore them in." VR 2, 11:24:55 - 57. Neither Thomas nor Tyler were sworn in. Prior to questioning Tyler, Mr. Smith told him he was under oath and the family court repeated, "you're under oath." VR 2, 11:25:00.

Tyler described the prior domestic violence incident which led to him obtaining a DVO against Thomas in July of 2017 where Thomas slammed him down causing him to land on a plate which broke and cut his back. Upon cross-examination, Mr. Helman questioned Tyler about the allegations in the petition. He was asked if he owned any guns and Tyler responded that he did not. He was asked why he made the statement in the emails about the gun. Tyler again explained about the scar on his back. Mr. Helman then called Tyler a liar and said he had an anger problem. Tyler denied having a problem with anger. He also denied owning any weapons. VR 2, 11:29:03. Tyler said, "Truthfully, as we sit here today, I do not. I merely stated I was armed because I wished to be left alone." VR 2, 11:29:14. Mr. Helman: "I'm reading what you're saying." "I carry

a .45 [Smith and Wesson].’ That’s a lie?” VR 2, 11:29:16 – 21. “I’m under oath, Mr. Helman. That’s a lie.” VR 2, 11:29:24.

Mr. Helman began badgering Tyler. “You’re a liar, aren’t you? Yes or no?” VR 2, 11:29:30. Tyler smacked his leg and stood up from his chair. VR 2, 11:29:52. Mr. Smith immediately placed his hand on Tyler’s chest and told him to sit down. VR 2, 11:29:54. Tyler complied. A deputy sheriff came over and scolded Tyler. VR 2, 11:29:57 – 11:30:06. Tyler apologized. VR 2, 11:30:09. The family court told Tyler to turn his chair around and look at her. VR 11:30:15. Tyler complied. Mr. Helman continued: “As we sit here today, you lied in your email?” VR 2, 11:30:22. Tyler responded: “Yes, I lied in my email.” VR 2, 11:30:23. Mr. Smith apologized for Tyler standing up and said “this is very, very emotional and difficult for him. He should not have stood up.” VR 2, 11:30:25 - 40. Tyler was visibly shaken and began to cry. VR 2, 11:30:51.

In determining Thomas was entitled to entry of a DVO, the family court stated:

It is hard for me to find someone who has such a lack of the ability to control themselves not a dangerous – I just – I don’t feel like in good conscious not take that as a threat based on the behaviors I saw. I’m sorry. I cannot take that risk. I’m going to issue a domestic violence order for one year. No weapons.

VR 2, 11:32:45. The family court did not make a specific finding that an act of domestic violence had occurred against Thomas in the past and was likely to occur in the future as statutorily required. The family court did not find any instances of past domestic violence, abuse or threats by Tyler. Rather, the family court said, “I’m not trying to punish you. I am worried about you. I am very familiar with your parents and I cannot imagine how you must feel and what all you’ve been going through.” VR 2, 11:34:04. The family court then proceeded to check the boxes on the DVO and stated:

You need to stay 500 feet away from your dad. I’m sure that will not be a problem. Don’t contact him or be around him. I know you don’t want to. Don’t damage any of his property. You cannot own, possess, or purchase, or attempt to own, possess or purchase a firearm.

[To Thomas] I cannot put you under any orders in this court but I’m making notations on here. You pushed him. You got what you wanted because I cannot take a chance. Leave this young man alone. If not, I will encourage him to take out criminal charges. Leave him alone. Get your divorce. He doesn’t want to be involved. Leave him alone.

VR 2, 11:35:52. Thereafter, the family court entered its Order of Protection dated October 15, 2018. R. at 17. It also entered a Domestic Violence Treatment Order for a mental health evaluation and follow-up. 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[.]” KRS¹ 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 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 Tyler’s arguments, we must address a fatal 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 CR² 76.12). Tyler’s brief fails to “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). Tyler simply states under a heading “*Preservation*” that he filed a timely notice of appeal of the

¹ Kentucky Revised Statutes.

² Kentucky Rules of Civil Procedure.

DVO entered against him. He cites CR 73.02(1)(a) and 77.04(2), neither of which deals with the proper requirements for appellate briefs.

“It is not the function or responsibility of this court to scour the record on appeal to ensure that an issue has been preserved.” *Koester*, 569 S.W.3d at 415 (citing *Phelps v. Louisville Water Co.*, 103 S.W.3d 46 (Ky. 2003)). Our procedural rules “are lights and buoys to mark the channels of safe passage and assure an expeditious voyage to the right destination.” *Louisville and Jefferson County Metropolitan Sewer Dist. v. Bischoff*, 248 S.W.3d 533, 536 (Ky. 2007) (quoting *Brown v. Commonwealth*, 551 S.W.2d 557, 559 (Ky. 1977)). Therefore, 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).

