[Cite as *Fouch v. Pennington*, 2012-Ohio-3536.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

CLERMONT COUNTY

SHILOH FOUCH,	:	
Petitioner-Appellee,	:	CASE NO. CA2011-10-075
	:	O P I N I O N
- vs -		8/6/2012
	:	
JAMES KEVIN PENNINGTON,	:	
Respondent-Appellant.	:	

CIVIL APPEAL FROM CLERMONT COUNTY COURT OF COMMON PLEAS
Case No. 2011 CVH 01329

Shiloh Fouch, 4240 Ponder Drive, Cincinnati, Ohio 45245, petitioner-appellee, pro se

James Kevin Pennington, 1250 West Ohio Pike #275, Amelia, Ohio 45102, respondent-appellant, *pro se*

POWELL, P.J.

{¶ 1} Respondent-appellant, James Kevin Pennington, appeals from a decision of the Clermont County Court of Common Pleas issuing a civil stalking protection order in favor of petitioner-appellee, Shiloh Fouch. For the reasons outlined below, we affirm.

{¶ 2} Pennington and Fouch were involved in a romantic relationship for approximately a year, during which they would repeatedly end their relationship and then get back together. Fouch was away on a business trip in the beginning of July 2011. Initially,

Pennington and Fouch were on good terms. However, Fouch broke off the relationship which induced several instances whereby Pennington initiated unwanted contact with Fouch and her family.

{¶ 3} On August 1, 2011, Fouch filed a petition for a civil stalking protection order seeking protection for herself and her two minor children. Fouch alleged that Pennington repeatedly called her following the end of their romantic relationship. Fouch alleged that Pennington threatened her and stated that he was going to "mess up" her life. She also alleged that Pennington had hacked into her email accounts, Facebook account, and her cellular telephone account. She alleged he had used a website to veil his phone number so that when he called her from his phone number it actually looked like he was calling from another phone number. In addition, she alleged that he had sent emails to her friends and family telling them that she had a mental disorder. Fouch also alleged that he had sent an email to her place of employment declaring that she had divulged company "secrets."

{¶ 4} Following the issuance of a temporary order, a full hearing was conducted by a magistrate. At the hearing, Fouch testified regarding several emails sent by Pennington to her family members and friends after the breakup, and an email and Facebook message that looked like they were initiated by her, but were not. She also testified regarding the email sent to her work. While the sender of the email to her work was not identified, she testified that the language contained in the email was very similar to other emails sent by Pennington. She testified to receiving at least one call from Pennington asking her whether she was dressed yet, and the call looked like it was initiated by someone else she knew. She testified that as a result of these instances she had to change her passwords to her accounts, and had to change her phone number due to the volume of calls and texts she had received. In addition, she testified that she felt that she was being harassed and that she "needed to be saved." She testified that she called the police on at least one occasion and had a security

system installed in her home.

{¶ 5} Jennifer Kelly stayed at Fouch's residence while Fouch was away on business. Kelly testified that while she was staying at Fouch's residence, she noticed that the internet browser on Fouch's computer included web addresses for Fouch's cellular telephone company and a website called "Bluff My Number" in its drop-down box. Kelly testified that she did not visit these sites, but that Pennington had access to Fouch's computer while Fouch was away.

{¶ 6} Pennington testified and denied logging into Fouch's accounts, but admitted to having been trained in various surveillance techniques through his experience in law enforcement and private security. He alleged that Fouch was having an affair while away on business, and testified that "they had a flurry of arguments and text messages over the phone for three days." However, Pennington reiterated that he knew Fouch had issues with anxiety and wanted to support her. Pennington also testified and produced emails from Fouch as late as July 19, 2011, expressing her love to him.

{¶ 7} At the conclusion of testimony, the magistrate found that Pennington had accessed Fouch's cellular telephone, email, and other electronic communication accounts. The magistrate stated that while Pennington's motivation may have been genuine, the preponderance of the evidence showed that Pennington knowingly engaged in a pattern of conduct that caused or will cause Fouch mental distress. After a lengthy hearing on an objection to the magistrate's decision filed by Pennington, the trial court adopted the decision of the magistrate. Pennington now appeals.

{¶ 8} While Pennington states he "assigns 5 errors to the trial court," his arguments relate to the sufficiency of the evidence. He argues that proof of a pattern of conduct alone is insufficient to establish menacing by stalking. He also asserts that there is insufficient evidence to show mental distress because Fouch had been under the care of a doctor for

many years for anxiety. In addition to sufficiency, Pennington argues that the trial court erred in its reliance on *Ellet v. Falk*, 6th Dist. No. L-09-1313, 2010-Ohio-6219, because it was not factually analogous to this case. We disagree.

{¶ 9} When assessing whether a civil stalking protection order should have been issued, the reviewing court must determine whether there was sufficient credible evidence to prove by a preponderance of the evidence that the petitioner was entitled to relief. *Lane v. Brewster*, 12th Dist. No. CA2011-08-060, 2012-Ohio-1290, ¶ 50; *Olenik v. Huff*, 5th Dist. No. 02-COA-058, 2003-Ohio-4621, ¶ 16-18. Whether the evidence presented is legally sufficient to sustain a verdict is a question of law. *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52.

