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NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2019-CA-000231-ME

MATTHEW JOSEPH MARCHESE — APPELLANT

v.

APPEAL FROM FAYETTE FAMILY COURT, DIVISION ONE
HONORABLE LIBBY G. MESSER, JUDGE
ACTION NO. 18-D-01434-001

MADISON COURTNEY CROOKS — APPELLEE

OPINION
AFFIRMING

** ** ** ** **

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

GOODWINE, JUDGE: Matthew Joseph Marchese ("Marchese") appeals from an interpersonal protective order ("IPO") entered against him by the Fayette Family Court. After careful review of the applicable statutes and the record, we affirm.

BACKGROUND

Marchese and Madison Courtney Crooks ("Crooks") met in nursing school at the University of Kentucky. They dated for approximately two years, ending in January 2016. Marchese and Crooks briefly revisited their romantic relationship for approximately two to three weeks in April 2018. During this brief stint, Crooks visited Marchese at his residence in Tennessee. Crooks testified that she told no one about the visit. The parties did not continue to pursue the relationship after the visit, and Crooks began dating another man in July 2018.

In November 2018, Crooks learned about two fake online profiles. The first was an online dating profile in her name. She reported it, and it was taken down. The second was a Facebook profile from which she received messages that were sexual in nature. She reported this profile and blocked the user, and the profile was removed. She believed Marchese created these profiles.

Also during November 2018, Crooks began receiving emails at her work email address that seemed to be from Marchese. The emails contain information about the parties' relationship, including the April 2018 visit, which Crooks had not told anyone else. Marchese sent several other emails, and Crooks responded, asking him to stop and leave her alone. Marchese responded, informing Crooks that during the April 2018 visit, he copied the contents of her phone. He emailed her links to publicly available websites where he posted her

call history and text messages. Marchese also sent an email to Crooks that was sexual and accusatory in nature and copied her new boyfriend. Marchese also sent Crooks detailed maps showing that he tracked her location from August through December 2018.

Crooks filed a petition for a protective order on December 16, 2018, detailing the communications from Marchese. The family court held a hearing on January 16, 2019, and took testimony from Crooks, her new boyfriend, and Marchese. Crooks presented the court with the emails and text messages she alleged Marchese sent her. Crooks' boyfriend provided similar testimony regarding text messages and emails he alleged were sent by Marchese. Marchese denied sending the communications to Crooks or her boyfriend. Marchese also denied that he created or used the email address and phone number from which the communications were sent. At the end of the hearing, the family court found Marchese stalked Crooks and entered an IPO in Crooks' favor. This appeal followed.

On appeal, Marchese argues: (1) there was insufficient evidence to support the entry of the IPO against him; (2) the family court's contradictory findings cannot support entry of an IPO against him; (3) the family court failed to make the necessary written findings in support of the IPO; and (4) the IPO is

voidable because the family court failed to adhere to the applicable statutory scheme.

ANALYSIS

At the outset, we must address the deficiencies of Marchese's brief. CR[1] 76.12(4)(c)(v) requires "at the beginning of [each] argument a statement with reference to the record showing whether the issue was properly preserved for review and, if so, in what manner." Marchese failed to include a preservation statement for all arguments except his final one, which he admits is unpreserved.

Marchese's failure to comply with CR 76.12 hinders our ability to review his arguments. *See Hallis v. Hallis*, 328 S.W.3d 694, 695-97 (Ky. App. 2010). "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). Because Marchese's arguments fail on the merits, we elect to ignore the deficiencies and proceed with our review.

First, Marchese argues there was insufficient evidence to support the entry of an IPO against him. "CR 52.01 provides that findings of fact may be set aside if clearly erroneous. . . . [T]he test is not whether we would have decided it

[1] Kentucky Rule of Civil Procedure.

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) (citing *Eviston v. Eviston*, 507 S.W.2d 153 (Ky. 1974)). "A factual finding is not clearly erroneous if it is supported by substantial evidence. Substantial evidence is evidence, when taken alone or in light of all the evidence, which has sufficient probative value to induce conviction in the mind of a reasonable person." *Hunter v. Hunter*, 127 S.W.3d 656, 659 (Ky. App. 2003) (citations omitted).

To obtain an IPO, a family court must find "by a preponderance of the evidence that dating violence and abuse, sexual assault, or stalking has occurred and may again occur[.]" KRS[2] 456.060. Here, the family court found that Marchese stalked Crooks based on the elements of stalking in the second degree. KRS 508.150 provides:

> (1) A person is guilty of stalking in the second degree when he intentionally:
>
> (a) Stalks another person; and
>
> (b) Makes an explicit or implicit threat with the intent to place that person in reasonable fear of:
>
> 1. Sexual contact as defined in KRS 510.010;
>
> 2. Physical injury; or
>
> 3. Death.

