

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

L.L.	:	JUDGES:
	:	
Petitioner-Appellee	:	Hon. Patricia A. Delaney, P.J.
	:	Hon. William B. Hoffman, J.
-vs-	:	Hon. Earle E. Wise, Jr., J.
	:	
	:	Case No. 17 CA 02
	:	
R.B.	:	
	:	
	:	
Respondent-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Guernsey County Court of Common Pleas, Case No. 16 CS 345

JUDGMENT: AFFIRMED

DATE OF JUDGMENT ENTRY: August 24, 2017

APPEARANCES:

For Plaintiff-Appellee:	For Defendant-Appellant:
No Appellate Brief Filed	Gregory McCleery 224 Third Street NW New Philadelphia, OH 44663

Delaney, P.J.

{¶1} Respondent-Appellant R.B. appeals the January 6, 2017 judgment entry of the Guernsey County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} On September 16, 2016, Petitioner-Appellee L.L. filed a Petition for Civil Stalking Protection Order (“CSPO”) in the Guernsey County Court of Common Pleas against Respondent-Appellant R.B. In her petition, L.L. alleged R.B. submitted a friend request to L.L. on Facebook multiple times under different aliases. L.L. declined her friend requests. L.L. alleged R.B. made four public posts on Facebook stating L.L. was stalking her by repeatedly driving by her home and that L.L. used illegal drugs. L.L. attached copies of R.B.’s Facebook posts to her petition. The four posts stated in relevant part:

Happy Sunday. Umm STALKER ALERT: Why is [L.L.] driving by my house? Last week she drove by at least thrse [sic] times..slowing to a near stop in front of my house..I was on the side at the water spicket..but I saw her in an SUV..Also, I am sure it was her at the pool last week in y purple shirt..that same woman drove by my house again..* * *In other news, she has also taken my original experiences I posted on FB * * * WORD FOR WORD..TAKING CREDIT FOR MY THING..* * *coincidence?? NO!! a flakey fraud broad..Spread the word not your legs. Thanks!! Damn, like wtf already..Why the interest in me now! Oh, cuz she is worried..competition? NO! This isn't the Olympics hun..I am a solo act..no need to compete..with you..we are NOT in the same league..Im major to ur minor..so, just sayin. As a mutha fukin reminder..I don't chase taken dues..but your taken dude

still peeps on hiy mistress sites..still watching those women his tried to fuk last year, when he told me he was single and not doing anyone else..Hi [K]..she told me everything..he denied it..FINALLY:SMALL TOWN GIMPES..YALL ARE SOME FUCKED UP INDIVIDUALS..Damn, I C U bitches. Have a great day everyond. Trust this, No ons can make this shit up..thus bullshit iy due to stupid ass low budged minds..of all money groups.

CAPTAINS LOG: Stalker Alert! [L.L.] see pic below [R.C. attached L.L.'s photo to the Facebook post.].. (School Principal at [omitted]).. seems to be lost..she is once again on my block..hmm..today too..no houses for sale, we are of poor ppl..why be on my dead end street teacher?? In a white car this time..and Highland Market..hmm..why so curious..of my hood..of my house..of me...?? my daughter would watch her drive and slow down in front of my house..neighboring confirmations of visual..THIS REPEATED UNWANTED BEHAVIOR..IT IS STALKING..yes?? It is stupid!

7. [omitted] school principal (and her friends)..sit at prego center watching my house..she drives by coming to stop in front of my house.neighbors..my kid and I all see her on several occasions over the last month and a half..hmm.

Maybe [omitted] principal got a double whammy stalkin my street..perhaps her original intent was curiosity for me..then bcuz she also bought and

snorted illegal pills..(allegedly true)..from a dude of block relativity would throw him un jail..to save her own ass..hmm double jeopardy fa sho..that just make me go hmhhh..xoxo

L.L. stated in her petition she reported the posts to Facebook, which took down one of the posts. L.L. claimed the posts were affecting her employment with the local school system. L.L. requested the trial court grant the CSPO to stop R.B.'s harassment.

{¶3} On September 16, 2016, the trial court granted the ex parte CSPO. It was made effective until December 19, 2016. The full hearing was scheduled for October 5, 2016 before the magistrate.

{¶4} On September 29, 2016, after service of the ex parte CSPO, R.B. filed a pro se Motion for Contempt of Domestic Violence Protection Order. R.B. claimed that since the filing of the ex parte CSPO, L.L. continued to drive by R.B.'s home. R.B. argued the trial court should hold L.L. in contempt of court for her continued harassment of R.B. In the motion, R.B. admitted to making the Facebook posts regarding L.L.

