

ORIGINAL

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No. 2012-239
Plaintiff-Appellee,	:	On Appeal from the Franklin
v.	:	County Court of Appeals
	:	Tenth Appellate District
ROBERT L. SMITH, JR.,	:	Court of Appeals
Defendant-Appellant.	:	Case No. 11AP-512

Merit Brief of Appellant Robert L. Smith, Jr.

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Statement of the Case and the Law

Robert Smith has no memory of his father living in his home.

Competency Report of Kristen Haskins, Clinical Psychologist, Filed Mar. 16, 2011, at 4 (“Report”). He had a half-brother from his father’s side, and a half-sister on his mother’s side. *Id.* at 5. The older brother shot and killed himself while this case was pending. *Id.* He said that while growing up, he traveled a few times to visit his mother’s boyfriends, including a trip to Wisconsin. *Id.*

Although his intelligence was “average,” Robert struggled in school from the start—missing 60 days of kindergarten, 23½ days of first grade, 18 days of second grade, and 24 days of fourth grade. *Id.* at 7-8. By age 6, he was taking Adderall for ADHD. *Id.* at 9. He had a two-week psychiatric hospitalization when he was 11 or 12 years old, and he received outpatient mental health treatment at Children’s Hospital in Columbus. *Id.* His diagnoses included generalized anxiety disorder, posttraumatic stress disorder, major depression, eating disturbance, suicide ideation, problems with self-concept, interpersonal problems, and bipolar disorder. *Id.* He dropped out in the 10th grade after years of special education classes, including stints at YouthBuild, a drop out recovery school. *Id.* at 6. His drug use started at least by age 13, and shortly after he turned 14 years old he began a 45-day stint at Maryhaven for marijuana use. *Id.* at 8. He has been prescribed anti-psychotic medication, antidepressants, as well as medication for ADHD. *Id.* at 12. Children’s Services placed him in an Ohio Youth Advocacy Program group home at age 15. *Id.* at 5.

When he was 17 years-old, he met Shasta Pickens, the 31-year-old mother of his then-girlfriend.¹ They started with a “friendship,” but it quickly evolved into a “dating” relationship. T.p. Vol. I, 54.² Ms. Pickens explained that Robert had “stayed a couple nights” but that it “wasn’t like a move in (sic) thing.” *Id.* at 72. She acknowledged that she had a history of convictions for theft, forgery, receiving stolen property, and identity theft for which she had received prison, probation, and drug treatment. *Id.* at 56, 72-74. She testified that this relationship between a 17-18 year old boy and a 30-31 year old woman was “rocky,” included shared marijuana use, and that they had had many “altercations.” *Id.* at 57, 73-4.

Ms. Pickens obtained a restraining order on April 12, 2010. State’s Exhibit D. She testified that on April 16, 2010, she “show[ed] him a copy” of the restraining order and told “him he’s not allowed to be around” her. T.p. Vol. I, 58. She did not say that she let Robert read any portion of the order, that she read him any portion of the order to him, or that she told him anything else about the order. She also did not testify that she gave him a

¹ The ages in this statement were calculated as follows: Robert Smith was born on June 8, 1991. Department of Rehabilitation and Correction, Offender Search, <http://www.drc.state.oh.us/OffenderSearch/Search.aspx> (accessed July 27, 2012). The violation in this case allegedly happened on April 17, 2010. On April 5, 2011, at trial, Shasta Pickens testified that she would be 33 years old later that year. She testified that she had been dating Robert for “six months to a year” before April 17, 2010. T.p. Vol. I, 54. She also testified that as of April 5, 2011, she had known Robert for “about two years.” *Id.* at 53.

² The transcript in this case was printed in all capital letters. For the convenience of the reader, capitalization has been supplied to all quotations from the transcript in this brief.

copy. She said Robert was “angry” about what she had told him, *id.* at 59, but there is no evidence he was violent.

Ms. Pickens testified that the next day she heard a bang in her basement, which was Robert coming through her basement window, followed by profanity, including, “Yeah, bitch, you thought it was over.” *Id.* at 59-60. She said that when he reached the top of the stairs, Robert put her in a chokehold to the point she thought she would pass out. *Id.* at 60. She said that the two “tussled around” for about ten minutes. *Id.* Ms. Pickens said she could not fight back she was “winded” as a result of smoking and being “overweight[.]” *Id.* at 61. She said she could not remember if Robert punched her more than once. *Id.* She also said that the “tussle” left bruises and a bite mark. There is no evidence that she sought medical treatment. In fact, she testified that she suffered no “serious injury” or “physical harm[.]” *Id.* at 69.

Ms. Pickens said the “tussle” stopped when her 14 year-old son came home with a friend. *Id.* at 62. She then “snuck” and called 911. *Id.* at 62. When the police came, Robert was in the basement, and he struggled and wrestled with police officers before being tased. *Id.* at 65, 89-93.

Robert was charged with aggravated burglary, violating a restraining order, and resisting arrest. Indictment, Apr. 27, 2010. At his jury trial, the defense argued that he should be acquitted because the restraining order was not properly served. The trial court rejected the argument, and in its closing argument, the State emphasized that merely being aware of the existence of a protection order is sufficient to create criminal liability for violating that order:

The law sets a completely lower bar for count two, violation of a protection order. In respect to what the defendant knew or should have known when he committed the offense of violating a protection order. I want you to pay attention to the instructions the judge gives you. There is not going to be a requirement that Mr. Smith was served by a deputy sheriff or by a process server. There is no requirement. If he was reckless as to the existence of it and he violated it anyway, he is guilty. She made him aware the night before showed him a copy. He acted recklessly and he recklessly violated that protection order when he returned the next day to commit the aggravated burglary.

T.p. Vol. II, 14-15.

The jury convicted Robert on all three counts. The trial court sentenced him to five years in prison for the aggravated burglary (F1) consecutive to two years for violating the restraining order (F3). The thirty-day sentence for resisting arrest (M2) was run concurrently to the other sentences. *Id.* at 81.

Robert appealed the convictions, again arguing that his conviction for violating the restraining order should be vacated due to lack of service. The State did not raise any procedural defenses in the court of appeals, which ruled on the merits of his claim. The Tenth District Court of appeals affirmed the conviction, but noted in the opinion that the First and Fifth Districts would have come to a different conclusion. Opinion at ¶ 17. This Court then accepted Robert's timely discretionary appeal.

Argument

Proposition of Law:

A defendant can only be convicted of violating a protection order under R.C. 2919.27 if that order has been lawfully served.

By the terms of R.C. 2919.27, a civil protection order is not criminally enforceable unless it is “issued . . . pursuant to section 2919.26[.]” That section requires service upon the defendant. R.C. 2919.26(G)(1) (“[t]he court shall direct that a copy of the order be delivered to the defendant on the same day that the order is entered”). Accordingly, when an order is not served, it has not yet been “issued . . . pursuant to section 2919.26[.]”

The Fifth District explains the correct position because it relies on a doctrine that this Court has repeatedly reaffirmed—criminal statutes must be strictly construed against the State. *State v. Malone*, 121 Ohio St. 3d 244 (2009-Ohio-310), ¶ 13 (quoting R.C. 2901.04(A)). As the Fifth District noted, “The protection order statute makes criminal conduct that would otherwise be legal; therefore, the statute’s requirements must be strictly construed in favor of the defendant and against the state.” *State v. Mohabir*, 5th Dist. No. 04CA17, 2005-Ohio-78, ¶ 34.

The consequences of the violation of a restraining order are so severe that the State must comply with the service of process requirement. As Judge Richard Rogers has explained:

The first offense is a misdemeanor of the first degree, punishable by up to six months in jail and a fine of up to \$ 1,000. Such penalties would seriously impact anyone's life, including his or her ability to remain employed. Furthermore, the second offense

becomes a felony. While misdemeanor offenses are sometimes trivialized, because maximum penalties are rarely imposed for first offenses, the potential long-term impact demands that we require due diligence by the State; first to determine whether the protection order has actually been served on a respondent . . . and then, to be prepared to prove such service beyond a reasonable doubt.

State v. Bombardiere, 3d Dist. No. 14-06-27, 2007-Ohio-1537 (Rogers, P.J., dissenting), ¶ 25.

Judge Rogers is correct. Proper service should also be required because the orders themselves place significant limits on personal liberty with no pre-deprivation due process for the defendant. Protection orders can prevent defendants from coming near their own homes, driving their own cars, or taking care of their own children. R.C. 3113.31(E)(1)(b), (c), (d), (g), and (h). The orders can include a ban on any consumption of alcohol—even having a beer with dinner can be a misdemeanor the first time, and a felony the second. Supreme Court of Ohio, *Form 10.01-(H), Domestic Violence Civil Protection Order (CPO) Ex Parte*, (July 1, 2010), http://www.sconet.state.oh.us/JCS/domesticViolence/protection_forms/DVForms/default.asp (zccessed February 7, 2012).

Relying on the reckless mens rea does not alleviate the problems that result from failing to require the State to show that the order was issued “pursuant to R.C. 2919.26[.]” For example, the First District considered an alleged violation of an order that the defendant was not given his statutory right to contest. In *State v. Franklin*, 1st Dist. App. No. C-000544, 2001 Ohio App. LEXIS 2727 (June 22, 2001). Under the State’s theory, a defendant would

be criminally liable for violating a restraining order issued based on easily-refuted perjury, because that defendant was never given a his right to contest the claims.

Further, proper service by law enforcement or a neutral party matters, because service by a law enforcement officer demonstrates to the defendant the legality of the order. Here, a 31 year-old woman showed her emotionally and psychologically disturbed 18-year-old ex-boyfriend three pieces of paper and then told the ex-boyfriend that he has to stay away. Given the status of their relationship, Robert Smith had no reason to believe Ms. Pickens' assertions—especially because there is no evidence that she allowed him to read the order.

