

IN THE SUPREME COURT OF OHIO

13-1574

Dorothy Fondessy

On Appeal from the Ottawa

Appellee

County Court of Appeals

v.

Sixth Appellate District

Anthony Simon

Court of Appeals

Appellant

Case No. OT-11-041

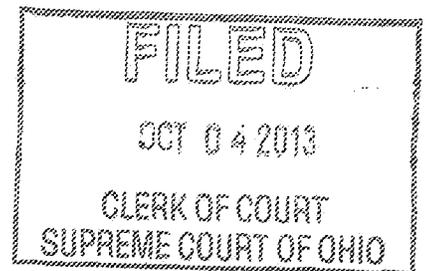
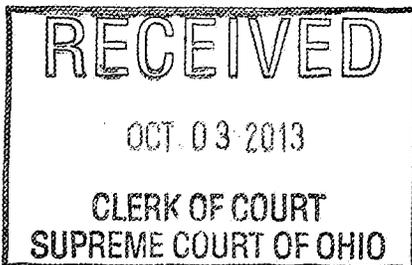
NOTICE OF CERTIFIED CONFLICT OF APPELLANT ANTHONY SIMON

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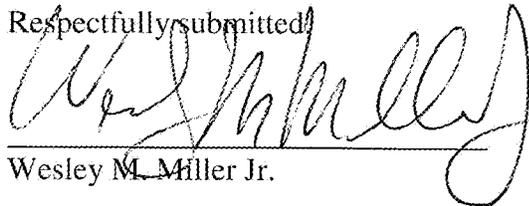


**Notice of Certified Conflict of Appellant Anthony Simon**

Appellant Anthony Simon hereby gives notice of a certified conflict to the Supreme Court of Ohio from a decision of the Ottawa County Court of Appeals, Sixth Appellate District, entered in Court of Appeals case No. OT-11-041 on September 20, 2013.

Attached, pursuant to S.Ct.Prac.R. 8.01, are copies of the respective opinions to be considered: the decision and judgment from the Sixth District Court of Appeals certifying the conflict in the captioned case; the opinion from the Mahoning County Court of Appeals, Seventh Appellate District in *Caban v. Ransome*, 7<sup>th</sup> Dist. No. 08 MA 36, 2009-Ohio-1034; the opinion from the Hocking County Court of Appeals, Fourth Appellate District in *Smith v. Wunsch*, 162 Ohio App.3d 21, 2005-Ohio-3498, 832 N.E.2d 757, (4<sup>th</sup> Dist.); the opinion from the Summit County Court of Appeals, Ninth Appellate District in *State v. Payne*, 178 Ohio App.3d 617, 2008-Ohio-5447, 899 N.E.2d 1011, (9<sup>th</sup> Dist.).

Respectfully submitted,

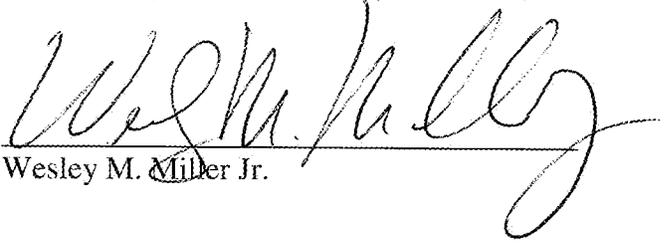


Wesley M. Miller Jr.

COUNSEL FOR APPELLANT,  
ANTHONY SIMON

**CERTIFICATE OF SERVICE**

I hereby certify that on September 30, 2013 the foregoing was sent via U.S. mail to Ernest E. Cottrell Jr. at 21980 State Rte. 51 W. Genoa, OH 43430-1252, Counsel for Appellee.

  
Wesley M. Miller Jr.

**FILED**  
**COURT OF APPEALS**  
 SEP 20 2013  
 GARY A. KOHLI CLERK  
 OTTAWA COUNTY, OHIO

IN THE COURT OF APPEALS OF OHIO  
 SIXTH APPELLATE DISTRICT  
 OTTAWA COUNTY

Dorothy Fondessy

Court of Appeals No. OT-11-041

Appellee

Trial Court No. 11-CV-515H

v.

