[Cite as *Bargar v. Kirby*, 2011-Ohio-4904.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

MELISSA R. BARGAR,	:	
Petitioner-Appellee,	:	CASE NO. CA2010-12-334
	:	O P I N I O N
- vs -		9/26/2011
	:	
CRAIG KIRBY,	:	
Respondent-Appellant.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DV10-11-1421

Melissa R. Bargar, 316 Pepperidge Drive, Trenton, Ohio 45067, petitioner-appellee, pro se

J. Gregory Howard, 110 Main Street, Hamilton, Ohio 45011, for respondent-appellant

PIPER, J.

{¶1} Respondent-appellant, Craig Kirby, appeals from the decision of the Butler County Court of Common Pleas, Domestic Relations Division, granting petitioner-appellee, Melissa R. Bargar, a final protective order against appellant.

{¶2} Appellee and appellant lived together as a couple for approximately five years before separating in 2010. Towards the end of that time, the relationship became tumultuous and resulted in conflict between the parties over a number of issues. Appellee claimed that

while at a camp in July of 2010, appellant began yelling at her, got in her face, and head butted her. Then in August, appellee alleged that appellant repeatedly knocked her purse out of her hands and dumped it on the floor, refused to allow her to leave the bedroom, took her car keys, cell phone, and computer, poured water on her, and grabbed her by the throat and head butted her. This altercation allegedly resulted in bruises on the back of appellee's arms and legs from being pushed into walls. Appellee subsequently filed a petition for a domestic violence civil protection order. That petition, however, was voluntarily dismissed on September 9, 2010. Appellee claimed the voluntary dismissal was done in the hopes that the relationship could be salvaged, and so as to not interfere with appellant's attempts to obtain visitation rights with his children.

{¶3} While it is uncontroverted that the parties had not seen each other since mid-September, they have remained in contact. Testimony at trial indicated that both parties had engaged in an exchange of vulgarities and obscenities through text messages, phone calls, and social networking websites. There has, however, been no testimony that any physical altercation has taken place since the voluntary dismissal.

{¶4} Based on the alleged history between the parties, a subsequent conditional threat, and the harassment via telephone and internet, appellee filed a second petition requesting a domestic violence civil protection order on November 8, 2010. Following a hearing on the matter, the trial court issued a decision granting appellee a final protective order against appellant.

{¶5} Appellant now appeals the decision of the trial court, raising the following assignment of error:

{¶6} "THE TRIAL COURT ERRED IN GRANTING APPELLEE'S PETITION FOR A DOMESTIC VIOLENCE CIVIL PROTECTION ORDER AS SUCH WAS AGAINST THE MANIFEST WEIGHT OF EVIDENCE AND AN ABUSE OF THE TRIAL COURT'S

DISCRETION."

{¶7} Appellant argues that the trial court erred in granting a final protection order because the evidence did not demonstrate any current physical harm or the fear of future imminent serious physical harm by threat of force. It is appellant's contention that the past acts, current vulgar but non-threatening text messages, and threats made to appellee by her own stepfather do not constitute domestic violence and should not have subjected him to a domestic violence civil protection order.

{¶8} The decision to grant a civil protection order is within the sound discretion of the trial court and an appellate court will not reverse the trial court's decision absent an abuse of discretion. *Woolum v. Woolum* (1999), 131 Ohio App.3d 818, 821. To find an abuse of discretion, we must determine that the trial court's decision was unreasonable, arbitrary, or unconscionable, and not merely an error of law or judgment. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. Because the trial court is in the best position to observe the witnesses and to assess the credibility of their testimony, we must presume the accuracy of the trial court's findings. *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80.

{¶9} In order for a court to issue a civil protection order (CPO), "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*, 79 Ohio St.3d 34, 1997-Ohio-302, paragraph two of the syllabus. Domestic violence is defined in R.C. 3113.31(A)(1) as follows:

{¶10} "'Domestic violence' means the occurrence of one or more of the following acts against a family or household member:

{¶11} "(a) Attempting to cause or recklessly causing bodily injury;

{¶12} "(b) Placing another person by the threat of force in fear of imminent serious physical harm * * *."

{¶13} Therefore, in order for domestic violence to exist there must be a threat of force, and that threat must place a party in fear of both imminent and serious physical harm. "Serious physical harm to persons" is defined in R.C. 2901.01(A)(5) as meaning any of the following:

{¶14} "(1) Any mental illness or condition of such gravity as would normally require hospitalization or prolonged psychiatric treatment;

{¶15} "(2) Any physical harm which carries a substantial risk of death;

{¶16} "(3) Any physical harm which involves some permanent incapacity, whether partial or total, or which involves some temporary, substantial incapacity;

{¶17} "(4) Any physical harm which involves some permanent disfigurement, or which involves some temporary, serious disfigurement;

{¶18} "(5) Any physical harm which involves acute pain of such duration as to result in substantial suffering, or which involves any degree of prolonged or intractable pain."