Moreover, there is no evidence that the State complied with the service requirements of R.C. 2919.26 before the incident in question. To properly serve a defendant, the State must personally serve the defendant, and the process server cannot be a party to the action. Civ.R. 4.1(B) (process may be served by “any person not less than eighteen years of age, who is not a party and who has been designated by order of the court to make service of process.”) Because there is no non-hearsay evidence that the complaint and order were ever served, and no evidence that the order was served before the alleged conduct in this case, the State did not show that the order was issued “pursuant to section 2919.26[.]” R.C. 2929.27(A)(1).

The protection order was directly relevant not only to the charge of violating a protective order, but also to the aggravated burglary conviction. The parties disputed whether Mr. Smith resided at the home where he met Ms.

Pickens, and the State used the protection order as a reason why Mr. Smith was not privileged to be in that house. T.p. Vol. II, 11 (“He had no right to be in her house. He was in violation of a protection order she had given him in doing so.”)

Applying the service requirement does not leave domestic violence victims or prosecutors defenseless. Defendants who commit assault, felonious assault, domestic violence, burglary or other crimes may still be prosecuted for those offenses. But because the State did not prove that the protection order was enforceable, the evidence was insufficient to convict Mr. Smith beyond a reasonable doubt of violating a protection order. *In re Winship*, 397 U.S. 358 (1970). And even though the evidence is sufficient to prove aggravated burglary, that charge should be reversed and remanded for a new trial because the jury based its conviction, in part, on an unenforceable order.

Conclusion

The State did not take the steps needed to make the protection order in this case enforceable. As a result, this Court should vacate Robert Smith’s convictions for violating a protection order and aggravated burglary, discharge Mr. Smith as to the protection order charge, and remand the case for a new trial on the charge of aggravated burglary.

Respectfully submitted,

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Certification of Service

This is to certify that a copy of the foregoing **Merit Brief of Appellant Robert L. Smith, Jr.** was forwarded by regular U.S. Mail, postage prepaid to the office of Sheryl Prichard, Assistant Franklin County Prosecutor, Hall of Justice, 373 S. High Street, 14th Floor, Columbus, Ohio 43215 this 30th day of July, 2012.



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IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	
	:	Case No. 2012-239
Plaintiff-Appellee,	:	
	:	On Appeal from the Franklin
v.	:	County Court of Appeals
	:	Tenth Appellate District
ROBERT L. SMITH, JR.,	:	
	:	Court of Appeals
Defendant-Appellant.	:	Case No. 11AP-512

Appendix to

Merit Brief of Appellant Robert L. Smith, Jr.

IN THE SUPREME COURT OF OHIO

STATE OF OHIO,	:	Case No.	12-0239
Plaintiff-Appellee,	:	On Appeal from the Franklin	
v.	:	County Court of Appeals	
ROBERT L. SMITH, JR.,	:	Tenth Appellate District	
Defendant-Appellant.	:	Court of Appeals	
	:	Case No. 11AP-512	

Notice of Appeal of Appellant Robert L. Smith, Jr.

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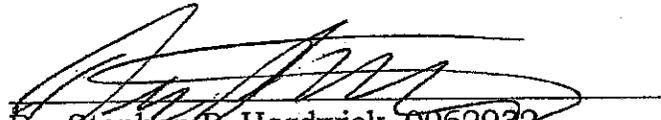
Notice of Appeal of Appellant Robert L. Smith, Jr.

Appellant Robert L. Smith, Jr., hereby gives notice of appeal to the Supreme Court of Ohio from the Decision and Journal Entry of the Franklin County Court of Appeals, Ten Appellate District, entered in Court of Appeals' Case No. 11AP-512 on December 27, 2011.

This case raises a substantial constitutional question, involves a felony, and is of public or great general interest.

Respectfully submitted,

Office of the Ohio Public Defender

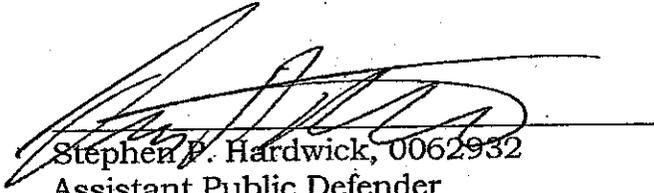

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Certification of Service

This is to certify that a copy of the foregoing **Notice of Appeal of Appellant Robert L. Smith, Jr.** was forwarded by regular U.S. Mail, postage prepaid to the office of Susan M. Suriano, Assistant Franklin County Prosecutor, Hall of Justice, 373 S. High Street, 14th Floor, Columbus, Ohio 43215 this 8th day of February, 2012.



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#361700

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IN THE COURT OF APPEALS OF OHIO
TENTH APPELLATE DISTRICT

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FRANKLIN COUNTY, OHIO

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State of Ohio, :

Plaintiff-Appellee, :

v. :

Robert L. Smith, Jr., :

Defendant-Appellant. :

No. 11AP-512

(C P C No. 10CR-2564) ✓

(REGULAR CALENDAR)

JUDGMENT ENTRY

For the reasons stated in the decision of this court rendered herein on December 27, 2011, appellant's three assignments of error are overruled, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is affirmed. Costs shall be assessed against appellant.

DORRIAN, KLATT & TYACK, JJ.

By _____

Julia L. Dorian
Judge Julia L. Dorian

THE STATE OF OHIO }
Franklin County, ss }
LIZ WELLS-TYACK, BUSINESS Clerk
OF THE COURT OF APPEALS
HEREBY CERTIFY THAT THE ABOVE AND FOREGOING IS TRULY TAKEN
AND COPIED FROM THE ORIGINAL
NOW ON FILE IN THE OFFICE OF THE CLERK OF THE COURT OF APPEALS
COUNTY THIS 28th DAY OF DECEMBER 2011
D.W.C. (Signature)
MARYELLEN O'SHAUGHNESSY, Clerk
By _____

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FRANKLIN CO., OHIO
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CLERK OF COURTS

State of Ohio, :

Plaintiff-Appellee, :

v. :

Robert L. Smith, Jr., :

Defendant-Appellant. :

No. 11AP-512
(C.P.C. No. 10CR-2564) ✓

(REGULAR CALENDAR)

D E C I S I O N

Rendered on December 27, 2011

Ron O'Brien, Prosecuting Attorney, and Susan M. Suriano, for appellee.

W. Joseph Edwards, for appellant.

APPEAL from the Franklin County Court of Common Pleas.

DORRIAN, J.

{¶1} Defendant-appellant, Robert L. Smith, Jr. ("appellant"), appeals from jury verdicts convicting him on charges of aggravated burglary, violating a protection order, and resisting arrest. For the reasons that follow, we affirm.

{¶2} Appellant was involved in a relationship with the victim, Shasta Pickens ("Pickens"). For a time, they lived together in Pickens' house at 879 Camden Avenue ("the house"). However, in early 2010, there was an altercation, and Pickens kicked appellant out of the house. On April 12, 2010, Pickens applied for and was granted an ex parte protection order providing that, among other restrictions, appellant was required to

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stay 500 feet away from Pickens, was not to enter her residence, and was not to initiate or have any contact with her. It appears that this order was not served on appellant until April 17, but Pickens stated that she showed appellant a copy of the order on April 16 and explained that he was not permitted to have contact with her.

{¶3} During the morning of April 17, 2010, Pickens was preparing food in her kitchen when she heard a loud noise in her basement. She opened the door to the basement stairs and saw appellant coming up the stairs toward her. Appellant grabbed Pickens by the neck and put her in a chokehold. Pickens struggled against him, but he pushed her into a wall and punched her. At some point during this altercation, appellant also bit Pickens on the back. The altercation ended when Pickens' son and his friend arrived at the house. Pickens was able to sneak away and call 911. Pickens called 911 twice; on the first call, she did not say anything and hung up, and on the second call, she just asked them to come to 879 Camden Avenue.

{¶4} Columbus Police Officers Benjamin Rohaley ("Officer Rohaley") and Jayson Bear ("Officer Bear") responded within a few minutes of the calls. When the officers knocked on the door, appellant went to the basement and tried to flee through the same window he had used to enter the house. Officer Rohaley secured the outside of the house while Officer Bear pursued appellant into the basement. Appellant struggled with Officer Bear, and Officer Rohaley went to the basement to assist in subduing him. Ultimately, two additional police officers arrived. Appellant continued to struggle, and one of the officers used a taser to subdue appellant and place him in custody.

{¶5} Appellant was indicted on charges of aggravated burglary, violating a protection order, domestic violence, and resisting arrest. The case was tried to a jury. At

the close of the state's case, the trial court granted the state's motion to amend the resisting arrest count from a felony to a misdemeanor offense. Appellant moved for acquittal on all counts under Crim.R. 29. The trial court granted appellant's motion for acquittal as to the domestic violence charge and denied it as to all other counts. The jury found appellant guilty of aggravated burglary, violating a protection order, and resisting arrest. The trial court sentenced appellant to five years of imprisonment on the aggravated burglary conviction and two years of imprisonment on the violating a protection order conviction, with the sentences to be served consecutively for a total of seven years of imprisonment. The trial court also sentenced appellant to 30 days of imprisonment on the resisting arrest conviction, to be served concurrently with his sentences on the other two convictions.

{¶6} Appellant appeals his convictions,¹ setting forth the following three assignments of error for this court's review:

I. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN A CONVICTION[.]

II. THE TRIAL COURT ERRED IN OVERRULING APPELLANT'S MOTION FOR ACQUITTAL PURSUANT TO CRIMINAL RULE 29[.]

III. THE TRIAL COURT ERRED WHEN IT ENTERED JUDGMENT AGAINST THE APPELLANT WHEN THE CONVICTION AND [sic] WAS NOT SUPPORTED BY THE MANIFEST WEIGHT OF THE EVIDENCE[.]

¹ Although the assignments of error do not differentiate between the three convictions, appellant's arguments focus exclusively on the aggravated burglary and violating protection order convictions. Thus, we conclude that appellant does not challenge his conviction on the resisting arrest charge and do not address it herein.