[2] Kentucky Revised Statute.

KRS 508.130(1) defines stalking:

> (1)(a) To "stalk" means to engage in an intentional course of conduct:
>
> 1. Directed at a specific person or persons;
>
> 2. Which seriously alarms, annoys, intimidates, or harasses the person or persons; and
>
> 3. Which serves no legitimate purpose.
>
> (b) The course of conduct shall be that which would cause a reasonable person to suffer substantial mental distress.
>
> (2) "Course of conduct" means a pattern of conduct composed of two (2) or more acts, evidencing a continuity of purpose. One (1) or more of these acts may include the use of any equipment, instrument, machine, or other device by which communication or information is transmitted, including computers, the Internet or other electronic network, cameras or other recording devices, telephones or other personal communications devices, scanners or other copying devices, and any device that enables the use of a transmitting device. Constitutionally protected activity is not included within the meaning of "course of conduct." If the defendant claims that he was engaged in constitutionally protected activity, the court shall determine the validity of that claim as a matter of law and, if found valid, shall exclude that activity from evidence.

In sum, Crooks was required to prove:

> by a preponderance of the evidence that, an individual intentionally engaged in two or more acts directed at the victim that seriously alarmed, annoyed, intimidated, or harassed the victim, that served no legitimate purpose, and would have caused a reasonable person to suffer

> substantial mental distress, and that these acts may occur again. KRS 508.130 and KRS 456.060. Additionally, the individual must prove that there was an implicit or explicit threat by the perpetrator that put the victim in reasonable fear of sexual contact, physical injury, or death. KRS 508.150.

Halloway v. Simmons, 532 S.W.3d 158, 162 (Ky. App. 2017).

At the hearing, Crooks testified that Marchese sent two or more harassing communications and established that she was alarmed and harassed by the communications. Marchese denied the allegations. "[J]udging the credibility of witnesses and weighing evidence are tasks within the exclusive province of the trial court." *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003). The family court clearly found Crooks' testimony more credible than Marchese's. The family court reviewed the evidence presented and found that Marchese "used some kind of software to mirror [Crooks'] phone and review her activity." Supplemental Record (Supp. R.) at 1. The court further found that Marchese "then sent that information to her and her family and significant other," and "this was done in an attempt to intimidate, harass, alarm, or annoy her." *Id.* The court concluded that "any reasonable person would be in fear." *Id.*

Based on our review of the record, Crooks presented documentation of text messages and emails by someone purporting to be Marchese. The emails contained attachments supporting Crooks' testimony that Marchese used software to mirror her phone when she visited him in April 2018. The documents attached

to the emails showed detailed call logs from Crooks' phone and detailed maps showing her location from August through December 2018. The emails were sexual in nature and contained what Crooks alleged were Marchese's sexual fantasies about her.

The family court's findings were based on substantial evidence. The family court weighed the evidence and testimony presented by both parties and concluded that Marchese's conduct met the definition of stalking under KRS 508.130. The family court found that Marchese sent the communications specifically to Crooks, they seriously alarmed and harassed her, and they did not serve a legitimate purpose. Marchese's communications also meet the definition of "course of conduct." He sent two or more communications using a computer, telephone, or other personal communication device.

The family court also concluded that Marchese's conduct met the second requirement of making "an explicit or implicit threat with the intent to place that person in reasonable fear" under KRS 508.150(1). The family court orally found that Marchese's act of communicating with Crooks to inform her that he was actively tracking her location and monitoring her call log and could use that information against her was a threat that would put a reasonable person in fear for their safety even though Marchese resided in Tennessee. Based on our analysis of the proceedings in the family court, we conclude there was sufficient evidence for

the family court to find that Marchese stalked Crooks. As such, the family court's findings of fact were not clearly erroneous.

Second, Marchese argues the family court erred in checking boxes finding for both petitioner and respondent on AOC Form 275.3. Crooks argues the family court's clerical mistake does not warrant reversal because, under CR 60.01, "a court may amend and correct a clerical mistake at any time because the time restrictions of Rule 59.05 do not apply." *Benson v. Lively*, 544 S.W.3d 159, 164 (Ky. App. 2018) (citation omitted). CR 60.01 provides:

> Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the court at any time of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed in the appellate court, and thereafter while the appeal is pending may be so corrected with leave of the appellate court.

