[Cite as *K.H. v. A.M.*, 2018-Ohio-5395.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

K.H.,

Petitioner-Appellee,

v.

A.M.,

Respondent-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 18 CO 0001

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2017 CV 343

BEFORE:
Gene Donofrio, Cheryl L. Waite, Carol Ann Robb, Judges.

JUDGMENT:
Affirmed

Atty. Christopher Maruca, The Maruca Law Firm, 201 East Commerce Street, Suite 316, Youngstown, Ohio 44503, for Petitioner-Appellee, and

Atty. Charles Payne, Law Director, 617 St. Clair Avenue, P.O. Box 114, East Liverpool, Ohio 43920, for Respondent-Appellant.

Dated:
December 24, 2018

Donofrio, J.

{¶1} Appellant, K.H., appeals from a Columbiana County Common Pleas Court judgment granting appellee, A.L.M., a civil protection order (CPO).

{¶2} This case arises from a family feud. Appellant is appellee's mother. Appellee had a daughter, A.M. A.M. had two minor children. In 2017, A.M. was suffering with cancer and going through a divorce. While the divorce was pending, A.M. and her children moved in with appellant.

{¶3} Relevant to the CPO in this case were three incidents.

{¶4} The first incident occurred at the Cleveland Clinic on June 2, 2017. Appellant and appellee were both visiting A.M. in the hospital. The parties contested what happened. According to appellee, she was helping A.M. to the bathroom when appellant shoved her and threatened her. But according to appellant, she simply lost her balance while helping A.M. to the bathroom and bumped into appellee.

{¶5} The second incident was actually comprised of multiple instances of appellant driving up and down appellee's street and parking in appellee's driveway for periods of time.

{¶6} The third incident occurred on June 26, 2017. It involved appellee going to appellant's house to pick up the children. Appellee was accompanied by the police. When she arrived, a heated exchange ensued between appellant and appellee. Appellant threatened appellee.

{¶7} On June 28, 2017, appellee sought a CPO against appellant. The matter proceeded to a hearing before a magistrate. After hearing the testimony, the magistrate entered judgement in favor of appellee, granting the CPO. Appellant filed objections to the magistrate's decision. The trial court agreed with the magistrate's decision and overruled appellant's objections.

{¶8} Appellant filed a timely notice of appeal on February 2, 2018. She now raises a single assignment of error

{¶9} Appellant's sole assignment of error states:

THE MAGISTRATE'S DECISION IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

{¶10} Appellant argues the magistrate's decision granting the menacing by stalking CPO was against the manifest weight of the evidence. She argues the testimony at the hearing did not establish the elements needed for a CPO.

{¶11} The decision whether to grant a civil protection order lies within the trial court's discretion. *Olenik v. Huff*, 5th Dist. No. 02-COA-058, 2003-Ohio-4621, ¶ 21. Our standard of review for whether the protection order should have been granted entails a manifest weight of the evidence review. *Caban v. Ransome*, 7th Dist. No. 08MA36, 2009-Ohio-1034, ¶ 7. The Ohio Supreme Court has explained that the manifest weight of the evidence standard set forth in *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), also applies in civil cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517.

{¶12} The appellate court's role in reviewing a manifest weight of the evidence claim is to examine the entire record, weigh the evidence, consider the credibility of witnesses, and determine whether the trial court "clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Jackson*, 7th Dist. No. 09-JE-13, 2009-Ohio-6407, ¶ 7, citing *Thompkins*, 78 Ohio St.3d 380 at 387. Determinations of witness credibility, conflicting testimony, and evidence weight, are primarily left to the trier of fact. *Jackson*, 7th Dist. No. 09-JE-13, citing *State v. DeHass*, 10 Ohio St.2d 230, 227 N.E.2d 212 (1967), paragraph one of the syllabus.

{¶13} A menacing by stalking civil protection order requires an allegation that the respondent committed a violation of R.C. 2903.211. R.C. 2903.214(C)(1). R.C. 2903.211(A)(1) provides:

> No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or a family or household member of the other person or cause mental distress to the other person or a family or household member of the other person.

{¶14} A person acts "knowingly" when that person is aware that his or her conduct will probably cause a certain result or will probably be of a certain nature. R.C. 2901.22(B). As used in R.C. 2903.211, a pattern of conduct means "two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents." R.C. 2903.211(D)(1).

{¶15} We must examine the evidence to determine if the decision granting the CPO was against the manifest weight of the evidence.

{¶16} Appellee testified that the feud began in Cleveland on June 2, 2017, when appellant threatened to use her "connections" in Columbiana County to get custody of the children. (Tr. 4). She further stated that while she and appellant were at the Cleveland Clinic with A.M., appellant threatened to shoot her. (Tr. 12-13). Appellee also told the court that when she went to pick up the children after obtaining temporary custody, appellant threatened her, stating "I will get you 'B,' I will get you." (Tr. 5).

{¶17} Appellee's husband witnessed the incident at the Cleveland Clinic. He stated that appellee got up to help A.M. go to the bathroom. (Tr. 17-18). He observed that while appellee was helping A.M. to the bathroom, appellant confronted appellee, pushed her, and said, "You keep your hands off my daughter. That's my daughter. You stay out of it." (Tr. 18). He described the push as a "get out of my way" type push. (Tr. 21). He told the court that he has seen appellant act violent towards appellee "plenty of times." (Tr. 18).

