

IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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|-----------------------|---|---------------------------|
| Brigitte Davis Gomez, | : | |
| Petitioner-Appellee, | : | |
| v. | : | No. 11AP-767 |
| Jonathan Kiner, | : | (C.P.C. No. 11-DV-04-553) |
| Respondent-Appellant. | : | (REGULAR CALENDAR) |
| Jonathan Kiner, | : | |
| Petitioner-Appellant, | : | |
| v. | : | No. 11AP-768 |
| Brigitte Davis Gomez, | : | (C.P.C. No. 11-DV-04-528) |
| Respondent-Appellee. | : | (REGULAR CALENDAR) |

D E C I S I O N

Rendered on March 13, 2012

Stuart Y. Itani, and Susan Donfrio, for appellee.

Jonathan Kiner, pro se.

APPEALS from the Franklin County Court of Common Pleas,
Division of Domestic Relations.

BROWN, P. J.

{¶ 1} In these consolidated cases, Jonathan Kiner, petitioner/respondent-appellant, appeals from two judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations. In one judgment, the court dismissed his petition for a domestic violence civil protection order ("CPO") against Brigitte Davis Gomez,

respondent/petitioner-appellee. In another judgment, the trial court granted appellee's petition for CPO against appellant.

{¶ 2} As appellant has failed to file a transcript of the proceedings below, our recitation of the facts is limited. On April 6, 2011, appellant filed a petition for CPO against appellee. On April 8, 2011, appellee filed a petition for CPO against appellant. The trial court granted both parties ex parte CPOs, and the matters were set for hearing on April 20, 2011. Both parties appeared at the April 20, 2011 hearing, but the cases were continued until June 15, 2011 to allow a party to obtain counsel and to gather additional evidence. On June 15, 2011, both parties appeared, but the trial court again continued both cases until August 9, 2011 due to the trial court's unavailability for trial.

{¶ 3} On August 9, 2011, appellee appeared for the hearing but appellant did not. On the same day, the trial court entered a decision and entry of dismissal with regard to appellant's petition for CPO for failure to prosecute. The court then held an evidentiary hearing on appellee's petition for CPO. On the same day, the trial court granted appellee a CPO, effective until August 9, 2016. Appellant separately appealed the judgments of the trial court, and this court consolidated the cases for purposes of appeal. Although appellant does not separately set forth individual assignments of error, we construe the following arguments as his assignments of error:

[I.] The Franklin County Domestic Court erred by entering a dismissal of court case number **11DV528**, (which I filed **FIRST** with good and applicable cause, with indisputable proof and verification).

[II.] Secondly, The Franklin County Domestic Court erred by granting court case number **11DV553** (filed **SECOND** and without viable merit nor evidence to its need solely as a repercussion only after being served my Truthful Protection Order) for 5 years, granted based only on this forced absence caused by provable Obstruction rather than on the merits that would have shown/and will show that accusations submitted in **11DV553** could not/cannot be substantiated because they were/are fictitious and would have resulted/will result in criminal charges including **Providing false statements to Prosecution in order to obtain a Protection Order, punishable under ORC2921.11.**

{¶ 4} Before addressing appellant's assignments of error, we must address several preliminary matters. As indicated above, appellant failed to file a transcript of the proceedings before the trial court. It is the appellant's burden to take the steps required to have the transcript prepared for inclusion in the record on appeal and to ensure that the record contains all that is necessary for the reviewing court to determine the appeal. *Rose Chevrolet, Inc. v. Adams*, 36 Ohio St.3d 17, 19 (1988). When a transcript of proceedings in the trial court is necessary to exemplify the facts which determined the issues presented there, its absence requires a reviewing court to either dismiss the appeal or affirm the judgment of the court from which the appeal is taken. *State v. Render*, 43 Ohio St.2d 17 (1975), paragraph two of the syllabus.

