

NOT DESIGNATED FOR PUBLICATION

No. 125,735

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

I.P. on behalf of D.A.,
Appellee,

v.

J.P.,
Appellant.

MEMORANDUM OPINION

Appeal from Johnson District Court; ROBERT G. SCOTT, magistrate judge. Submitted without oral argument. Opinion filed December 1, 2023. Affirmed in part and reversed in part.

Richard W. Martin, Jr., of Martin & Wallentine, LLC, of Olathe, for appellant.

Mario J. Moore, of Moore Ramirez Law Firm, LLC, of Kansas City, Missouri, for appellee.

Before GREEN, P.J., SCHROEDER and CLINE, JJ.

CLINE, J.: J.P. challenges a final protection from abuse (PFA) order entered against him on behalf of his estranged wife, I.P., and her minor child, D.A. He argues the district court lacked jurisdiction to hear I.P.'s petition because it was unverified and unsigned, and he contends her allegations of abuse were outside the statute of limitations. He also argues there was insufficient evidence to support the district court's decision to enter the order. After a thorough review of the record, we find jurisdiction exists because J.P. waived the defects he raises for the first time on appeal. We affirm the district court's decision entering a final PFA order for I.P. but reverse the part of its order that pertains to D.A. for lack of evidence.

FACTS

In January 2022, I.P. petitioned without legal representation for a PFA order for herself and her minor child, D.A., against J.P. In her petition, I.P. alleged that J.P. caused her bodily injury and placed her and D.A. in fear of imminent bodily injury. She explained that J.P. had broken her arm, and he was generally very aggressive and violent. I.P. also said J.P. had threatened her several times, broken her phone, and said he would call the police and tell them lies to get I.P. in trouble.

In her petition, she described the most recent incident of abuse as having occurred during an argument between the couple in August 2021. According to I.P., she wanted to leave but J.P. would not let her. She said J.P. picked her up and threw her on the couch, hurting her hip. She claimed D.A. witnessed this incident. I.P. did not sign the petition, but on the last page under the title "Verification," her name was typewritten on the line asking for the "Plaintiff's Name" underneath the signature line.

The district court granted a temporary PFA order and set a hearing date. The hearing was continued twice and the temporary PFA order was extended in the meantime.

At the hearing, both parties were represented by counsel and each party testified under oath. I.P. elaborated on the allegations in her petition, explaining that she and her husband, J.P., were separated and had been separated on prior occasions because he beat her. She explained that J.P. would get drunk and physically abuse her. She discussed both incidents mentioned in her petition, claiming J.P. had broken her arm in 2016 and hurt her again in August 2021. She claimed he had abused her on other occasions as well, but she had not reported these incidents to the police because she was afraid J.P. would be deported. I.P. testified she was afraid for her life and felt she was in danger from J.P.

On cross-examination, I.P. was asked if she had any evidence that J.P. broke her arm. She referenced a document she called a "[d]octor's note," which is not in the record. She admitted she cannot read English, but she claimed the doctor explained the document's contents to her and told her x-rays revealed a bone fracture. Counsel for J.P. admitted this document as evidence and asked the court to take notice that it did not say I.P.'s arm was fractured.

J.P. testified and generally denied the allegations, stating that he had not broken I.P.'s phone or physically harmed her. According to J.P., I.P. was the aggressor in the 2016 incident.

After hearing the evidence, the district court discussed the Protection from Abuse Act, K.S.A. 60-3101 et seq., noting, in part, that the Act does not have any sort of statute of limitations. The court then described the document provided by I.P., which is not in the record, as saying that the doctor noted "subluxation of the right ulnar" and that there were "indications of swelling" which the court recognized as indication of an injury to the right elbow. The court found that J.P. did abuse I.P. and ordered the temporary PFA to be final for one year.

ANALYSIS

Did the district court lack jurisdiction because I.P.'s claim was time-barred?

J.P. first argues the district court lacked jurisdiction to consider I.P.'s PFA petition because it was time-barred. He claims that, under K.S.A. 60-513(a)(4), a two-year statute of limitations applies to civil orders of protection such as PFA orders. He claims the district court erred "[b]ecause the only abuse alleged occurred in 2016," and thus I.P.'s petition is time-barred.

