[Cite as *Nolder v. Nolder,* 2023-Ohio-2371.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
COLUMBIANA COUNTY

LEANNA NOLDER,

Petitioner-Appellee,

v.

CARL NOLDER,

Respondent-Appellant.

OPINION AND JUDGMENT ENTRY
Case No. 22 CO 0027

Civil Appeal from the
Court of Common Pleas of Columbiana County, Ohio
Case No. 2021-CV-341

BEFORE:
Cheryl L. Waite, Carol Ann Robb, Mark A. Hanni, Judges.

JUDGMENT:
Affirmed.

Atty. Kathleen Bartlett, 542B East State Street, Salem, Ohio 44460, for Petitioner-Appellee

Atty. James R. Wise, 91 West Taggart Street, P.O. Box 85, East Palestine, Ohio 44413, for Respondent-Appellant.

Dated: June 30, 2023

WAITE, J.

{¶1} Appellant Carl Nolder argues that the civil stalking protection order ("CSPO") issued against him was against the manifest weight of the evidence. A CSPO requires proof that the respondent engaged in menacing by stalking as defined by R.C. 2903.211. Appellant argues that his behavior did not constitute menacing by stalking because he did not engage in a pattern of conduct, did not exhibit threatening behavior, and because the petitioner did not suffer mental distress. Appellant contends that without proof of these elements, a CSPO should not have been issued against him. The record supports that all elements were proven by the petitioner, including the elements of menacing by stalking. Appellant's assignment of error is overruled and the judgment of the trial court is affirmed.

Case History and Facts

{¶2} On September 27, 2021, Appellee filed a Petition for a Civil Stalking Protection Order against Respondent/Appellant pursuant to R.C. 2903.211 and 2903.214. The parties had been married but were divorced at the time the petition was filed. An ex parte menacing by stalking civil protection order was issued the same day.

{¶3} The matter was set for a full magistrate's hearing on January 25, 2022. Both parties testified at the hearing.

{¶4} Appellee testified that the parties were divorced on May 26, 2021. She testified that she had suffered domestic violence inflicted by Appellant during their marriage, including being punched in the eye, suffering a broken front tooth, and being hit with a pipe wrench on her shin. Appellant also spit in her face, urinated on the floor and made her clean it up, pulled her hair, pushed her down when she was pregnant, and

threatened to knock out all of her teeth. (1/25/22 Tr., p. 8.) He threatened to send her to the hospital the week that she filed for divorce. (1/25/22 Tr., p. 8.) He told her: "if I had to call the cops that he would make it worth his while before they came." (1/25/22 Tr., p. 9.) She called the police twice because of his abuse, both physical and verbal. After one of these, Appellant took all the decorations off of her house and burned them, then threatened to break the windows of her car. (1/25/22 Tr., p. 10.) She testified a number of times that she feared him because of these incidents. (1/25/22 Tr., pp. 5, 9, 10, 11.) She testified that Appellee caused her mental distress. (1/25/22 Tr., p. 5.)

{¶5} Appellee testified that on September 26, 2021, after Appellant had seen her spend time with a male friend, Appellant left over twenty threatening messages on her phone. (1/25/22 Tr., p. 13.) This was nearly three months after they had been divorced. She testified that the total number of messages between September 26th and 27th was approximately forty. (1/25/22 Tr., p. 13.) She also testified as follows:

> Q. What kind of messages was he leaving?
>
> A. He was leaving threatening messages. He was saying that he was going to go to my work. He was name-calling me -- calling any name you could think of. Telling me to pick up the phone.
>
> Q. Did he say if you don't pick up the phone, I'm going to -- something going to happen, are there going to be consequences?
>
> A. Yes.
>
> Q. -- if you don't pick up the phone?

A. He did say that if I did not pick-up the phone that he was -- that it was going to get ugly or bad for me.

Q. And when he says it's going to get bad for you, what did you take that to mean?

A. I took that as he was going to hurt me.

Q. So he threatened you with various things in those phone calls?

A. Yes.

Q. What kinds of things does he threaten you with?

A. He threatens to take my children away from me. He threatens that it will get bad for me. He threatens my job. He name-calls me.

