In the
Court of Appeals
Second Appellate District of Texas
at Fort Worth

No. 02-19-00252-CV

KATRINA JEAN ELLIS, Appellant

V.

CORY BARINEAU, Appellee

On Appeal from County Court at Law No. 2
Wise County, Texas
Trial Court No. CV-7954

Before Birdwell, Bassel, and Womack, JJ.
Memorandum Opinion by Justice Womack

MEMORANDUM OPINION

I. INTRODUCTION

Following a trial de novo on appeal from the justice court, the county court found that pro se appellant Katrina Jean Ellis's harassment suit against appellee Cory Barineau was frivolous. The county court consequently rendered judgment denying all relief Ellis requested in her suit and finding in favor of Barineau on a counterclaim. The county court awarded Barineau $400 in damages and $2,500 in attorney's fees. Ellis then appealed to this court in two issues, primarily arguing that the trial court reversibly erred by denying her a continuance and by denying her Sixth Amendment right to cross-examine Barineau. Finding no merit in these issues, we affirm.

II. BACKGROUND

Ellis filed a pro se petition in the justice court against Cory Barineau. In the complaint portion of the petition, Ellis alleged the following:

> [D]espite numerous attempts to plead [with Barineau] to stop[,] he has continually stalked me [with] cell phone video taking and security cameras aimed specifically at my yard. He is almost on a daily basis harassing, bullying, [and] yelling at me. In addition, he parks various automobiles in my yard causing damage to potted plants, security light, signs, fence, gate, reflectors, throws bricks at me, smashes stake [with] ax, calls various gov[ernment] agencies to try to get me in trouble[, and] slanders me. This causes great delays in my work here.

In the requested relief portion of her petition, Ellis indicated that she sought $7,000 in damages, a figure that was apparently based on the following items: "Fence cut – $60.00, Security l[ight] – [$]20.00, plants in pots – $20.00, Time delays – $3,000.00, the

rest for cost." As additional relief, Ellis pleaded for "plaintiff's sense of peace [and] safety. Too much stress [and] plaintiff has grand mal seizures. I cannot go out into my own yard without being under constant surveillance[,] which there is no price for that. Peace and safety is my right."

In response to Ellis's petition, Barineau filed a general denial. Barineau also specially excepted to Ellis's petition, asserting that her suit was baseless, without merit, and was brought for the purpose of harassment. Barineau additionally filed counterclaims against Ellis for trespass to real property and for nuisance. Those claims were based in part on allegations that Ellis had spray painted Barineau's car in an attempt to intimidate him.

Following trial, the justice court rendered a take nothing judgment against Ellis and awarded Barineau $1,000 in attorney's fees. Ellis appealed that judgment to the county court for a trial de novo. *See* Tex. R. Civ. P. 506.1(a), 506.3. The county court called the case for trial on July 1, 2019. The record from that proceeding indicates that both the county court and Barineau's counsel were initially unsure as to what causes of action Ellis had asserted against Barineau in her pro se petition.

At the start of the trial, the county court asked Barineau's counsel for a brief overview of what the case was about. Barineau's counsel indicated that he believed Ellis's suit against Barineau involved claims related to a fence that she had erected on property that was adjacent to hers. According to Barineau's counsel, the City of Newark, Texas, had previously obtained a judgment against Ellis declaring that the

city held an easement in the property on which Ellis had built the fence and ordering her to remove the fence. But after offering this explanation, counsel added, "I'm not exactly sure what [Ellis] is alleging in this action, Judge."

While testifying during trial, Ellis clarified that her suit was not a property dispute. She said that she had sued Barineau for harassment because he had been throwing things at her, yelling at her, and stalking her. In support of those allegations, Ellis testified that any time she came near to a fence that bisected the property she was renting and Barineau's property, he would throw things at her. She said that on one occasion, Barineau was spraying weed killer toward the fence knowing she was standing on the other side and that she could feel the spray get on her. She also said that Barineau would throw gravel over the fence and that it would get on her. Ellis also suggested that Barineau threw rocks and bricks at her.

Ellis further testified that Barineau would yell at her and would have his friends yell at her. According to Ellis, Barineau had three surveillance cameras on his property that he had pointed toward her property, and Ellis said that Barineau had on one occasion told her, "I'm watching everything you do, and when you do something illegal, I'm going to report it." Ellis claimed that even though she did not bother Barineau "in any way," he would park his car on a portion of the property she was renting. She said that any time she went near a certain area, Barineau would film her with his cell phone. Ellis said that she had gone to law enforcement about Barineau's harassment and that they had told her to file a civil suit.