{¶18} A family cousin testified as to what happened on the day appellee went to pick up the children from appellant's house. She explained that she went with appellee to appellant's home accompanied by three police officers to pick up the children. (Tr. 23). She stated that when they were leaving, appellant came out of the home and threatened them. (Tr. 24). She testified that the officers at the scene overheard the threat, but took no action. (Tr. 24). She believed the threat was directed at appellee. (Tr. 27). She testified that she had heard appellant make threats before. (Tr. 28).

{¶19} Appellee's neighbor testified that he witnessed and recorded A.M., appellant, and another person, parked in appellee's driveway when she was not home. (Tr. 37). Appellee had asked him to observe her house when she was away for this type of behavior. (Tr. 42). He also observed the same group park and sit at the edge of

the road leading up to appellee's driveway when appellee was home. (Tr. 38). He stated that he witnessed appellant drive up and down the road and saw them sitting outside of his house. (Tr. 39). He saw the car sit and wait on the side of the road three to four times. (Tr. 41).

{¶20} Appellant testified that the reason she stopped in appellee's driveway was to pick up one of the children to take her to school. (Tr. 45). She claimed that at no other time did she stop and wait outside of appellee's driveway. (Tr. 45). She also said that because of construction on her road she would turn around and go back down. (Tr. 45). Appellant admitted that when appellee came to pick up the children she pointed her finger at appellee and said "Some day, some way you're going to pay for this, Bitch." (Tr. 48). But she claimed it was not a threat and that she was merely referencing her belief that "the Lord will take care of this." (Tr. 48).

{¶21} Appellant also relayed to the court her version of what happened at the Cleveland Clinic. She stated that she was helping A.M. to the bathroom when she lost her balance due to prolonged sitting. (Tr. 51). She said that after she lost her balance she immediately left the room. (Tr. 51). She told the court she has no hostility towards appellee. (Tr. 54). Although she has a concealed carry permit, she told the court she has not had a gun in the house for years. (Tr. 53).

{¶22} Appellant's son testified that he has never seen appellant make threats of physical violence to appellee. (Tr. 59). He also testified that appellant does not own a gun. (Tr. 59).

{¶23} Appellant's friend was present when appellee came to take the children from appellant. (Tr. 60-61). She testified that appellant told appellee, "I'll get you for this" while holding up the court order. (Tr. 62).

{¶24} The evidence demonstrates that neither the magistrate nor the trial court lost their way in issuing the CPO.

{¶25} First, the incidents show a pattern of conduct. A pattern of conduct is when two or more events occur closely related in time. R.C. 2903.211(D)(1). Three distinct events occurred. The first incident was the altercation at the Cleveland Clinic on June 2, 2017. Appellee's husband testified that appellant shoved appellee and told her to "keep your hands off my daughter." And appellee testified that appellant threatened

her. Appellant testified that she lost her balance, but offered no further explanation regarding how the parties ended up coming into physical contact.

{¶26} The second incident, or series of incidents, occurred later in the same month. Appellee's neighbor testified that appellee asked him to watch her home when she was away. He told the court that he witnessed appellant driving up and down the street, parking her car on the side of the road near appellee's home, and waiting for minutes at a time. He stated that this happened when appellee was both home and away. Appellant claimed her driving pattern claimed was due to roadwork. But this does not explain why she would stop for extended periods, or even why she would repeatedly go the same way knowing there was roadwork. Regardless, the trier of fact was in a better position than this court to examine witness testimony and determine reliability. *Jackson*, 7th Dist. No. 09-JE-13. This type of behavior is sufficient to establish a belief that the offender will cause physical harm, even without a direct threat. *See Cooper v. Manta*, 11th Dist. No. 2011-L-035, 2012-Ohio-867, ¶ 33 (father followed daughter in his truck at a low speed as she jogged through her neighborhood, parked for extended periods of time along daughter's street to peer inside her home, and drove past her home at a very low rate of speed).

{¶27} The third incident occurred on June 26, 2017. Every witness, even appellant, agreed as to what transpired on the day appellee went to pick up the children with the court order. The parties only disagreed about the meaning of the comment that appellant directed toward appellee. Appellee and her cousin both testified that they interpreted the comment as a threat. Although there were minor differences in wording, every witness who testified about the altercation overheard appellant say something to the effect of, "I'll get you for this," or "You're going to pay for this." Although appellant claimed that she was merely referencing her religious convictions, it was reasonable for appellee, and the trier of fact, to believe it was a threat of physical harm.

{¶28} In the context of the volatile family relationship, threats of harm, and the incident at the Cleveland Clinic, the trial court did not clearly lose its way in viewing the statement as a threat of harm. In addition, the meaning of the statement would also come down to which testimony the trial court believed. Again, the weight to place on witness testimony falls within the trial court's discretion.

{¶29} The pattern of conduct need only cause the complainant to believe that the offender will cause physical harm or mental distress. Appellee met this burden. She told the court, "I was fearful for my safety and my life because of the incidents that's been with this woman." (Tr. 5).

{¶30} Given the totality of the evidence, the decision to grant the CPO was not against the manifest weight of the evidence.

{¶31} Accordingly, appellant's sole assignment of error is without merit and is overruled.

{¶32} For the reasons stated above, the trial court's judgment is hereby affirmed.

Waite, J., concurs.

Robb, P. J., concurs.

For the reasons stated in the Opinion rendered herein, the sole assignment of error is overruled and it is the final judgment and order of this Court that the judgment of the Court of Common Pleas of Columbiana County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.