Q. Because of all these things, are you afraid of your ex-husband?

A. Yes.

Q. You were afraid of him during your marriage?

A. Yes.

Q. You are still afraid of him today?

A. Yes.

Q. Do you believe that he will stop this behavior without a court order?

A. No.

Q. Because of these things, have you suffered mental distress?

A. Yes.

(1/25/22 Tr., pp. 13-14.)

{¶6} Appellant testified that he was a commercial driver and a part-time police officer. He admitted he threw a pipe wrench and hit Appellee on the shin. (1/25/22 Tr., p. 28.) He admitted that he called her "non-stop" on September 27, 2021. (1/25/22 Tr., p. 29.) He testified that he called Appellee's boyfriend a "piece of crap," "a pervert" and "a pedophile." He admitted he threatened them at their places of employment: "I will go to his work place and I will go to your work. And I will put it out in public. And I will make it horrible for everybody." (1/25/22 Tr., p. 30.) He admitted he made forty calls between 5:00 p.m. on September 26th and the morning of September 27th. (1/25/22 Tr., p. 32.) He also admitted these calls were threatening:

Q. And you were threatening her on those calls; right? You were threatening to go to his job; threatening to go to her job. And you just testified I will make it horrible for everybody.

You were leaving those messages; right?

A. Yeah.

(1/25/22 Tr., p. 32.)

{¶7} On February 9, 2022, the magistrate filed an entry containing twelve findings and granting the CSPO until September 27, 2026. The final order matched the earlier ex parte order. The trial judge signed the order the same day.

{¶8} On February 22, 2022, Appellant filed objections to the CSPO pursuant to Civ.R. 65.1. The trial court reviewed the objections, Appellee's response, and the transcript of the January 25, 2022 hearing. Final judgment was issued on July 13, 2022. The court found that Appellant had not met his burden of proving his objections under Civ.R. 65.1(G), that the magistrate's order was supported by the weight of the evidence, and that the magistrate did not abuse its discretion in issuing the CSPO. The trial court affirmed the magistrate's CSPO in its entirety.

{¶9} This appeal followed on July 29, 2022. Appellant presents one assignment of error on appeal.

ASSIGNMENT OF ERROR

> THE TRIAL COURT ERRED IN FINDING THAT THE ORDER OF PROTECTION WAS NOT CONTRARY TO LAW, AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE, OR AN ABUSE OF DISCRETION.

{¶10} The record reveals the basis for Appellant's objection to the magistrate's CSPO, as evidenced by the April 11, 2022 Amended Objections, was that he did not commit menacing by stalking because he did not engage in a pattern of conduct, did not exhibit threatening behavior, and that the petitioner did not suffer mental distress. He argues that these must be proven by the petitioner in order to obtain a CSPO, and that

the record does not support the issuance of a CSPO. He makes the identical arguments on appeal.

{¶11} Appellee filed a petition for a CSPO pursuant to R.C. 2903.214, which provides:

> (C) A person may seek relief under this section for the person, or any parent or adult household member may seek relief under this section on behalf of any other family or household member, by filing a petition with the court. The petition shall contain or state all of the following:
>
> (1) An allegation that the respondent is eighteen years of age or older and engaged in a violation of section 2903.211 of the Revised Code against the person to be protected by the protection order or committed a sexually oriented offense against the person to be protected by the protection order, including a description of the nature and extent of the violation[.]

{¶12} A petition under R.C. 2903.214 alleges that a violation of R.C. 2903.211, menacing by stalking, has occurred. R.C. 2903.211 states:

> (A)(1) 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. In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other

> person's family or household member or mental distress to the other person or the other person's family or household member, the other person's belief or mental distress may be based on words or conduct of the offender that are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

{¶13} After a magistrate holds a hearing and orders or denies the CSPO, a party may file Civ.R. 65.1(F) objections within fourteen days. The parties may not file their objections as though they were objections to a magistrate's decision under Civ.R. 53, and filing objections pursuant to Civ.R. 65.1 does not stay the CSPO. Civ.R. 65.1(G). The trial court in this case reviewed the record, including the transcript of the magistrate's hearing, overruled the objections, adopted the magistrate's decision and granted the CSPO.