{¶5} The trial court dismissed R.B.'s motion for contempt.

{¶6} On October 5, 2016, the full hearing went forward before the magistrate. L.L. testified she did not know R.B. or where R.B. lived. (T. 5). She denied the accusations posted by R.B. on Facebook. L.L. stated she had never driven by R.B.'s home. (T. 12).

{¶7} L.L. testified she received a Facebook friend request from R.B., which L.L. declined. (T. 6). L.L.'s colleagues and friends informed L.L. of R.B.'s Facebook posts regarding L.L., copies of which L.L. attached to the petition. (T. 6). L.L. testified R.B. was at a local restaurant and L.L.'s staff member was working at the restaurant. (T. 7). The staff member reported to L.L. that R.B. began shouting "vulgar" things about L.L. at the

restaurant. (T. 7). L.L. felt R.B. harassed her because L.L. had a relationship with a man after the man declined to be in relationship with R.B. (T. 8-9).

{¶8} L.L. testified R.B.'s accusations caused her mental stress and distress. (T. 7-8). L.L. testified that on the evening R.B. was served with the ex parte petition, "I honestly had my children stay at their dad's because I was afraid of what she might do. If you have read any of her posts it is quite obvious she is unstable." (T. 8). L.L. stated she feared for her children and what R.B. might do. (T. 8, 10). She further claimed R.B.'s posts put her job and reputation in jeopardy. She had to meet with the school superintendent to let him know about the posts before he found out in the community. (T. 8).

{¶9} R.B. admitted during her testimony that she wrote the public Facebook posts regarding L.L. (T. 18, 19). R.B. stated the reason she posted on Facebook that L.L. was repeatedly driving by her home was to inform people of L.L.'s behavior and to protect herself. (T. 18). R.B. testified a neighbor told her she saw L.L. using illegal drugs. (T. 18). R.B. posted that information to explain that perhaps L.L. was driving by R.B.'s home to obtain drugs. (T. 18).

{¶10} At the conclusion of the hearing, the magistrate found R.B. knowingly engaged in a pattern of conduct that caused L.L. to believe that R.B. would cause physical harm or cause or has caused mental distress. The magistrate granted the full CSPO to be effective until October 5, 2021.

{¶11} R.B. filed objections to the CSPO on November 29, 2016. She raised five specific objections:

1. Appellant objects to magistrate's decision as erred based on the insufficient findings and conclusion set forth in the Protection Order [dated]

October 5, 2016, whereas the magistrate concludes, “Respondent admitted that the postings submitted with the Petitioner were posted by her on Facebook. The postings are vulgar and defaming and have jeopardized Petitioner’s job and reputation in the community.”

2. Appellant objects to magistrate’s decision as erred based on insufficient evidence provided by the Petitioner that the Respondent [R.B.] was stalking the Petitioner [L.L.] in accordance with the “Menacing by Stalking” Revised Code 2903.211(A)(1).

3. Appellant objects to magistrate’s decision that [R.B.] defamed and jeopardized [L.L.]’s job and reputation in the community.

4. Appellant objects to magistrates [sic] decision regarding the stalking law and putting another person in jeopardy for harm.

5. The Appellant objects to the magistrate’s decision in full based on prejudice and bias of the court.

The trial court overruled the objections on January 6, 2017.

{¶12} It is from this judgment R.B. now appeals.

ASSIGNMENTS OF ERROR

{¶13} R.B. raises three Assignments of Error:

{¶14} “I. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT GRANTED THE STALKING PROTECTION ORDER WITHOUT SUFFICIENT EVIDENCE OF MENTAL DISTRESS.

{¶15} “II. THE TRIAL COURT ERRED, BASED ON THE WEIGHT OF THE EVIDENCE, WHEN IT GRANTED A STALKING CIVIL PROTECTION ORDER AGAINST THE APPELLANT.

{¶16} “III. THE TRIAL COURT’S RULING VIOLATED THE 1ST AND 14TH AMENDMENT OF THE UNITED STATES CONSTITUTION, UNDULY DENYING THE APPELLANT’S RIGHTS TO DUE PROCESS AND FREEDOM OF SPEECH.”

ANALYSIS

I. and II.

{¶17} In her first and second Assignments of Error, R.B. contends the trial court’s decision that she committed menacing by stalking is against the manifest weight and sufficiency of the evidence. We disagree.