Anthony Simon

**DECISION AND JUDGMENT**

Appellant

Decided: **SEP 20 2013**

\*\*\*\*\*

This matter is before the court on the motion of defendant-appellant, Anthony Simon, to certify this case to the Supreme Court of Ohio on the ground that the judgment rendered by this court on August 9, 2013, is in conflict with decisions of several other Ohio District Courts of Appeals. Appellee, Dorothy Fondessy, has filed a contra memorandum.

In our decision of August 9, 2013, we affirmed the judgment of the trial court which entered a civil stalking protection order ("CSPO") against appellant for the protection of appellee Dorothy Fondessy and her husband Wayne Fondessy. In

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particular, we concluded that there was competent, credible evidence to support the trial court's judgment.

Pursuant to Section 3(B)(4), Article IV of the Ohio Constitution, "[w]henver the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination." The Ohio Supreme Court has set forth three requirements that must be met in order for a case to be certified:

First, the certifying court must find that its judgment is in conflict with the judgment of a court of appeals of another district and the asserted conflict must be "upon the same question." Second, the alleged conflict must be on a rule of law – not facts. Third, the journal entry or opinion of the certifying court must clearly set forth that rule of law which the certifying court contends is in conflict with the judgment on the same question by other district courts of appeals. *Whitelock v. Gilbane Bldg. Co.*, 66 Ohio St.3d 594, 596, 613 N.E.2d 1032 (1993).

Appellant asserts that our decision in this case is in conflict with the decisions of several other appellate districts on the issue of our interpretation of the "mental distress" a petitioner must prove for a court to grant a petition for a CSPO.

As we discussed in our decision of August 9, 2013, for a trial court to grant a CSPO, the petitioner must show by a preponderance of the evidence, that the complained

of conduct violates the menacing by stalking statute. R.C. 2903.211(A)(1) proscribes menacing by stalking and reads: "No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." This court has consistently held that the statute "does not require that the victim actually experience mental distress, but only that the victim believes the stalker would cause mental distress or physical harm." *Ensley v Glover*, 6th Dist. Lucas No. L-11-1026, 2012-Ohio-4487, ¶ 13. In the present case, we relied on this interpretation in concluding that appellee had established the elements for the court to order a CSPO. It is this interpretation with which appellant contends there is a conflict among the Ohio District Courts of Appeals.

This court follows the interpretation of a majority of the Ohio District Courts of Appeals. See *Griga v. DiBenedetto*, 1st Dist. Hamilton No. C-120300, 2012-Ohio-6097, ¶ 13; *Dayton v. Davis*, 136 Ohio App.3d 26, 32, 735 N.E.2d 939 (2d Dist.1999); *Holloway v. Parker*, 3d Dist. Marion No. 9-12-50, 2013-Ohio-1940, ¶ 23; *Bloom v. Macbeth*, 5th Dist. Ashland No. 2007-COA-050, 2008-Ohio-4564, ¶ 11; *Rufener v. Hutson*, 8th Dist. Cuyahoga No. 97635, 2012-Ohio-5061, ¶ 13; *Cooper v. Manta*, 11th Dist. Lake No. 2011-L-035, 2012-Ohio-867, ¶ 33; and *State v. Hart*, 12th Dist. Warren No. CA2008-06-079, 2009-Ohio-997, ¶ 31.

Several other Ohio District Courts of Appeals, however, "proceed as if the test is whether mental distress was in fact caused." *Caban v. Ransome*, 7th Dist. Mahoning No. 08 MA 36, 2009-Ohio-1034, ¶ 23. See also *Smith v. Wunsch*, 162 Ohio App.3d 21,

2005-Ohio-3498, 832 N.E.2d 757, ¶ 21 (4th Dist.); *State v. Payne*, 178 Ohio App.3d 617, 2008-Ohio-5447, 899 N.E.2d 1011, ¶ 10 (9th Dist.).

