[Cite as *Zawrotuk v. Zawrotuk*, 2014-Ohio-5225.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

JULIE ZAWROTUK,	)	
	)	CASE NO. 14 MA 13
PLAINTIFF-APPELLEE,	)	
	)	
VS.	)	O P I N I O N
	)	
STEVEN ZAWROTUK,	)	
	)	
DEFENDANT-APPELLANT.	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Domestic Relations Division, Case No. 13DV396.

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee:
Attorney Melissa Rocci
1570 S. Canfield Niles Road, Suite C101
Austintown, Ohio 44515

For Defendant-Appellant:
Attorney Christopher Maruca
201 East Commerce Street, Suite 316
Youngstown, Ohio 44503

JUDGES:
Hon. Joseph J. Vukovich
Hon. Cheryl L. Waite
Hon. Mary DeGenaro

Dated: November 7, 2014

[Cite as *Zawrotuk v. Zawrotuk*, 2014-Ohio-5225.]
VUKOVICH, J.

{¶1} Appellant Steven Zawrotuk appeals the decision of the Mahoning County Common Pleas Court, Domestic Relations Division, upholding a magistrate's decision to grant a domestic violence civil protection order. For the following reasons, the judgment of the trial court is affirmed.

STATEMENT OF THE CASE

{¶2} On July 2, 2013, Julie Zawrotuk filed a petition for a domestic violence civil protection order against her husband of eighteen years, Steven Zawrotuk. That same day, a magistrate held an ex parte hearing, granted an ex parte protection order, and set the case for a full hearing. The husband through counsel was granted two continuances for the expressed reason that there existed a pending criminal case against him.

{¶3} The full hearing proceeded on November 4, 2013. The wife testified that on June 4, 2013, she came home from work and they argued about dishes that had not been put away. (Tr. 75). The husband had lost his job, and there was a discussion about household responsibilities. (Tr. 74). The husband left the house for approximately an hour.

{¶4} After he returned home, he went upstairs, the wife followed him up, and they argued. When she told her husband to leave the house, he reportedly declared that he could hurt her and lunged at her. (Tr. 54-55, 84). She threw her husband's suitcase and clothes over the bannister to the first floor. (Tr. 55, 76). She then ran downstairs after realizing how she may have made him. (Tr. 82).

{¶5} The wife said that the husband started to leave but then turned and "came back at me." She testified that he aggressively put both hands around her head, one on each side and pulled her toward him. (Tr. 55-56). This scared her partly due to a prior domestic incident where he grabbed her head and slammed it into the steps, which prompted an emergency room visit and a protective order in February of 2008. She thus swung her arm up and hit him as he then forcefully kissed her with his hands on either side of her head. (Tr. 55-56).

{¶6} The wife testified that her husband then very aggressively threw her by the head onto the floor. (Tr. 56, 86-87). She said that this caused her head to hit the floor and resulted in a bruise and scratch to her left arm and a bruise on her back. (Tr. 56). She showed photographs that she took the next day showing marks on her back and arm and testified that she was in a great deal of pain. (Tr. 116).

{¶7} She explained that as she was on the floor, her husband came toward her; so she grabbed a plastic hanger that fell with the clothes and started to hit him with it as she told him to leave while their two children were also screaming. (Tr. 56-57). After he left the house, she calmed the children down and then called the Boardman police. She expressed that she feared her husband would return and hurt her. (Tr. 45). She asked the officers to meet her at a nearby gas station so the children did not see the police at the house. (Tr. 57). She gave a statement of the preceding facts but would not sign the statement in order to press charges; she said she was too scared and just wanted the police to be aware of the matter in case she needed their assistance later if he returned. (Tr. 58).