{¶ 10} Issuance of a protection order pursuant to R.C. 2903.214 requires the petitioner to establish that the respondent engaged in conduct constituting menacing by stalking. R.C. 2903.214(C)(1). Menacing by stalking is defined as "engaging in a pattern of conduct" that knowingly "cause[s] another to believe that the offender will cause serious physical harm to the other person or cause mental distress to the other person." R.C. 2903.211(A)(1).

{¶ 11} To establish a pattern of conduct, there only needs to be two or more actions closely related in time. R.C. 2903.211(D)(1). In determining what constitutes a pattern of conduct, courts must take every action of the respondent into consideration even if some of the actions in isolation do not seem particularly threatening. *Middletown v. Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, ¶ 10 (12th Dist.). It is possible that a pattern of conduct can arise out of two or more events which occur on the same day. *Shockey v. Shockey*, 5th Dist. No. 08CAE070043, 2008-Ohio-6797, ¶ 19.

{¶ 12} R.C. 2901.22 defines knowingly when a person "regardless of his purpose, * * * is aware that his conduct will probably cause a certain result or will probably be of a certain nature." Furthermore, "[a] person has knowledge of circumstances when he is aware that

such circumstances probably exist." *Id*.

{¶ 13} Mental distress under R.C. 2903.211(D)(2), is defined as any of the following:

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

It is the duty of the trier of fact to determine whether a victim suffered mental distress as a result of the offender's actions. *Middletown* at ¶ 7. In making this determination, the trial court "may rely on its knowledge and experience in determining whether mental distress has been caused." *Smith v. Wunsch*, 162 Ohio App.3d 21, 2005-Ohio-3498, ¶ 18 (4th Dist.). Notably, we have held that actual mental distress need not occur. *See State v. Hart*, 12th Dist. No. CA2008-06-079, 2009-Ohio-997. Instead, the petitioner "'need only show that a [respondent] knowingly caused the [petitioner] to believe that he would cause her mental distress * * *.'" *Hart* at ¶ 31, quoting *State v. Horsley*, 10th Dist. No.05AP-350, 2006-Ohio-1208, ¶ 47.

{¶ 14} In this case, the magistrate found that following their most recent breakup in July 2011, there were instances where Pennington accessed Fouch's cellular telephone, email, and other electronic communication accounts. The trial judge also found this to be the case. Fouch testified that she received two phone calls that appeared to be from other people, but she believed that the calls originated from Pennington. One of the phone calls that appeared to be from another person was Pennington, who asked if she was dressed yet. Additionally, Fouch testified that there was a post that appeared to have been written by her on her own Facebook wall, but was not, that stated she had cheated on Pennington again and was having a great time in Washington getting drunk. Furthermore, Fouch testified that

there was an email sent to her employer alleging she had "divulged company information" to an employee of a competitor with whom she supposedly had an affair. Fouch testified that she received a text message from Pennington earlier the same day indicating that he was "sorry." Pennington testified that "they had a flurry of arguments and text messages over the phone for three days."

{¶ 15} Additionally, the magistrate found that the "knowingly" element of the statute was met. The trial judge specifically stated that Pennington knew Fouch suffered from anxiety and was emotionally weak, and Pennington was in a position to know Fouch's psyche. Emails were entered into evidence whereby Pennington communicated to others that he thought Fouch had a borderline personality disorder. Pennington testified that he had a conversation with Fouch about anxiety for which she was taking medication, indicating he knew about her anxiety issues.

{¶ 16} Finally, in regard to mental distress, the magistrate found that Pennington engaged in conduct that caused Fouch to believe that Pennington caused or will cause mental distress. The trial judge stated that Pennington's actions would cause mental distress for an average person and the totality of the circumstances established mental distress. The trial judge found that Pennington was emotionally threatening and went "too far," and that Fouch was distressed regarding these incidents. Fouch's testimony revealed that she felt like she was being harassed, and she could not concentrate on her work. She testified that she "needed to be saved." Fouch testified that she eventually contacted the police requesting that they inform Pennington that she did not want to be contacted by him. Fouch also testified that she had a security system installed in her home because she felt threatened.

{¶ 17} In light of the foregoing, we find that there was sufficient credible evidence to go to each element of the statute for menacing by stalking. There was evidence that on several occasions Pennington contacted Fouch or contacted others regarding Fouch. Pennington

testified that he knew Fouch suffered from anxiety. Fouch testified that she felt that she was being harassed. Consequently, we find there was sufficient evidence to support the issuance of the civil stalking protection order.

{¶ 18} Furthermore, Pennington argues that the trial court erred in relying on *Ellet v. Falk*, 6th Dist. No. L-09-1313, 2010-Ohio-6219, because its facts are distinguishable from the case at bar. However, in reviewing the record, the trial court relied on *Ellet* to determine the proper law to apply. While it may have been prudent for the trial court to rely on a Twelfth District case for the proper legal standard, we cannot say that relying on the law articulated in *Ellet* prejudiced Pennington.

{¶ 19} Accordingly, Pennington's assignments of error are all overruled.

{¶ 20} Judgment affirmed.

RINGLAND and PIPER, JJ., concur.