

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

Y.H., :
 :
 Petitioner-Appellee, :
 : No. 107892
 v. :
 :
 C.C., :
 :
 Respondent-Appellant. :

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED
RELEASED AND JOURNALIZED: July 18, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DV-18-371081

Appearances:

The Law Office of Samantha M. Salamon, and Samantha Salamon, *for appellee.*

C.C., *pro se.*

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Respondent-appellant, C.C.¹ (“Husband”), *pro se*, appeals a judgment of the Cuyahoga County Court of Common Pleas, Domestic Relations Division,

¹ In accordance with this court’s policy and with 18 U.S.C. 2265(d)(3), initials are used herein to protect the privacy of the protected party.

granting a domestic violence civil protection order (“CPO”) against him and in favor of petitioner-appellee, Y.H. (“Wife”). He claims the following errors:

1. The petition and issuance of civil protection order based on the same cause and events as the complaint for criminal proceeding shall be invalid due to lack of evidence and burden of proof beyond a reasonable doubt and necessity to prevent immediate and threatened hurt or bodily harm.
2. The motion to petition an extension of civil protection order based on the text message as the complaint for threatening language shall be invalid due to lack of preponderance of evidence demonstrating the danger of domestic violence.

{¶ 2} We find no merit to the appeal and affirm the trial court’s judgment.

I. Facts and Procedural History

{¶ 3} On March 15, 2018, Wife filed a petition seeking a CPO against Husband, alleging that Husband sexually assaulted her. The court entered an ex parte order of protection that day and a full hearing was scheduled for April 30, 2018. At the April 30, 2018 hearing, Wife, who does not speak English, testified through an interpreter that Husband is unable to control his temper and has abused her “many times.” (Apr. 30, 2018 tr. 27.) She explained: “I don’t know what he will do when he gets home. I need to protect myself and my children.” (Apr. 30, 2018 tr. 27.) Husband and Wife, who are Chinese immigrants, have three small children.

{¶ 4} In September 2017, Wife contacted Asia, Inc., a nonprofit organization that provides legal services to immigrants, because she wanted to consult with a lawyer. A representative from Asia, Inc. scheduled an appointment with Wife on the morning of October 18, 2017. Wife was afraid she would be unable

to make the appointment without Husband's knowledge because he followed her wherever she went. The Asia, Inc. representative advised Wife that she would keep the appointment open in the event she found herself able to attend.

{¶ 5} On the morning of the scheduled appointment, Husband told Wife that he was going to the library. He left the house, but returned minutes later. He did this several times, and Wife thought he was checking to ensure she stayed home. However, after he had been gone for a while, Wife took the children and went to the appointment at Asia, Inc.

{¶ 6} That evening, Husband questioned Wife about where she went while he was gone. (Apr. 30, 2018 tr. 31-32.) He "hugged" Wife from behind and rubbed his penis against her buttocks. Wife did not answer Husband's questions and Husband became angry. Later that night, after Wife had gone to bed in a guest bedroom with her children, Husband woke her up and again began questioning her about where she went while he was at the library. As he questioned her, he placed his hands on her vagina and put his finger inside her vagina. Wife pushed him away, ran across the room, and texted a friend, who told her to call the police. Wife testified that she did not call the police because she was "very scared." (Apr. 30, 2018 tr. 38.)

{¶ 7} Husband left the bedroom and Wife locked the door. Husband used a tool to unlock the door and climbed back into bed with Wife where he continued to question her about where she went earlier that day. (Apr. 30, 2018 tr. 40.) Husband also continued to touch her vagina inside her pants. (Apr. 30, 2018 tr. 41.)

Wife told Husband she was not in the mood for sex, but Husband told her she could not refuse because she is his wife. (Apr. 30, 2018 tr. 41.) Thereafter, he rubbed his penis against her vagina while persisting with his questions. (Apr. 30, 2018 tr. 41.)

{¶ 8} Wife was the first to wake up the next morning and started reading text messages on her phone. One of Wife's friends told her that she had called the police on Wife's behalf. While Wife was reading the texts, the police knocked on the door and arrested Husband. Wife went to the police station with a representative from Asia, Inc. to make a police report. Thereafter, Husband was charged with one count each of rape, kidnapping, and gross sexual imposition. Following a jury trial, Husband was acquitted of all charges.