{¶14} This Court reviews the decision to grant a CSPO for an abuse of discretion. *Kranek v. Richards*, 7th Dist. Jefferson No. 11 JE 2, 2011-Ohio-6374, ¶ 14; *T.V. v. R.S.*, 8th Dist. Cuyahoga No. 110049, 2021-Ohio-2444, ¶ 22. "An abuse of discretion is more than an error of law or judgment; it implies that the court's attitude is unreasonable, arbitrary or unconscionable." *Thompson Farms, Inc. v. Estate of Thompson*, 7th Dist. Columbiana No. 20 CO 0014, 2021-Ohio-2364, ¶ 79, citing *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983).

> It is to be expected that most instances of abuse of discretion will result in decisions that are simply unreasonable, rather than decisions that are unconscionable or arbitrary. A decision is unreasonable if there is no sound

> reasoning process that would support that decision. It is not enough that the reviewing court, were it deciding the issue de novo, would not have found that reasoning process to be persuasive, perhaps in view of countervailing reasoning processes that would support a contrary result.

AAAA Enterprises, Inc. v. River Place Community Urban Redevelopment Corp., 50 Ohio St.3d 157, 161, 553 N.E.2d 597 (1990).

> [Civ.R. 65.1] does not contain a provision allowing for the trial court's independent review of the magistrate's factual determinations. Instead, a party objecting to the trial court's adoption of the magistrate's order assumes an affirmative burden under Civ. R. 65.1(F)(3)(d)(iii) to demonstrate one of three things: [1] that an error of law or other defect is evident on the face of the order, or [2] that the credible evidence of record is insufficient to support the granting or denial of the protection order, or [3] that the magistrate abused the magistrate's discretion in including or failing to include specific terms in the protection order.

Durastanti v. Durastanti, 1st Dist. Hamilton No. C-190655, 2020-Ohio-4687, ¶ 15.

{¶15} "Before a court may grant a CSPO, a petitioner must demonstrate, by a preponderance of the evidence, that the respondent has engaged in menacing by stalking." *Kranek*, *supra*, at ¶ 22, citing *Strausser v. White*, 8th Dist. Cuyahoga No. 92091, 2009-Ohio-3597, ¶ 30. Appellant's argument on appeal is that he did not engage in menacing by stalking. Appellant first argues that a pattern of conduct must be established, as that is an element of the menacing by stalking statute. The "pattern of

conduct" mentioned in R.C. 2903.211 has no set time parameters, but must include two or more incidents closely related in time. R.C. 2903.211(D)(1). *Kranek supra*, at ¶ 24.

{¶16} Incidents occurring on the same day or only separated by a few hours may be found to be closely related in time as well. *State v. Cunningham*, 9th Dist. Medina No. 19CA0081-M, 2021-Ohio-2710, ¶ 15. Appellant admitted that he made forty phone calls to the victim over a two-day period. "R.C. 2903.211 does not require that the pattern of conduct be proved by events from at least two different days. Arguably, a pattern of conduct could arise out of two or more events occurring on the same date, provided that there was a sufficient interval between them." *State v. Scruggs*, 136 Ohio App.3d 631, 634, 737 N.E.2d 574 (2nd Dist.2000). In this case, forty phone calls over a two-day period satisfies the "pattern of conduct" element of the statute.

{¶17} Menacing by stalking may be established either by proof that the offender knowingly made another person believe that he or she would cause physical harm to the other person, or by proof that the offender knowingly caused the other person to suffer mental distress, or both. Appellant claims neither of these were proven.

{¶18} Appellant first argues that he did not cause Appellee to believe he would cause her physical harm because he did not threaten her.

{¶19} Regarding whether Appellant's actions were threatening to the point that Appellee believed she was in danger of physical harm, every action by the accused must be taken into consideration, even if some of the actions may not seem threatening in and of themselves. *Guthrie v. Long*, Franklin App. No. 04AP-913, 2005-Ohio-1541, ¶ 12.