{¶8} The police report stated that they responded at 8:15 p.m. The two officers who met her at the gas station testified to the statement she provided, which coincided with her testimony. Both officers said the wife was visibly shaken and crying. (Tr. 9, 32-33). They observed a bruise and scratch on her left elbow. (Tr. 9, 31-32). One of the officers filed a complaint against the husband for domestic violence after taking the wife's statement on the night of the incident. (Tr. 12).

{¶9} The defense pointed out that the wife waited a month to file the protection order after calling police. It was also noted that the criminal case was set for pretrial on July 11, a week before this civil protection order was sought. (Tr. 58). (That criminal case was still pending at the time of this trial.) It was elicited that a restraining order is a condition of bond in a domestic violence case, and it is often lifted when the case is over. (Tr. 17, 24, 33). The wife testified that she still needed a protection order to protect her and that she would be fearful without one. (Tr. 117, 127).

{¶10} As to the aforementioned past incident, the wife explained that on February 14, 2008, while they were living in Pennsylvania, her husband ripped her shirt down the front, shoved her against a wall, and started grinding against her. When she started to run up the stairs, he pulled her feet and then grabbed her head and slammed it into the stairs. (Tr. 46). She suffered bruising and severe head pain. She went to the emergency room where a CT scan was performed. She indicated that there had been prior abuse in the year or two before the 2008 incident, which was the worst incident up until that time. (Tr. 45, 48). She received a protection order at that time, wherein she requested telephone contact so they could work on their marriage for the sake of the children and figure out what happened. (Tr. 47-48).

{¶11} The wife also testified that one year after that incident, on March 17, 2009, her husband slapped and punched her and beat her with pillows in front of their children. She went to the police station that night with the children. The police took photographs of bruising on her chest, and charges were filed against her husband. (Tr. 49). The parties filed for divorce but then dismissed the action, soon moving to Ohio. (Tr. 52). At the time, she was hopeful the move would "bring us back around." (Tr. 53). Four years later, the current incident happened. She testified that she was in counseling due to the situation. (Tr. 71).

{¶12} After the hearing, the magistrate granted the requested domestic violence civil protection order, and the domestic relations judge signed the protection order as well. In the findings of fact section, the magistrate recapped the June 4, 2013 incident and stated that the wife's testimony was credible. On November 13, 2003, the husband filed a "motion to set aside" the November 4, 2013 protection order, which would constitute a timely objection to the magistrate's decision.

{¶13} First, the husband argued that the wife was under no threat of harm at the time the underlying ex parte order was granted. He stated that the ex parte order was granted under false pretenses because the petition did not provide the June 4, 2013 date of the incident and was not filed until July 2, 2013, surmising the magistrate, when granting the ex parte order, thought the incident was more recent. He suggested that the wife could not be in danger at the time she filed the petition

because there was already a restraining order in the criminal court and because he was residing in Pennsylvania.

{¶14} Second, the husband argued that the wife provided contradictory testimony, construing her statements on times as an admission that she called the police immediately after the disagreement about the dishes, a time at which she did not allege there had been physical contact. He concluded that the lack of danger and the contradictory testimony required the magistrate to deny the protection order after the full hearing. The husband provided the transcript of proceedings from the full hearing.

{¶15} The domestic relations court heard oral arguments on the objections and, on January 10, 2014, found no merit to the husband's objections. The court stated it was not dispositive that the most recent incident occurred a month before the wife filed her petition, noting that the incident was relatively new and there were pending criminal charges regarding the incident at the time. The court pointed out that regardless of the ex parte order, the wife had the burden at the full hearing to prove domestic violence occurred.

{¶16} In response to an argument made at the objections hearing, the court explained that the wife established the first statutory definition of domestic violence (attempting to cause or recklessly causing bodily injury) and was not relying on the alternate definition of domestic violence (place another by threat of force in fear of imminent serious physical harm). The court also referenced an argument at the objections hearing about the prior incidents, stated that past history is relevant, and pointed out that the defense did not object to the testimony on the prior incidents.

