

IN THE COURT OF APPEALS
TWELFTH APPELLATE DISTRICT OF OHIO
BUTLER COUNTY

KELLY RICHTER, :
 :
 Petitioner-Appellee, : CASE NO. CA2009-02-055
 :
 - vs - : OPINION
 : 8/3/2009
 :
 DANIEL RICHTER, :
 :
 Respondent-Appellant. :

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DV08-01-1394

Jane M. Grote, 602 Main Street, Suite 307, Cincinnati, Ohio 45202, for petitioner-appellee
Dennis L. Adams, 120 North Second Street, Hamilton, Ohio 45011, for respondent-appellant

RINGLAND, J.

{¶1} Respondent-appellant, Daniel Richter, appeals a domestic violence civil protection order issued by the Butler County Court of Common Pleas, Domestic Relations Division.

{¶2} The parties were married on August 4, 2008. On November 18, 2008, appellant's wife, petitioner-appellee, Kelly Richter, filed a petition for a domestic violence civil protection order. Appellee claimed that appellant woke her up around 3:00 a.m. by grabbing

her ankle and telling her to get "your ass out of bed." Appellee was pregnant at the time and her children were present. According to appellee, appellant was very angry, yelled at her about the couple's finances and threw papers at her. She also testified that appellant threatened that he planned to fight for the custody of their unborn child. Appellee also described a previous incident from two weeks earlier where appellant had behaved in a similar fashion by awaking her and yelling about a football that her child had left in the living room. Appellee and her children were so upset by the incident that she immediately got dressed and they left the residence.

{¶3} Appellant's version differed significantly. Appellant testified that he awoke appellee by gently touching her ankle and that he never raised his voice toward her or the children, he merely wished to speak with her about some bounced checks.

{¶4} Following a hearing on the petition, the magistrate issued a domestic violence civil protection order (DVCPO). Appellant filed timely objections, which were overruled by the trial court. Appellant timely appeals, raising a single assignment of error:

{¶5} "THE TRIAL COURT ERRED IN GRANTING THE PETITION FOR DOMESTIC VIOLENCE CIVIL PROTECTION ORDER AS SUCH WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND ABUSE OF THE TRIAL COURT'S DISCRETION."

{¶6} In his sole assignment of error, appellant challenges the DVCPO. Appellant argues that no physical harm resulted. Further, appellant submits, "the court did not find, nor was there any evidence, that the [wife] had a fear of imminent physical harm." Finally, appellant states that no threat of force, physical violence, compulsion or restraint was ever made.

{¶7} In reviewing the issuance of a protection order, the standard employed by an appellate court is contingent upon the nature of the challenge to the order. *Tabor v. Palacio*, Butler App. No. CA2007-01-002, 2008-Ohio-349, ¶17, quoting *Abuhamda-Sliman v. Sliman*,

161 Ohio App.3d 541, 2005-Ohio-2836, ¶9. Due to the fact that R.C. 3113.31 expressly authorizes courts to fashion protection orders that are suited to the circumstances of a case, a trial court's decision on the scope of a protection order will not be overturned absent an abuse of discretion. *Ferris v. Ferris*, Clermont App. No. CA2005-05-043, 2006-Ohio-878, ¶26.

{¶8} On the other hand, a dispute regarding whether a protection order should have been granted at all necessarily entails a different standard. *Tabor* at ¶17. This is because the resolution of a challenge to the issuance of a protection order depends upon whether the petitioner has shown by a preponderance of the evidence that the petitioner, or the petitioner's family or household members, are in danger of domestic violence. *Id.* Therefore, an appellate court addressing such a challenge must determine whether there was sufficient, credible evidence to support the finding that the respondent engaged in acts or threats of domestic violence. *Id.* at ¶18. In view of the fact that appellant challenges the very issuance of the DVCPO, this is the standard we will employ in this matter.

{¶9} For the purpose of this case, "domestic violence" means "the occurrence of one or more of the following acts against a family or household member: Placing another person by the threat of force in fear of imminent serious physical harm * * *." R.C. 3113.31(A)(1)(b).

{¶10} As a preliminary matter, we must address the discrepancy regarding the date of the incident in relation to appellee's filing of the petition. At the ex parte hearing, held on November 19, 2008, appellee testified that the incident occurred approximately one and a half weeks before she filed the petition. However, at the November 26 hearing, she testified that the incident occurred approximately four weeks before the November 26 hearing; three weeks before filing her petition. Appellee submits that the incident occurred only one and a half weeks before the incident, while appellant claims that the incident occurred four weeks before the filing of the petition. Further, in the instant appeal, appellant argues that the threat

of harm clearly was not "imminent" as evidenced by appellee's significant delay in filing the petition.