{¶ 5} Here, appellant failed to file a transcript of any proceedings below. A party may remedy its failure to file a transcript by filing a statement of the evidence with this court pursuant to App.R. 9(C). However, appellant made no attempt here to file an App.R. 9(C) statement. Therefore, this court is without any transcript of the proceedings before the trial court necessary to exemplify the facts that determined the issues presented. In such absence, we cannot review any of appellant's assignments of error that rely upon factual issues in dispute, and we must presume regularity of the proceedings under such circumstances. Therefore, we may only address arguments in appellant's assignments of error that are based solely on questions of law.

{¶ 6} We also note that our ability to review appellant's assignments of error is hampered by appellant's failure to conform to the requirements of the Ohio Appellate Rules in numerous respects. Appellant failed to provide a table of contents pursuant to App.R. 16(A)(1); a table of cases pursuant to App.R. 16(A)(2); a statement of the assignments of error pursuant to App.R. 16(A)(3); a statement of the issues pursuant to App.R. 16(A)(4); a statement of the case pursuant to App.R. 16(A)(5); a statement of facts pursuant to App.R. 16(A)(6); and citations to authorities and parts of the record upon which he relies pursuant to App.R. 16(A)(7). Pursuant to App.R. 12(A)(2), we may disregard an assignment of error presented for review if the party raising it fails to identify in the record the error on which the assignment of error is based or fails to argue the assignment separately in the brief as required under App.R. 16(A).

{¶ 7} Here, appellant's failure to follow the dictates of App.R. 16(A) is equivalent to not filing a brief at all and would, in and of itself, be grounds for dismissing the appeal. *See* App.R. 18(C). A court of appeals generally has the authority to dismiss an appeal for an appellant's failure to follow the Rules of Appellate Procedure. App.R. 3(A). Therefore, this court could overrule appellant's assignments of error regardless of their merit.

{¶ 8} Notwithstanding, in the interests of justice, we will review appellant's arguments. Appellant argues in his first assignment of error that the trial court erred when it dismissed his petition for CPO. Appellant's arguments are difficult to decipher. His arguments appear to be the following: (1) he was forced to be absent from the hearing on his CPO due to the "obstruction of justice" committed by Janette Spring, a domestic violence advocate, when she took appellant's proof of appellee's violent violations of the protection order and documented proof of appellee's felonies to the police department and had him arrested two days before the final CPO hearing; (2) the evidence in the case file demonstrates appellee committed acts and threats of violence and abuse, as well as unindicted and unspecified felonies; and (3) the evidence in the case file demonstrates appellee committed grand theft, identity theft, check fraud, and aggravated menacing, all of which were ignored and concealed by Spring.

{¶ 9} All of the above arguments rely upon factual issues that appellant was required to develop at the hearing on his petition for CPO. Even if he attached various pieces of evidence to his court filings in support of these arguments, appellant was still required to appear at the hearing, present evidence, and prosecute his action. We cannot make any judgment on appeal based upon those documents in the record when the trial court neither reviewed this evidence nor made any determinations due to appellant's failure to appear.

{¶ 10} Appellant raises no purely legal arguments in his brief under this assignment of error. An appellant must affirmatively demonstrate error on appeal and must provide legal arguments that substantiate the alleged error. *State v. Humphries*, 9th Dist. No. 06CA00156, 2008-Ohio-388, ¶ 47-48. This court will neither construct assignments of error nor create arguments on behalf of an appellant. *See In re G.E.S.*, 9th Dist. No. 23963, 2008-Ohio-2671, ¶ 53. *See also Sisson v. Ohio Dept. of Human Servs.*, 9th Dist. No. 2949-M (Apr. 19, 2000) (it is not the duty of an Ohio appellate court to

create arguments for the parties); *Cardone v. Cardone*, 9th Dist. No. 18349 (May 6, 1998) (if an argument exists that can support an assignment of error, it is not the appellate court's duty to root it out). Because appellant has failed to present any purely legal arguments under this assignment of error, and we cannot address the factual arguments, we have nothing to review. For all of the above reasons, we must affirm the trial court's dismissal of appellant's petition for CPO and overrule his first assignment of error.

