[Cite as *Schultz v. Schultz*, 2010-Ohio-3665.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF MEDINA	)	

CHRISTINE SCHULTZ	C. A. No. 09CA0048-M
Appellant	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
THOMAS SCHULTZ	COURT OF COMMON PLEAS COUNTY OF MEDINA, OHIO
Appellee	CASE No. 09DV0148

DECISION AND JOURNAL ENTRY

Dated: August 9, 2010

MOORE, Judge.

{¶1} Appellant, Christine Schultz, appeals from the decision of the Medina County Domestic Relations Court. This Court reverses and remands for proceedings consistent with this decision.

I.

{¶2} On April 1, 2009, Thomas Schultz ("Husband") chased, smacked, and choked his Wife, Christine Schultz ("Wife"), after she took his cell phone. At that time Husband and Wife lived together, but were negotiating a dissolution. As a result of the confrontation, on June 26, 2009, Wife filed a petition for a domestic violence civil protection order, seeking to protect herself and the parties' minor child. On that same day, after an ex-parte hearing, the trial court granted the petition. On July 22, 2009, the trial court held a full hearing at which Wife provided the sole testimony. Also on July 22, 2009, the magistrate issued her decision, dismissing the civil protection order. The magistrate determined that Wife failed to identify Husband as her

attacker and that her testimony did not by a preponderance of the evidence meet the criteria to establish domestic violence. The trial court adopted this decision, thus vacating the June 29, 2009 protection order and dismissing the petition. Wife timely filed her notice of appeal. She has asserted three assignments of error for our review.

II.

ASSIGNMENT OF ERROR I

"THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION AS ITS DECISION IS CONTRARY TO OHIO REVISED CODE SECTION 3113.31 (AND/OR 2151.031)."

ASSIGNMENT OF ERROR II

"THE TRIAL COURT'S DECISION IS AGAINST THE PREPONDERANCE OF THE EVIDENCE PRESENTED AT TRIAL."

ASSIGNMENT OF ERROR III

"THE TRIAL COURT ERRED AND/OR ABUSED ITS DISCRETION AS [WIFE] MET HER BURDEN AND PROVIDE [SIC] HER CASE OF DOMESTIC VIOLENCE AGAINST [HUSBAND]."

{¶3} Wife combined her assignments of error for purposes of analysis. Essentially, Wife disputes the trial court's decision to deny her domestic violence civil protection order pursuant to R.C. 3113.31. We agree.

{¶4} This appeal arises from the trial court's adoption of the magistrate's decision. Such a decision to modify, adopt, or reverse a magistrate's decision lies within the discretion of the trial court and should not be reversed on appeal absent an abuse of discretion. *Kalail v. Dave Walter, Inc.*, 9th Dist. No. 22817, 2006-Ohio-157, at ¶5, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. On appellate review, "we consider the trial court's action with reference to the nature of the underlying matter." *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶18.

{¶5} The Ohio Supreme Court has explained that "[w]hen granting a protection order, the trial court must find that petitioner has shown by a preponderance of the evidence that petitioner or petitioner's family or household members are in danger of domestic violence." *Felton v. Felton* (1997), 79 Ohio St.3d 34, paragraph two of the syllabus. This Court may reverse if the trial court's judgment is not supported by some competent, credible evidence going to all the essential elements of the case. See *Wilburn v. Wilburn*, 9th Dist. No. 05CA008740, 2006-Ohio-2553, at ¶13, quoting *Gatt v. Gatt*, 9th Dist. No. 3217-M, at *1, quoting *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, syllabus.

{¶6} "The issuance of a civil protection order is governed by R.C. 3113.31." *Gatt*, supra, at *1. R.C. 3113.31(A)(1) defines "domestic violence" as

> "the occurrence of one or more of the following acts against a family or household member:
>
> "(a) Attempting to cause or recklessly causing bodily injury;
>
> "(b) Placing another person by the threat of force in fear of imminent serious physical harm[.]"

{¶7} After a hearing on the issue, the trial court determined that "there was no direct identification of Respondent as the person who allegedly engaged in domestic violence against Petitioner and that they were in fact husband and wife and/or family members." A review of the record does not support the trial court's conclusion. Pursuant to R.C. 3113.31(A)(3), "family or household member" means "[a]ny of the following who is residing with or has resided with the respondent: *** [a] spouse[.]"

{¶8} Wife consistently referred to her "Husband" as her attacker on April 1, 2009. For example, she explained that "[m]y husband was furious, chased me through the house, through the dining room, living room, and down the hallway***, came and attacked me from behind trying to get the cell phone out of my hand and in the process choked me to where I could not

breathe and was cutting off my air supply." Although she does not state her husband's name, on cross-examination, Husband's counsel introduced himself to her stating that "I represent your husband, Thomas Schultz, in this matter, and I have some questions for you. I'm going to direct your attention to the morning of April 1st of 2009. You saw your husband's cell phone, is that correct?" Wife answered yes, thereby adopting counsel's statement that Thomas Schultz was the person Wife referred to when she explained that her "husband" attacked her on April 1. Thus, Wife identified Husband by a preponderance of the evidence, and thus the trial court's contrary decision was not based upon some competent, credible evidence.