{¶19} The court in *Henry v. Henry*, Ross App. No. 04CA2781, 2005-Ohio-67, ¶19, extensively examined the meaning of "imminent" in this context: "'Imminent' means 'on the point of happening.' In *Strong v. Bauman*, (May 21, 1999), Montgomery App. Nos. 17256 and 17414, the court defined 'imminent' as 'ready to take place,' 'near at hand,' 'impending,' 'hanging threateningly over one's head,' or 'menacingly near.' 'Imminent' does not mean that 'the offender carry out the threat immediately or be in the process of carrying it out.' Rather, the critical inquiry is 'whether a reasonable person would be placed in fear of imminent (in the sense of unconditional, non-contingent), serious physical harm * * * [which] necessarily involves both subjective and objective elements.'" (Internal citations omitted.)

{¶20} In *McGuire v. Sprinkle*, Warren App. No. CA2006-06-069, 2007-Ohio-2705, ¶15, this court recognized that "[t]hreats of violence constitute domestic violence for the purpose of R.C. 3113.31 if the fear resulting from those threats is reasonable. The

reasonableness of the fear should be determined with reference to the history between the petitioner and the defendant." (Internal citations omitted.)

{¶21} In the present case, appellee testified that she was "fearful" of appellant. When asked "[w[hy?", she responded, "[i]t is the look in his face and he's always told me that if I was a man he would whip my ass." This alleged threat is a generalized, conditional threat based upon a condition that cannot be met because appellee is not a man. A conditional threat is one where "a prerequisite must occur before the actor intends or is empowered to carry out the threat." *In re Jenkins*, 2004-Ohio-2657, at ¶26. Because the prerequisite to this threat is one which cannot be fulfilled, we cannot find that a fear of imminent serious physical harm resulting from such an impossibly conditioned threat is reasonable.

{¶22} Additionally, it is clear that the look in someone's face is generally insufficient for a court to find that a person is reasonably in fear of imminent serious physical harm. At the very least, this look would need to be supported by additional facts. Appellee testified only that she was generally in fear based on appellant's look and the conditional threat. At no point did she testify, nor was evidence introduced, that she feared *imminent* serious physical harm. Absent this, it cannot be said that a previous conditional threat, or the look on appellant's face, could reasonably place appellee in fear of imminent serious physical harm.

{¶23} The only other threat that appellee testified to was made by her own stepfather. Appellee testified that her stepfather "has threatened to have, um, friends of his come after me and I'm scared, my kids are scared." This fear, however reasonable, does not warrant a CPO against appellant.

{¶24} Appellee also references past confrontations between herself and appellant as the basis for the protection order. While we acknowledge appellee's history with appellant in determining the reasonableness of her fear, we note that appellee testified that she was not afraid of appellant *at the time* the alleged incidents of domestic violence took place. Past

domestic violence may be considered by the trial court, however it must be coupled with threats of present or future violence in order to satisfy the requirements of domestic violence such that a protection order may be granted. *McGuire* at ¶22. As discussed above, the alleged threats in this case were either not made by appellant, or were not sufficiently established such that a trial court could find a reasonable fear of imminent, serious physical harm. Therefore, with appellee testifying that she was not in fear at the time of the historical altercations, her attempting to reunite with appellant, and her citing only a conditional threat (which was impossible to fulfill), we cannot find that there has been any threat of present or future violence that would place appellee or her family in danger of domestic violence, as legally defined, and thus the evidence did not permit the granting of a CPO.

{¶25} Finally, the parties have had no physical contact with one another in months and since appellant moved to Columbus, the only contact between the parties has been electronic. While the mutual electronic name-calling has been deplorable, we cannot find that the record supports a threat whereby appellant has placed appellee in fear of imminent, serious physical harm. Therefore, we find that the trial court, given the nature of the evidence presented, could not reasonably find by a preponderance of the evidence that appellee was in danger of domestic violence as defined by the Ohio Revised Code, and thus has abused its discretion.

{¶26} Our decision today does not hold that past acts of domestic violence are irrelevant or not to be considered. To the contrary, they are very relevant, but must be considered in light of any current allegations requesting a CPO. Nothing in our reasoning today prevents appellee from requesting a CPO in the future should factual circumstances warrant such.

{¶27} Accordingly, appellant's assignment of error is sustained.

{¶28} Judgment reversed and we hereby order the protection order herein vacated.

POWELL, P.J., and HUTZEL, J., concur.