Ellis told the court the relief she sought:

> [W]hat I would like is, maybe, a statement from [Barineau] agreeing that he will not throw things at me and do all those things anymore, that he will just stop the harassment. Just stop. Just so we can live in peace. Because I'm not moving. I don't care. The City is -- they are not exactly -- well, I don't want to say anything.

When Barineau's counsel asked her during cross-examination what relief she was seeking, Ellis replied, "Peace. Peace. Peace."

Barineau also testified at trial, and he disputed Ellis's allegations. Barineau said that one morning, he discovered that someone had spray painted his car and that he had surveillance video showing Ellis holding pink spray paint. Barineau stated that law enforcement was investigating that incident. Barineau also said that Ellis had taken gravel out of his driveway and had used it to fill potholes on the property she was renting. Barineau stated that it had cost him "$500 for the repairs on [his] vehicle" and that the cost to replace the gravel was "$40, maybe, from Lowe's. Just a couple bags of gravel." Finally, Barineau claimed that Ellis had threatened him and that he was worried for the safety of his family.

The county court rendered judgment in favor of Barineau and denied all relief that Ellis requested. The county court awarded Barineau $400 for the damage done to his car. And, based upon a finding that Ellis's suit was frivolous, the county court awarded Barineau $2,500 in costs and attorney's fees. Ellis has appealed that judgment to this court, raising two issues.

III. DISCUSSION

A. Motion For Continuance

In her first issue, Ellis asserts that the county court abused its discretion by allowing the trial to proceed after she apprised it that she had suffered a grand mal seizure shortly before trial.[1] Ellis's argument in that regard is brief, and we reproduce it in its entirety here:

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[1]Under the "Issues Presented" portion of her brief, Ellis included as part of her first issue a sentence stating that "the [county] court showed afterward that [it] had none of Plaintiff's twenty-two photographic evidence that should have been forwarded from the lower court." She additionally represented under the "Summary of the Arguments" portion of her brief that she had notified the county court that the photographs had not been forwarded from the justice court and that after notifying the county court of the missing photographs, she assumed "the courts had done their job." Because of this alleged failure, Ellis asserts that she believes the county court was prejudiced against her. Also in her first issue under the "Issues Presented" portion of her brief, Ellis asserted that the county court "never addressed" her second amended combined motion to strike Barineau's special exception and to dismiss his counterclaim, which she filed in the county court.

To the extent that Ellis attempts to raise a complaint on appeal that is grounded on these assertions, we cannot perceive what it is. She does not concisely state a discernible issue based on these assertions, does not cite us to any part of the record supporting her factual assertions, and does not advance any clear and concise arguments supporting her contentions, complete with appropriate citations to authorities and to the record in the "Arguments" portion of her brief. *See* Tex. R. App. P. 38.1(f)–(i). As a matter of practice, we liberally construe briefs filed by the parties. *See Allen v. Bank of Am., N.A.*, No. 02-17-00414-CV, 2018 WL 3702565, at *1 (Tex. App.—Fort Worth Aug. 2, 2018, no pet.) (mem. op.). But construction cannot be so liberal as to turn us into advocates. In liberally construing a party's brief, we cannot go so far as to make the party's arguments for them, and then adjudicate the case based on the arguments we have made on their behalf. *Cf. Ihnfeldt v. Reagan*, No. 02-14-00220-CV, 2016 WL 7010922, at *9 (Tex. App.—Fort Worth Dec. 1, 2016, pet. denied) (mem. op.) (noting that "[w]hen appellate issues are not supported by argument, citations to the record, or legal authority, nothing is presented for review"

> The [county] court erred and abused its discretion by allowing the hearing to continue after Appellant told the court what had happened and her ill state and inability to present her case properly. It is relatively common knowledge that grand mal seizures render the victim unconscious for a period of time during which their heart stops and all brain activity ceases. It is the closest thing to death without being actually dead. It takes the brain at least two weeks to recover during which time the patient has severe memory, speech, and reasoning problems.

We glean from this argument that Ellis asserts the county court abused its discretion by failing to grant her a continuance after she notified it on the day of trial that she had suffered a grand mal seizure.