{¶20} Appellee testified multiple times that Appellant did threaten her. When further questioned about the threats, she did not give explicit examples of physical harm

that Appellant threatened to perform. Instead, her examples were more implicit or general: Appellant said "something [was] going to happen," or that there would be "consequences," or that "it was going to get ugly or bad" for Appellee. Explicit threats, though, are not required to prove the victim believed "that the offender will cause physical harm[.]" For example, in *Cooper v. Manta*, 11th Dist. Lake No. 2011-L-035, 2012-Ohio-867, the fact that the offender followed the victim in his truck at a low speed as the victim jogged through her neighborhood, that he parked his car for extended periods of time along her street to peer inside her home, and that he drove past her home at a very low rate of speed, were sufficient to show the victim believed he would cause physical harm, in light of the remainder of the evidence in the case.

{¶21} In the instant case, Appellee testified to a long history of verbal abuse and physical violence by Appellant, followed by a series of 40 phone calls over the course of two days in which Appellant threatened that "things" would "get ugly or bad" for her, that he would take Appellee's children away, that there would be "consequences" if she did not pick up the phone. All of the evidence supports the trial court's conclusion that Appellant did indeed threaten the victim and that she believed he would cause her physical harm. Certainly, he had done so in the recent past.

{¶22} Appellant also argues that there was no proof Appellee suffered actual mental distress as required by the menacing by stalking statute. Although not all of Ohio's appellate districts agree, we have held the petitioner must provide evidence of actual mental distress. *State v. Rowbotham*, 7th Dist. Mahoning No. 19 MA 0066, 2022-Ohio-926, ¶ 90. There is no requirement that the mental distress be totally or permanently incapacitating or debilitating, but it must be substantial. *Morton v. Pyles*, 7th Dist.

Mahoning No. 11 MA 124, 2012-Ohio-5343, ¶ 15; R.C. 2903.211(D)(2)(a). Mere annoyance does not constitute mental distress for purposes of the menacing by stalking statute. *Caban v. Ransome*, 7th Dist. Mahoning No. 08MA36, 2009-Ohio-1034, ¶ 29.

{¶23} "Testimony that a respondent's conduct caused the person considerable fear can support a finding of mental distress." *A.V. v. McNichols*, 4th Dist. No. 18CA17, 2019-Ohio-2180, 137 N.E.3d 534, ¶ 24; *Middletown v. Jones,* 12th Dist. No. CA2004-06-160, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E.2d 1003, ¶ 8; *Morton*, *supra*, ¶ 15. The fact-finder can rely on his or her own experience and knowledge to determine if the offender caused such fear that it constituted mental distress to the victim. *R.G. v. R.M.,* 7th Dist. No. 17 MA 0004, 2017-Ohio-8918, 88 N.E.3d 1027, ¶ 27.

{¶24} Appellee stated many times in her testimony that she was afraid of Appellant, that she believed the threats in his phone calls, and that she had long been afraid of him both during the marriage and after it ended. This fear was based on many incidents of verbal abuse and physical violence. Although Appellant denied that many of these instances occurred, he readily admitted to others. It was for the magistrate to determine whose testimony was more credible, and it is clear that the magistrate accepted Appellee's testimony as true. Appellant's many phone calls, in light of the history of abuse, caused the victim to have fear that sufficiently constituted substantial mental distress.

{¶25} The record establishes Appellant engaged in a pattern of conduct such that Appellee believed that he would cause her physical harm, and that the victim suffered substantial mental distress due to Appellant's conduct. As there were multiple reasons for granting the CSPO, there was no abuse of discretion in the trial court's adoption of the

magistrate's decision and in granting the CSPO. Appellant's assignment of error has no merit and is overruled.

Conclusion

{¶26} Appellee filed a petition for a CSPO against Appellant, which was granted by a magistrate. Appellant filed objections to the magistrate's decision and they were overruled by the trial court. Appellant argues that the record does not support the issuance of a CSPO because he did not engage in menacing by stalking. He argues that he did not engage in a pattern of conduct, that he did not explicitly threaten Appellee, and that Appellee did not suffer mental distress from his actions. The record supports the conclusion that forty phone calls over two days involved a pattern of conduct, Appellant did threaten Appellee, and Appellee did suffer fear that constituted substantial mental distress. The record fully supports the trial court's decision to overrule Appellant's objections, and the judgment of the trial court is affirmed.

Robb, J., concurs.

Hanni, J., concurs.

For the reasons stated in the Opinion rendered herein, the 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.