{¶17} The court emphasized that the wife alleged more than threats of harm but alleged actual physical harm on more than one occasion. The court disagreed that the wife's testimony as to various times during the evening on June 4, 2013 affected her credibility. The court recited that the wife described the evening as "hell night" and opined that it is not unusual that a victim of domestic violence cannot remember the exact hour of an incident. The court then noted that the husband

chose not to testify and thus presented no direct contradictory evidence to negate the wife's testimony. The husband filed a timely notice of appeal.

GENERAL CIVIL PROTECTION ORDER LAW

{¶18} In the civil protection order statute, domestic violence is defined as the occurrence of one of the following against a family or household member: (a) attempting to cause or recklessly causing bodily injury; (b) placing another by the threat of force in fear of imminent serious physical harm or committing a violation of R.C. 2903.211 or 2911.211; (c) committing certain acts against a child; or (d) committing a sexual oriented offense. R.C. 3113.31(A)(1)(a)-(d). A person may seek relief under the statute by filing a petition which shall contain: (1) an allegation that the respondent engaged in domestic violence against a family or household member, including a description of the nature and extent of the domestic violence; (2) the relationship of the respondent to the petitioner; and (3) a request for relief under this section. R.C. 3113.31(C)(1)-(3).

{¶19} If the petitioner requests an ex parte order, the court shall hold a hearing that day. The court, for good cause shown at the ex parte hearing, may enter any temporary orders including a restraining order that the court finds necessary to protect the family member from domestic violence. Immediate and present danger of domestic violence constitutes good cause and includes threats of bodily harm or a prior conviction of domestic violence. R.C. 3113.31(D)(1). If no ex parte order is requested, or the court does not issue an ex parte order after a hearing, the court shall proceed as in a normal civil action and grant a full hearing on the matter. R.C. 3113.31(D)(3). After the full hearing, the court may grant a protection order to bring about a cessation of domestic violence against the family or household member. R.C. 3113.31(E)(1). The remedy is in addition to, and not in lieu of, any other available civil or criminal remedies. R.C. 3113.31(G).

ASSIGNMENTS OF ERROR

{¶20} Appellant sets forth the following two assignments of error:

{¶21} "The Magistrate abused its discretion in issuing the civil protection order."

{¶22} "The tr[ia]l court abused its discretion by not granting Respondent/Appellant's Motion to Set Aside the Domestic Violence Civil Protection Order."

{¶23} The first argument appellant makes revolves around the fact that the July 2, 2013 petition does not provide the date of the precipitating incident as being June 4, 2013. Appellant also claims there was no testimony at the ex parte hearing on the date. Appellant concludes that without knowing the timing of the alleged incident, it was impossible to apply the test for issuing an ex parte order. He concludes that the ex parte order was based on an incomplete foundation and thus it should have been invalidated rather than extended after the full hearing.

{¶24} However, the statute does not require the petition to contain the date of the incident outlined therein; nor does the standard form ask for such date. *See* R.C. 3113.31(C)(1)-(3) (petition shall: (1) allege the respondent engaged in domestic violence against a family or household member, including a description of the nature and extent of the domestic violence; (2) state the relationship of respondent to petitioner; and (3) ask for relief under this section). The petition is typically filed without counsel, and the process is designed for use even by the most unsophisticated of victims. A hearing is required before an ex parte petition can be granted, and this is where timing should be discussed.

{¶25} Appellant suggests that the magistrate at the ex parte hearing did not inquire when the incident occurred and that the wife did not verbally indicate that the incident occurred four weeks before the hearing. However, this is mere supposition. Appellant was not at the hearing. And, no transcript of the ex parte hearing was ordered.

{¶26} Instead, appellant relies on cross-examination of the wife at the full hearing where she was asked, "Did you tell the magistrate when this had occurred. Look at the petition." The wife responded that she did not recall. Appellant's attorney then asked her again to look at the petition and asked if there was a date on it, and she responded that she did not put a date, that she agreed it was important for the magistrate to know, but she did not think about putting it on the petition. (Tr. 110-

111). This does not establish that she and the magistrate failed to discuss the date of the June 4 incident at the ex parte hearing.