Accordingly, we find that there is a conflict with our decision of August 9, 2013, and the decisions of the Seventh, Fourth and Ninth District Courts of Appeals in *Caban*, *Smith*, and *Payne* on the issue of whether R.C. 2903.211(A)(1) requires a victim to actually experience mental distress or only believe that the stalker will cause the victim physical harm or mental distress, for a court to issue a CSPO.

Appellant further appears to argue that our decision is in conflict with decisions of the Seventh and Tenth District Courts of Appeals on the issue of the “knowingly” element that must be proven for the issuance of a CSPO. Appellant cites to *Darling v. Darling*, 7th Dist. Jefferson Nos. 06 JE 6, 06 JE 7, 2007-Ohio-3151, and *Jenkins v. Jenkins*, 10th Dist. Franklin No. 06AP-652, 2007-Ohio-422, in support. Neither of these cases conflict with our decision on the issue of knowingly. While *Darling* does conflict with our decision on the issue of mental distress, that case is from the Seventh District Court of Appeals, the same court with which we have already identified a conflict as stated above. Moreover, *Jenkins* follows the same interpretation of R.C. 2903.211(A)(1) that this court follows. *See Jenkins, supra*, at ¶ 15.

Finding a conflict in our ruling and those of the Fourth, Seventh and Ninth District Courts of Appeals, we hereby grant appellant’s motion and certify the record in this case for review and final determination to the Supreme Court of Ohio on the following issue: Whether R.C. 2903.211(A)(1) requires a victim to actually experience mental distress or

only believe that the stalker will cause the victim physical harm or mental distress, for a court to issue a civil stalking protection order.

It is so ordered.

Mark L. Pietrykowski, J.

Arlene Singer, P.J.

Stephen A. Yarbrough, J.  
CONCUR.

  
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 JUDGE

  
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 JUDGE

  
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 JUDGE



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**NORMA CABAN, PLAINTIFF-APPELLEE, VS. ALONZO RANSOME,  
DEFENDANT-APPELLANT.**

**CASE NO. 08 MA 36**

**COURT OF APPEALS OF OHIO, SEVENTH APPELLATE DISTRICT,  
MAHONING COUNTY**

*2009-Ohio-1034; 2009 Ohio App. LEXIS 909*

**March 4, 2009, Decided**

**PRIOR HISTORY:** [\*\*1]

CHARACTER OF PROCEEDINGS: Civil Appeal from Common Pleas Court, Case No. 07CV3889.

**DISPOSITION:** Reversed and Vacated.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Appellant ex-boyfriend sought review of the judgment of the Mahoning County Common Pleas Court (Ohio), which granted a civil stalking protection order (CSPO) against him in favor of appellee ex-girlfriend.

**OVERVIEW:** After dating for fourteen years, the parties terminated their relationship. About five months later, the girlfriend filed a petition for a CSPO. The court held that the trial court improperly granted the CSPO as the elements of menacing by stalking had not been demonstrated by some competent, credible evidence. The evidence did establish a pattern of conduct under *R.C. 2903.211(D)(1)*. However, the evidence did not show that the boyfriend caused the girlfriend to believe that he would cause her physical harm. In her testimony, the girlfriend did not state that she feared for her safety but instead testified that she feared that the boyfriend would confront her and ask her again why she broke up with him. Threatening to approach a person for conversation

was not a threat of physical harm. The alternative element of mental distress was not satisfied. The girlfriend did not testify that the boyfriend's call to her, stating that, when he found her, "all bets are off," caused her to develop a mental condition that involved some temporary substantial incapacity, as required by *§ 2903.211(D)(2)*, or that would normally require mental health services.

**OUTCOME:** The court reversed the judgment of the trial court, vacated the CSPO, and entered judgment for the ex-boyfriend.

**COUNSEL:** Norma Caban, Plaintiff-Appellee, Pro se, Youngstown, Ohio.

For Defendant-Appellant: Attorney James Gentile, Youngstown, Ohio.