{¶11} Based upon a review of the record, neither position is accurate. Specifically, the petition was filed November 18, 2009 and appellee testified that the incident occurred four weeks prior to the November 26 hearing. Accordingly, the record clearly establishes that appellee filed the petition approximately three weeks following the incident.

{¶12} The magistrate in this case found, "the Petitioner's testimony, and specifically her testimony regarding [sic] incident also described in her Petition, regarding the Respondent's awakening her and grabbing her ankle and throwing papers at her, some of which happened in the presence of her children along with the rest of her testimony and demeanor, convinces this hearing officer."

{¶13} In overruling appellant's objection to the magistrate's decision, the trial court held, "[t]he crux of this case is credibility. The magistrate sitting in the position to judge the demeanor of the witnesses when testifying found Ms. Richter's testimony more credible. The Court agrees. If Mr. Richter was not angry, then why wake Ms. Richter from sleep to discuss bills or toys. The matter could wait until she was up for the day. Moreover, why grab her ankle or touch her ankle at all. The Court finds Ms. Richter's testimony credible. While touching Ms. Richter's ankle alone may not rise to the level of domestic violence. Grabbing her ankle in conjunction with Mr. Richter's demeanor creates a fear of threat of force."

{¶14} In support of his position, appellant relies upon *Flechner v. Flechner*, 177 Ohio App.3d 706, 2008-Ohio-4000. The wife and husband in *Flechner* were separated. *Id.* at ¶2. The wife filed for a divorce in October 2007. *Id.* On the same day, the wife filed a petition to obtain a DVCPO, claiming that the husband "continually emails me, stops at my work, calls my parents + [sic] friends. On Saturday 10/20/07, he sent me an email that states that he's going to take his anger + [sic] frustration out on me in court. He harasses me in any way

possible." Id. At the hearing on the matter, the wife testified that the repeated attempts at contact scare her, although she did not mention any particular statements or threats. Id. The trial court issued the DVCPO, stating R.C. 3113.31 "is designed to protect people from a number of different things. The mildest thing that it can do is protect somebody from being abused or harassed, and that was exactly what the Petitioner asked for was simply a protection order that she not be abused or harassed." Id. at ¶12.

{¶15} The Tenth District Court of Appeals reversed the DVCPO. Id. at ¶30. The court reasoned that the wife's allegations did not place her in fear of imminent physical harm. Id. at ¶30. The court concluded that the 'threat' described by the wife in her petition "was a threat to take *legal action* and was not an explicit or implied threat of physical 'violence, compulsion or constraint.'" Id. at ¶26. In addition, the court noted that although the wife testified about prior incidents in which the husband used actual force against her, "the reasonableness of [a petitioner's] fear of imminent serious physical harm may not be determined by incidents of prior domestic violence absent an initial, explicit indication that she was in fear of imminent serious physical harm on the date contained in the petition." Id. at ¶27.

{¶16} Appellant urges that his conduct in this case is analogous to *Flechner*. Like *Flechner*, appellant claims his mere legal threat to gain custody of the couple's unborn child does not meet the definition of "domestic violence."

{¶17} Appellant's argument is unpersuasive. Appellant's conduct was not confined to simply making legal threats like *Flechner*. The record demonstrates, and the trier of fact concluded, that appellant's conduct involved unwanted physical contact as well as significant verbal attacks. Appellant's conduct placed appellee in fear of imminent serious physical harm as evidenced by her immediately leaving the residence with her children. See *Eichenberger v. Eichenberger* (1992), 82 Ohio App.3d 809; and *Dobos v. Dobos*, 179 Ohio

App.3d 173, 2008-Ohio-5665.

{¶18} Appellant further cites the lengthy amount of time between the incident and appellee's petition for the DVCPO. However, appellant neglects the fact that appellee left the house immediately after the incident. Further, she testified that, after moving from the couple's residence, appellant discovered her new address. She immediately filed the petition for the DVCPO because "I don't feel safe with him knowing where I'm gonna be living if he has access to come near my home." Accordingly, we find sufficient, credible evidence to support the DVCPO.

{¶19} Appellant's sole assignment of error is overruled.

{¶20} Judgment affirmed.

POWELL, P.J., and HENDRICKSON, J., concur.

[Cite as *Richter v. Richter*, 2009-Ohio-3828.]