[Cite as *Rehfus v. Smith*, 2015-Ohio-2145.]

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

KIMBERLY K. REHFUS, PETITIONER-APPELLANT, VS. RYAN E. SMITH, RESPONDENT-APPELLEE.	)))))))))	CASE NO. 14 CA 897 OPINION

CHARACTER OF PROCEEDINGS:	Domestic Appeal from Common Pleas Court Case No. 13-DRH-27625
JUDGMENT:	Affirmed.
APPEARANCES:	
For Plaintiff-Appellant:	Attorney Jacob Will 116 Cleveland Avenue NW Suite 808 Canton, Ohio 44702
For Defendants-Appellees:	Attorney David Smith 245 33rd Street, N.W. Canton, Ohio 44709

JUDGES:

Hon. Mary DeGenaro
Hon. Gene Donofrio
Hon. Carol Ann Robb

Dated: June 2, 2015

DeGENARO, J.

{¶1} Petitioner-Appellant, Kim Rehfus, appeals the January 29, 2014 judgment of the Carroll County Court of Common Pleas denying the petition for a civil sexually oriented offense protection order she filed on behalf of her minor child R.R. against the child's paternal uncle, Respondent-Appellee, Ryan Smith. On appeal, Rehfus asserts that trial court's overall decision to deny the protection order was erroneous and that the trial court erred by admitting a psychological evaluation into evidence.

{¶2} Upon review, the trial court's decision was not against the manifest weight of the evidence. And although the trial court erred by admitting the evaluation because it was not properly authenticated, it was harmless error at most as it was not relied upon by the trial court. Accordingly, the judgment of the trial court is affirmed.

Facts and Procedural History

{¶3} On August 12, 2013, Rehfus filed a petition for a civil sexually oriented offense protection order. Rehfus claimed that Smith had inappropriately sexually touched and/or assaulted her son R.R., who was three years old at the time the petition was filed. An ex parte order was granted that same day. On January 23, 2014, the case was called for a full evidentiary hearing on the merits of the protection order.

{¶4} Rehfus testified that she sought a protection order for her son against Smith, the child's paternal uncle because she thought it was necessary to ensure the child's safety. Rehfus explained that in January of 2012, R.R., who would have been approximately 18 months old at the time, told her that Smith punched and kicked him and pulled his hair after seeing a picture of Smith on Facebook.

{¶5} On August 7, 2013, when R.R. would have just turned 3, Rehfus said her son again saw a picture of Smith on Facebook. Upon seeing this picture, R.R. stated "He's mean to me, he puts his pee-pee in my butt and in my mouth." Rehfus said she contacted the police that day and filed a report.

{¶6} Rehfus testified that in October 2012, R.R. had suffered from rectal bleeding as well as an anal fissure. She stated that R.R.'s father took him to an urgent care facility for treatment for these conditions during his visitation with R.R. She said she also took R.R. to a specialist. Rehfus said that once the temporary protection

order took effect, the rectal bleeding ceased and she had no further suspicions of sexual assault.

{¶7} On cross, Rehfus stated that R.R. never complained about being hurt by Uncle Ryan (Smith) upon returning from visitation with his father. She admitted that she had made numerous reports to the Carroll County Department of Job & Family Services. She conceded that the rectal bleeding occurred during bouts of diarrhea. Finally, she denied that R.R. had been acting out sexually.

{¶8} Rehfus was also asked about the Northeast Ohio Behavioral Health evaluation that was performed on R.R. She stated that she had read it. When asked about whether she agreed with it or not, Smith's counsel objected on the basis that it had not been introduced yet. The trial court sustained the objection.

{¶9} Rehfus also called Dr. Thomas Nguyen, R.R.'s pediatrician to testify. Nguyen had been treating R.R. since March 13, 2012 and had seen R.R. at least six times. He saw R.R. in August 2013 regarding Rehfus' concerns that the child had been sexually abused. During that time, Nguyen performed a physical exam on R.R., but the findings were normal. During his treatment of R.R., Nguyen learned that when R.R. saw a picture of Smith, R.R. stated "he put his pee-pee in my mouth and butt." During the exam, R.R. also told Dr. Nguyen that Smith "put his pee-pee in my mouth." Despite this interaction with R.R., Dr. Nguyen was unable to conclude that sexual abuse occurred because the appointment was not long enough. Nguyen agreed that in many cases, sexual assaults occur with no physical evidence.

{¶10} On cross-examination, Nguyen testified that he had never testified in a sex abuse case prior to the instant case. Nguyen admitted that it was possible that no sexual abuse occurred.