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

**OPINION BY:** Joseph J. Vukovich

**OPINION**

VUKOVICH, P.J.

[\*P1] Defendant-appellant Alonzo Ransome appeals the decision of the Mahoning County Common Pleas Court granting a civil stalking protection order against him in favor of plaintiff-appellee Norma Caban. The issue is whether there was some competent, credible evidence on the elements of menacing by stalking, which is a prerequisite for granting a civil stalking protection order. For the following reasons, there was not some competent, credible evidence upon which the fact-finder could determine that appellant knowingly caused appellee to believe that he would cause her physical harm or alternatively that he knowingly caused appellee mental distress, *as statutorily defined*. For the following reasons, the judgment of the trial court is reversed on grounds of manifest weight of the evidence and the civil stalking protection order [\*\*2] is vacated.

#### STATEMENT OF THE CASE

[\*P2] Appellee dated appellant for fourteen years, and terminated the relationship at the end of May in 2007. After receiving multiple telephone messages from appellant over the summer, appellee filed a petition for a civil stalking protection order against him on October 17, 2007. An ex parte order was issued, and then the full hearing was held before a magistrate on November 5, 2007, where appellant and appellee both testified. At that time, the magistrate granted the petition for a protection order with an expiration date of November 5, 2009.

[\*P3] The magistrate found that appellant repeatedly called and left messages at appellee's home and on her cellular telephone, he came to her place of employment and he left a threatening message stating that when he found her, "all bets are off." The magistrate concluded that the preponderance of the evidence established that appellant knowingly engaged in a pattern of conduct that "caused [appellee] to believe that [he] will cause physical harm or cause or has caused mental distress." The magistrate then prohibited appellant from contacting and coming within fifty yards of appellee or entering appellee's property and [\*\*3] place of employment.

[\*P4] Appellant filed timely objections to the magistrate's decision. On January 7, 2008, the trial court overruled the objections, adopted the magistrate's decision and granted appellee's petition for a civil stalking protection order. Because the clerk did not serve the parties with the entry until February 5, 2008, appellant's March 4, 2008 notice of appeal was timely

filed.

#### GENERAL LAW

[\*P5] In order to grant a petition for a civil stalking protection order, the trial court must hold a full hearing and proceed as in a normal civil action. *R.C. 2903.214(D)(3)*. Notably, the petition is not evidence to be considered at that full hearing. *Felton v. Felton (1997), 79 Ohio St.3d 34, 42-43, 1997 Ohio 302, 679 N.E.2d 672*. The trier of fact must determine whether the preponderance of the evidence presented at the hearing establishes that the defendant engaged in a violation of *R.C. 2903.211*, which is the menacing by stalking statute. See *R.C. 2903.214(C)(1)*. See, also, *Felton, 79 Ohio St.3d at 42* (holding that since court considering a protection order is to proceed as in a normal civil action and since statute is silent on standard of proof, preponderance of evidence is the proper standard). The menacing by [\*\*4] stalking statute provides:

[\*P6] "No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." *R.C. 2903.211(A)(1)*.

[\*P7] Our standard of review for whether the protection order should have been granted and thus whether the elements of menacing by stalking were established by the preponderance of the evidence entails a manifest weight of the evidence review. *Abuhamda-Sliman v. Sliman 161 Ohio App.3d 541, 2005 Ohio 2836, P9-10, 831 N.E.2d 453*. See, also, *Felton, 79 Ohio St.3d at 42-43* (where Court evaluated whether there was sufficient credible evidence to support the decision that elements of protection order were satisfied). If there is a question as to the restrictions imposed by the court, however, we review the court's decision for an abuse of discretion. See *R.C. 2903.214(E)* (allowing court to design order to ensure safety and protection). See, also, *Abuhamda-Sliman, 161 Ohio App.3d 541 at P9, 2005 Ohio 2836, 831 N.E.2d 453*. Here, appellant's arguments are all concerned with the granting of the petition, not its contents or restrictions.

