[Cite as *Everitt v. Everitt,* 2010-Ohio-875.]

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

ROD EVERITT	C.A. No. 24860
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
GERALD EVERITT	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 2008-08-2363

DECISION AND JOURNAL ENTRY

Dated: March 10, 2010

CARR, Judge.

{¶1} Appellant-respondent, Gerald Everitt, appeals the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court affirms.

I.

{¶2} On August 6, 2008, appellee-petitioner, Rod Everitt ("Rod"), filed a petition for a domestic violence civil protection order ("CPO") pursuant to R.C. 3113.31 against his father Gerald Everitt ("Gerald"). Rod and Gerald did not live in the same home or same city. Rod also sought relief on behalf of his teenage son, who lived with him on weekends and during the summer. The crux of Rod's allegations was that Gerald, who owned more than 180 firearms, had been threatening to shoot him. Rod alleged that Gerald would drive to his house, draw attention to himself, gesture as though he were shooting Rod with his hand, then drive away. The trial court issued an ex parte CPO the same day and scheduled the matter for a subsequent full hearing. The hearing was continued and eventually took place on January 12, 2009.

{¶3} At the conclusion of the full hearing, the magistrate issued a CPO against Gerald, naming only Rod as the person protected by the order. Gerald filed timely objections to the magistrate's decision and requested a transcript. Gerald supplemented his objections after preparation of the transcript. On July 9, 2009, the trial court overruled Gerald's objections and ordered that the January 16, 2009 CPO shall remain in full force and effect. Gerald filed a timely appeal, raising one assignment of error for review.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT'S JUDGMENT IS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE AND IS UNSUPPORTED BY THE EVIDENCE."

{¶4} Gerald argues that the trial court's adoption of the magistrate's decision is against the manifest weight of the evidence and not supported by sufficient evidence. This Court disagrees.

{¶5} When reviewing an appeal from the trial court's ruling on objections to a magistrate's decision, this Court must determine whether the trial court abused its discretion in reaching its decision. *Turner v. Turner*, 9th Dist. No. 07CA009187, 2008-Ohio-2601, at ¶10. "In so doing, 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. "Any claim of trial court error must be based on the actions of the trial court, not on the magistrate's findings or proposed decision." *Mealey v. Mealey* (May 8, 1996), 9th Dist. No. 95CA0093. An abuse of discretion is more than an error of judgment; it means that the trial court was unreasonable, arbitrary, or unconscionable in its ruling. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion demonstrates "perversity of will, passion, prejudice,

partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621. When applying the abuse of discretion standard, this Court may not substitute its judgment for that of the trial court. Id.

{¶6} The civil standards of review for challenges to sufficiency and manifest weight of the evidence are as follows:

> "When applying a sufficiency-of-the-evidence standard, a court of appeals should affirm a trial court when the evidence is legally sufficient to support the jury verdict as a matter of law. When applying a civil manifest-weight-of-the-evidence standard, a court of appeals should affirm a trial court when the trial court's decision is supported by some competent, credible evidence." (Internal citations and quotations omitted.) *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918, at ¶3; *Rosen v. Chesler*, 9th Dist. No. 08CA009419, 2009-Ohio-3163, at ¶8.

{¶7} The Ohio Supreme Court has held that "when granting a protection order [pursuant to R.C. 3113.31], 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, 42. Pursuant to R.C. 3113.31(A)(1), "domestic violence" is defined as any of the following as against a family or household member:

> "(a) Attempting to cause or recklessly causing bodily injury;
>
> "(b) Placing another person by threat of force in fear of imminent serious physical harm or committing a violation of section 2903.211 [menacing by stalking] or 2911.211 [aggravated trespass] of the Revised Code;
>
> "(c) Committing any act with respect to a child that would result in the child being an abused child, as defined in section 2151.031 of the Revised Code; [or]
>
> "(d) Committing a sexually oriented offense."

{¶8} At the hearing, the magistrate swore in both Rod and Gerald. Because Rod was not represented by counsel, the magistrate allowed him to make a statement as to the reasons behind his petition for a CPO.

{¶9} Rod testified that Gerald was "basically threatening [and] stalking" him. The magistrate inquired as to the most recent incident precipitating the filing of his petition. Rod testified to an incident, without reference to any time frame, during which Gerald turned around in Rod's driveway, blew his horn, and then made a hand gesture as if he were shooting Rod. Rod testified regarding two incidents in September 2008, the month after he filed his petition for a CPO, in which Gerald drove on Rod's street and turned around in his neighbor's driveway. He did not testify that Gerald threatened or even gestured to him on those occasions.

{¶10} Rod testified that on November 22, 2008, some three-and-a-half months after he filed his petition, Gerald "rapidly approached my truck, hands in his pockets, scowl on his face[,]" as Rod was parked outside of his parents' house and waiting to pick up his son. Rod testified that Gerald got to within 10 feet of his truck before he drove away and Gerald turned around and walked back into his house. Finally, Rod testified regarding an incident on December 27, 2007, more than seven months before he filed his petition, in which Gerald parked in front of Rod's house for one hour and twenty minutes, took Rod's picture, made "gestures, little smirks," and had his hands outside his car window. Rod admitted that Gerald was never arrested for any of these incidents.

{¶11} Rod testified that he believed that his father's contentious attitude arose out of Rod's siding with his mother in regard to his parents' pending divorce. He testified that Gerald was "extremely bitter," and he learned that Gerald had told his mother that he wanted Rod "dead or in prison."

