[Cite as *Rosine v. Rosine*, 2010-Ohio-613.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

CYNTHIA J. ROSINE,	)	
	)	
PETITIONER-APPELLEE,	)	
	)	
VS.	)	CASE NO. 09-MA-18
	)	
MICHAEL S. ROSINE,	)	OPINION
	)	
RESPONDENT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas of Mahoning County, Ohio Case No. 08DV490
JUDGMENT:	Affirmed
APPEARANCES: For Petitioner-Appellee	Cynthia Rosine, pro-se 1346 Pheasant Court Boardman, Ohio 44512
For Respondent-Appellant	Attorney Benjamin Joltin 3855 Starr Centre Drive Suite A Canfield, Ohio 44406

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite

Dated: February 17, 2010

[Cite as *Rosine v. Rosine*, 2010-Ohio-613.]
DONOFRIO, J.

{¶1} Respondent-appellant, Michael Rosine, appeals from a Mahoning County Court of Common Pleas decision issuing a domestic violence civil protection order against him.

{¶2} According to appellant's wife, petitioner-appellee, Cynthia Rosine, on September 2, 2008, appellant entered the marital home, threatened appellee, hit her in the buttock and in the head, and threw her to the ground. Appellee did not immediately contact the police because her children were due to return home from school and she had to take her son to football practice. Later that day, appellee contacted the police.

{¶3} Appellee filed a petition for a domestic violence civil protection order (CPO) the next day. A magistrate issued an ex parte temporary order of protection and scheduled a full hearing.

{¶4} At the hearing, the magistrate heard testimony from appellant, appellee, and several others. She then found that appellant hit and kicked appellee in the buttock, struck her in the head with his fist, and picked her up and threw her to the ground. Consequently, the magistrate issued a CPO.

{¶5} Appellant filed objections to the magistrate's decision arguing that the magistrate's findings were against the weight of the evidence. The trial court reviewed the transcript, gave a detailed analysis of the evidence, and determined that the magistrate properly issued the CPO. The court overruled appellant's objections and held that the CPO was to remain in full force and effect.

{¶6} Appellant filed a timely notice of appeal on January 28, 2009.

{¶7} Appellee has not filed a brief in this matter. In accordance with App.R. 18(C), when an appellee fails to file a brief, this court may accept the appellant's statement of the facts and issues as correct and reverse the judgment if the appellant's brief reasonably appears to sustain such action.

{¶8} Appellant raises one assignment of error, which states:

{¶9} "WHETHER THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION IN FINDING THAT APPELLEE PROVED BY A PREPONDERENCE

OF THE EVIDENCE THAT APPELLANT COMMITTED DOMESTIC VIOLENCE AND ISSUING THE REQUESTED CIVIL PROTECTION ORDER."

{¶10} Appellant alleges that the magistrate's decision is against the manifest weight of the evidence and should be vacated as a matter of law. He argues that appellee's behavior after the occurrence of the alleged incident, specifically her failure to notify the police for several hours after the incident or seek medical attention, damages her credibility. He also alleges that the decision is based on inconsistent testimony of appellee and hearsay evidence of her witness.

{¶11} When an appellant argues that a finding of domestic violence on which a CPO was issued is against the manifest weight of the evidence, the appellate court must determine whether the trial court's decision was supported by sufficient competent, credible evidence. *Calicoat v. Calicoat*, 2d Dist. No. 08CA32, 2009-Ohio-5869, at ¶15. "Judgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris v. Foley Construction Co.* (1978), 54 Ohio St.2d 279, at the syllabus.

{¶12} The burden of proof on a petitioner seeking a civil protection order is a demonstration by the preponderance of the evidence that the petitioner or the petitioner's family or household members are in danger of domestic violence. *Felton v. Felton* (1997), 79 Ohio St.3d 34, at paragraph two of the syllabus. According to R.C. 3113.31(A)(1)(a), domestic violence includes "attempting to cause or recklessly causing bodily injury" to a family or household member.

{¶13} The magistrate found that domestic violence had occurred based upon appellee's testimony that appellant struck her in the head and buttock and threw her to the ground, resulting in bruising to her buttock, and Cynthia Buzin's testimony that she saw the bruising on appellee's buttock three to four days after the incident. This physical violence resulting in bruising to appellee's buttock can be characterized as attempting to cause or recklessly causing bodily injury to a family member, and therefore constitutes "domestic violence" under R.C. 3113.31(A)(1)(a).

{¶14} We must examine the testimony to determine whether the finding of domestic violence, and therefore the issuance of the CPO, was in fact supported by the weight of the evidence.

{¶15} At the hearing, appellee testified that on September 2, 2008, appellant entered the marital residence at roughly 2:15 pm, threatened her and struck her three to five times in the head and buttocks, then lifted her up and threw her to the ground. (Tr. 10, 20-21). She also stated that she suffered bruising on her buttocks. (Tr. 21). This testimony was corroborated by Cynthia Buzin, who witnessed the bruising days later. (Tr. 30, 34). Appellee also testified that she did not call or go to the police station for several hours after the incident, but rather waited for her children to return from school and then drove her son to football practice. (Tr. 10-11). She testified that she feared for her life, but that she wanted to shield her children from the knowledge of the violent incident. (Tr. 10-11).

{¶16} Appellant, on the other hand, testified that he did not threaten, physically assault, punch, kick, or shove appellee at any time on September 2, 2008, but that they only had a verbal argument that day. (Tr. 52). He testified that he did go to the marital home that afternoon, but that appellee and her father were in a car when he arrived and that they never exited the vehicle before driving away. (Tr. 61-62).

{¶17} Appellant challenges appellee's credibility, citing her behavior after the incident and inconsistencies in the accounts of the incident. Regarding her behavior, he claims that the delay of four hours between the occurrence and reporting of the incident was unreasonable and her failure to take photographs of her injuries or request that the police do so, coupled with her failure to seek medical attention do not reflect the actions of a victim of violence. With regard to appellee's testimony, appellant claims that at one point she stated that she did not have time to contact anyone after the incident and that later she stated she contacted her father.

{¶18} Determining the credibility of a witness's testimony is an issue for the trier of fact. *State v. DeHass* (1967), 10 Ohio St.2d 230, 227. The Ohio Supreme

Court has provided the rationale for giving deference to the fact finding of a magistrate: "[T]he 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. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶19} In this case, the magistrate based her decision upon appellee's testimony describing the incident and upon Buzin's testimony that she witnessed bruising on appellee's buttock only days later, lending credence to appellee's testimony. And while appellant's testimony contradicted appellee's testimony, the magistrate, and the trial court too, apparently found that appellant's testimony was lacking credibility since they accepted appellee's version of the incident in question as an accurate depiction of the events that occurred.

{¶20} Appellant further argues that Buzin's testimony was hearsay because she had no first hand knowledge of the incident in question. However, Buzin's testimony, as it relates to what she actually observed, that being appellant's bruise, is not hearsay. Hearsay is defined in Evid.R. 801(C) as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Buzin's testimony of what she actually observed, bruising on appellee's buttock, does not fall within the definition of hearsay and was therefore admissible.

{¶21} This court must exercise a high degree of deference toward the magistrate's decision since her presence at the hearing made her uniquely qualified to judge the credibility of the witnesses. Given this deference, it is clear that competent, credible evidence exists to support the issuance of the CPO. Accordingly, appellant's sole assignment of error is without merit.

{¶22} For the reasons stated above, the trial court's judgment is hereby

affirmed.

Vukovich, P.J., concurs.

Waite, J., concurs.