To begin, J.P. failed to raise this issue below. Issues not raised before the district court cannot be raised on appeal. *In re Adoption of Baby Girl G.*, 311 Kan. 798, 801, 466 P.3d 1207 (2020). Nor does J.P. explain, as he is required to do, why the issue should be considered for the first time on appeal. Supreme Court Rule 6.02(a)(5) (2023 Kan. S. Ct. R. at 36). The rule is strictly enforced and the failure to comply with the rule risks a ruling that the issue is improperly briefed and will be deemed waived or abandoned. See *State v. Daniel*, 307 Kan. 428, 430, 410 P.3d 877 (2018); *State v. Godfrey*, 301 Kan. 1041, 1044, 350 P.3d 1068 (2015).

Our Supreme Court has held the statute of limitations is not jurisdictional and is thus waivable. *State v. Valdiviezo-Martinez*, 313 Kan. 614, 624, 486 P.3d 1256 (2021). And it has found this affirmative defense is waived if not raised at trial. *State v. Sitlington*, 291 Kan. 458, 463, 241 P.3d 1003 (2010). J.P. did not raise this affirmative defense before his appeal, nor has he explained why we should consider it for the first time now. We find he has waived this argument.

That said, we note that even if we considered J.P.'s argument and assumed without deciding that a two-year statute of limitations applies, the record does not support J.P.'s claim that the only abuse alleged occurred in 2016. I.P. testified about an incident of abuse that occurred in August 2021, which was only a few months before she filed her petition. This incident would be sufficient to support the court's decision.

Did the district court lack jurisdiction because the petition was neither signed nor verified?

J.P. next argues the district court lacked jurisdiction to consider I.P.'s PFA petition because it was neither signed nor verified. He correctly notes that both K.S.A. 60-3104 and K.S.A. 60-3105 require a verified petition to seek relief under the PFA Act, including ex parte temporary orders like those granted here. And according to K.S.A. 60-211 every

pleading—which includes a petition like the one filed by I.P.—must be signed by an attorney (if the party is represented) or the party (if the party is not represented).

I.P. argues this court should not address the issue because J.P. did not raise it below and fails to explain why this court should address it for the first time on appeal. See *In re Adoption of Baby Girl G.*, 311 Kan. at 801; Supreme Court Rule 6.02(a)(5). But if J.P.'s argument raises a jurisdictional issue—as he alleges—then it can be raised for the first time on appeal because "[p]arties cannot confer subject matter jurisdiction by consent, waiver, or estoppel. A failure to object to the court's jurisdiction does not invest the court with the requisite subject matter jurisdiction." *In re K.L.B.*, 56 Kan. App. 2d 429, 437, 431 P.3d 883 (2018).

J.P. makes no argument to support his claim that this is a jurisdictional issue. He simply points to the statutory requirements that the petition be signed and verified. And while I.P. cites no legal authority for her position, she makes a compelling common sense argument that the issue is moot since she testified to the allegations set forth in her petition under oath at the hearing with no objection from J.P.

Although Kansas courts have not addressed the specific issue of whether a failure to verify or sign a PFA petition precludes the court from obtaining jurisdiction, they have addressed these issues in the context of other statutes.

As for verification, in *Patterson v. Patterson*, 164 Kan. 501, 504, 190 P.2d 887 (1948), the Kansas Supreme Court noted "it has been repeatedly held that an imperfect verification, or lack of verification, does not oust the court of jurisdiction." And "[w]hen the court's attention is not called to an improper verification, or lack of verification of the pleadings, and the action proceeds to trial as though the pleadings were verified, the improper verification, or lack of verification, is waived." 164 Kan. at 504.

Our Supreme Court reached a similar decision in *State v. Fraker*, 242 Kan. 466, 467-68, 748 P.2d 868 (1988), which involved a DUI charge that did not include a properly verified complaint. The court held the defendant's conviction needed to be vacated but that the verification error was not a jurisdictional problem. And it said the "verification of a complaint is a defect which may be waived; lack of verification does not oust the court of jurisdiction." 242 Kan. at 468. The court reasoned that

"[w]here the charging document, whether in the form of a formal complaint or in the form of a notice to appear, contains all of the information necessary to charge the offense of DUI, but is unverified, and where the accused appears and proceeds to trial without objection to the lack of verification, the defect is waived." 242 Kan. at 468.