{¶7} Appellant's first assignment of error asserts that the evidence was insufficient to sustain guilty verdicts on the charges of aggravated burglary and violating a protective order. His second assignment of error contends that the trial court erred in denying his motion under Crim.R. 29 for acquittal on those charges. "Because a Crim.R. 29 motion questions the sufficiency of the evidence, '[w]e apply the same standard of review to Crim.R. 29 motions as we use in reviewing the sufficiency of the evidence.'" *State v. Walburg*, 10th Dist. No. 10AP-1087, 2011-Ohio-4762, ¶11, quoting *State v. Hernandez*, 10th Dist. No. 09AP-125, 2009-Ohio-5128, ¶6. Accordingly, we will consider appellant's first and second assignments of error together.

{¶8} "Sufficiency of the evidence is a legal standard that tests whether the evidence introduced at trial is legally sufficient to support a verdict." *State v. Cassell*, 10th Dist. No. 08AP-1093, 2010-Ohio-1881, ¶36, citing *State v. Thompkins*, 78 Ohio St.3d 380, 386, 1997-Ohio-52. In reviewing a challenge to the sufficiency of the evidence, an appellate court must determine "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt." *State v. Jenks* (1991), 61 Ohio St.3d 259, paragraph two of the syllabus, superseded by constitutional amendment on other grounds as recognized in *State v. Smith*, 80 Ohio St.3d 89, 102, 1997-Ohio-355.

{¶9} Appellant generally argues that the evidence was insufficient to sustain the convictions because Pickens was the only witness who testified that appellant broke into the house and that appellant had seen the protection order before April 17, 2010. However, "the testimony of one witness, if believed by the jury, is enough to support a conviction." *State v. Strong*, 10th Dist. No. 09AP-874, 2011-Ohio-1024, ¶42. Appellant

also challenges Pickens' credibility, based on her prior felony convictions, admitted drug use, and alleged variations between her statement to the prosecutor and her trial testimony. However, credibility challenges are more directly addressed to the weight rather than the sufficiency of the evidence. See *Columbus v. Miller*, 10th Dist. No. 09AP-770, 2010-Ohio-1384, ¶26, citing *Thompkins* at 387 ("Unlike a challenge to the sufficiency of the evidence, which attacks the adequacy of the evidence presented, a challenge to the manifest weight of the evidence attacks the credibility of the evidence presented.") Accordingly, we will address appellant's credibility arguments in our analysis of his challenge to the weight of the evidence.

¶10 We begin by considering whether there was sufficient evidence to sustain the conviction for aggravated burglary. R.C. 2911.11(A) defines aggravated burglary and provides as follows:

No person, by force, stealth, or deception, shall trespass in an occupied structure or in a separately secured or separately occupied portion of an occupied structure, when another person other than an accomplice of the offender is present, with purpose to commit in the structure or in the separately secured or separately occupied portion of the structure any criminal offense, if any of the following apply:

- (1) The offender inflicts, or attempts or threatens to inflict physical harm on another;
- (2) The offender has a deadly weapon or dangerous ordnance on or about the offender's person or under the offender's control.

{¶11} Appellant argues there was insufficient evidence that he trespassed on the residence or that he inflicted, attempted, or threatened to inflict physical harm.² For purposes of aggravated burglary, "trespass" is defined as a violation of the statute defining criminal trespassing. R.C. 2911.10. That statute, in relevant part, provides that "[n]o person, without privilege to do so, shall * * * [k]nowingly enter or remain on the land or premises of another." R.C. 2911.21(A)(1). "A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). "Physical harm" includes "any injury, illness, or other physiological impairment, regardless of its duration." R.C. 2901.01(A)(3).

{¶12} Pickens testified that she previously had a romantic relationship with appellant and that they lived together at the house. However, she stated that she kicked appellant out of the house in early 2010. Pickens stated that, after she kicked appellant out, he was not allowed back in the house. She confirmed that appellant was not living in or staying in the house in April 2010. Pickens testified that on the morning of April 17, she heard a "big bang" from the basement and that it was the sound of appellant entering the residence through a basement window. (Tr. 59.) She identified photos of the open basement window that appellant used to enter the house. Pickens and Officer Rohaley testified that, after the police arrived, appellant sought to flee through the basement window. The jury could reasonably infer that appellant attempted to flee through the same known point of access that he used to enter the residence. If believed, this testimony,

² Appellant also argues that there was insufficient evidence that he had a deadly weapon on or about his person or under his control to support a conviction under R.C. 2911.11(A)(2). However, in order to convict on a charge of aggravated burglary, a jury need find only that the state proved beyond a reasonable doubt either the element of physical harm per R.C. 2911.11(A)(1) or a deadly weapon per R.C. 2911.11(A)(2). It is

taken as a whole, would be sufficient to permit a jury to find that appellant knowingly entered the house without the privilege to be there, thus establishing the criminal trespass element of aggravated burglary.

{¶13} Pickens testified that, after she heard the bang, she opened the door and saw appellant coming up the basement stairs. Appellant grabbed Pickens by the neck and put her in a chokehold. Pickens testified that they struggled as she tried to get out of the chokehold and that appellant hit her with his fist. She stated that appellant also bit her during the struggle. Pickens testified that she suffered bruises on her arms and a bite mark on her back. Officer Rohaley testified that, when he arrived, Pickens told him a similar story, stating that appellant choked her nearly to the point of losing consciousness and that appellant pulled her hair and struck her against the wall. This evidence would be sufficient to establish that appellant inflicted physical harm on Pickens. See *State v. West*, 10th Dist. No. 06AP-114, 2006-Ohio-5095, ¶17 (victim's testimony that defendant hit her in the head, knocked her to the ground, kicked her, and repeatedly choked her, if believed, was sufficient evidence to find that defendant caused or attempted to cause physical harm).

{¶14} Appellant also asserts that the evidence was insufficient to sustain his conviction for violating a protection order. The law provides that "[n]o person shall recklessly violate the terms of * * * [a] protection order issued pursuant to section 2151.34, 2903.213, or 2903.214 of the Revised Code." R.C. 2919.27(A)(2). "A person acts recklessly when, with heedless indifference to the consequences, he perversely

not necessary to find both. Therefore, we address only the physical harm element and not the deadly weapon argument herein.

disregards a known risk that his conduct is likely to cause a certain result or is likely to be of a certain nature." R.C. 2901.22(C). Appellant argues that there was insufficient evidence to establish that he knew there was a protection order in place and, thus, he could not have recklessly violated the order by disregarding a known risk that his conduct would violate the order.

{¶15} The record indicates that, on April 12, 2010, following an ex parte hearing, the Franklin County Court of Common Pleas issued a protection order under R.C. 2903.214 to Pickens. The order included a provision directing the clerk of courts to cause a copy of the order to be delivered to appellant. The return of service for the order indicates that it was served on appellant on April 17, 2010. However, Pickens testified that, on the day before the incident, April 16, she showed appellant a copy of the protection order and told him that he was not allowed to be around her. Pickens stated that appellant was angry about this development. Pickens' testimony was the only evidence introduced to establish that appellant was aware of the existence of the protection order.

{¶16} The Ninth District Court of Appeals considered a similar scenario in *State v. Bunch* (Jan. 17, 2001), 9th Dist. No. 20059. In that case, the defendant's former girlfriend, Deborah Majka ("Majka"), obtained a civil protection order pursuant to R.C. 3113.31. The defendant did not appear at the hearing on the order, and the court's attempt to serve the order by certified mail went unclaimed. The following year the defendant was charged with violating the order by going to Majka's apartment. At trial, Majka testified that a few months after the order was issued she had been at a Christmas event when the defendant arrived. Majka immediately began to leave, but the defendant

asked her to stay. Majka told the defendant she had a protection order against him and testified that he responded "I know." The defendant argued that he could not have recklessly violated the protection order by going to Majka's apartment because he was never served with a copy of the order and, therefore, could not be said to have disregarded a known risk that his conduct would violate the order. The appellate court rejected this argument, noting that service of a protection order was not an element of the crime of violating a protection order. The court found that Majka's testimony was sufficient evidence to establish that the defendant recklessly violated the order. See also *State v. Rutherford*, 2d Dist. No. 08CA11, 2009-Ohio-2071, citing *Bunch* ("R.C. 2919.27(A) does not make service of a civil protection order an element of the offense of violation of a civil protection order."); *State v. Bombardiere*, 3d Dist. No. 14-06-27, 2007-Ohio-1537, ¶16 ("[T]here was no direct evidence in the record that specifically stated that [defendant] was served, [but] he did readily admit in his testimony that he knew the terms of the civil protection order[.] * * * We conclude that this evidence was sufficient to establish that he did have adequate notice of the terms of the civil protection order.") We agree with the reasoning of the *Bunch* decision and reach the same conclusion here.

{¶17} We do note, however, that the Fifth District Court of Appeals has held that the due process requirements of R.C. 2919.26 require a defendant be served with a temporary protection order before he can be found to have violated that order. *State v. Mohabir*, 5th Dist. No. 04CA17, 2005-Ohio-78, ¶¶34-35. See also *Bombardiere* at ¶¶22-26 (Rogers, P.J., dissenting) (arguing that conviction for violating a protection order should be reversed based on *Mohabir* because state failed to prove that order had been served on the defendant). R.C. 2919.26(G)(1) requires that a copy of an ex parte protection order

"be issued by the court to * * * defendant * * * [and] [t]he court shall direct that a copy of the order be delivered to defendant on the same day that the order is entered." Nevertheless, after reviewing the statute, we reach a different conclusion. Service of the protection order on the defendant is not an element of the crime of violating a protection order, as defined in R.C. 2919.27(A). The General Assembly could have required the prosecution to establish service of the order as an element of proving a violation of a protective order, or could have mirrored the language in R.C. 2919.26(G), but it did not. Therefore, we decline to expand the statute to require prior service of the order on a defendant before a violation can be established.