{¶27} Moreover, an issue with an ex parte order does not invalidate a protection order issued after a full hearing. In some cases, an ex parte order is not even sought. *See* R.C. 3113.31(D)(3). In other cases, the court denies the ex parte order. *See id.* This does not prohibit the court from thereafter issuing the protection order after a full hearing. *See id.* Likewise, a questionable presentation of facts at an ex parte hearing does not preclude a court from granting a protection order after a full hearing.

{¶28} In a sense, the ex parte order "merges" out of existence and "into" the final order. *See, e.g., Luttrell v. Younce*, 2d Dist. No. 09CA45, 2011-Ohio-4458, ¶ 35. That is to say, a final protection order supersedes an ex parte order. *See Daugherty v. Daugherty*, 4th Dist. No. 11CA19, 2012-Ohio-1520, ¶ 15. The final protection order comes with its own protections and determinations and does not rely on whether an ex parte order was made or made properly. Thus, appellant's initial argument is without merit.

{¶29} Appellant next states that past actions must be coupled with a threat or reason to place the petitioner in reasonable fear of imminent harm and that past acts alone do not justify such a finding, citing *Bargar* and *Eichenberger*. Appellant posits that there is no reason to fear imminent harm because the most recent incident here was a month before the petition, there were no allegations of threatening activity in the month before filing, the wife did not require medical attention, the two other incidents were four and five years ago, and he complied with the ex parte order for four months. He adds that he moved to Pennsylvania (until moving back to Ohio in the fall of 2013).

{¶30} As to the latter assertions, the fact a respondent moves across the nearby state border at some point after a physical incident does not weigh against a protection order. In fact, they were still married with pending entanglements including their minor children with whom visitation would be proceeding, further minimizing the significance of any move. The Supreme Court has recognized that women separated

(or divorced) are at higher risk than those who are not separated, and the risk is greatest when the woman leaves or threatens to leave the relationship. *See Felton v. Felton*, 79 Ohio St.3d 34, 40, 679 N.E.2d 672 (1997). In any event, counsel mentioned the fact of a move in closing argument, but it was not presented in testimony.

{¶31} As for the *Eichenberger* case appellant cites, the wife in that case testified that the husband had threatened to kill her and she was afraid he would follow through with that threat. *Eichenberger v. Eichenberger*, 82 Ohio App.3d 809, 815, 613 N.E.2d 678 (10th Dist.1992). The appellate court stated that fear always has a subjective element to it, and the trial court could rationally find that the wife's fear was reasonable even if the husband thinks it is not since he never hurt her in the past. *Id.*

{¶32} That court set forth the four statutory definitions of domestic violence with the first two being pertinent: the first requires attempting to cause or recklessly causing physical harm; and the second requires placing another by the threat of force in fear of imminent serious physical harm. The court then specifically stated that the husband *did not injure or attempt to injure his wife and the sole theory at trial was that threats of force had placed his wife in fear of imminent serious physical harm*. *Id.*

{¶33} *Eichenberger* thus proceeded under the second statutory definition of domestic violence. *Id.* The *Barger* case appellant cites also proceeded under the second statutory definition of domestic violence and the precipitating event was not an attempt to cause or recklessly causing physical harm. *See Bargar v. Kirby*, 12th Dist. No. CA2010-12-334, 2011-Ohio-4904

{¶34} Here, although appellant may have threatened his wife in words and actions, the main claim involved the statutory definition of domestic violence involving an attempt to cause or recklessly causing physical harm. *See* R.C. 3113.31(A)(1)(a). Thus, a petitioner need not strictly testify that the respondent placed her in fear of imminent harm when he actually harmed her. *See id.* *Compare* R.C. 3113.31(A)(1)(b) (respondent placed family member by threat of force in fear of imminent serious physical harm).