{¶ 9} Wife petitioned the court for a CPO within a week of Husband's acquittal. When asked if Wife felt safe at the time of the CPO hearing, she replied: "No." (Apr. 30, 2018 tr. 46.) She explained: "Now when I see him, I still feel very scared." (Apr. 30, 2018 tr. 52.)

{¶ 10} Based on the evidence presented at the CPO hearing, the domestic relations court entered judgment dated May 22, 2018, granting the CPO for a period of one year. However, two weeks later, Wife filed a motion to extend the time period to five years, alleging that Husband violated the terms of the CPO by sending her text messages. Thereafter, Husband filed a motion to terminate the CPO. The court held a hearing on the motions on August 22, 2018.

{¶ 11} At the August 22, 2018 hearing, Wife, through an interpreter, authenticated text messages she received from Husband. One of the text messages stated, in relevant part:

The restraining order is not higher than Constitution of the United States. It can't stop me to press in social media and publication nor can it stop us to communicate. * * * We need to talk.

(Aug. 22, 2018 tr. 26.) When asked how she felt when she received the messages, Wife replied that she felt confused and still has “tremors” from “that incident.” (Aug. 22, 2018 tr. 26.) She explained:

I mean I have mild PTSD. So I cannot feel different kinds of feelings or I can feel just confused and when I know this, I only feel confusing. I feel very frustrate[d] and then * * * images came back to my mind * * * when my husband is home. * * *

Every time that we have * * * argument, he didn't want me to talk too much. If I talk too much, he will --- he would yell at me. He would use all kinds of --- all kinds of --- any way to stop me.

(Aug. 22, 2018 tr. 27.) Husband admitted on cross-examination that he sent the text messages in violation of the CPO. (Aug. 22, 2018 tr. 52.)

{¶ 12} Based on the evidence presented at the August 22, 2018 hearing, the court granted Wife's motion and extended the CPO for a period of five years. The trial court denied Husband's motion to terminate the CPO. Husband, pro se, now appeals the trial court's judgment.

II. Law and Analysis

A. Standard of Review

{¶ 13} We review the trial court’s judgment modifying a CPO for an abuse of discretion. *Dowhan v. Dowhan*, 11th Dist. Lake No. 2012-L-037, 2012-Ohio-5830, ¶ 34. An abuse of discretion implies a decision that is unreasonable, arbitrary, or unconscionable. *State ex rel. DiFranco v. S. Euclid*, 144 Ohio St.3d 571, 2015-Ohio-4915, 45 N.E.3d 987, ¶ 13. When applying the abuse of discretion standard, a reviewing court may not substitute its judgment for that of the trial court. *Vannucci v. Schneider*, 8th Dist. Cuyahoga No. 105577, 2018-Ohio-1294, ¶ 22.

B. Burden of Proof

{¶ 14} In the first assignment of error, Husband argues the trial court erred in granting the CPO, which was based on his alleged sexual assault on Wife, because he was acquitted of the sexual assault charges in the criminal proceeding. He contends there was not enough evidence to prove he assaulted Wife beyond a reasonable doubt.

{¶ 15} Although the Due Process Clause of the Fourteenth Amendment to the United States Constitution protects a criminal defendant from conviction except upon proof beyond a reasonable doubt, a petition for a CPO is not a criminal proceeding; it is a civil proceeding governed by R.C. 3113.31. In order to obtain a CPO under R.C. 3113.31, the petitioner must prove, by a preponderance of the evidence, that the respondent has engaged in an act of domestic violence against petitioner or petitioner’s family or household members. R.C. 3113.31(D); *Croone v.*

Arif, 8th Dist. Cuyahoga No. 101103, 2014-Ohio-5546, ¶ 18, citing *Felton v. Felton*, 79 Ohio St.3d 34, 679 N.E.2d 672 (1997), paragraph two of the syllabus. “Preponderance of the evidence’ means the greater weight of the evidence, or evidence that leads the trier of fact to find that the existence of a contested fact is more probable than its nonexistence.” *Id.*, quoting *State v. Stumpf*, 32 Ohio St.3d 95, 102, 512 N.E.2d 598 (1987).

