RENDERED: NOVEMBER 14, 2025; 10:00 A.M.
NOT TO BE PUBLISHED

Commonwealth of Kentucky

Court of Appeals

NO. 2024-CA-1487-ME

TIMOTHY MCILWAIN — APPELLANT

v.

APPEAL FROM JEFFERSON CIRCUIT COURT
HONORABLE JESSICA STONE, JUDGE
ACTION NO. 19-D-501308-010

BROOKE BERRY AND H.B., A MINOR CHILD — APPELLEES

OPINION
AFFIRMING

** ** ** ** **

BEFORE: THOMPSON, CHIEF JUDGE; ACREE AND MCNEILL, JUDGES.

MCNEILL, JUDGE: Timothy McIlwain ("McIlwain") appeals from the Jefferson Circuit Court's entry of a domestic violence order ("DVO") prohibiting him from having contact with his minor child, H.B. For the reasons below, we affirm.

BACKGROUND

In 2019, H.B. revealed to her mother, Brooke Berry ("Berry"), that her father, McIlwain, had been sexually abusing her. Berry sought an order of

protection on behalf of H.B., and a hearing was held on September 19, 2024. At the hearing, Berry testified that she first became concerned about possible sexual abuse when H.B. began being terrified of being diapered following a week-long stay with McIlwain. Subsequently, H.B. disclosed the abuse to a teacher in August of 2019 and soon after to Berry and a therapist.

Berry testified that H.B. made several spontaneous statements to her concerning the abuse, often as she was getting ready for bed or in the bathtub, and she recorded them. Two of these videos were introduced into evidence at the hearing. In the first, H.B. says that McIlwain "touched this. Inside. Really hard. And I said 'ow.' And he did it really, really, really, hard . . . ." H.B. is naked and gestures with her finger that McIlwain put his finger in her vaginal and buttocks areas.[1] She says he did it "a hundred times." In the second video, H.B. says that McIlwain stuck "his finger in my butty butt."

H.B. also revealed the abuse to her therapist, Marsha Mintz. Mintz testified that she began seeing H.B. in September 2019. On one occasion, Mintz asked H.B. if she wanted to see her daddy, and she said no, because "he hurt me." Another time, H.B. told Mintz that McIlwain "put his finger in my butty butt."

[1] We have taken these facts from the family court's order and rely on its representation of what can be seen on the videos because we do not have access to them on appeal. Only the audio can be heard on the recording of the hearing and, while the videos were made exhibits, they were not included in the appellate record.

Mintz said she believed H.B. was being truthful because she exhibited shame and fear during the disclosures. Mintz also found H.B.'s behavioral changes significant, such as her fear of being diapered.

McIlwain's expert, Dr. Kamala London, a developmental psychologist who specializes in children's memory, questioned H.B.'s disclosures in the videos and to Mintz. She testified that Berry's questioning technique would naturally lead to false reports. Further, because Berry told Mintz about the alleged abuse before Mintz began treating H.B., London believed Mintz elicited the disclosure she expected.

McIlwain testified that Berry made up the abuse as retaliation for him taking H.B. to New Jersey for six days in 2019. He denied sexually abusing H.B. and claimed Berry copied the allegations from a movie. McIlwain insists Berry fabricated the allegations to gain leverage in their child custody action. He argues it is physically impossible for him to sexually abuse H.B. without causing physical injury due to his size, of which there was no evidence. He also contends that abuse is improbable because his visitation was supervised.

Following the hearing, the family court entered findings of fact and conclusions of law granting the domestic violence order. The court found Berry's testimony that H.B. developed a fear of being diapered after visiting McIlwain credible. It also found H.B.'s disclosures to Mintz and Berry convincing. The

court acknowledged Dr. London's testimony about suggestibility but found H.B. to be believable, considering her behavior while disclosing to Mintz. The DVO prevented McIlwain from any contact with H.B. for three years. This appeal followed.

STANDARD OF REVIEW

"We review the entry of a DVO for whether the trial court's finding of domestic violence was an abuse of discretion." *Johnston v. Johnston*, 639 S.W.3d 428, 431 (Ky. App. 2021) (citation omitted). "The test for abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *McKinney v. McKinney*, 257 S.W.3d 130, 133 (Ky. App. 2008). "A reviewing court may not substitute its findings of fact for the trial court's unless they are clearly erroneous." *Hall v. Smith*, 599 S.W.3d 451, 454 (Ky. App. 2020) (citations omitted). "A trial court's factual determination is not clearly erroneous if it is supported by substantial evidence, which is evidence of sufficient probative value to induce conviction in the minds of reasonable people." *Johnston*, 639 S.W.3d at 431 (citation omitted).