{¶35} Rather, a court can find that there exists a danger of domestic violence based upon the testimony presented. *See Felton*, 79 Ohio St.3d at (where testimony established physical harm, the Court merely mentioned a finding of a danger of domestic violence); R.C. 3113.31(E)(1) (protection order can be granted to bring about the cessation of domestic violence). A victim's expressions of fear are valuable, but a court can find a danger of domestic violence from a prior attempt to cause or an actual reckless (or intentional) causing of physical harm and the totality of circumstances of a particular case. We note here that circumstantial evidence and direct evidence inherently possess the same probative value. *State v. Jenks*, 61 Ohio St.3d 259, 274, 574 N.E.2d 492 (1991).

{¶36} Regardless, the wife expressed that she was very fearful of appellant during the June 4, 2013 incident and that she was afraid he would return that night. (Tr. 45, 57-58). She also expressed her current fear of appellant and insisted that he is a threat to her without a protection order. (Tr. 69-71, 117). A criminal case and a divorce action were pending. Visitation with the minor children was agreed to be conducted with appellant coming to the house and staying in his vehicle. Thus, further encounters were anticipated. The fact that this was not an isolated incident would also be a consideration as to whether there was a need to protect the petitioner.

{¶37} The petitioner must meet her burden of proof by a preponderance of the evidence. *Felton*, 79 Ohio St.3d at 42. Preponderance of the evidence means the greater weight of evidence that is necessary to alter the equilibrium. *State v. Stumpf*, 32 Ohio St.3d 95, 102, 512 N.E.2d 598 (1987). It is that proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence. *Id.*

{¶38} Weight of the evidence concerns "the inclination of the greater amount of credible evidence" supporting one side over the other. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12, 17, applying *State v. Thompkins*, 78 Ohio St.3d 380, 678 N.E.2d 541 (1997). "Weight is not a question of mathematics, but depends on its effect in inducing belief." *Eastley*, 132 Ohio St.3d

32 at ¶ 12. A reversal on weight of the evidence is ordered only in exceptional circumstances. *Thompkins*, 78 Ohio St.3d at 387.

{¶39} To reverse on weight of the evidence, the appellate court would have to find that the trier of fact clearly lost its way in resolving conflicts in the evidence and created a manifest miscarriage of justice. *Id.* In weighing the evidence, the court of appeals must always be mindful that every reasonable presumption must be made in favor of the finder of fact. *Eastley*, 132 Ohio St.3d 328 at ¶ 21, citing *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3. It is the fact-finder who is best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, eye movements, and gestures of the witnesses testifying before it. *See Seasons Coal*, 10 Ohio St.3d at 80; *State v. DeHass*, 10 Ohio St.2d 230, 231, 227 N.E.2d 212 (1967). We thus proceed under the theory that when there are two fairly reasonable views of the evidence or two conflicting versions of events, neither of which is unbelievable, it is not our province to choose which one should be believed. *State v. Gore*, 131 Ohio App.3d 197, 201, 722 N.E.2d 125 (7th Dist.1999).

{¶40} A rational fact-finder could find the wife's testimony credible regarding the June 4, 2013 incident and conclude that the preponderance of the evidence shows that her husband attempted to cause or recklessly caused her physical harm. A rational fact-finder could also believe her testimony regarding the prior incidents and her fear of appellant as a result of this history and the current incident.

{¶41} That she waited four weeks to file the petition does not destroy her case. *See Serdy v. Serdy*, 7th Dist. No. 13NO400, 2013-Ohio-5532, ¶ 42 ("merely because she did not seek the protection order right away does not preclude her from seeking protection six weeks later"). And, *Serdy* involved only the statutory definition of domestic violence of placing one in fear of serious physical harm by threat of force rather than actual physical harm or attempt to harm.