{¶11} Baylee Rehfus, the daughter of Appellant Rehfus and sister of R.R., who was 17 years old at the time of trial, testified that in April 2013 she was changing R.R.'s diaper when she noticed bleeding "around his butt." She said this incident occurred after R.R. had a visit with his father. She said she babysat R.R. frequently and changed his diapers often, but had only seen bleeding that one time. She agreed that R.R. had never expressed to her any allegations of sexual abuse. She agreed that R.R.'s father and mother had taken R.R. to the doctor regarding the rectal bleeding.

{¶12} After Rehfus rested her case, Smith made a motion to dismiss the case, which the trial court denied.

{¶13} Smith then moved to admit the Northeast Ohio Behavioral Health evaluation. Earlier Smith's counsel had asserted that at the final pre-trial admissibility of the report was discussed and "it was indicated that * * *if there was a problem with [its] admissibility, whoever had the problem would pay for that person to come in [to authenticate it.]" Rehfus' counsel was not willing to concede this point, claiming that the pretrial in question concerned both this case and another custody case (presumably involving Rehfus and the child's father.) Thus, when Smith moved to admit the evaluation, Rehfus objected. The trial court overruled the objection and admitted the evaluation into evidence.

{¶14} Smith then presented the testimony of Amy Robinson, who is R.R.'s stepmother. She testified that Smith had only seen R.R. approximately four times. She was unaware of a time that Smith ever babysat R.R. and said she never heard R.R. complain about Smith abusing him or hurting him. Robinson stated that there was no time when R.R. would have been with his father (and ergo Smith) without her being there. She said that based on her limited observations of R.R. and Smith that the two got along. She never saw any change in R.R.'s demeanor when Smith visited.

{¶15} Smith then testified. He stated he has no criminal history, has a bachelor's degree from Youngstown State University and was looking for employment. He said he is the half-brother of Wil Robinson, R.R.'s father and that he only sees Wil a "handful of times in a year." He stated that he had seen R.R. approximately 20 times since he was born. However, he stated that he had never been alone with R.R, nor had he ever bathed him. He testified that he never hit R.R, kicked him, or had otherwise been mean to him, and he denied ever engaging in any sexual activity with R.R. He said he had complied with the ex parte order and had no contact with R.R. since that order was filed. On cross, Smith stated that Robinson was incorrect when she stated that he had only been around R.R. 3 or 4 times. He denied any history of sexual abuse in his family.

{¶16} In a judgment entry dated January 29, 2014, the trial court denied the protection order, concluding that Rehfus had failed to present any credible evidence

that the minor child was the victim of any sexually oriented offenses as defined by R.C. 2950.01 committed by Smith. Rehfus did not request findings of fact and conclusions of law.

Denial of Protection Order

{¶17} In her first of two assignments of error, Rehfus asserts:

{¶18} "The trial court erred in denying Appellant's petition for a civil protection order."

{¶19} With regard to a sexually oriented offense civil protection order, the Revised Code provides in pertinent part: "* * * 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 [which] shall contain or state all of the following: (1) An allegation that the respondent is eighteen years of age or older and * * * committed a sexually oriented offense against the person to be protected by the protection order, including a description of the nature and extent of the violation[.]" R.C. 2903.214(C)(1).

{¶20} Rehfus asserts that decisions regarding protection orders should be reviewed under an abuse of discretion standard. However, in *Williams v. Hupp*, 7th Dist. No. 10 MA 112, 2011-Ohio-3403, ¶21, this court held that "the better course is to apply a manifest weight standard of review when the issue is whether a civil protection order should issue[.]" By contrast when the issue is the *scope* of the civil protection order, an abuse of discretion standard of review should apply. *Id*.

{¶21} Here, the issue is whether the protection order should have been granted, not its scope. Thus, we apply a manifest weight of the evidence standard of review. As set forth by the Supreme Court of Ohio in *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012–Ohio–2179, 972 N.E.2d 517, ¶17–23, the manifest weight of the evidence standard set forth in *Thompkins*, a criminal case, also applies in civil cases. As was explained in *Thompkins*:

> The court, reviewing the entire record, weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the jury clearly

> lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered. The discretionary power to grant a new trial should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction.

State v. Thompkins, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997), quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983).

{¶22} The fact that Rehfus failed to request findings of fact and conclusions of law further narrows the standard of review. *See, e.g., Bugg v. Fancher*, 4th Dist. No. 06CA12, 2007-Ohio-2019, ¶10, quoting *Pettit v. Pettit*, 55 Ohio App.3d 128, 130, 562 N.E.2d 929 (1988) ("If a party wishes to challenge the * * * judgment as being against the manifest weight of the evidence he had best secure separate findings of fact and conclusions of law. Otherwise his already 'uphill' burden of demonstrating error becomes an almost insurmountable 'mountain.' ")

{¶23} The trial court's decision survives a manifest weight of the evidence review. Decisions regarding credibility fall within the province of the trier of fact. *See Nguyen v. Chaffee*, 7th Dist. No. 08 CO 35, 2009-Ohio-3352, ¶8. Here, the allegations of sex abuse made by Rehfus lacked much corroboration; in other words, to grant the protection order the trial court would have had to believe Rehfus' testimony. Considering the testimony of other witnesses, most notably that of the child's pediatrician, which did not substantiate the abuse, the trial court reasonably decided Rehfus was not credible. Accordingly, Rehfus' first assignment of error is meritless.