[\*P8] Unlike criminal appeals, where we can reweigh the evidence, [\*\*5] civil appeals require more deference to the trial court and require affirmance of those judgments supported by some competent and credible evidence. *State v. Wilson, 113 Ohio St.3d 382,*

2007 Ohio 2202, P26, 865 N.E.2d 1264. Thus, civil judgments supported by some competent and credible evidence cannot be reversed on appeal as being contrary to the manifest weight of the evidence. *Id.* at P24, citing *C.E. Morris Co. v. Foley Constr. Co. (1978)*, 54 Ohio St.2d 279, 280, 376 N.E.2d 578. Thus, we must evaluate whether there was some competent, credible evidence on each element of menacing by stalking.

[\*P9] In reviewing a trial court's weighing of competing evidence and credibility determinations, we are guided by a presumption that the trial court's factual findings are correct. *Id.* This is due in part to the fact that the trial court occupies the best position from which to view the witnesses and observe their demeanor, voice inflection, gestures, eye movements, etc. *Id.* We cannot reverse a civil judgment merely because we hold a different opinion on the weight of the evidence presented to the trial court and the credibility of the witnesses. *Id.*

#### ASSIGNMENT OF ERROR

[\*P10] Appellant's sole assignment of error provides:

[\*P11] "THE COURT ERRED [\*\*6] IN ADOPTING THE REPORT AND RECOMMENDATION OF THE MAGISTRATE."

[\*P12] Appellant claims that after "a couple" efforts to contact appellee were rebuffed, he stopped attempting to communicate with her. He urges that this was a typical example of a long-term relationship ending. He alleges that there was no evidence to support the elements of menacing by stalking. More specifically, he contends there was no pattern of activity, he did not knowingly cause appellee to believe that he would cause physical harm, and there was no mental distress.

[\*P13] Appellant's first argument concerns pattern of conduct, which is defined merely as two or more actions or incidents closely related in time. *R.C. 2903.211(D)(1)*. The pattern can include messages or information sent via computer or telephone. *R.C. 2903.211(D)(1),(6); 2913.01(Y)*.

[\*P14] At the November 2007 hearing, appellee complained that appellant had been calling her since June 2007, even though she told him in May that she did not want to speak to him again. (Tr. 4-5). She said that she spent all summer deleting his messages on her work and

home phones because he leaves more than the ten messages that the voice mail system will hold. (Tr. 5). She explained that [\*\*7] on September 9, 2007, appellant came to an open house she was holding as a realtor, and appellant acknowledged that he went to this open house to talk. (Tr. 14).

[\*P15] Appellee testified that appellant's October messages became threatening. She testified that one message stated that if he did not hear from her by midnight, then he would come looking for her at work or at a meeting or at an open house and that she would have to talk to him. (Tr. 7). Appellee played the latest October message for the court. (Tr. 8). The court could rationally believe this testimony on the amount of calls.

[\*P16] Furthermore, appellant admitted that he called appellee repeatedly in July 2007 and conceded that he also emailed her. (Tr. 11-12). Appellant also disclosed that he called appellee's sister in Florida when she went on vacation. (Tr. 13). Consequently, there is some competent, credible evidence regarding a pattern of activity. Thus, the court's decision on this element is valid.

[\*P17] Next, appellant contends that there was no evidence that he caused appellee to believe that he will cause her physical harm. This element was apparently found to exist because of appellant's persistence over the summer in combination [\*\*8] with his final call, which appellee characterized as threatening and which the court also described as threatening because it relayed that "he would find her + 'all bets are off'." (Tr. 7-8). In that call, appellant gave appellee a deadline to contact him, advised that he would come looking for her at work, and expressed confidence that she would talk to him this time. (Tr. 7). Besides this call, appellee had also explained that appellant came to an open house she was working and that she sat in her car to avoid talking to him. (Tr. 6). She testified merely that she told him "no more talking" and that he left without responding. (Tr. 9-10).