Tyler’s failure to comply with CR 76.12 hinders our ability to review his arguments. *See Hallis*, 328 S.W.3d at 695-97. “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*, 328 S.W.3d at 696 (citation omitted). The fatal flaw in Tyler’s brief is his failure

to include a preservation statement for the issues raised.³ Tyler 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 v. Stone*, 799 S.W.2d 46, 48 (Ky. App. 1990). “[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 Thomas failed to file a brief. This Court granted Mr. Helman leave to withdraw by order entered March 11, 2019. Thomas was given 15 days to notify this Court of his intent to retain new counsel to represent him on appeal, and if so, new counsel had 15 days thereafter to file a brief on Thomas’s behalf. Thomas’s brief was due on or before April 10, 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

³ We note that the record on appeal is 25 pages and the hearings total less than one hour. We have reviewed the entire record and watched the entire hearing. None of Tyler’s issues were properly preserved.

76.12(8)(c). As mentioned above, due to the deficiency in Tyler’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[.]” KRS 403.725(3)(c).

“Domestic violence and abuse” is defined as:

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

KRS 403.720(1).

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 (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.

Our review of the record reveals that neither Thomas nor Tyler was placed under oath prior to testifying at the hearing on October 15, 2018.

Testimony should be taken in open court and under oath. CR 43.04. Moreover,

Kentucky Rule of Evidence (KRE) 603 provides: “[b]efore testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness’ conscience and impress the witness’ mind with the duty to do so.”

Mr. Helman allowed Thomas to proceed with his testimony without being sworn. Tyler did not object. Rather, prior to Tyler’s testimony, Mr. Smith inquired of the family court if the witnesses had been sworn in. The family court mistakenly said they had been when, in fact, they had not. Failure to object and provide the trial court with the opportunity to cure any error waives that error unless it will result in manifest injustice. *See Dep’t of Highways v. Stamper*, 345 S.W.2d 640 (Ky. 1961). The testimony was contentious and disputed. It was error to accept testimony without the witnesses being administered an appropriate oath. Under the circumstances of this case, we find it is not merely harmless error, but reversible error, because Tyler’s substantial rights were affected. *See* CR 61.01.

“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). “[A] party has a meaningful opportunity to be heard where the trial court allows each party to present evidence and give *sworn* testimony before making a decision.” *Id.* (citation omitted) (emphasis added). “Due process is not satisfied when a DVO is granted without . . . *sworn testimony*. . . .” *Id.* (emphasis added).

Thomas presented no evidence of violence or harm by Tyler, nor did he testify specifically regarding Tyler inflicting fear of imminent injury, abuse or assault. Thomas merely stated he was afraid of Tyler and afraid for his girlfriend's safety and for his safety. Mr. Helman, through cross-examination of Tyler, totally refuted the contents of the email which formed the basis of the petition that Tyler owned a .45 Smith and Wesson. Tyler testified that he did not own any guns and lied in the email when he said he owned a gun because he wished to be left alone.

Although Thomas said Tyler punched him in the past, he did not give any description of when that happened nor under what circumstances. He admitted that Tyler never approached him with a gun or threatened him with a gun. He also acknowledged he never sought a DVO against Tyler in the past. To the contrary, Tyler testified that Thomas pushed him down onto a plate which broke and cut him on his back. He was successful in getting a DVO entered against Thomas in July of 2017 for a one-year period.

The family court failed to make specific findings that Thomas was a victim of domestic violence; that domestic violence had occurred in the past and was likely to occur in the future. Rather, the sole reason relied on by the family court in entering the DVO was Tyler's act of standing up, which he did in response to being called a liar by Mr. Helman. The act was not directed at Thomas. It is clear from the videotape the attorneys were between him and Thomas. Tyler

immediately sat back down upon instruction by his attorney and turned and faced the court upon the court's instruction to do so.

We conclude Tyler's sole act of standing up is insufficient under the law to issue a DVO. KRS 403.740(1). The family court's failure to make a finding of past or present physical threats or abuse, or fear of imminent harm, wholly undermined its conclusion. Tyler's standing up was certainly improper but 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, "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 Jefferson Family Court, with instructions to vacate the DVO entered on October 15, 2018 and dismiss Thomas's petition without prejudice pursuant to KRS 403.730(1)(a).

ALL CONCUR.

BRIEF FOR APPELLANT:

Tyler Maginnis, *pro se*
Louisville, Kentucky

BRIEF FOR APPELLEE:

No brief filed.