{¶18} Pickens testified that she showed appellant a copy of the order and explained that he could not be around her. This testimony, if believed, would permit a reasonable jury to conclude that appellant knew about the order when he broke into Pickens' house on April 17, 2010. A jury could further conclude that appellant knew that there was a risk that his conduct would violate the order and that he acted recklessly by disregarding such risk. Therefore, the evidence was sufficient to permit the jury to conclude that appellant was guilty of violating the protection order.

{¶19} For all these reasons, we conclude that appellant's convictions for aggravated burglary and violating a protection order were supported by sufficient evidence. Accordingly, appellant's first and second assignments of error are without merit and are overruled.

{¶20} In his third assignment of error, appellant argues that his convictions for aggravated burglary and violating a protection order are against the manifest weight of the evidence.

{¶21} "While sufficiency of the evidence is a test of adequacy regarding whether the evidence is legally sufficient to support the verdict as a matter of law, the criminal manifest weight of the evidence standard addresses the evidence's effect of inducing belief." *Cassell* at ¶38, citing *State v. Wilson*, 113 Ohio St.3d 382, 2007-Ohio-2202, citing *Thompkins* at 386. "When a court of appeals reverses a judgment of a trial court on the basis that the verdict is against the weight of the evidence, the appellate court sits as a 'thirteenth juror' and disagrees with the factfinder's resolution of the conflicting testimony." *Thompkins* at 387, citing *Tibbs v. Florida* (1982), 457 U.S. 31, 42, 102 S.Ct. 2211, 2220. "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." *Thompkins*, quoting *State v. Martin* (1983), 20 Ohio App.3d 172, 175. This discretionary authority "should be exercised only in the exceptional case in which the evidence weighs heavily against the conviction." *Id.*

{¶22} Appellant argues that his convictions were against the manifest weight of the evidence because Pickens provided the only testimony to establish her injuries and appellant's knowledge of the protection order. At trial, Pickens admitted that she had previously been convicted of multiple felony charges, including receiving stolen property and forgery. Pickens also admitted that she had twice violated her probation and that she had been sent to prison after the second probation violation. Further, Pickens admitted that she had used drugs, including marijuana and cocaine, with appellant. Appellant argues that Pickens' prior convictions of crimes involving deception and history of drug

use make her an unreliable witness and that her testimony was not credible.

{¶23} "[A]lthough an appellate court must act as a 'thirteenth juror' when considering whether the manifest weight of the evidence requires reversal, it must give great deference to the fact finder's determination of the witnesses' credibility." *State v. Spires*, 10th Dist. No. 10AP-861, 2011-Ohio-3312, ¶18. In this case, the jury was made aware of Pickens' prior convictions, probation violations, and drug use through her direct testimony and through cross-examination. Thus, the jury could properly weigh this information in determining whether Pickens' testimony was credible. After reviewing the evidence presented at trial, we find no reason to overturn the jury's determination as to her credibility.

{¶24} With respect to the aggravated burglary charge, Pickens testified that appellant broke into the house through a basement window. Both Pickens and Officer Rohaley testified that appellant attempted to flee through the same basement window. As noted above, the attempt to flee through an open basement window is circumstantial evidence that the same window had been appellant's point of entry into the house. Further, this suggests that appellant knew he was not allowed to be there because he did not attempt to enter the house through the door. Pickens also testified to the bruises on her arms and the bite mark on her back. On cross-examination, she conceded that there were no photographs of her injuries and no way to verify them other than her testimony. Pickens also conceded that she did not tell the prosecutor that appellant struck her with his fist during an interview several months before trial. However, during her testimony, Pickens also reviewed the statement she made to the police on the day of the incident. That statement did not indicate that appellant punched her, but it was otherwise

consistent with her trial testimony. Despite a lack of physical evidence to corroborate Pickens' injuries and some inconsistency in her statements as to whether appellant struck her with his fist, we cannot conclude that the jury clearly lost its way in finding that appellant was guilty of aggravated burglary.

{¶25} Pickens' testimony constituted the only evidence to establish that appellant violated the protection order. She testified that she showed appellant a copy of the order on the day before the incident and told him he was not allowed to be around her. Additionally, she testified that, as appellant was coming up the basement stairs after breaking in the basement, he said "yeah, bitch, you thought it was over." (Tr. 60.) The jury could reasonably infer that this statement indicated that appellant was aware of the protection order—i.e., appellant believed that Pickens "thought it was over" because she had obtained a protection order, which was intended to keep appellant away from her. Again, we cannot conclude that the jury clearly lost its way in believing Pickens' testimony and finding appellant guilty of violating the protection order.

{¶26} For all these reasons, we conclude that appellant's convictions for aggravated burglary and violating a protection order were not against the manifest weight of the evidence. Accordingly, appellant's third assignment of error is without merit and is overruled.

{¶27} For the foregoing reasons, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas is hereby affirmed.

Judgment affirmed.

KLATT and TYACK, JJ., concur.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2901. GENERAL PROVISIONS
IN GENERAL

ORC Ann. 2901.04 (2012)

§ 2901.04. Rules of construction; references to previous conviction; interpretation of statutory references that define or specify a criminal offense

(A) Except as otherwise provided in division (C) or (D) of this section, sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

(C) Any provision of a section of the Revised Code that refers to a previous conviction of or plea of guilty to a violation of a section of the Revised Code or of a division of a section of the Revised Code shall be construed to also refer to a previous conviction of or plea of guilty to a substantially equivalent offense under an existing or former law of this state, another state, or the United States or under an existing or former municipal ordinance.

(D) Any provision of the Revised Code that refers to a section, or to a division of a section, of the Revised Code that defines or specifies a criminal offense shall be construed to also refer to an existing or former law of this state, another state, or the United States, to an existing or former municipal ordinance, or to an existing or former division of any such existing or former law or ordinance that defines or specifies, or that defined or specified, a substantially equivalent offense.

HISTORY:

134 v H 511 (Eff 1-1-74); 148 v S 107. Eff 3-23-2000; 150 v S 146, § 1, eff. 9-23-04.

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TITLE 29. CRIMES -- PROCEDURE
CHAPTER 2919. OFFENSES AGAINST THE FAMILY
DOMESTIC VIOLENCE

ORC Ann. 2919.26 (2012)

§ 2919.26. Motion for temporary protection order; form

(A) (1) Upon the filing of a complaint that alleges a violation of *section 2909.06, 2909.07, 2911.12, or 2911.211 [2911.21.1] of the Revised Code* if the alleged victim of the violation was a family or household member at the time of the violation, a violation of a municipal ordinance that is substantially similar to any of those sections if the alleged victim of the violation was a family or household member at the time of the violation, any offense of violence if the alleged victim of the offense was a family or household member at the time of the commission of the offense, or any sexually oriented offense if the alleged victim of the offense was a family or household member at the time of the commission of the offense, the complainant, the alleged victim, or a family or household member of an alleged victim may file, or, if in an emergency the alleged victim is unable to file, a person who made an arrest for the alleged violation or offense under *section 2935.03 of the Revised Code* may file on behalf of the alleged victim, a motion that requests the issuance of a temporary protection order as a pretrial condition of release of the alleged offender, in addition to any bail set under *Criminal Rule 46*. The motion shall be filed with the clerk of the court that has jurisdiction of the case at any time after the filing of the complaint.

(2) For purposes of *section 2930.09 of the Revised Code*, all stages of a proceeding arising out of a complaint alleging the commission of a violation, offense of violence, or sexually oriented offense described in division (A)(1) of this section, including all proceedings on a motion for a temporary protection order, are critical stages of the case, and a victim may be accompanied by a victim advocate or another person to provide support to the victim as provided in that section.

(B) The motion shall be prepared on a form that is provided by the clerk of the court, which form shall be substantially as follows:

"MOTION FOR TEMPORARY PROTECTION ORDER
..... Court

Name and address of court

State of Ohio

v.

No.

.....

Name of Defendant

(name of person), moves the court to issue a temporary protection order containing terms designed to ensure the safety and protection of the complainant, alleged victim, and other family or household members, in relation to the named defendant, pursuant to its authority to issue such an order under *section 2919.26 of the Revised Code*.

A complaint, a copy of which has been attached to this motion, has been filed in this court charging the named defendant with (name of the specified violation, the offense of violence, or sexually oriented offense charged) in circumstances in which the victim was a family or household member in violation of (section of the Revised Code designating the specified violation, offense of violence, or sexually oriented offense charged), or charging the named defendant with a violation of a municipal ordinance that is substantially similar to (section of the Revised Code designating the specified violation, offense of violence, or sexually oriented offense charged) involving a family or household member.

I understand that I must appear before the court, at a time set by the court within twenty-four hours after the filing of this motion, for a hearing on the motion or that, if I am unable to appear because of hospitalization or a medical condition resulting from the offense alleged in the complaint, a person who can provide information about my need for a temporary protection order must appear before the court in lieu of my appearing in court. I understand that any temporary protection order granted pursuant to this motion is a pretrial condition of release and is effective only until the disposition of the criminal proceeding arising out of the attached complaint, or the issuance of a civil protection order or the approval of a consent agreement, arising out of the same activities as those that were the basis of the complaint, under *section 3113.31 of the Revised Code*.

.....

Signature of person

(or signature of the arresting officer who filed the motion on behalf of the alleged victim)

.....
 Address of person (or office address of the arresting officer who filed the motion on behalf of the alleged victim)"

(C) (1) As soon as possible after the filing of a motion that requests the issuance of a temporary protection order, but not later than twenty-four hours after the filing of the motion, the court shall conduct a hearing to determine whether to issue the order. The person who requested the order shall appear before the court and provide the court with the information that it requests concerning the basis of the motion. If the person who requested the order is unable to appear and if the court finds that the failure to appear is because of the person's hospitalization or medical condition resulting from the offense alleged in the complaint, another person who is able to provide the court with the information it requests may appear in lieu of the person who requested the order. If the court finds that the safety and protection of the complainant, alleged victim, or any other family or household member of the alleged victim may be impaired by the continued presence of the alleged offender, the court may issue a temporary protection order, as a pretrial condition of release, that contains terms designed to ensure the safety and protection of the complainant, alleged victim, or the family or household member, including a requirement that the alleged offender refrain from entering the residence, school, business, or place of employment of the complainant, alleged victim, or the family or household member.