{¶12} Rod testified that 166 firearms were seized from Gerald's home by the Summit County Sheriff's Office, presumably as a result of the temporary CPO. He testified that Gerald still had a firearm in his home up until December 12, 2008, when Gerald was arrested for

domestic violence against his wife (Rod's mother). Rod conceded that he does not know of any instance in which Gerald shot or even pointed a gun at anyone. He testified, however, that he finds it "pretty disturbing" that Gerald has practiced "quick draws" in his basement, rapidly firing weapons into a bullet trap.

{¶13} Although Rod testified that he believes that Gerald "would shoot me in a New York minute[,]" he admitted to having called Gerald after obtaining the temporary CPO, even though he does not want Gerald to contact him. Rod testified that he called his father in hopes of working things out in regard to the CPO because he thought Gerald had perhaps had a "change of heart."

{¶14} Rod testified that before he obtained the temporary CPO against his father, his son lived with his parents during the week, even sleeping at Gerald's on weeknights. He admitted that his son was never threatened by Gerald and that his son has "nothing to do with the CPO."

{¶15} Rod called one witness at the hearing. However, the witness was neither identified nor sworn. Evid.R. 603 states:

> "Before testifying, every witness shall be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so." See, also, Section 7, Article I, Ohio Constitution.

"The purpose of swearing or affirming a witness is twofold: to impress upon the witness the solemnity of the event and the need to testify truthfully, and to subject the witness to the penalties of perjury if the testimony is subsequently proved false." *In re Thompson* (Apr. 26, 2001), 10th Dist. Nos. 00AP-1358, 00AP-1359. The Ohio Supreme Court, however, has held that, while the admission of unsworn testimony constitutes error, the failure to object constitutes a waiver of the issue. *Stores Realty Co. v. Cleveland, Bd. of Bldg. Stds. and Bldg. Appeals* (1975), 41 Ohio St.2d 41, 43. No party objected to the admission of this witness' testimony. As

the ultimate issue before this Court, however, is whether there exists "some competent, credible evidence" to support the trial court's decision, we necessarily view the competence and credibility of an unsworn witness with skepticism. See *Bryan-Wollman* at ¶3; *Rosen* at ¶8.

{¶16} More troubling is the fact that this witness was never identified. We do not speculate as to why Rod did not elicit the identity of his sole witness outside of himself. This Court, however, is hard pressed to imagine any circumstances in which the testimony of an anonymous witness who has not taken an oath to testify truthfully could ever be considered competent or credible. An unidentified witness provides no context from which the trier of fact may assess whether she has personal knowledge regarding the matters to which she is testifying. The testimony of this unidentified and unsworn witness provides no indicia of competence or credibility. Accordingly, this Court declines to consider it.

{¶17} The trial court overruled Gerald's objections to the magistrate's decision and ordered that the CPO remain in full force and effect upon its findings that "Respondent has threatened to shoot the Petitioner, and that Petitioner has just reason to fear the Respondent." A review of the evidence indicates that there was sufficient evidence and some competent credible evidence to demonstrate by a preponderance of the evidence that Rod was in danger of domestic violence by Gerald. There is no evidence that Gerald attempted to cause or recklessly caused any bodily injury to Rod. Moreover, despite his threats and hand gestures, there is no evidence that Gerald had any of his 166 firearms ready at hand to put Rod in fear of imminent harm. However, there is some competent, credible evidence going to every element of R.C. 2903.211 to demonstrate by a preponderance of the evidence that Gerald committed menacing by stalking against Rod, so as to qualify as domestic violence pursuant to R.C. 3113.31(A)(1)(b).

{¶18} R.C. 2903.211(A)(1) states:

> "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 cause mental distress to the other person."

R.C. 2901.22(B) states:

> "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist."

{¶19} "Pattern of conduct" is defined as "two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents." R.C. 2903.211(D)(1). R.C. 2903.211(D)(2) defines "[m]ental distress" as:

> "(a) Any mental illness or condition that involves some temporary substantial incapacity; [or]
>
> "(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."

{¶20} Rod testified that he knew his father had numerous firearms and that he practiced to improve his marksmanship abilities. He testified that his father harbored great bitterness towards him and that Gerald had expressed a desire to see his son dead. Moreover, Rod testified that Gerald had repeatedly driven to or near his home, honked to draw attention to himself, and gestured as though he were shooting his son. Rod testified that his father approached him rapidly from the home where he was known to keep numerous firearms with his hands in his pockets, hiding anything which might have been in his hands. Under the circumstances, Rod presented evidence that Gerald engaged in a pattern of conduct which he would have known would cause Rod to believe that his father would physically harm him or cause him on-going mental distress. That Rod contacted his father since the granting of the temporary CPO does not

diminish the threat of domestic violence. Rod testified that the only reason he contacted Gerald was to try to abate the threat. Accordingly, there was both sufficient and some competent, credible evidence to prove that Rod was in danger of domestic violence by Gerald, and the trial court did not abuse its discretion by overruling Gerald's objections and adopting the CPO. Gerald's assignment of error is overruled.

III.

{¶21} Appellant-respondent's sole assignment of error is overruled. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, is affirmed.

Judgment affirmed.

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 Summit, 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 Appellant.

DONNA J. CARR
FOR THE COURT

WHITMORE, J.
BELFANCE, P. J.
CONCUR

APPEARANCES:

THOMAS C. LOEPP, Attorney at Law, for Appellant.

ROD EVERITT, pro se, Appellee.