[Cite as *Raybourne v. McKarns*, 2009-Ohio-2654.]

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

LAURA RAYBOURNE,	)	
	)	CASE NO. 08 CA 856
PLAINTIFF-APPELLEE,	)	
	)	
- VS -	)	OPINION
	)	
DANIEL J. McKARNS,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 08DRH25581.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Laura Raybourne, Pro-se
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JUDGES:
Hon. Mary DeGenaro
Hon. Joseph J. Vukovich
Hon. Gene Donofrio

Dated: June 1, 2009

[Cite as *Raybourne v. McKarns*, 2009-Ohio-2654.]
DeGenaro, J.

{¶1} This timely appeal comes for consideration upon the record in the trial court, and appellant's brief. Appellant, Daniel J. McKarns appeals the decision of the Carroll County Court of Common Pleas that granted a domestic violence civil protection order against him that was requested by appellee Laura E. Raybourne. On appeal, McKarns argues that the trial court abused its discretion by interrogating witnesses during trial in a biased and partial manner in violation of Evid.R. 614(B).

{¶2} Upon review of the record, McKarns's arguments are meritless. McKarns points to four specific instances where he felt the trial court questioned witnesses in a partial or biased manner. However, with respect to three of those occasions, McKarns failed to object during trial, and has waived all but plain error. The trial court did not commit plain error in those instances, because the questions did not seriously affect the basic fairness, integrity, or public reputation of the judicial process, nor did they challenge the legitimacy of the underlying judicial process itself. With regard to the one instance where McKarns did object, the trial court did not abuse its discretion. Rather, the court posed relevant questions and did not appear to exhibit any bias towards McKarns. Accordingly, McKarns's assignment of error is meritless, and the decision of the trial court is affirmed.

Facts

{¶3} On July 22, 2008, Raybourne petitioned the trial court for a civil protection order, pursuant to R.C. 3113.31, in which she alleged that McKarns, her brother, had committed acts of domestic violence against her. Specifically, she asserted that McKarns threatened her with serious bodily harm via several email messages. The trial court held an ex parte hearing and as a result issued a temporary ex parte domestic violence civil protection order.

{¶4} On August 12, 2008, the trial court conducted a full evidentiary hearing. At the hearing, McKarns was represented by counsel, while Raybourne represented herself. Both Raybourne and McKarns testified, and the trial court asked questions of both parties. It emerged during the hearing that McKarns sent several threatening emails to Raybourne, apparently because he was upset about Raybourne meddling in his personal

affairs, and contacting his former wife. McKarns stipulated that he had written the emails in question, and they were admitted into evidence without objection.

{¶5} Raybourne testified she received the first email on July 15, 2008. She stated she had not had contact with McKarns for over a year and that the email surprised her. In that email, McKarns stated, among other things:

{¶6} "I strongly suggest you never show your face around here again. If you feel the need to test this then you just haul your big ass up here and I will gladly give you a hands on demonstration and I don't give a rats ass who is here or how many. Got it? If this message doesn't send chills down your back you may want to have your head examined."

{¶7} Raybourne testified that this email caused her to be scared that McKarns would come to her house or their parents' house and physically harm her. She stated she had witnessed his rage in the past, not to humans, but to cattle and inanimate objects. She testified McKarns lives on a farm that adjoins their parents' farm and that out of fear of him she had not visited her parents' home in over a year.

{¶8} On July 21, 2008, Raybourne received another email from McKarns. In this email it was apparent McKarns was upset about Raybourne's attempts to contact his former wife. The email stated, among other things:

{¶9} "Now I didn't threaten to kill you by any means (beat the shit out of you, yes) but if you have done as Kris [his former wife] accuses you of you need to stay the hell away from me forever!"

{¶10} Raybourne interpreted that statement as a threat of bodily harm. She stated she was afraid to visit her parents or go to family functions out of fear that McKarns would harm her. Further, Raybourne testified she believed McKarns owned guns, had advanced Army combat training, and that he suffered from psychological problems.

{¶11} McKarns testified that he had no desire to cause bodily harm to Raybourne. He characterized the emails as isolated incidences, and stated he was upset because he felt Raybourne was getting too involved in his personal business. He further stated he had not suffered from psychological problems since 1991. He admitted his emails

contained threats towards Raybourne.

{¶12} Based upon the evidence presented, the trial court granted the order of protection, effective until August 15, 2013, unless earlier modified or dismissed by the court.

Evidence Rule 614(B)

{¶13} As an initial matter, we note that Raybourne failed to file a brief in this matter, and thus pursuant to App. R. 18(C), this court may accept McKarns's statement of the facts and issues as correct and reverse the judgment if appellant's brief reasonably appears to sustain such action. However, as will be explained below, McKarns's brief does not reasonably appear to support reversal.

{¶14} In his sole assignment of error, McKarns asserts:

{¶15} "The trial court erred by interrogating witnesses in a partial and biased manner in violation of Evidence Rule 614(B)."