(2) (a) If the court issues a temporary protection order that includes a requirement that the alleged offender refrain from entering the residence, school, business, or place of employment of the complainant, the alleged victim, or the family or household member, the order shall state clearly that the order cannot be waived or nullified by an invitation to the alleged offender from the complainant, alleged victim, or family or household member to enter the residence, school, business, or place of employment or by the alleged offender's entry into one of those places otherwise upon the consent of the complainant, alleged victim, or family or household member.

(b) Division (C)(2)(a) of this section does not limit any discretion of a court to determine that an alleged offender charged with a violation of *section 2919.27 of the Revised Code*, with a violation of a municipal ordinance substantially equivalent to that section, or with contempt of court, which charge is based on an alleged violation of a temporary protection order issued under this section, did not commit the violation or was not in contempt of court.

(D) (1) Upon the filing of a complaint that alleges a violation of *section 2909.06, 2909.07, 2911.12, or 2911.211 [2911.21.1] of the Revised Code* if the alleged victim of the violation was a family or household member at the time of the violation, a violation of a municipal ordinance that is substantially similar to any of those sections if the alleged victim of the violation was a family or household member at the time of the violation, any offense of violence if the alleged victim of the offense was a family or household member at the time of the commission of the offense, or any sexually oriented offense if the alleged victim of the offense was a family or household member at the time of the commission of the offense, the court, upon its own motion, may issue a temporary protection order as a pretrial condition of release if it finds that the safety and protection of the complainant, alleged victim, or other family or household member of the alleged offender may be impaired by the continued presence of the alleged offender.

(2) If the court issues a temporary protection order under this section as an ex parte order, it shall conduct, as soon as possible after the issuance of the order, a hearing in the presence of the

alleged offender not later than the next day on which the court is scheduled to conduct business after the day on which the alleged offender was arrested or at the time of the appearance of the alleged offender pursuant to summons to determine whether the order should remain in effect, be modified, or be revoked. The hearing shall be conducted under the standards set forth in division (C) of this section.

(3) An order issued under this section shall contain only those terms authorized in orders issued under division (C) of this section.

(4) If a municipal court or a county court issues a temporary protection order under this section and if, subsequent to the issuance of the order, the alleged offender who is the subject of the order is bound over to the court of common pleas for prosecution of a felony arising out of the same activities as those that were the basis of the complaint upon which the order is based, notwithstanding the fact that the order was issued by a municipal court or county court, the order shall remain in effect, as though it were an order of the court of common pleas, while the charges against the alleged offender are pending in the court of common pleas, for the period of time described in division (E)(2) of this section, and the court of common pleas has exclusive jurisdiction to modify the order issued by the municipal court or county court. This division applies when the alleged offender is bound over to the court of common pleas as a result of the person waiving a preliminary hearing on the felony charge, as a result of the municipal court or county court having determined at a preliminary hearing that there is probable cause to believe that the felony has been committed and that the alleged offender committed it, as a result of the alleged offender having been indicted for the felony, or in any other manner.

(E) A temporary protection order that is issued as a pretrial condition of release under this section:

(1) Is in addition to, but shall not be construed as a part of, any bail set under *Criminal Rule 46*;

(2) Is effective only until the occurrence of either of the following:

(a) The disposition, by the court that issued the order or, in the circumstances described in division (D)(4) of this section, by the court of common pleas to which the alleged offender is bound over for prosecution, of the criminal proceeding arising out of the complaint upon which the order is based;

(b) The issuance of a protection order or the approval of a consent agreement, arising out of the same activities as those that were the basis of the complaint upon which the order is based, under *section 3113.31 of the Revised Code*;

(3) Shall not be construed as a finding that the alleged offender committed the alleged offense, and shall not be introduced as evidence of the commission of the offense at the trial of the alleged offender on the complaint upon which the order is based.

(F) A person who meets the criteria for bail under *Criminal Rule 46* and who, if required to do so pursuant to that rule, executes or posts bond or deposits cash or securities as bail, shall not be held in custody pending a hearing before the court on a motion requesting a temporary protection order.

(G) (1) A copy of any temporary protection order that is issued under this section shall be issued by the court to the complainant, to the alleged victim, to the person who requested the order, to the

defendant, and to all law enforcement agencies that have jurisdiction to enforce the order. The court shall direct that a copy of the order be delivered to the defendant on the same day that the order is entered. If a municipal court or a county court issues a temporary protection order under this section and if, subsequent to the issuance of the order, the defendant who is the subject of the order is bound over to the court of common pleas for prosecution as described in division (D)(4) of this section, the municipal court or county court shall direct that a copy of the order be delivered to the court of common pleas to which the defendant is bound over.

(2) Upon the issuance of a protection order under this section, the court shall provide the parties to the order with the following notice orally or by form:

"NOTICE

As a result of this protection order, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition pursuant to federal law under *18 U.S.C. 922(g)(8)*. If you have any questions whether this law makes it illegal for you to possess or purchase a firearm or ammunition, you should consult an attorney."

(3) All law enforcement agencies shall establish and maintain an index for the temporary protection orders delivered to the agencies pursuant to division (G)(1) of this section. With respect to each order delivered, each agency shall note on the index, the date and time of the receipt of the order by the agency.

(4) A complainant, alleged victim, or other person who obtains a temporary protection order under this section may provide notice of the issuance of the temporary protection order to the judicial and law enforcement officials in any county other than the county in which the order is issued by registering that order in the other county in accordance with division (N) of *section 3113.31 of the Revised Code* and filing a copy of the registered protection order with a law enforcement agency in the other county in accordance with that division.

(5) Any officer of a law enforcement agency shall enforce a temporary protection order issued by any court in this state in accordance with the provisions of the order, including removing the defendant from the premises, regardless of whether the order is registered in the county in which the officer's agency has jurisdiction as authorized by division (G)(4) of this section.

(H) Upon a violation of a temporary protection order, the court may issue another temporary protection order, as a pretrial condition of release, that modifies the terms of the order that was violated.

(I) (1) As used in divisions (I)(1) and (2) of this section, "defendant" means a person who is alleged in a complaint to have committed a violation, offense of violence, or sexually oriented offense of the type described in division (A) of this section.

(2) If a complaint is filed that alleges that a person committed a violation, offense of violence, or sexually oriented offense of the type described in division (A) of this section, the court may not issue a temporary protection order under this section that requires the complainant, the alleged victim, or another family or household member of the defendant to do or refrain from doing an act that the court may require the defendant to do or refrain from doing under a temporary protection order unless both of the following apply:

(a) The defendant has filed a separate complaint that alleges that the complainant, alleged victim, or other family or household member in question who would be required under the order to

do or refrain from doing the act committed a violation or offense of violence of the type described in division (A) of this section.

(b) The court determines that both the complainant, alleged victim, or other family or household member in question who would be required under the order to do or refrain from doing the act and the defendant acted primarily as aggressors, that neither the complainant, alleged victim, or other family or household member in question who would be required under the order to do or refrain from doing the act nor the defendant acted primarily in self-defense, and, in accordance with the standards and criteria of this section as applied in relation to the separate complaint filed by the defendant, that it should issue the order to require the complainant, alleged victim, or other family or household member in question to do or refrain from doing the act.

(J) Notwithstanding any provision of law to the contrary and regardless of whether a protection order is issued or a consent agreement is approved by a court of another county or a court of another state, no court or unit of state or local government shall charge any fee, cost, deposit, or money in connection with the filing of a motion pursuant to this section, in connection with the filing, issuance, registration, or service of a protection order or consent agreement, or for obtaining a certified copy of a protection order or consent agreement.

(K) As used in this section:

(1) "Sexually oriented offense" has the same meaning as in *section 2950.01 of the Revised Code*.

(2) "Victim advocate" means a person who provides support and assistance for a victim of an offense during court proceedings.

HISTORY:

137 v H 835 (Eff 3-27-79); 138 v H 920 (Eff 4-9-81); 140 v H 587 (Eff 9-25-84); 143 v S 3 (Eff 4-11-91); 144 v H 536 (Eff 11-5-92); 145 v H 335 (Eff 12-9-94); 147 v S 1 (Eff 10-21-97); 147 v S 98 (Eff 3-17-98); 148 v H 137 (Eff 3-10-2000); 149 v H 548. Eff 3-31-2003; 150 v S 50, § 1, eff. 1-8-04; 151 v S 17, § 1, eff. 8-3-06; 151 v H 95, § 1, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 152 v H 562, § 101.01, eff. 6-24-08; 153 v H 238, § 1, eff. 9-8-10.

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TITLE 29. CRIMES -- PROCEDURE
 CHAPTER 2919. OFFENSES AGAINST THE FAMILY
 DOMESTIC VIOLENCE

ORC Ann. 2919.27 (2012)

§ 2919.27. Violating protection order

(A) No person shall recklessly violate the terms of any of the following:

(1) A protection order issued or consent agreement approved pursuant to *section 2919.26 or 3113.31 of the Revised Code*;

(2) A protection order issued pursuant to *section 2151.34, 2903.213 [2903.21.3], or 2903.214 [2903.21.4] of the Revised Code*;

(3) A protection order issued by a court of another state.

(B) (1) Whoever violates this section is guilty of violating a protection order.

(2) Except as otherwise provided in division (B)(3) or (4) of this section, violating a protection order is a misdemeanor of the first degree.

(3) If the offender previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for a violation of a protection order issued pursuant to *section 2151.34, 2903.213 [2903.21.3], or 2903.214 [2903.21.4] of the Revised Code*, two or more violations of *section 2903.21, 2903.211 [2903.21.1], 2903.22, or 2911.211 [2911.21.1] of the Revised Code* that involved the same person who is the subject of the protection order or consent agreement, or one or more violations of this section, violating a protection order is a felony of the fifth degree.