In *Taylor v. McKune*, 25 Kan. App. 2d 283, 288, 962 P.2d 566 (1998), a habeas case, this court addressed an inmate's petition which was "initially filed with no verification, no list of prior civil actions, no filing fee, and no poverty affidavit." The inmate "quickly remedied those deficiencies upon receiving the district court's order of noncompliance," but we still addressed whether those deficiencies prevented the district court clerk from accepting the petition at all. 25 Kan. App. 2d at 288. We held that it did not, citing, in part, *Patterson's* holding that imperfect verification or lack of verification does not oust the court of jurisdiction. 164 Kan. at 504.

The habeas statute merely states that a petition seeking habeas relief "shall be verified." K.S.A. 60-1502. And the statute here contains similar bare-bones language addressing verification. K.S.A. 60-3104(a). While the court's decision in *Fraker* was limited to the realm of criminal law and relied on K.S.A. 22-3208(3), which requires a defendant to raise defenses or objections to a deficient complaint before trial, we find its reasoning equally relevant here. I.P.'s failure to verify her petition did not present a jurisdictional issue and, like in *Patterson* and *Fraker*, J.P. waived his right to complain

about this defect through his appearance and participation without objection to the lack of verification at the hearing.

Our courts have similarly found a failure to sign a pleading is a "technical defect" that "does not affect the substantial rights of the party." *Architectural & Engineered Products Co. v. Whitehead*, 19 Kan. App. 2d 378, 382, 869 P.2d 766 (1994). As I.P. points out, K.S.A. 60-211 specifies the remedy for a party's failure to sign the petition; that is, "[t]he court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention." K.S.A. 2022 Supp. 60-211(a). Therefore, we also find I.P.'s failure to sign the PFA petition was not a jurisdictional defect and was waived by J.P.'s failure to raise it before now.

Was there sufficient evidence to support the district court's final protection from abuse order?

For his final issue on appeal, J.P. argues there was insufficient evidence to support the district court's decision to grant the final PFA order for I.P. and D.A.

When a verdict or district court decision is challenged for insufficiency of evidence or as being contrary to the evidence, an appellate court does not reweigh the evidence or pass on the credibility of the witnesses. If the evidence, when considered in the light most favorable to the prevailing party, supports the verdict, the verdict will not be disturbed on appeal. *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 407, 266 P.3d 516 (2011). Substantial competent evidence refers to legal and relevant evidence that a reasonable person could accept as adequate to support a conclusion. *Granados v. Wilson*, 317 Kan. 34, 41, 523 P.3d 501 (2023).

J.P. contends the sole basis for the district court's conclusion that J.P. abused I.P. is the medical record admitted at trial (which is not contained in the record on appeal). He

contends this document only evidences "bruising" on I.P.'s arm and does not establish "that the bruising was related in any way to [him]." But since this document is not in the record, we cannot examine it. The burden is on the party making a claim to designate a record sufficient to present its points to the appellate court and to establish its claims. *Friedman v. Kansas State Bd. of Healing Arts*, 296 Kan. 636, 644, 294 P.3d 287 (2013). J.P. fails to designate a record that this court can adequately reference to address his claim.

Even if the document itself does not refer to J.P., I.P.'s testimony was sufficient, when examined in a light most favorable to her, to support the district court's ruling. She testified that in 2016, J.P. hurt her arm. She also testified that other abuse occurred, such as when J.P. threw her on a couch and injured her hip in August 2021. Therefore, we find there is sufficient evidence to support the court's final PFA order regarding I.P.

Even so, J.P. is correct that there was no evidence of abuse toward D.A. To have a PFA order in place for D.A. required a separate showing that J.P. abused D.A., as defined by the Act. See *Baker v. McCormick*, 52 Kan. App. 2d 899, 913-14, 380 P.3d 706 (2016). We find no basis in the evidence for the district court's entry of a final PFA order regarding D.A. and therefore reverse that portion of its order.

Is I.P. entitled to attorney fees?

In her brief, I.P. requested we award her attorney fees under K.S.A. 45-222 because she claims she is the prevailing party and J.P. maintained this action not in good faith and without a reasonable basis in fact or law. She did not file a corresponding motion for appellate attorney fees under Supreme Court Rule 7.07 (2023 Kan. S. Ct. R. at 51). Assuming without deciding that we have authority to consider I.P.'s fee request, we do not find J.P. maintained his action in bad faith or without a reasonable basis in fact or law, as is required to support an award of attorney fees under the statute. The specific

questions were not answered by controlling precedent, and we reversed one of the final PFA orders for lack of evidence. Therefore, even if we had authority to grant I.P. her attorney fees on appeal, we would deny her request.

Affirmed in part and reversed in part.