[\*P18] In a mere six pages of testimony given by appellee, she did not state that she feared for her safety. Instead, it seems as if what she feared was that appellant would confront her again and ask her again why she broke up with him after a fourteen-year relationship. The element of causing her to believe has subjective requirements. Labeling a call as threatening does not express a belief that the caller would cause physical harm. That is, threatening to approach a person for

conversation is not a threat of physical harm. As such, we cannot find [\*\*9] some competent, credible evidence to support a finding that appellant knowingly caused appellee to believe that he would cause her physical harm.

[\*P19] We turn to the question of whether the alternative element of mental distress was satisfied. To review, the menacing by stalking statute states:

[\*P20] "No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." *R.C. 2903.211(A)(1)*.

[\*P21] Before proceeding to address what mental distress means, we must answer a statutory interpretation problem. Appellant's brief fluctuates between whether the defendant must have actually caused the victim to suffer mental distress or whether he need have only caused her to believe he would cause her mental distress. See *Apt. Br. at 7* versus *8*. The checked portion of the trial court's form entry proceeds as if the mental distress alternative is established by either causing mental distress or by causing the petitioner to believe that he will cause mental distress. See Order of Protection, page 2, first checked box ("caused [appellee] to believe that [he] will cause physical harm [\*\*10] or cause or has caused mental distress") (emphasis added).

[\*P22] Some courts have held that menacing by stalking can be found even if the defendant only caused the victim to believe that mental distress would be caused. See, e.g., *Irwin v. Murray*, 6th Dist. No. L-05-1113, 2006 Ohio 1633, P18; *Dayton v. Davis* (1999), 136 Ohio App.3d 26, 32, 735 N.E.2d 939 (2d Dist.).

[\*P23] However, this district and various other districts proceed as if the test is whether mental distress was in fact caused. See *Darling v. Darling*, 7th Dist. Nos. 06JE6, 06JE7, 2007 Ohio 3151, P20 ("menacing by stalking involves either behavior that causes the victim to believe that he or she will be physically harmed, or behavior that causes mental distress to the victim"; *State v. Werfel*, 11th Dist. No. 2006-L-163, 2007 Ohio 5198, P26-27 (the test is whether defendant "knowingly acted in such a way that would cause a reasonable person to feel threatened of physical harm and/or suffer mental distress"); *Middletown v. Jones*, 167 Ohio App.3d 679,

2006 Ohio 3465, P7, 856 N.E.2d 1003 (12th Dist.); *Smith v. Wunsch*, 162 Ohio App.3d 21, 2005 Ohio 3498, P18-19, 832 N.E.2d 757 (4th Dist); *State v. Tichon* (1995), 102 Ohio App. 3d 758, 763, 658 N.E.2d 16 (9th Dist).

[\*P24] We maintain this position and further [\*\*11] note that by repeating "to the other person" after both physical harm and mental distress, rather than merely placing it at the end of the sentence, the legislature expressed that "to believe" does not modify "mental distress". As such, any mental distress must have actually been caused.

[\*P25] We can now address whether there was some competent, credible evidence to show that appellant knowingly and actually caused any mental distress here. The menacing by stalking statute specifically defines mental distress as follows:

[\*P26] "(a) Any mental illness or condition that involves some temporary substantial incapacity; [or]

[\*P27] (b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services." *R.C. 2903.211(D)(2)*.

[\*P28] Analyzing the available facts under the proper law, we conclude that there was not some competent, credible evidence showing that the defendant actually and knowingly caused mental distress. There is absolutely no indication that appellee developed a mental illness under *R.C. 2903.211(D)(2)(a)*. [\*\*12] Thus, we are left with the question of whether there was some competent, credible evidence that she developed a mental condition that involved some temporary substantial incapacity or that would normally require mental health services. See *R.C. 2903.211(D)(2)(a)-(b)*.

[\*P29] We acknowledge that the fact-finder can rely on its own experience and knowledge to determine if mental distress was caused. *Smith*, 162 Ohio App.3d 21, 2005 Ohio 3498 at P18, 832 N.E.2d 757. However, mental distress for purposes of menacing by stalking is not mere mental stress or annoyance.