(4) If the offender violates a protection order or consent agreement while committing a felony offense, violating a protection order is a felony of the third degree.

(5) If the protection order violated by the offender was an order issued pursuant to *section 2151.34 or 2903.214 [2903.21.4] of the Revised Code* that required electronic monitoring of the offender pursuant to that section, the court may require in addition to any other sentence imposed upon the offender that the offender be electronically monitored for a period not exceeding five years by a law enforcement agency designated by the court. If the court requires under this division that the offender be electronically monitored, unless the court determines that the offender is indigent,

the court shall order that the offender pay the costs of the installation of the electronic monitoring device and the cost of monitoring the electronic monitoring device. If the court determines that the offender is indigent and subject to the maximum amount allowable and the rules promulgated by the attorney general under *section 2903.214 [2903.21.4] of the Revised Code*, the costs of the installation of the electronic monitoring device and the cost of monitoring the electronic monitoring device may be paid out of funds from the reparations fund created pursuant to *section 2743.191 [2743.19.1] of the Revised Code*. The total amount paid from the reparations fund created pursuant to *section 2743.191 [2743.19.1] of the Revised Code* for electronic monitoring under this section and *sections 2151.34 and 2903.214 [2903.21.4] of the Revised Code* shall not exceed three hundred thousand dollars per year.

(C) It is an affirmative defense to a charge under division (A)(3) of this section that the protection order issued by a court of another state does not comply with the requirements specified in *18 U.S.C. 2265(b)* for a protection order that must be accorded full faith and credit by a court of this state or that it is not entitled to full faith and credit under *18 U.S.C. 2265(c)*.

(D) As used in this section, "protection order issued by a court of another state" means an injunction or another order issued by a criminal court of another state for the purpose of preventing violent or threatening acts or harassment against, contact or communication with, or physical proximity to another person, including a temporary order, and means an injunction or order of that nature issued by a civil court of another state, including a temporary order and a final order issued in an independent action or as a pendente lite order in a proceeding for other relief, if the court issued it in response to a complaint, petition, or motion filed by or on behalf of a person seeking protection. "Protection order issued by a court of another state" does not include an order for support or for custody of a child issued pursuant to the divorce and child custody laws of another state, except to the extent that the order for support or for custody of a child is entitled to full faith and credit under the laws of the United States.

HISTORY:

140 v H 587 (Eff 9-25-84); 141 v H 475 (Eff 3-7-86); 144 v H 536 (Eff 11-5-92); 145 v H 335 (Eff 12-9-94); 146 v S 2 (Eff 7-1-96); 147 v S 1 (Eff 10-21-97); 147 v H 302 (Eff 7-29-98); 149 v H 548. Eff 3-31-2003; 150 v S 50, § 1, eff. 1-8-04; 152 v H 471, § 1, eff. 4-7-09; 153 v H 10, § 1, eff. 6-17-10.

Page's Ohio Revised Code Annotated:
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Current through Legislation passed by the 129th Ohio General Assembly
 and filed with the Secretary of State through File 124
 *** Annotations current through May 7, 2012 ***

TITLE 31. DOMESTIC RELATIONS -- CHILDREN
 CHAPTER 3113. NEGLECT, ABANDONMENT, OR DOMESTIC VIOLENCE
 DOMESTIC VIOLENCE

ORC Ann. 3113.31 (2012)

§ 3113.31. Definitions; jurisdiction; petition; hearing; protection orders; consent agreements

(A) As used in this section:

(1) "Domestic violence" means the occurrence of one or more of the following acts against a family or household member:

(a) Attempting to cause or recklessly causing bodily injury;

(b) Placing another person by the threat of force in fear of imminent serious physical harm or committing a violation of *section 2903.211 [2903.21.1]* or *2911.211 [2911.21.1]* of the Revised Code;

(c) Committing any act with respect to a child that would result in the child being an abused child, as defined in *section 2151.031 [2151.03.1]* of the Revised Code;

(d) Committing a sexually oriented offense.

(2) "Court" means the domestic relations division of the court of common pleas in counties that have a domestic relations division and the court of common pleas in counties that do not have a domestic relations division, or the juvenile division of the court of common pleas of the county in which the person to be protected by a protection order issued or a consent agreement approved under this section resides if the respondent is less than eighteen years of age.

(3) "Family or household member" means any of the following:

(a) Any of the following who is residing with or has resided with the respondent:

(i) A spouse, a person living as a spouse, or a former spouse of the respondent;

(ii) A parent, a foster parent, or a child of the respondent, or another person related by consanguinity or affinity to the respondent;

(iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the respondent, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the respondent.

(b) The natural parent of any child of whom the respondent is the other natural parent or is the putative other natural parent.

(4) "Person living as a spouse" means a person who is living or has lived with the respondent in a common law marital relationship, who otherwise is cohabiting with the respondent, or who otherwise has cohabited with the respondent within five years prior to the date of the alleged occurrence of the act in question.

(5) "Victim advocate" means a person who provides support and assistance for a person who files a petition under this section.

(6) "Sexually oriented offense" has the same meaning as in *section 2950.01 of the Revised Code*.

(B) The court has jurisdiction over all proceedings under this section. The petitioner's right to relief under this section is not affected by the petitioner's leaving the residence or household to avoid further domestic violence.

(C) A person may seek relief under this section on the person's own behalf, or 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. The petition shall contain or state:

(1) An allegation that the respondent engaged in domestic violence against a family or household member of the respondent, including a description of the nature and extent of the domestic violence;

(2) The relationship of the respondent to the petitioner, and to the victim if other than the petitioner;

(3) A request for relief under this section.

(D) (1) If a person who files a petition pursuant to this section requests an ex parte order, the court shall hold an ex parte hearing on the same day that the petition is filed. The court, for good cause shown at the ex parte hearing, may enter any temporary orders, with or without bond, including, but not limited to, an order described in division (E)(1)(a), (b), or (c) of this section, that the court finds necessary to protect the family or household member from domestic violence. Immediate and present danger of domestic violence to the family or household member constitutes good cause for purposes of this section. Immediate and present danger includes, but is not limited to, situations in which the respondent has threatened the family or household member with bodily harm, in which the respondent has threatened the family or household member with a sexually oriented offense, or in which the respondent previously has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for an offense that constitutes domestic violence against the family or household member.

(2) (a) If the court, after an ex parte hearing, issues an order described in division (E)(1)(b) or (c) of this section, the court shall schedule a full hearing for a date that is within seven court days after the ex parte hearing. If any other type of protection order that is authorized under division (E) of this section is issued by the court after an ex parte hearing, the court shall schedule a full hearing

for a date that is within ten court days after the ex parte hearing. The court shall give the respondent notice of, and an opportunity to be heard at, the full hearing. The court shall hold the full hearing on the date scheduled under this division unless the court grants a continuance of the hearing in accordance with this division. Under any of the following circumstances or for any of the following reasons, the court may grant a continuance of the full hearing to a reasonable time determined by the court:

(i) Prior to the date scheduled for the full hearing under this division, the respondent has not been served with the petition filed pursuant to this section and notice of the full hearing.

(ii) The parties consent to the continuance.

(iii) The continuance is needed to allow a party to obtain counsel.

(iv) The continuance is needed for other good cause.

(b) An ex parte order issued under this section does not expire because of a failure to serve notice of the full hearing upon the respondent before the date set for the full hearing under division (D)(2)(a) of this section or because the court grants a continuance under that division.

(3) If a person who files a petition pursuant to this section does not request an ex parte order, or if a person requests an ex parte order but the court does not issue an ex parte order after an ex parte hearing, the court shall proceed as in a normal civil action and grant a full hearing on the matter.

(E) (1) After an ex parte or full hearing, the court may grant any protection order, with or without bond, or approve any consent agreement to bring about a cessation of domestic violence against the family or household members. The order or agreement may:

(a) Direct the respondent to refrain from abusing or from committing sexually oriented offenses against the family or household members;

(b) Grant possession of the residence or household to the petitioner or other family or household member, to the exclusion of the respondent, by evicting the respondent, when the residence or household is owned or leased solely by the petitioner or other family or household member, or by ordering the respondent to vacate the premises, when the residence or household is jointly owned or leased by the respondent, and the petitioner or other family or household member;

(c) When the respondent has a duty to support the petitioner or other family or household member living in the residence or household and the respondent is the sole owner or lessee of the residence or household, grant possession of the residence or household to the petitioner or other family or household member, to the exclusion of the respondent, by ordering the respondent to vacate the premises, or, in the case of a consent agreement, allow the respondent to provide suitable, alternative housing;

(d) Temporarily allocate parental rights and responsibilities for the care of, or establish temporary parenting time rights with regard to, minor children, if no other court has determined, or is determining, the allocation of parental rights and responsibilities for the minor children or parenting time rights;

(e) Require the respondent to maintain support, if the respondent customarily provides for or contributes to the support of the family or household member, or if the respondent has a duty to support the petitioner or family or household member;

(f) Require the respondent, petitioner, victim of domestic violence, or any combination of those persons, to seek counseling;

(g) Require the respondent to refrain from entering the residence, school, business, or place of employment of the petitioner or family or household member;

(h) Grant other relief that the court considers equitable and fair, including, but not limited to, ordering the respondent to permit the use of a motor vehicle by the petitioner or other family or household member and the apportionment of household and family personal property.

(2) If a protection order has been issued pursuant to this section in a prior action involving the respondent and the petitioner or one or more of the family or household members or victims, the court may include in a protection order that it issues a prohibition against the respondent returning to the residence or household. If it includes a prohibition against the respondent returning to the residence or household in the order, it also shall include in the order provisions of the type described in division (E)(7) of this section. This division does not preclude the court from including in a protection order or consent agreement, in circumstances other than those described in this division, a requirement that the respondent be evicted from or vacate the residence or household or refrain from entering the residence, school, business, or place of employment of the petitioner or a family or household member, and, if the court includes any requirement of that type in an order or agreement, the court also shall include in the order provisions of the type described in division (E)(7) of this section.