{¶18} As an appellate court, we are not fact finders; we neither weigh the evidence nor judge the credibility of witnesses. Our role is to determine whether there is relevant, competent, and credible evidence upon which the fact finder could base his or her judgment. *Markel v. Wright*, 5th Dist. Coshocton No. 2013CA0004, 2013–Ohio–5274, ¶ 23 citing *Peterson v. Peterson*, 5th Dist. Muskingum No. CT2003–0049, 2004–Ohio–4714, ¶ 10, citing *Cross Truck v. Jeffries*, 5th Dist. Stark No. CA–5758, 1982 WL 2911 (Feb. 10, 1982).

{¶19} In *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, the Ohio Supreme Court clarified the standard of review appellate courts should apply when assessing the manifest weight of the evidence in a civil case. *SST Bearing Corp. v. Twin City Fan Companies, Ltd.*, 1st Dist. Hamilton No. C110611, 2012–Ohio–2490, ¶ 16. The Ohio Supreme Court held the standard of review for manifest weight of the evidence for criminal cases stated in *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997), is also applicable in civil cases. *Eastley, supra*, 2012–Ohio–2179 at ¶ 17–19. A reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses, and determine “whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed and a new trial ordered.” *Id.* at ¶ 20 quoting *Twearson v. Simon*, 141 Ohio App.3d 103, 115, 750 N.E.2d 176 (9th Dist.2001); see also *Sheet Metal Workers Local Union No. 33 v. Sutton*, 5th Dist. Stark No.2011 CA00262, 2012–Ohio–3549, citing *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). “In a civil case, in which the burden of persuasion is only by a preponderance of the evidence, rather than beyond a reasonable doubt, evidence must still exist on each element (sufficiency) and the evidence on each element must satisfy the burden of persuasion (weight).” *Eastley, supra*, 2012–Ohio–2179 at ¶ 19.

{¶20} R.C. 2903.214 governs the filing of a petition for a civil stalking protection order. R.C. 2903.214(C) provides: “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.” To be entitled to a civil stalking protection order, the petitioner must show by a preponderance

of the evidence that the respondent engaged in menacing by stalking, a violation of R.C. 2903.211, against the person seeking the order. See *Tumblin v. Jackson*, 5th Dist. Coshocton No. 06CA002, 2006–Ohio–3270, ¶ 17.

{¶21} The decision whether to grant a civil protection order lies within the sound discretion of the trial court. *Olenik v. Huff*, 5th Dist. Ashland No. 02–COA–058, 2003–Ohio–4621, at ¶ 21. Therefore, an appellate court should not reverse the decision of the trial court absent an abuse of discretion. In order to find an abuse of discretion, this Court must determine that the trial court's decision was unreasonable, arbitrary or unconscionable and not merely an error of law or judgment. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). We further note that a judgment supported by some competent, credible evidence will not be reversed by a reviewing court as against the manifest weight of the evidence. *C.E. Morris Co. v. Foley Construction Co.*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578 (1978). A reviewing court must not substitute its judgment for that of the trial court where there exists some competent and credible evidence supporting the judgment rendered by the trial court. *Myers v. Garson*, 66 Ohio St.3d 610, 614 N.E.2d 742 (1993). The underlying rationale for giving deference to the findings of the trial court rests with the knowledge that the trial judge is best able to view the witnesses and observe their demeanor, gestures, and voice inflections, and use these observations in weighing the credibility of the proffered testimony. *Seasons Coal Co. v. City of Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984).

{¶22} R.C. 2903.211(A), menacing by stalking, states that “[n]o person by engaging in a pattern of conduct shall knowingly cause another to believe that the

offender will cause physical harm to the other person or cause mental distress to the other person.”

{¶23} R.B. does not contest she engaged in a pattern of conduct by posting four Facebook posts about L.L. R.B. contends that because R.B.’s Facebook posts did not contain any threat of violence towards L.L., the only legal question before the trial court was whether L.L. established R.B. caused her mental distress pursuant to the standard necessary under R.C. 2903.211(A)(1). It is sufficient for L.L. to establish a fear of physical harm or mental distress. *Elkins v. Reed*, 5th Dist. Stark No. 2013CA0091, 2014-Ohio-1217, ¶ 33.

{¶24} R.C. 2903.211(D)(2) defines “mental distress” as:

- (a) Any mental illness or condition that involves some temporary substantial incapacity;
- (b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

{¶25} R.B. contends there is no credible evidence L.L. suffered mental distress. At most, R.B. states the evidence showed L.L. felt annoyance or embarrassment. R.B. is correct when she states that “mere annoyance” is not the proper subject for a civil stalking protection order. *McNaughton v. Cochenour*, 4th Dist. Ross No. 15CA3479, 2015-Ohio-4648, ¶ 26. In order for the trial court to determine if a petitioner suffered mental distress,

* * * whether treatment is sought is not determinative; rather, it is the duty of the trier of fact to determine whether a victim suffered mental distress as

a result of the offender's actions. *State v. Rucker* (2002), Butler App. No. CA2001-04-076, 2002 WL 83731. In making this determination, the trial court "may rely on its knowledge and experience in determining whether mental distress has been caused." *Smith v. Wunsch*, 162 Ohio App.3d 21, 2005-Ohio-3498, 832 N.E.2d 757, ¶ 18.