{¶42} As appellee points out, the police filed charges against the husband due to the incident after taking the wife's report the night of the incident and the criminal case was still pending at the time the wife filed her petition. A victim could

reasonably feel a modicum of safety just after the charges are filed. Still, a criminal case has a much higher burden of proof, beyond a reasonable doubt, and the case was coming up for hearing on July 11. The wife filed her petition on July 2.

{¶43} Appellant then tries to use the criminal case as a reason the petition should not have been granted. However, a civil protection order exists as a remedy in addition to, not in lieu of, other available remedies such as a criminal case and its bond conditions. *See* R.C. 3113.31(G). Where domestic violence taking the form of actual physical harm is found to have occurred in 2008, 2009, *and four weeks prior* to the petition, a reasonable trier of fact could find that the danger of domestic violence was not wholly eliminated by the passage of four weeks since the last incident and that the pending criminal case helped explain the delay in filing as well.

{¶44} Finally, compliance with an ex parte order for some months does not preclude the granting of a protection order. *Compare* R.C. 3113.31(E)(8)(c)(v) (compliance with protection order is *one* factor of many to consider in determining whether to modify or terminate the protection order *that was issued after the full hearing*). Notably, the full hearing is supposed to take place within days of the ex parte order, but appellant asked for two extensions, creating this four-month period of compliance with the ex parte order. His extensions cannot create a situation where a court can no longer issue a protection order issue because time has passed since the precipitating incident and the respondent obeyed the ex parte order during that time. The need for protection is not erased due to compliance with the ex parte order; a lack of threatening contact may be the direct result of that order (and the criminal bond conditions).

{¶45} Appellant's last argument is that the trial court improperly drew a negative inference from his decision not to testify at the full protection order hearing. (He did not specifically invoke his right against self-incrimination as he was not called to testify, but he did not testify in his defense.) As aforementioned, in overruling appellant's objections to the magistrate's decision, the court stated that the victim's confusion as to the exact timing of the incident on June 4 is not unusual or concerning and then noted that the husband "chose not to testify at the full hearing

and therefore he presented no direct contradictory evidence to negate" the wife's testimony. Appellant concludes that this holding was an abuse of discretion as a party is not required to testify on his own behalf and the trier of fact should not draw a negative inference based on the refusal to testify, citing the Fifth Amendment to the United States Constitution.

{¶46} Initially, it should be pointed out that a statement that a defendant failed to present any evidence is not improper, even in a criminal case. *See, e.g., State v. Clemons*, 82 Ohio St.3d 438, 452, 696 N.E.2d 1009 (1998) (prosecution may comment on defense's failure to offer evidence), citing *State v. Williams*, 23 Ohio St.3d 16, 19-20, 23 OBR 13, 16-17, 490 N.E.2d 906 (1986); (prosecutor is permitted to call the state's evidence uncontradicted and say no evidence was offered by the defense to rebut it). *See also State v. McKnight*, 107 Ohio St.3d 101, 837 N.E.2d 315, 2005-Ohio-6046, ¶ 293 (where prosecutor asked, "Why didn't [the defense] present any witnesses?").

{¶47} As for drawing inferences from a failure of a defendant to testify, a comment on *a criminal defendant's* failure to testify violates the Fifth Amendment. *Griffin v. California*, 380 U.S. 609, 615, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965). *See also United States v. Hasting*, 461 U.S. 499, 103 S.Ct. 1974, 76 L.Ed.2d 96 (1983); *Chapman v. California* (1967), 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967) (but prosecutor's comments regarding a defendant's failure to testify to a jury can be harmless). The privilege against self-incrimination can be claimed at any proceeding (whether it is criminal, civil, or administrative) if the witness may reasonably apprehend the evidence could be used in a criminal prosecution or could lead to other evidence that might be so used. *In Re Gault*, 387 U.S. 1, 47-48, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967).