(3) (a) Any protection order issued or consent agreement approved under this section shall be valid until a date certain, but not later than five years from the date of its issuance or approval, or not later than the date a respondent who is less than eighteen years of age attains nineteen years of age, unless modified or terminated as provided in division (E)(8) of this section.

(b) Subject to the limitation on the duration of an order or agreement set forth in division (E)(3)(a) of this section, any order under division (E)(1)(d) of this section shall terminate on the date that a court in an action for divorce, dissolution of marriage, or legal separation brought by the petitioner or respondent issues an order allocating parental rights and responsibilities for the care of children or on the date that a juvenile court in an action brought by the petitioner or respondent issues an order awarding legal custody of minor children. Subject to the limitation on the duration of an order or agreement set forth in division (E)(3)(a) of this section, any order under division (E)(1)(e) of this section shall terminate on the date that a court in an action for divorce, dissolution of marriage, or legal separation brought by the petitioner or respondent issues a support order or on the date that a juvenile court in an action brought by the petitioner or respondent issues a support order.

(c) Any protection order issued or consent agreement approved pursuant to this section may be renewed in the same manner as the original order or agreement was issued or approved.

(4) A court may not issue a protection order that requires a petitioner to do or to refrain from doing an act that the court may require a respondent to do or to refrain from doing under division (E)(1)(a), (b), (c), (d), (e), (g), or (h) of this section unless all of the following apply:

(a) The respondent files a separate petition for a protection order in accordance with this section.

(b) The petitioner is served notice of the respondent's petition at least forty-eight hours before the court holds a hearing with respect to the respondent's petition, or the petitioner waives the right to receive this notice.

(c) If the petitioner has requested an ex parte order pursuant to division (D) of this section, the court does not delay any hearing required by that division beyond the time specified in that division in order to consolidate the hearing with a hearing on the petition filed by the respondent.

(d) After a full hearing at which the respondent presents evidence in support of the request for a protection order and the petitioner is afforded an opportunity to defend against that evidence, the court determines that the petitioner has committed an act of domestic violence or has violated a temporary protection order issued pursuant to *section 2919.26 of the Revised Code*, that both the petitioner and the respondent acted primarily as aggressors, and that neither the petitioner nor the respondent acted primarily in self-defense.

(5) No protection order issued or consent agreement approved under this section shall in any manner affect title to any real property.

(6) (a) If a petitioner, or the child of a petitioner, who obtains a protection order or consent agreement pursuant to division (E)(1) of this section or a temporary protection order pursuant to *section 2919.26 of the Revised Code* and is the subject of a parenting time order issued pursuant to *section 3109.051 [3109.05.1]* or *3109.12 of the Revised Code* or a visitation or companionship order issued pursuant to *section 3109.051 [3109.05.1]*, *3109.11*, or *3109.12 of the Revised Code* or division (E)(1)(d) of this section granting parenting time rights to the respondent, the court may require the public children services agency of the county in which the court is located to provide supervision of the respondent's exercise of parenting time or visitation or companionship rights with respect to the child for a period not to exceed nine months, if the court makes the following findings of fact:

(i) The child is in danger from the respondent;

(ii) No other person or agency is available to provide the supervision.

(b) A court that requires an agency to provide supervision pursuant to division (E)(6)(a) of this section shall order the respondent to reimburse the agency for the cost of providing the supervision, if it determines that the respondent has sufficient income or resources to pay that cost.

(7) (a) If a protection order issued or consent agreement approved under this section includes a requirement that the respondent be evicted from or vacate the residence or household or refrain from entering the residence, school, business, or place of employment of the petitioner or a family or household member, the order or agreement shall state clearly that the order or agreement cannot be waived or nullified by an invitation to the respondent from the petitioner or other family or household member to enter the residence, school, business, or place of employment or by the respondent's entry into one of those places otherwise upon the consent of the petitioner or other family or household member.

(b) Division (E)(7)(a) of this section does not limit any discretion of a court to determine that a respondent charged with a violation of *section 2919.27 of the Revised Code*, with a violation of a municipal ordinance substantially equivalent to that section, or with contempt of court, which charge is based on an alleged violation of a protection order issued or consent agreement approved under this section, did not commit the violation or was not in contempt of court.

(8) (a) The court may modify or terminate as provided in division (E)(8) of this section a protection order or consent agreement that was issued after a full hearing under this section. The court that issued the protection order or approved the consent agreement shall hear a motion for modification or termination of the protection order or consent agreement pursuant to division (E)(8) of this section.

(b) Either the petitioner or the respondent of the original protection order or consent agreement may bring a motion for modification or termination of a protection order or consent agreement that was issued or approved after a full hearing. The court shall require notice of the motion to be made as provided by the Rules of Civil Procedure. If the petitioner for the original protection order or consent agreement has requested that the petitioner's address be kept confidential, the court shall not disclose the address to the respondent of the original protection order or consent agreement or any other person, except as otherwise required by law. The moving party has the burden of proof to show, by a preponderance of the evidence, that modification or termination of the protection order or consent agreement is appropriate because either the protection order or consent agreement is no longer needed or because the terms of the original protection order or consent agreement are no longer appropriate.

(c) In considering whether to modify or terminate a protection order or consent agreement issued or approved under this section, the court shall consider all relevant factors, including, but not limited to, the following:

- (i) Whether the petitioner consents to modification or termination of the protection order or consent agreement;
- (ii) Whether the petitioner fears the respondent;
- (iii) The current nature of the relationship between the petitioner and the respondent;
- (iv) The circumstances of the petitioner and respondent, including the relative proximity of the petitioner's and respondent's workplaces and residences and whether the petitioner and respondent have minor children together;
- (v) Whether the respondent has complied with the terms and conditions of the original protection order or consent agreement;
- (vi) Whether the respondent has a continuing involvement with illegal drugs or alcohol;
- (vii) Whether the respondent has been convicted of, pleaded guilty to, or been adjudicated a delinquent child for an offense of violence since the issuance of the protection order or approval of the consent agreement;
- (viii) Whether any other protection orders, consent agreements, restraining orders, or no contact orders have been issued against the respondent pursuant to this section, *section 2919.26 of the Revised Code*, any other provision of state law, or the law of any other state;
- (ix) Whether the respondent has participated in any domestic violence treatment, intervention program, or other counseling addressing domestic violence and whether the respondent has completed the treatment, program, or counseling;
- (x) The time that has elapsed since the protection order was issued or since the consent agreement was approved;

(xi) The age and health of the respondent;

(xii) When the last incident of abuse, threat of harm, or commission of a sexually oriented offense occurred or other relevant information concerning the safety and protection of the petitioner or other protected parties.

(d) If a protection order or consent agreement is modified or terminated as provided in division (E)(8) of this section, the court shall issue copies of the modified or terminated order or agreement as provided in division (F) of this section. A petitioner may also provide notice of the modification or termination to the judicial and law enforcement officials in any county other than the county in which the order or agreement is modified or terminated as provided in division (N) of this section.

(e) If the respondent moves for modification or termination of a protection order or consent agreement pursuant to this section, the court may assess costs against the respondent for the filing of the motion.

(9) Any protection order issued or any consent agreement approved pursuant to this section shall include a provision that the court will automatically seal all of the records of the proceeding in which the order is issued or agreement approved on the date the respondent attains the age of nineteen years unless the petitioner provides the court with evidence that the respondent has not complied with all of the terms of the protection order or consent agreement. The protection order or consent agreement shall specify the date when the respondent attains the age of nineteen years.

(F) (1) A copy of any protection order, or consent agreement, that is issued, approved, modified, or terminated under this section shall be issued by the court to the petitioner, to the respondent, and to all law enforcement agencies that have jurisdiction to enforce the order or agreement. The court shall direct that a copy of an order be delivered to the respondent on the same day that the order is entered.

(2) Upon the issuance of a protection order or the approval of a consent agreement under this section, the court shall provide the parties to the order or agreement with the following notice orally or by form:

"NOTICE

As a result of this order or consent agreement, it may be unlawful for you to possess or purchase a firearm, including a rifle, pistol, or revolver, or ammunition pursuant to federal law under *18 U.S.C. 922(g)(8)*. If you have any questions whether this law makes it illegal for you to possess or purchase a firearm or ammunition, you should consult an attorney."

(3) All law enforcement agencies shall establish and maintain an index for the protection orders and the approved consent agreements delivered to the agencies pursuant to division (F)(1) of this section. With respect to each order and consent agreement delivered, each agency shall note on the index the date and time that it received the order or consent agreement.

(4) Regardless of whether the petitioner has registered the order or agreement in the county in which the officer's agency has jurisdiction pursuant to division (N) of this section, any officer of a law enforcement agency shall enforce a protection order issued or consent agreement approved by any court in this state in accordance with the provisions of the order or agreement, including removing the respondent from the premises, if appropriate.

(G) Any proceeding under this section shall be conducted in accordance with the Rules of Civil Procedure, except that an order under this section may be obtained with or without bond. An order issued under this section, other than an ex parte order, that grants a protection order or approves a consent agreement that modifies or terminates a protection order or consent agreement, or that refuses to modify or terminate a protection order or consent agreement, that refuses to grant a protection order or approve a consent agreement, is a final, appealable order. The remedies and procedures provided in this section are in addition to, and not in lieu of, any other available civil or criminal remedies.

(H) The filing of proceedings under this section does not excuse a person from filing any report or giving any notice required by *section 2151.421 [2151.42.1] of the Revised Code* or by any other law. When a petition under this section alleges domestic violence against minor children, the court shall report the fact, or cause reports to be made, to a county, township, or municipal peace officer under *section 2151.421 [2151.42.1] of the Revised Code*.

(I) Any law enforcement agency that investigates a domestic dispute shall provide information to the family or household members involved regarding the relief available under this section and *section 2919.26 of the Revised Code*.