Although Ellis acted pro se in the county court, she was nevertheless subject to the same standards as a licensed attorney and had to comply with the applicable rules of procedure, including the rules of preservation. *Ramey v. Fed. Home Loan Mortg. Corp.*, No. 14-14-00147-CV, 2015 WL 3751539, at *2 (Tex. App.—Houston [14th Dist.] June 16, 2015, no pet.) (mem. op.) ("Pro se litigants are held to the same standards as licensed attorneys and are not relieved of preservation-of-error requirements."). To preserve a complaint for appellate review, a party must present to

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and that an appellate court would abandon its role as a neutral adjudicator and would become an advocate for a party if the court undertook "an independent review of the record and the applicable law to determine whether there was error"). Given the briefing deficiencies we noted above, we conclude that Ellis's assertions concerning the photographs that the county court allegedly failed to retrieve from the justice court, as well as those concerning the county court's alleged failure to rule on her second amended motion to strike, present nothing for our review. *See* Tex. R. App. P. 38.1(f)–(i); *Ihnfeldt*, 2016 WL 7010922, at *9 ("When appellate issues are not supported by argument, citations to the record, or legal authority, nothing is presented for review.").

the trial court a timely request, objection, or motion that states the specific grounds for the desired ruling, if not apparent from the request's, objection's, or motion's context. Tex. R. App. P. 33.1(a)(1)(A); *see also* Tex. R. Evid. 103(a)(1). If a party fails to do this, error is not preserved. *Bushell v. Dean*, 803 S.W.2d 711, 712 (Tex. 1991) (op. on reh'g). The objecting party must also get a ruling—either express or implied—from the trial court. Tex. R. App. P. 33.1(a)(2)(A), (b); *see Lenz v. Lenz*, 79 S.W.3d 10, 13 (Tex. 2002). If the trial court refuses to rule, the party preserves error by objecting to that refusal. Tex. R. App. P. 33.1(a)(2)(B). If the trial court does not rule and the party does not object to the refusal to rule, error is not preserved. *Id.*

The record reflects that Ellis did not preserve her complaint regarding the county court's failure to grant her a continuance. Ellis did not file a written motion in the county court requesting a continuance. *See Hardwick v. Hardwick*, No. 02-15-00325-CV, 2016 WL 5442772, at *1 (Tex. App.—Fort Worth Sept. 29, 2016, no pet.) (mem. op.) (citing Tex. R. Civ. P. 151 and stating that a request for continuance must be in writing). And while she did mention during an oral exchange with the county court on the day of trial that she had suffered a grand mal seizure, the record reflects that she did not ask for a continuance during that exchange. Instead, as demonstrated below, Ellis told the county court that she would "do [her] best" during the trial.

Toward the beginning of the proceeding, after Ellis indicated she had something to say, the following exchange took place:

THE COURT: Go ahead and stand, please.

> MS. ELLIS: I had a grand mal seizure, and I'm just not up to par. So I'm going to do my best. But sometimes I have trouble finding words after that. And so anyway . . .
>
> THE COURT: Okay. Thank you, ma'am. Thanks for sharing that with me. You may have a seat.
>
> MS. ELLIS: And I forgot my glasses. Does anybody have any glasses they want to share with me? That's part of it. I lost my keys. I lost my glasses. One time I put the remote in the -- I found it in the refrigerator. I will do my best.[2]

Accordingly, because Ellis never asked the county court for a continuance, Ellis failed to preserve her appellate complaint that it abused its discretion by not continuing the trial. *See* Tex. R. App. P. 33.1(a)(1)(A).

But even if we construed Ellis's exchange with the county court as an oral request for continuance, she nevertheless failed to preserve her complaint in that circumstance. Rule 251 of the Texas Rules of Civil Procedure requires motions for continuance to be supported by affidavit, and a party fails to preserve error in a trial court's denial of a request for continuance if the request is not supported by affidavit. *See* Tex. R. Civ. P. 251; *Edomwande v. Gaza*, No. 02-13-00125-CV, 2013 WL 6198852, at *1 (Tex. App.—Fort Worth Nov. 27, 2013, no pet.) (mem. op.); *Taherzadeh v. Ghaleb-Assadi*, 108 S.W.3d 927, 928 (Tex. App.—Dallas 2003, pet. denied). Assuming Ellis's exchange with the county court constituted an oral request for continuance, it

[2]The record reflects that Ellis did not inform the trial court about any of the effects of grand mal seizures that she has articulated in her brief.

nevertheless was not supported by affidavit and thus was insufficient to preserve her complaint. *See* Tex. R. Civ. P. 251; *Taherzadeh*, 108 S.W.3d at 928 (holding appellant's oral request for continuance was insufficient to preserve error where appellant did not support it with an affidavit).