Theibert v. Anderson, 5th Dist. Knox No. 16CA00013, 2017-Ohio-1029, ¶ 18 quoting *Middletown v. Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E.2d 1003, ¶ 10 (12th Dist.). "Mental distress need not be incapacitating or debilitating." *McNaughton v. Cochenour*, 4th Dist. Ross No. 15CA3479, 2015-Ohio-4648, ¶ 28.

{¶26} In this case, L.L. testified that R.B.'s accusations posted on Facebook, "have put mental stress and distress on me." (T. 8). On the evening R.B. was served with the ex parte CSPO, L.L. testified, "I honestly had my children stay at their dad's because I was afraid of what she might do. If you have ever read any of her posts it is quite obvious that she is unstable. * * * I do fear for my children, and what she might do because I do fear she is very unstable." (T. 8). The magistrate witnessed the parties' character and demeanor and assessed their credibility at the hearing. As the trier of fact, the trial court was free to draw its own conclusions about credibility and to disbelieve all, part, or none of their testimony. In civil stalking protection order cases, the appellate court typically defers to trial courts on issues of weight and credibility because the trial court observed demeanor, gestures and voice inflections and uses those in weighing testimony. *McNaughton, supra*, at ¶ 29 citing *Smith v. Wunsch*, 162 Ohio App.3d 21, 2005-Ohio-3498, 832 N.E.2d 757, ¶ 21 (4th Dist.); *Elkins v. Reed*, 5th Dist. Stark No. 2013CA00091, 2014-Ohio-1217, ¶ 36.

{¶27} The record in this case would allow a rational trier of fact to find that L.L. suffered mental distress beyond annoyance or embarrassment. Testimony that a respondent's conduct caused the person considerable fear can support a finding of mental distress. *McNaughton, supra*, at ¶ 30 quoting *Middletown v. Jones*, 167 Ohio App.3d 679, 683, 2006–Ohio–3465, 856 N.E.2d 1003, 1006, ¶ 8 (12th Dist.) (testimony that petitioner felt “nervous,” “frightened,” “upset,” “worried,” and “scared” was sufficient to support a finding of mental distress). We find no abuse of discretion in the trial court’s determination to find R.B. engaged in a pattern of conduct that caused L.L. mental distress based on the content of R.B.’s multiple Facebook posts.

{¶28} R.B.’s first and second Assignments of Error are overruled.

III.

{¶29} R.B. contends in her third Assignment of Error that the trial court violated R.B.’s right to due process and freedom of speech when it granted L.L.’s petition for a civil stalking protection order.

{¶30} A review of R.B.’s objections to the magistrate’s decision shows she did not raise this argument before the trial court. Civil Rule 53(D)(3)(b)(iv) provides that “a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion * * * unless the party has objected to that finding or conclusion as required by Civil Rule 53(D)(3)(b).” *Fabish v. Harnak*, 5th Dist. Delaware No. 15 CAG 04 0036, 2015-Ohio-4777, ¶ 30 quoting *Tipton v. Directory Concepts, Inc.*, 5th Dist. Richland No. 13CA61, 2014–Ohio–1215.

{¶31} We note, however, that authority exists in Ohio law for the proposition that an appellant’s failure to object to the magistrate's decision does not bar appellate review

for “plain error.” *Id.* However, 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 seriously affects the basic fairness, integrity, or public reputation of the judicial process, thereby challenging the legitimacy of the underlying judicial process itself. *Kell v. Russo*, 5th Dist. Stark No. 2011 CA 00082, 2012–Ohio–1286, citing *Goldfuss v. Davidson*, 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997); *Pratt v. Easton Technical Products, Inc.*, 5th Dist. Stark No.2014CA00144, 2015-Ohio-3180. In *Goldfuss*, the Court explained that the doctrine should 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 the judicial proceeding. 79 Ohio St.3d 116, 679 N.E.2d 1099 (1997).

{¶32} Upon review, we find this case does not present exceptional circumstances that rise to the level of plain error. R.B.’s third Assignment of Error is overruled.

CONCLUSION

{¶33} The judgment of the Guernsey County Court of Common Pleas is affirmed.

By: Delaney, P.J.,

Hoffman, J. and

Wise, Earle, J., concur.