ANALYSIS

"When entering a DVO, the trial 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." *Matehuala v. Torres*, 547 S.W.3d 142, 144 (Ky.

App. 2018) (citing KRS[2] 403.750(1)). "To enter a DVO, the trial court must decide a petitioner is more likely than not to have been a victim of domestic violence." *Id.* (citations omitted). "Our review in this Court is not whether we would have decided the case differently, but rather whether the trial court's findings were clearly erroneous or constituted an abuse of discretion." *Id.* (citing *Cherry v. Cherry*, 634 S.W.2d 423, 425 (Ky. 1982)).

McIlwain brings a multitude of arguments on appeal; however, we must first address his failure to comply with our Rules of Appellate Procedure ("RAP").[3] RAP 32(A)(4) requires an appellant's brief to 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." None of McIlwain's nine numbered arguments contains a preservation statement. Our rules call for a preservation statement to assure the reviewing court that "the issue was properly presented to the trial court and therefore, is appropriate for our consideration." *Oakley v. Oakley*, 391 S.W.3d 377, 380 (Ky. App. 2012). "If a party fails to inform the appellate court of where in the record his issue is

[2] Kentucky Revised Statutes.

[3] We recognize McIlwain is a *pro se* litigant. However, "[w]hile *pro se* litigants are sometimes held to less stringent standards than lawyers in drafting formal pleadings, Kentucky courts still require *pro se* litigants to follow the Kentucky Rules of [Appellate] Procedure." *Watkins v. Fannin*, 278 S.W.3d 637, 643 (Ky. App. 2009) (citation omitted). This is especially true since McIlwain has a law degree (though not licensed in Kentucky).

preserved, the appellate court can treat that issue as unpreserved." *Ford v. Commonwealth*, 628 S.W.3d 147, 155 (Ky. 2021). Thus, we will review the issues raised in McIlwain's brief for palpable error only.

Under Kentucky Rule of Civil Procedure (CR) 61.02, "[a] palpable error which affects the substantial rights of a party may be considered 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." "An error is palpable only when it is 'easily perceptible, plain, obvious and readily noticeable.'" *Hibdon v. Hibdon*, 247 S.W.3d 915, 918 (Ky. App. 2007) (citation omitted). "A palpable error must be so grave in nature that if it were uncorrected, it would seriously affect the fairness of the proceedings." *Brewer v. Commonwealth*, 206 S.W.3d 343, 349 (Ky. 2006) (citation omitted). "Fundamentally, a palpable error determination turns on whether the court believes there is a 'substantial possibility' that the result would have been different without the error." *Hibdon*, 247 S.W.3d at 918 (citing *Brewer*, 206 S.W.3d at 349).

Turning to the merits of the appeal, several of McIlwain's challenges pertain to custody issues. For instance, he argues the family court should have dismissed the emergency protective order and, instead, held a hearing to determine visitation and temporary custody pursuant to KRS 403.320(1) and KRS 403.280

and prior orders in the custody proceeding. These issues are not properly before us because McIlwain's appeal is from the November 13, 2024, findings of fact and conclusions of law entered in the DVO proceeding. Therefore, we will not address them.

McIlwain next argues the family court erred in denying discovery before the DVO hearing. Specifically, he contends he was denied access to therapy notes from the child's therapist and forensic videos. First, we question McIlwain's entitlement to conduct discovery before a DVO hearing as "timely holding the domestic violence hearing is essential to the purpose of the statutes." *Hohman v. Dery*, 371 S.W.3d 780, 784 (Ky. App. 2012). In any case, we find this argument waived. McIlwain never requested a continuance to complete discovery. In fact, at the hearing, he specifically stated he wanted to move forward with the hearing and that "it's time to get to the bottom of this." Further, even if the argument were properly before us, McIlwain has not identified any prejudice. We find no error, palpable or otherwise.

McIlwain also claims that he was denied procedural due process when he was only given 21 minutes to present rebuttal evidence. He contends that if he had been given more time, the family court could have reviewed 44 videos that he took of H.B. that would show the sexual abuse did not occur. We would note that McIlwain was actually given over 43 minutes to present evidence. This was in

addition to the significant amount of time he was allowed to cross-examine Berry's witnesses. All told, the family court allotted over six hours to the DVO hearing.