{¶48} *However, the Fifth Amendment does not prohibit the ability of the fact-finder to make adverse inferences against parties in a civil action when they refuse to testify in response to probative evidence offered against them*. *Baxter v. Palmigiano*, 425 U.S. 308, 318-319, 96 S.Ct. 1551, 47 L.Ed.2d 810 (1976) (silence is often evidence of the most persuasive character). Thus, a defendant's failure to testify

may be commented upon to a jury in a civil trial. *Burns v. Adams*, 4th Dist. No. 12CA3508, 2014-Ohio-1917, ¶ 72; *Bigler v. Personal Serv. Ins. Co.*, 7th Dist. No. 12BE10, 2014-Ohio-1467, ¶ 105-108 (also stating that the court may disallow comment to jury due to an explanation, besides fear of exposure, as to why the defendant is absent, e.g. medical reasons due to the accident for which he was sued); *Smith v. Lautensleger*, 15 Ohio App.2d 212, 214, 240 N.E.2d 109 (1st Dist.1968); *Cincinnati Traction Co. v. Reis*, 17 Ohio App. 198 (1st Dist.1922), citing Wigmore on Evidence, Sec. 285 (inferences on civil party's failure to testify can be made except upon certain conditions and are open to explanation that a different hypothesis is more natural than *a party's fear of exposure*).

{¶49} Civil protection order proceedings are to be conducted in accordance with the Rules of Civil Procedure. R.C. 313.31(G). A "civil" protection order hearing is just that: civil; it is not equivalent to a criminal proceeding. *Luttrell v. Younce*, 2d Dist. No. 09CA45, 2011-Ohio-4458, ¶ 39; *Patton v. Patton*, 5th Dist. No. CT2009-0031, 2010-Ohio-2096, ¶ 30; *Gomez v. Dyer*, 7th Dist. No. 07NO342, 2008-Ohio-1523, ¶ 20. The constitutional rights applicable to a criminal case are thus not applicable to the civil protection order proceeding. *See, e.g., Luttrell*, 2d Dist. No. 09CA45 at ¶ 39 (overruling argument that court did not explain risks of proceeding without attorney before proceeding with full protection order hearing); *Patton*, 5th Dist. No. CT2009-0031 at ¶ 30 (double jeopardy inapplicable to civil protection order); *Gomez*, 7th Dist. No. 07NO342 at ¶ 20 (no attendant right to counsel for protection order).

{¶50} This does not change merely because criminal charges are pending as well. *See, e.g., State ex rel. Verhovec v. Mascio*, 81 Ohio St.3d 334, 337, 691 N.E.2d 282 (1998) ("the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them"), quoting *Baxter*, 425 U.S. at 318 (permitting an adverse inference to be drawn from inmate's silence at prison disciplinary hearing). Thus, the trial court's statement here was not reversible. *See* all of above-cited cases. *See also Wolf v. Rossen*, 8th Dist. Nos. 84603, 84650, 2005-Ohio-1174, ¶ 20 (court can,

but need not, draw negative inference from civil protection order respondent's invocation of Fifth Amendment right to refuse to testify, citing *Baxter*); *Rihan v. Rihan*, 2d Dist. No. 2004-CA-46, 2005-Ohio-309, ¶ 32 (adverse inference can be drawn from invocation of Fifth Amendment privilege against self-incrimination in divorce case);

{¶51} We also note that the decision of the domestic relations court does not suggest that the court relied on the defendant's failure to testify. The court's statement was made in the context of addressing an argument about the exact hour certain events occurred in a three-hour period: the husband's leaving of the house, his subsequent return to the house, the physical incident, and the calling of the police. The court was expressing that the wife's internal confusion did not itself make for an incredible witness.

{¶52} For all of the foregoing reasons, the judgment of the trial court is affirmed, and the civil protection order is upheld.

Waite, J., concurs.
DeGenaro, P.J., concurs.