{¶ 16} Husband did not appeal the trial court’s May 2, 2018 judgment granting the CPO for one year. He appeals from the court’s judgment, dated October 12, 2018, extending the CPO for a period of five years. To prevail on a motion to modify a CPO, R.C. 3113.31(E)(8)(b) provides that the moving party must prove, by a preponderance of the evidence, that modification of the CPO is appropriate because “either the protection order * * * is no longer needed or because the terms of the original protection order * * * are no longer appropriate.” In determining whether modification of a CPO is appropriate, R.C. 3113.31(E)(8)(c) directs the court to consider several factors including:

(ii) Whether the petitioner fears the respondent;

(iii) The current nature of the relationship between the petitioner and the respondent;

* * *

(v) Whether the respondent has complied with the terms and conditions of the original protection order or consent agreement;

* * *

(ix) Whether the respondent has participated in any domestic violence treatment, intervention program, or other counseling addressing domestic violence and whether the respondent has completed the treatment, program, or counseling;

(x) The time that has elapsed since the protection order was issued * * *.

{¶ 17} The magistrate noted in his decision granting modification of the CPO that Wife was “visibly shaking and trembling during her testimony.” (Magistrate’s decision filed Oct. 12, 2018, p. 4.) Wife testified that she experienced “tremors” when she received the text messages from Husband because they brought back memories and images that “made me scared.” (Aug. 22, 2018 tr. 28.) Thus, at the time of the August 22, 2018 hearing, Wife still feared Husband. R.C. 3113.31(E)(8)(c)(ii). The court previously determined that Wife’s fears were reasonable under the circumstances when it granted the one-year CPO.

{¶ 18} Additionally, Husband admitted at the August 22, 2018 hearing that he violated the CPO by communicating with Wife. He also admitted that he was criminally charged with violating the CPO in the Lyndhurst Municipal Court and conceded he was convicted of the charge after trial. (Aug. 22, 2018 tr. 48-49.) Therefore, there was undisputed evidence that Husband failed to comply with the terms of the CPO. R.C. 3113.31(E)(8)(c)(v). Further, Husband violated the CPO within two weeks of its issuance. R.C. 3113.31(E)(8)(c)(x).

{¶ 19} Wife testified at the April 30, 2018 hearing that while she and Husband were living together, she slept in a separate bedroom because she did not want to have any physical contact with Husband. (Apr. 30, 2018 tr. 33.) At the

August 22, 2018 hearing, Husband testified that he loves Wife. Wife, however, wants a divorce. She wants to move away from Husband because she wants to “live happy and without fear.” (Aug. 22, 2018 tr. 31.) Therefore, the current nature of the relationship between Husband and Wife distresses Wife rather than provides a sense of safety and security. R.C. 3113.31(E)(8)(c)(iii).

{¶ 20} Having reviewed the evidence and the relevant factors under R.C. 3113.31(E)(8), we find there was competent, credible evidence supporting the trial court’s decision to extend the CPO for five years. Therefore, the trial court acted within its discretion when it found that Wife had met her burden of proving that an extension of the CPO was appropriate under the circumstances.

{¶ 21} The first assignment of error is overruled.

B. Evidence of Text Messages

{¶ 22} In the second assignment of error, Husband argues that his text messages could not be used as evidence to extend the term of the CPO.

{¶ 23} However, the one-year CPO issued by the court on May 2, 2018, restrained Husband from, among other things, “making any communication with the protected person, including but not limited to, personal, written, or telephone contact * * *.” Thus, evidence that Husband sent text messages to Wife was relevant and necessary to prove that Husband violated the terms of the CPO. Therefore, the trial court properly considered evidence of the text messages Husband sent to Wife for purposes of deciding whether Husband violated the terms of the CPO.

{¶ 24} The second assignment of error is overruled.

{¶ 25} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas, Domestic Relations Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, PRESIDING JUDGE

**ANITA LASTER MAYS, J., and
FRANK D. CELEBREZZE, JR., J., CONCUR**