{¶16} This appeal arose out a domestic civil protection order proceeding, which is governed by R.C. 3113.31. In order to grant a civil protection order pursuant to that section, a trial court must find by a preponderance of the evidence that the petitioner is in danger of domestic violence. *Solomon v. Solomon*, 157 Ohio App.3d 807, 2004-Ohio-2486, 813 N.E.2d 918, at ¶18, citing *Felton v. Felton*, 79 Ohio St.3d 34, 1997-Ohio-302, 679 N.E.2d 672, paragraph two of the syllabus.

{¶17} "Domestic violence" includes, "the occurrence of one or more of the following acts against a family or household member:

{¶18} "(b) Placing another person by the threat of force in fear of imminent serious physical harm * * *" R.C. 3113.31(A)(1)(b).

{¶19} A "family or household member" includes a "person related by consanguinity or affinity to the respondent," who is residing with or has resided with the respondent. R.C. 3113.31(A)(3)(ii).

{¶20} On appeal, McKarns does not attack the trial court's substantive decision to grant the civil protection order. Rather, McKarns argues that the trial court erred by interrogating witnesses in a partial and biased manner during trial, in violation of Evid.R.

614(B). McKarns therefore urges this court to reverse the trial court's order and remand the case for a new trial before a different judge.

{¶21} Evid.R. 614(B), "Interrogation by court," provides:

{¶22} "The court may interrogate witnesses, in an impartial manner, whether called by itself or by a party."

{¶23} As this court has previously stated:

{¶24} "Evid.R. 614(B) permits a trial judge to interrogate a witness as long as the questions are relevant and do not suggest a bias for one side or the other. *State v. Blankenship* (1995), 102 Ohio App.3d 534, 548, 657 N.E.2d 559, 567-568. Absent a showing of bias, prejudice, or prodding of the witness to elicit partisan testimony, it is presumed that the trial court interrogated the witness in an impartial manner in an attempt to ascertain a material fact or develop the truth. Id. A trial court's interrogation of a witness is not deemed partial for purposes of Evid.R. 614(B) merely because the evidence elicited during the questioning is potentially damaging to the defendant. Id." *Metro. Life Ins. Co. v. Tomchik* (1999), 134 Ohio App.3d 765, 794, 732 N.E.2d 430.

{¶25} The trial court's questioning of witnesses during trial, pursuant to Evid.R. 614(B), is reviewed under an abuse of discretion standard. Id. at 795. When reviewing a trial court's decision for an abuse of discretion, this court cannot simply substitute its judgment for that of the trial court. *Holcomb v. Holcomb* (1989), 44 Ohio St.3d 128, 131, 541 N.E.2d 597. The term "abuse of discretion" connotes more than an error of law or judgment; it implies that the trial court's attitude was unreasonable, arbitrary or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 OBR 481, 450 N.E.2d 1140.

{¶26} In this case, McKarns takes issue with several specific instances where the trial court questioned witnesses. First, McKarns argues the trial court abused its discretion when it "extracted testimony" from Raybourne that was not pertinent to the allegations of domestic violence. Specifically, McKarns complains about the following interchange:

{¶27} "THE COURT: What happened prior to this email to cause you to have

these fears [of McKarns] for the past year?

{¶28} "MRS. RAYBOURNE: Just because of the other things that he has been going through. He's been going through – I don't know what it is. If it is a divorce or some kind of case with his ex-wife. He's been trying – he tried to give up his daughter he was fighting custody for. Mom and Dad called, they are upset. They don't know what to do, because now they can't see family. She is missing her first communion.

{¶29} "ATTORNEY THOMAS: Objection. There is no relevance to a lot of information she's giving.

{¶30} "MRS. RAYBOURNE: But he is in a rage, and I'm afraid to just - - I don't want to be involved in that. So I - -

{¶31} "THE COURT: How did you know he was in a rage?"

{¶32} "MRS. RAYBOURNE: Because they are tel - - Mom and Dad are telling me the different things that he's doing. That he, that - -

{¶33} "THE COURT: Did you get the impression from what you heard that, that he was acting abnormally?

{¶34} "MRS. RAYBOURNE: Yes. I even have an e-mail - -

{¶35} "THE COURT: And did you fear for your safety as a result of what you heard?

{¶36} "MRS. RAYBOURNE: I feared for my safety, as far as, not going to my mom and dad's farm to be around that."

{¶37} McKarns argues that the trial court abused its discretion and acted in a partial and biased manner inasmuch as it never ruled on the above objection, permitted Raybourne to answer, and continued with its inquiry. McKarns is incorrect. Admittedly, the trial court never specifically ruled on the relevancy objection. However, immediately following that objection, Raybourne redirected her testimony to matters that were certainly relevant, namely McKarns's fits of rage and the fear they caused her. The trial court continued to ask questions that were relevant and the court did not appear to exhibit any bias. Thus, the trial court did not abuse its discretion with regard to that line of questioning.