The family court clearly made a clerical error as evidenced by the written findings of fact in the supplemental record. These findings clearly state that the family court granted a one-year no-contact IPO in favor of Crooks. The family court is free to amend its findings on the AOC form if it has not already done so.

Third, Marchese argues the family court failed to make sufficient findings of fact in support of the IPO. This issue is now moot as the family court entered an agreed order to supplement the appellate record with its written

findings. Because our record contains the written findings Marchese argues are required to support the IPO, this argument is moot.

Finally, Marchese argues the family court palpably erred in failing to adhere to the statutory standard for continuing a hearing on an IPO petition when a respondent has not been served. KRS 456.050(2)(a) provides:

> If the adverse party is not present at the hearing ordered pursuant to KRS 456.040 and has not been served, a previously issued temporary interpersonal protective order shall remain in place, and the court shall direct the issuance of a new summons for a hearing set not more than fourteen (14) days in the future. If service has not been made on the adverse party before that hearing or a subsequent hearing, the temporary interpersonal protective order shall remain in place, and the court shall continue the hearing and issue a new summons with a new date and time for the hearing to occur, which shall be within fourteen (14) days of the originally scheduled date for the continued hearing. The court shall repeat the process of continuing the hearing and reissuing a new summons until the adverse party is served in advance of the scheduled hearing. If service has not been made on the respondent at least seventy-two (72) hours prior to the scheduled hearing, the court may continue the hearing no more than fourteen (14) days in the future. In issuing the summons, the court shall simultaneously transmit a copy of the summons or notice of its issuance and provisions to the petitioner.

Marchese concedes that he did not preserve this issue and requests review for palpable error. CR 61.02 provides:

> 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.

"Relief under CR 61.02 requires a determination of manifest injustice resulting from an error that affected the substantial rights of the party." *Herndon v. Herndon*, 139 S.W.3d 822, 827 (Ky. 2004). "Manifest injustice is found if the error seriously affected the 'fairness, integrity, or public reputation of the proceeding.'" *McGuire v. Commonwealth*, 368 S.W.3d 100, 112 (Ky. 2012) (quoting *Martin v. Commonwealth*, 207 S.W.3d 1, 4 (Ky. 2006)).

KRS 456.050(2)(a) requires a court to direct the issuance of a "summons for a hearing set not more than fourteen (14) days in the future" when the respondent is not present at the scheduled hearing and has not been served. Here the hearing was originally set for December 26, 2018. Marchese did not appear because he had not been served. The family court rescheduled the hearing for January 16, 2019, which was twenty-one (21) days later.

Marchese argues the IPO is voidable because the family court lost jurisdiction over this particular case when it failed to set the hearing within the 14-day time period. However, particular case jurisdiction "may be waived." *Hisle v. Lexington-Fayette Urban County Government*, 258 S.W.3d 422, 431 (Ky. App. 2008) (quoting *Collins v. Duff*, 283 S.W.2d 179, 182 (Ky. 1955)). Marchese

waived any challenge to the family court's error when he consented to holding the hearing on January 16, 2019.

As noted above, Marchese raised this issue for the first time on appeal and requests review for palpable error. Although the family court clearly failed to follow the statute, Marchese fails to show how he was harmed by the 21-day continuance. Instead, he merely argues the violation in and of itself requires reversal, even though he waived challenging this error by failing to challenge the family court's particular case jurisdiction below. Marchese received notice in advance of the hearing, obtained counsel, and testified and presented exhibits at the hearing. He fails to show how a different result would have occurred in the absence of the error. As such, the family court did not palpably err.

Before concluding, we must readdress Crooks' motion for leave to correct clerical mistake. As discussed above, the family court found for both Crooks and Marchese on the AOC Form 275.3. Two months after Marchese filed his notice of appeal, Crooks filed contemporaneous motions with this Court and the family court to correct the clerical error on that form. About a month later, Crooks filed a motion to supplement the record with the family court's findings of fact that were mistakenly excluded. The parties entered an agreed order to supplement the record with this document, and the Fayette Circuit Clerk completed a supplemental certification of record on appeal. This Court ruled on Crooks'

motion for leave to correct clerical mistake by order entered August 1, 2019. Our order denied Crooks' motion as moot, assuming the motion was addressed in the supplemental record. However, upon review of the supplemental record, it is clear the family court never addressed the clerical error on the AOC form, presumably because this Court never granted leave for it to do so under CR 60.01. Therefore, we grant Crooks' motion for leave to correct clerical mistake by separate order.

CONCLUSION

For the foregoing reasons, we affirm the order of the Fayette Circuit Court.

ALL CONCUR.

BRIEFS FOR APPELLANT:

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BRIEF FOR APPELLEE:

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