{¶ 11} Appellant argues in his second assignment of error that the trial court erred when it granted appellee's petition for CPO. The issuance of a civil stalking protection order is left to the sound discretion of the trial court and will not be reversed on appeal absent an abuse of that discretion. *Smith v. Wunsch*, 162 Ohio App.3d 21, 2005-Ohio-3498, ¶ 10 (4th Dist.). To constitute an abuse of discretion, the ruling must be unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217 (1983).

{¶ 12} As with appellant's arguments under his first assignment of error, the arguments under appellant's second assignment of error are also somewhat difficult to discern. Appellant seems to argue the trial court erred when it granted appellee's petition for CPO based upon the following grounds: (1) his evidence would have shown that the accusations submitted against him could not be substantiated because they were fictitious and would result in criminal charges against appellee, including providing false statements to obtain a protection order pursuant to R.C. 2921.11; (2) he approached the trial judge several times to alert him of appellee's lies to obtain the CPO; (3) appellee has a documented history of violence and abuse, and she has stated that she will utilize the court system to her advantage; (4) Janette Spring committed obstruction of justice when she took his proof and details he attached to his motion for emergency hearing to the police and manufactured reasons for him to be arrested two days before the CPO hearing, intentionally prohibiting him from attending the hearing; and (5) the evidence Spring utilized to have him arrested referred to an alleged e-mail that appellee actually sent to herself claiming it was from appellant.

{¶ 13} However, as with appellant's arguments under his first assignment of error, his arguments under his second assignment of error all rely upon factual issues for which a transcript is required to review. Appellant's failure to file a transcript from any

proceedings below prohibits this court from reviewing these factual arguments. Thus, we are left to address only the legal arguments raised under this assignment of error.

{¶ 14} In the final paragraph of appellant's brief, appellant asserts that the hearings on both his petition for CPO and appellee's petition for CPO should have been continued, with no further argument in support of such assertion. Although a transcript would be necessary to review what, if anything, the court may have stated regarding a continuance of the matter, we will address the issue in general terms. The decision whether to grant or deny a continuance lies within the sound discretion of the trial court. *State v. Unger*, 67 Ohio St.2d 65, 67 (1981). Thus, a trial court's decision regarding a continuance will only be reversed if the trial court abused its discretion. *Fiocca v. Fiocca*, 10th Dist. No. 04AP-962, 2005-Ohio-2199.

{¶ 15} The problem in the present case is that appellant did not appear at the final hearing, so he never requested a continuance of the matter. There is nothing in the record demonstrating why appellant did not appear, although appellant claims throughout his brief that he was in jail at the time. There is also nothing in the record demonstrating what actions appellant took while allegedly in jail to alert the court of his circumstances or to seek legal representation to protect his interests at the hearing. Due to the lack of a transcript, we also do not know whether the trial court was aware of why appellant was not present at the hearing. Under these circumstances, we cannot find the trial court abused its discretion when it did not continue the hearing on the petitions for CPO.

{¶ 16} With regard to the trial court granting appellee's CPO, the trial court found that, by a preponderance of the evidence, appellee demonstrated she was in danger of or had been a victim of domestic violence or sexually oriented offenses, as defined by R.C. 3113.31(A), committed by appellant; and the CPO was equitable, fair, and necessary to protect appellee from domestic violence. Appellant does not specifically contest any of these findings, and the lack of a trial transcript makes our review of such findings impossible. Without a transcript of proceedings, this court is bound to presume the regularity of the proceedings below and affirm. *Knapp v. Edwards Laboratories*, 61 Ohio St.2d 197, 199 (1980). Therefore, we must find the trial court did not err when it granted appellee's petition for CPO. For the foregoing reasons, appellant's second assignment of error is overruled.

{¶ 17} Accordingly, appellant's two assignments of error are overruled, and the judgments of the Franklin County Court of Common Pleas, Division of Domestic Relations, are affirmed.

Judgments affirmed.

KLATT and FRENCH, JJ., concur.