{¶38} McKarns also takes issue with three other occasions where the trial court questioned witnesses at trial. However, McKarns failed to object to those questions at the proper time during the hearing. "Ordinarily, an error in the conduct of a trial that was not brought to the attention of the trial court at a time when the error could have been corrected will not provide a basis for reversal on appeal unless it rises to the level of plain error." *Vermeer of S. Ohio, Inc. v. Argo Constr. Co.* (2001), 144 Ohio App.3d 271, 275, 760 N.E.2d 1.

{¶39} "In appeals of civil cases, the plain error doctrine is not favored and may be applied only in the extremely rare case involving exceptional circumstances where error, to which no objection was made at the trial court, seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself." *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 1997-Ohio-401, 679 N.E.2d 1099, at paragraph one of the syllabus. In *Goldfuss*, the Court explained that the doctrine shall only be applied in extremely unusual circumstances where the error complained of, if left uncorrected, would have a material adverse effect on the character of and public confidence in judicial proceedings. Id. at 121. The Court continued that the public's confidence is rarely upset merely by forcing civil litigants to live with the errors they themselves or the attorney chosen by them committed at trial. Id. at 121-122.

{¶40} In this case, none of three other instances of questioning constitute error, let alone plain error. First, McKarns argues that the trial court was biased and partial in that it permitted testimony and continued inquiry regarding McKarns's "alleged rage, hitting animals, and hitting inanimate objects." McKarns submits that this line of questioning impermissibly transformed the trial court into an advocate for Raybourne. A review of the record reveals that that the court did question Raybourne at length about the times she had witnessed McKarns striking cattle and inanimate objects. The court also asked Raybourne about what sort of "gratification" McKarns appeared to get from that conduct. Contrary to McKarn's assertions, however, the trial court did not abuse its discretion or commit plain error during that line of questioning. "A trial judge has a duty to see that

truth is developed and therefore should not hesitate to pose a proper, pertinent, and even-handed question when justice so requires." *In re Chantel R.*, 8th Dist. No. 79691, 2002-Ohio-593, at *5 (internal citations omitted). Here, the court was asking relevant questions to determine whether it was reasonable for Raybourne to fear McKarns.

{¶41} McKarns also takes issue with the trial court's use of leading questions in the form of cross-examination in two instances. McKarns argues that the trial court used that type of questioning out of anger towards McKarns, and that the court was therefore biased against him. The first instance occurred after the trial court admonished McKarns for misleading comments he made about the trial judge. Immediately following the admonishment, the court posed the following questions:

{¶42} "Now this expression here [from the email] (as read): 'Now I didn't threaten to kill you by any means, beat the shit out of you yes.' Now I'm going to ask you a question about how I interpret that. Am I to interpret that that (sic) you meant to tell her that you may beat the shit out of her enough to kill her; do I have it right?"

{¶43} "So you are admitting that you may have threatened to kill her - - I mean beat the shit out of her?"

{¶44} The second instance occurred while the court questioned McKarns about specific statements he made in his emails to Raybourne. Specifically, the trial court posed questions such as:

{¶45} "But it's a threat, right? Yes or no?"

{¶46} "No? Then she [Raybourne] is a liar, huh?"

{¶47} "And this is all make-believe?"

{¶48} Neither of these lines of questioning constitutes plain error. "During the course of its examination, the court may, in the interests of justice, ask proper questions of witnesses, *even if these are leading questions*." *Syslo v. Syslo*, 6th Dist. No. L-01-1273, 2002-Ohio-5205, at ¶83 (emphasis added, internal citations omitted.) Further, as quoted in ¶24, infra, the eliciting of potentially damaging evidence does not make questioning by the trial court problematic. *Metro. Life Ins. Co.* at 794. Although it may be gleaned that the trial court was perhaps somewhat irritated with McKarns at several points

during the trial, the court was not combative or acting in a biased manner.

Conclusion

{¶49} McKarns argues that the trial court abused its discretion by interrogating witnesses during trial in a biased and partial manner in violation of Evid.R. 614(B). McKarns points to four specific instances where he felt the trial court questioned witnesses in a partial or biased manner. However, with regard to three of those occasions, McKarns failed to object during trial, and has waived all but plain error. The trial court did not commit plain error in those instances, because the questions did not seriously affect the basic fairness, integrity, or public reputation of the judicial process, nor did they challenge the legitimacy of the underlying judicial process itself. With regard to the one instance where McKarns did object, the trial court did not abuse its discretion. The trial court asked relevant questions and did not appear to exhibit any bias towards McKarns. Moreover, since McKarns admitted he wrote the threatening emails, he cannot show how the trial court's actions prejudiced him. Accordingly, McKarns's sole assignment of error is meritless, and the decision of the trial court is affirmed.

Vukovich, P.J., concurs.

Donofrio, J., concurs.