(J) Notwithstanding any provision of law to the contrary and regardless of whether a protection order is issued or a consent agreement is approved by a court of another county or a court of another state, no court or unit of state or local government shall charge any fee, cost, deposit, or money in connection with the filing of a petition pursuant to this section or in connection with the filing, issuance, registration, or service of a protection order or consent agreement, or for obtaining a certified copy of a protection order or consent agreement.

(K) (1) The court shall comply with Chapters 3119., 3121., 3123., and 3125. of the Revised Code when it makes or modifies an order for child support under this section.

(2) If any person required to pay child support under an order made under this section on or after April 15, 1985, or modified under this section on or after December 31, 1986, is found in contempt of court for failure to make support payments under the order, the court that makes the finding, in addition to any other penalty or remedy imposed, shall assess all court costs arising out of the contempt proceeding against the person and require the person to pay any reasonable attorney's fees of any adverse party, as determined by the court, that arose in relation to the act of contempt.

(L) (1) A person who violates a protection order issued or a consent agreement approved under this section is subject to the following sanctions:

(a) Criminal prosecution or a delinquent child proceeding for a violation of *section 2919.27 of the Revised Code*, if the violation of the protection order or consent agreement constitutes a violation of that section;

(b) Punishment for contempt of court.

(2) The punishment of a person for contempt of court for violation of a protection order issued or a consent agreement approved under this section does not bar criminal prosecution of the person or a delinquent child proceeding concerning the person for a violation of *section 2919.27 of the Revised Code*. However, a person punished for contempt of court is entitled to credit for the punishment imposed upon conviction of or adjudication as a delinquent child for a violation of that

section, and a person convicted of or adjudicated a delinquent child for a violation of that section shall not subsequently be punished for contempt of court arising out of the same activity.

(M) In all stages of a proceeding under this section, a petitioner may be accompanied by a victim advocate.

(N) (1) A petitioner who obtains a protection order or consent agreement under this section or a temporary protection order under *section 2919.26 of the Revised Code* may provide notice of the issuance or approval of the order or agreement to the judicial and law enforcement officials in any county other than the county in which the order is issued or the agreement is approved by registering that order or agreement in the other county pursuant to division (N)(2) of this section and filing a copy of the registered order or registered agreement with a law enforcement agency in the other county in accordance with that division. A person who obtains a protection order issued by a court of another state may provide notice of the issuance of the order to the judicial and law enforcement officials in any county of this state by registering the order in that county pursuant to *section 2919.272 [2919.27.2] of the Revised Code* and filing a copy of the registered order with a law enforcement agency in that county.

(2) A petitioner may register a temporary protection order, protection order, or consent agreement in a county other than the county in which the court that issued the order or approved the agreement is located in the following manner:

(a) The petitioner shall obtain a certified copy of the order or agreement from the clerk of the court that issued the order or approved the agreement and present that certified copy to the clerk of the court of common pleas or the clerk of a municipal court or county court in the county in which the order or agreement is to be registered.

(b) Upon accepting the certified copy of the order or agreement for registration, the clerk of the court of common pleas, municipal court, or county court shall place an endorsement of registration on the order or agreement and give the petitioner a copy of the order or agreement that bears that proof of registration.

(3) The clerk of each court of common pleas, the clerk of each municipal court, and the clerk of each county court shall maintain a registry of certified copies of temporary protection orders, protection orders, or consent agreements that have been issued or approved by courts in other counties and that have been registered with the clerk.

(O) Nothing in this section prohibits the domestic relations division of a court of common pleas in counties that have a domestic relations division or a court of common pleas in counties that do not have a domestic relations division from designating a minor child as a protected party on a protection order or consent agreement.

HISTORY:

137 v H 835 (Eff 3-27-79); 138 v H 920 (Eff 4-9-81); 140 v H 587 (Eff 9-25-84); 140 v H 614 (Eff 4-10-85); 140 v H 113 (Eff 1-8-85); 141 v H 509 (Eff 12-1-86); 141 v H 428 (Eff 12-23-86); 142 v H 231 (Eff 10-5-87); 142 v H 708 (Eff 4-19-88); 142 v H 172 (Eff 3-17-89); 143 v H 591 (Eff 4-12-90); 143 v S 3 (Eff 4-11-91); 144 v S 10 (Eff 7-15-92); 144 v H 536 (Eff 11-5-92); 145 v H 173 (Eff 12-31-93); 145 v H 335 (Eff 12-9-94); 146 v H 274 (Eff 8-8-96); 146 v H 438 (Eff 7-1-97); 147 v S 1 (Eff 10-21-97); 147 v H 352 (Eff 1-1-98); 148 v S 180 (Eff 3-22-2001); 149 v H

548. Eff 3-31-2003; 151 v S 17, § 1, eff. 8-3-06; 151 v H 95, § 1, eff. 8-3-06; 151 v S 260, § 1, eff. 1-2-07; 152 v H 562, § 101.01, eff. 6-24-08; 153 v H 10, § 1, eff. 6-17-10.

OHIO RULES OF COURT SERVICE
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*** Rules current through rule amendments received as of May 22, 2012 ***
 *** Annotations current through May 7, 2012 ***

Ohio Rules Of Civil Procedure
 Title II Commencement Of Action And Venue; Service Of Process; Service And Filing Of Pleadings And Other Papers Subsequent To The Original Complaint; Time

Ohio Civ. R. 4.1 (2012)

Review Court Orders which may amend this Rule.

Rule 4.1. Process: Methods of service[Effective July 1, 2012.]

All methods of service within this state, except service by publication as provided in *Civ. R. 4.4(A)* are described in this rule. Methods of out-of-state service and for service in a foreign country are described in *Civ. R. 4.3* and *4.5*.

(A) Service by clerk.

(1) Methods of service.

(a) Service by United States certified or express mail.

Evidenced by return receipt signed by any person, service of any process shall be by United States certified or express mail unless otherwise permitted by these rules. The clerk shall deliver a copy of the process and complaint or other document to be served to the United States Postal Service for mailing at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk as certified or express mail return receipt requested, with instructions to the delivering postal employee to show to whom delivered, date of delivery, and address where delivered.

(b) Service by commercial carrier service.

As an alternative to service under *Civ.R. 4.1(A)(1)(a)*, the clerk may make service of any process by a commercial carrier service utilizing any form of delivery requiring a signed receipt. The clerk shall deliver a copy of the process and complaint or other document to be served to a commercial carrier service for delivery at the address set forth in the caption or at the address set forth in written instructions furnished to the clerk, with instructions to the carrier to return a signed receipt showing to who delivered, date of delivery, and address where delivered.

(2) Docket entries; Return.

The clerk shall forthwith enter on the appearance docket the fact of delivery to the United States Postal Service for mailing or the fact of delivery to a specified commercial carrier service for delivery, and make a similar entry when the return receipt is received. If the return shows failure of delivery, the clerk shall forthwith notify the attorney of record or, if there is no attorney of record, the party at whose instance process was issued and enter the fact and method of notification on the appearance docket. The clerk shall file the return receipt or returned envelope in the records of the action.

(3) Costs.

All postage and commercial carrier service fees shall be charged to costs. If the parties to be served are numerous and the clerk determines there is insufficient security for costs, the clerk may require the party requesting service to advance an amount estimated by the clerk to be sufficient to pay the costs of delivery.

(B) Personal service.

When the plaintiff files a written request with the clerk for personal service, service of process shall be made by that method.

When process issued from the Supreme Court, a court of appeals, a court of common pleas, or a county court is to be served personally under this division, the clerk of the court shall deliver the process and sufficient copies of the process and complaint, or other document to be served, to the sheriff of the county in which the party to be served resides or may be found. When process issues from the municipal court, delivery shall be to the bailiff of the court for service on all defendants who reside or may be found within the county or counties in which that court has territorial jurisdiction and to the sheriff of any other county in this state for service upon a defendant who resides in or may be found in that other county. In the alternative, process issuing from any of these courts may be delivered by the clerk to any person not less than eighteen years of age, who is not a party and who has been designated by order of the court to make personal service of process under this division. The person serving process shall locate the person to be served and shall tender a copy of the process and accompanying documents to the person to be served. When the copy of the process has been served, the person serving process shall endorse that fact on the process and return it to the clerk, who shall make the appropriate entry on the appearance docket.

When the person serving process is unable to serve a copy of the process within twenty-eight days, the person shall endorse that fact and the reasons therefor on the process and return the process and copies to the clerk who shall make the appropriate entry on the appearance docket. In the event of failure of service, the clerk shall follow the notification procedure set forth in division (A)(2) of this rule. Failure to make service within the twenty-eight day period and failure to make proof of service do not affect the validity of the service.

(C) Residence service.

When the plaintiff files a written request with the clerk for residence service, service of process shall be made by that method.

When process is to be served under this division, the clerk of the court shall deliver the process and sufficient copies of the process and complaint, or other document to be served, to the sheriff of the county in which the party to be served resides or may be found. When process issues from the municipal court, delivery shall be to the bailiff of the court for service on all defendants who reside

or may be found within the county or counties in which that court has territorial jurisdiction and to the sheriff of any other county in this state for service upon a defendant who resides in or may be found in that county. In the alternative, process may be delivered by the clerk to any person not less than eighteen years of age, who is not a party and who has been designated by order of the court to make residence service of process under this division. The person serving process shall effect service by leaving a copy of the process and the complaint, or other document to be served, at the usual place of residence of the person to be served with some person of suitable age and discretion then residing therein. When the copy of the process has been served, the person serving process shall endorse that fact on the process and return it to the clerk, who shall make the appropriate entry on the appearance docket.

When the person serving process is unable to serve a copy of the process within twenty-eight days, the person shall endorse that fact and the reasons therefor on the process, and return the process and copies to the clerk, who shall make the appropriate entry on the appearance docket. In the event of failure of service, the clerk shall follow the notification procedure set forth in division (A)(2) of this rule. Failure to make service within the twenty-eight-day period and failure to make proof of service do not affect the validity of service.

HISTORY: Amended, eff 7-1-71; 7-1-80; 7-1-97; 7-1-12.