{¶9} Further, at the beginning of the proceeding the magistrate discussed the parties' divorce proceedings, and on cross-examination, Wife testified that at the time of the incident, the parties were attempting to negotiate a dissolution. She explained that at the time of the incident, Husband and Wife lived together. Thus, Wife clearly established that she and Husband were married and that Husband resided with her. The trial court's conclusion on this point was not supported by some competent, credible evidence.

{¶10} Next, the trial court determined that "[e]ven if these criteria had been fully satisfied, the testimony of [Wife] at the hearing did not by a preponderance of the evidence meet the criteria to establish domestic violence as defined by Ohio Revised Code 3113.31." The trial court does not indicate that Wife's testimony was not credible, rather, that Wife's testimony did not satisfy the statute. This conclusion is not based upon competent, credible evidence.

{¶11} Wife was the sole witness at trial. "Often the only evidence of domestic violence is the testimony of the victim." *Felton*, 79 Ohio St.3d, at 44. Thus, Wife's testimony was uncontroverted. She explained that after grabbing his cell phone, Husband chased her around the house, hit her in the arm, and choked her. She affirmed that she was in fear of imminent serious

physical harm. On cross-examination, she explained that she believed Husband "was trying to hurt" her.

{¶12} Pursuant to R.C. 3113.31(A)(1), Wife was required to establish by a preponderance of the evidence either that Husband attempted to cause her physical harm *or* that she was in imminent fear of serious physical harm. Although not required to show both, the uncontroverted testimony of Wife established that Husband attempted to cause her harm by chasing her, striking her, and choking her, *and* that based upon this incident, she was in imminent fear of serious physical harm. Despite the magistrate's characterization of the events that occurred on April 1 as a "marital struggle" the facts establish the offense of domestic violence by a preponderance of the evidence. The characterization of the incident as a "marital struggle" does not remove the conduct from the reach of the statute.

{¶13} Lastly, we feel compelled to reiterate the distinction made by the Ohio Supreme Court between a civil protection order and a no-harassment provision contained in a divorce or dissolution decree. "The General Assembly enacted the domestic violence statutes specifically to criminalize those activities commonly known as domestic violence and to authorize a court to issue protection orders designed to ensure the safety and protection of a complainant in a domestic violence case. *** The no-harassment provision, by contrast, contains only a general prohibition." *Felton*, 79 Ohio St.3d, at 38. The Court concluded by stating that

> "In Ohio, the domestic violence statutes grant police and courts great authority to enforce protection orders, and violations of those protection orders incur harsh penalties. Therefore, protection orders issued pursuant to R.C. 3113.31 are the more appropriate and efficacious method to prevent future domestic violence and thus accomplish the goals of the legislation." Id. at 41.

{¶14} At the beginning of the hearing, the magistrate explained to the parties the options available in lieu of a civil protection order. However, the Ohio Supreme Court noted "that R.C.

3113.31(G) states, 'The remedies and procedures provided in this section are *in addition to, and not in lieu of,* any other available civil or criminal remedies.' (Emphasis added.)" Id. at 37. The magistrate stated that "[t]he options that I suggested to your attorneys to sort of not go forward with the hearing because you guys have about the next year that you're going to be engaged in divorce litigation. I explained to them that we can do something called a consent agreement which is no finding of domestic violence but gives Mrs. Schultz a protection order that she is looking for herself. I also explained that the protection order could be dismissed and that we could put a restraining orders against Mr. Schultz in the divorce case." At the conclusion of the hearing, the magistrate dismissed the petition for a civil protection order but issued a restraining order in the divorce case. The magistrate's actions imply a belief that the provisions are alternative remedies. Such is not the case.

{¶15} The magistrate's decision to deny the civil protection order was not based upon competent, credible evidence and therefore, the trial court erred when it adopted the magistrate's decision.

III.

{¶16} The judgment of the Medina County Court of Common Pleas is reversed and the cause remanded for proceedings consistent with this opinion.

Judgment reversed,
and cause remanded.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Medina, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellee.

CARLA MOORE
FOR THE COURT

CARR, P. J.
WHITMORE, J.
CONCUR

APPEARANCES:

JOSEPH G. STAFFORD, MICHELE A. KALAPOS, ANNE F. COAN, and GREGORY J. MOORE, Attorneys at Law, for Appellant.

DAVID L. MCCARTOR, Attorney at Law, for Appellee.