Evidentiary Issues with Evaluation

{¶24} In her second and final assignment of error, Rehfus asserts:

{¶25} "The trial court erred on considering and admitting a sex abuse evaluation over the objection of counsel for the Appellant."

{¶26} Rehfus asserts that there were two problems with the trial court's decision to admit the evaluation. First, she claims it was not properly authenticated, and second, she claims it constitutes inadmissible hearsay. She argues that the admission of this evaluation was prejudicial and requires a remand for a new trial.

{¶27} Evidentiary rulings are reviewed for abuse of discretion. *Scatamacchio v. W. Res. Care Sys*., 161 Ohio App.3d 230, 2005–Ohio–2690, 829 N.E.2d 1247, ¶74

(7th Dist.). A reviewing court should not disturb evidentiary rulings absent an abuse of discretion that has materially prejudiced a party. *Beard v. Meridia Huron Hosp*., 106 Ohio St.3d 237, 2005–Ohio–4787, 834 N.E.2d 323, ¶20. " 'Generally, in order to find that substantial justice has been done to [a party] so as to prevent reversal of a judgment for errors occurring at the trial, the reviewing court must not only weigh the prejudicial effect of those errors but also determine that, if those errors had not occurred, the jury or other trier of the facts would probably have made the same decision.' " *Id*. at ¶35, quoting *O'Brien v. Angley*, 63 Ohio St.2d 159, 164–165, 407 N.E.2d 490 (1980), quoting *Hallworth v. Republic Steel Corp*., 153 Ohio St. 349, 91 N.E.2d 690 (1950), paragraph three of the syllabus.

{¶28} Turning first to the authentication issue, Rehfus argues that the evaluation was inadmissible at trial because it was not properly authenticated. The general purpose behind the requirement that a document is authenticated prior to admission is to prove that the writing is what the proponent claims it to be. *See* Evid.R. 901(A). The Rule sets out several illustrations of how evidence may be authenticated, for example, by way of testimony of a witness with knowledge that a matter is what it is claimed to be. Evid.R. 901(B)(1). In addition, public records may be authenticated via "[e]vidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement or data compilation, in any form, is from the public office where items of this nature are kept." Evid.R. 901(B)(7).

{¶29} The evaluation here was prepared by a private agency, Northeast Behavioral Health, Ltd. Although the child was referred for the assessment by a public agency, (Carroll County Department of Job and Family Services), that does not appear to transform the document into a public record. And importantly, there was no testimony from, for example, a representative of Northeast Behavioral Health, to authenticate the report. No attempt to authenticate this document was made, and it is not self-authenticating pursuant to Evid.R. 902.

{¶30} Smith does not provide much in the way of argument regarding the merits of the authentication issue; rather, he contends that during a pretrial the admissibility of the evaluation was discussed and that the parties agreed that if one

side sought to dispute the admissibility of the document, that party would bear the cost of having the evaluator attend trial. However this pretrial was not transcribed, and when this alleged stipulation was raised in response to Rehfus' objection to the evaluation at trial, Rehfus' counsel failed to acknowledge the stipulation.

{¶31} The evaluation was not properly authenticated, and therefore the trial court erred in admitting it. Because we have concluded that it was improperly admitted, Rehfus' hearsay argument is moot and we decline to discuss it. *See* App.R. 12(A)(1)(c).

{¶32} Turning to the question of prejudice, Smith asserts there was none because the trial court did not actually consider it when rendering its decision. The January 29, 2014 judgment entry denying the petition for a protection order does not state that the trial court gave consideration to the evaluation. Instead, the trial court referenced only the witnesses who testified and stated its decision. As a court of record speaks only through its journal, *State ex rel. Fogle v. Steiner* (1995), 74 Ohio St.3d 158, 163, 656 N.E.2d 1288 (1995), it appears the trial court relied only upon the witnesses' testimony. The trial court had an opportunity to observe all the witnesses testify, and it found Rehfus was not credible. Thus, at most, the admission of the report was harmless error.

{¶33} Accordingly, Rehfus' second assignment of error is meritless.

{¶34} In sum, the trial court's decision was not against the manifest weight of the evidence. And although the trial court erred by admitting the evaluation because it was not properly authenticated, it was harmless error at most as it was not relied upon by the trial court. Accordingly, the judgment of the trial court is affirmed.

Donofrio, P.J., concurs
Robb, J., concurs