Because we conclude that Ellis failed to preserve her first issue, we overrule it.[3]

B. Cross-Examination

In her second issue, Ellis contends the county court erred by prohibiting her from cross-examining Barineau.[4] At the start of trial, the county court informed the parties about how it was going to conduct the trial:

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[3]In the argument portion of her brief relating to her first issue, Ellis makes the conclusory assertion that "defense evidence should have been thrown out." However, Barineau's evidence in this case consisted of his own testimony and two documentary exhibits, and the record reflects that the county court admitted the exhibits without objection from Ellis and that Ellis did not raise any objections to Barineau's testimony. Thus, to the extent Ellis could be understood as complaining that the county court erred by admitting all, or any portion of, Barineau's evidence, we conclude that she failed to preserve that complaint. *See* Tex. R. App. P. 33.1(a)(1)(A); *Castleberry v. Weatherford Indep. Sch. Dist.*, No. 2-02-183-CV, 2003 WL 1784578, at *2 (Tex. App.—Fort Worth Apr. 3, 2003, no pet.) (per curiam) (mem. op.) (holding that appellant failed to preserve error in the trial court's admission of evidence when appellant failed to object to the evidence).

[4]Under the "Arguments" portion of her briefing related to her second issue, Ellis appears to embed, as she did with respect to her first issue, a challenge to the admissibility of Barineau's evidence. But for the reasons we explained with regard to her challenge to the admissibility of the evidence in issue one, Ellis failed to preserve any complaint that the county court erroneously admitted Barineau's evidence. Additionally, under the "Issues Presented" portion of her brief, Ellis included a statement in her second issue that the trial court "abused its discretion" by awarding Barineau "$540.00 in damages" (the record reflects that the county court awarded Barineau only $400 in damages) and $2,500 in attorney's fees. She also included that

> THE COURT: Just a minute, ma'am. Let me tell y'all what we are doing here. We are going to get started. We have got an hour scheduled for this. Each side gets 30 minutes to present your case, that includes cross-examination of witnesses.
>
> This is an appeal from the justice court. Since it's an appeal from the justice court, then we have a trial de novo. We start all over. So you are the plaintiff. So it will be up to you to present your case first. Then the defendant will be able to present its case.

The county court asked Ellis whether she understood what it had just said, and Ellis replied that she did, and she raised no objection to the county court's directions. *See State v. Reina*, 218 S.W.3d 247, 254–55 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (holding that it was incumbent upon the State to object to the time limits imposed by the trial court); *see also Schwartz v. Forest Pharm., Inc.*, 127 S.W.3d 118, 126–27 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (concluding that the appellant failed to preserve error as to trial court's time limit because he failed to object when he first knew of the time limit).

After Ellis presented her case, Barineau took the stand. And when his counsel was finished questioning him on direct, the following exchange occurred:

> THE COURT: All right. You may go ahead and step down, sir.

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statement in the "Conclusion" portion of her brief. However, these bare assertions suffer from the same deficiencies that we outlined with respect to her assertions that the county court failed to retrieve photographs filed in the justice court and that the county court failed to address her amended motion to strike. *See supra* note 1. And for the reasons we explained regarding those assertions, we conclude Ellis's assertions that the county court abused its discretion by awarding damages and fees to Barineau present nothing for our review. *See id.*

MS. ELLIS: I was going to ask him some questions.

> THE COURT: You're out of time, ma'am. You have used your 30 minutes. I said that each side had 30 minutes to present their case including cross-examination of witnesses. Your 30 minutes are up.
>
> [Counsel], do you have any other witnesses?

Ellis contends that the county court's refusal to allow her to cross-examine Barineau violated her Sixth Amendment right of confrontation. But the Sixth Amendment applies only to criminal prosecutions. *See* U.S. Const. Amend VI ("In all *criminal prosecutions*, the accused shall enjoy the right . . . to be confronted with the witnesses against him" (emphasis added)); *Leachman v. Stephens*, No. 02-13-00357-CV, 2016 WL 6648747, at *18 (Tex. App.—Fort Worth Nov. 10, 2016, pet. denied) (mem. op.). This is a civil case, and thus Ellis's complaint that the county court's refusal to allow her to cross-examine Barineau violated her Sixth Amendment right of confrontation has no merit. *See Leachman*, 2016 WL 6648747, at *18. And because Ellis bases her complaint solely on the Sixth Amendment, we must overrule her second issue.

IV. CONCLUSION

Having overruled all of Ellis's issues, we affirm the county court's judgment. *See* Tex. R. App. P. 43.2(a).

/s/ Dana Womack
Dana Womack
Justice

Delivered: May 21, 2020