"Due process requires an evidentiary hearing and a meaningful opportunity to be heard prior to the entry of a DVO." *Cottrell v. Cottrell*, 571 S.W.3d 590, 592 (Ky. App. 2019) (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." *Holt v. Holt*, 458 S.W.3d 806, 813 (Ky. App. 2015). Here, McIlwain was allowed to present evidence in the form of an expert witness and personally defend against the allegations. We find no palpable error.

Next, McIlwain claims the DVO is not supported by substantial evidence. He argues the family court erred by discounting that the child's pediatrician found no evidence of sexual abuse. He also contends that it is impossible that a man of his size could digitally penetrate a child's anus or vagina without causing physical trauma. Essentially, McIlwain disagrees with the family court's weighing of the evidence. However, "the family court is in the best position to judge the credibility of the witnesses and weigh the evidence presented." *Williford v. Williford*, 583 S.W.3d 424, 429 (Ky. App. 2019) (citation omitted).

"When reviewing a decision on a DVO petition, the test is not whether we would have decided it differently, but whether the court's findings were clearly erroneous or that it abused its discretion." *Johnston*, 639 S.W.3d at 432 (internal quotation marks and citation omitted). Here, the family court's finding that H.B. had been the victim of sexual abuse and that sexual abuse may again occur was supported by substantial evidence. Berry testified that H.B.'s behavior changed after visiting her father, and she became terrified of being diapered. Mintz testified that H.B. told her that her daddy hurt her and had "put his finger in her butty butt." H.B. made this accusation again in a video recorded by her mother. In another video, H.B. gestured that McIlwain had put his finger in her anus and vagina. It was within the family court's purview to believe this evidence over other, conflicting evidence.

McIlwain next argues that the family court abused its discretion in finding that sexual abuse occurred without physical evidence or expert testimony. However, there is no requirement that sexual abuse be proven by physical evidence or expert testimony. McIlwain again appears to take issue with the family court's weighing of the evidence. Here, the family court considered Dr. London's testimony but found it unpersuasive because it was based upon information provided only by McIlwain. The court further considered McIlwain's defense, including his claim that it was impossible to sexually abuse the child without

causing physical injury. Ultimately, the court found other evidence more credible. As noted above, the court's finding that sexual abuse had occurred and may occur again was supported by substantial evidence. There was no palpable error.

McIlwain's next argument is much the same as his last. He argues the circuit court abused its discretion in discounting Dr. London's testimony. As above, "judging 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) (citation omitted). We find no palpable error.

McIlwain's next contention is that the family court erred in relying upon perjured testimony as the basis for the DVO. He claims Berry falsely testified that H.B. first disclosed the abuse to school staff in August 2019, when, in fact, H.B. disclosed to Berry before that. McIlwaine essentially argues that the family court (wrongly) discounted his expert witness's testimony because of this misinformation.

While it appears the family court believed H.B. first disclosed to school staff, it is also clear that it carefully considered the testimony of Dr. London when determining the weight to give the child's disclosures to Mintz and Berry. It found H.B.'s disclosure to Mintz credible, "particularly given the description of the child's behavior while disclosing to Mintz." It also found persuasive Berry's "testimony that H.B. was fearful of being diapered[.]" Thus, it does not appear

that the family court relied on this "false statement" in rendering its decision, as claimed by McIlwain. We find no palpable error.

McIlwain also alleges the family court erred in not disqualifying itself and transferring the DVO proceeding out of Jefferson County. At some point, McIlwain filed a motion to recuse Judge Jessica Stone due to her connection with the Louisville Ballet, where H.B. took dance lessons. Judge Stone denied the motion. McIlwain's argument on appeal is mostly conclusory, claiming that during the DVO hearing Judge Stone "appeared extremely one sided when ruling that sexual abuse occurred[.]" He then asserts, "Clearly, Appellee's and Mintz's version of facts were false, and the Court abused its discretion by ignoring objective evidence to obtain the predetermined outcome." Once again, McIlwain simply disagrees with the family court's weighing of the evidence. We find no basis for questioning the impartiality of the family court or any palpable error.

McIlwain's final contention is that the family court has violated his due process rights by prohibiting contact with his child. He insists he was not given a meaningful opportunity to be heard. We disagree. As noted above, the family court devoted two days and over six hours to the DVO hearing. McIlwain was given ample time to cross-examine witnesses and present his defense. We find no palpable error.

CONCLUSION

Based upon the foregoing, the Jefferson Circuit Court's domestic violence order is affirmed.

ALL CONCUR.

BRIEFS FOR APPELLANT:

Timothy J. McIlwain, *pro se*
Northfield, New Jersey

BRIEF FOR APPELLEE:

Elizabeth McConahy Jenkins
Kylie King
Louisville, Kentucky