[\*P30] The magistrate heard evidence that appellant, who was appellee's boyfriend of fourteen

years, kept leaving appellant messages asking to talk about why their long-term relationship suddenly ended. Appellant's final message seemed to be the final straw which caused appellee to report appellant. The trial court failed to preserve this call for our review but did outline its contents. As set forth above, the call gave appellee a deadline to contact him, opined that he would find her wherever she is, warned that "all bets are off" and seemed confident that she would talk to him this time. The question is whether that call (combined with the prior behavior) actually caused [\*\*13] appellee the kind of mental distress that is required by the definition portion of the statute.

[\*P31] Appellee did not testify that it did cause her such distress. Nor did she mention any stress reactions that could qualify as temporary substantial incapacity or that would lead one to seek mental health services. Rather, the testimony showed that appellee is sick of appellant and that he is annoyingly obsessed with why she left him after all their years together and why she refuses to speak to him. The calls may constitute telephone harassment but do not by themselves establish mental distress was actually suffered.

[\*P32] Nor did the open house encounter establish mental distress under the facts herein. Appellant did show up at her open house to which she responded by sitting in her car. See *id. at P20* (evidence of changed routine can corroborate a finding of mental distress). However, he left after she told him that she would not speak to him. Even if this is enough to show mental stress, it is not enough to show mental distress as statutorily defined.

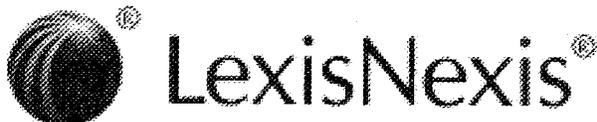
[\*P33] We also point out that the magistrate read the petition into the record. (Tr. 4). Yet, as aforementioned in our general recital of the relevant [\*\*14] law, the petition is not evidence and its contents cannot be considered by the court in granting a petition. See *Felton, 79 Ohio St.3d at 42-42* (holding that pleading is not evidence so answer to petition for protection order cannot be used by court).

[\*P34] In conclusion, without any mention of or allusion to her mental state in the evidence presented to the court, the fairly stringent test of mental distress has not been met under the particular facts and circumstances of this case. Considering the totality of these facts and circumstances, the elements of menacing by stalking have not been demonstrated by some competent, credible evidence.

[\*P35] For all of the foregoing reasons, we hereby reverse the granting of the civil stalking protection order on manifest weight of the evidence grounds. In the appeal of a civil non-jury trial, two appellate judges can reverse and remand one time on weight of the evidence grounds or the appellate court can enter the judgment that the trial court should have entered on that evidence. *App.R. 12(C)*. We choose to vacate the civil stalking protection order and enter judgment for appellant.

Waite, J., concurs.

DeGenaro, J., concurs.



RACHEL N. SMITH, Plaintiff-Appellee, vs. RONNY E. WUNSCH,  
Defendant-Appellant.

Case No. 04CA14

COURT OF APPEALS OF OHIO, FOURTH APPELLATE DISTRICT, HOCKING  
COUNTY

*162 Ohio App. 3d 21; 2005-Ohio-3498; 832 N.E.2d 757; 2005 Ohio App. LEXIS 3246*

June 28, 2005, Date Journalized

**PRIOR HISTORY:** CIVIL APPEAL FROM  
COMMON PLEAS COURT.

**DISPOSITION:** JUDGMENT AFFIRMED.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Petitioner victim filed an action requesting a civil stalking protection order (CSPO) to direct respondent former mayor to cease contacting, harassing, bothering, and annoying her and her husband. The Hocking County Court of Common Pleas (Ohio) found that the former mayor had engaged in "menacing by stalking" (*Ohio Rev. Code Ann. § 2903.214*) and granted the CSPO under *Ohio Rev. Code Ann. § 2903.211(C)(1)*. The former mayor appealed.

**OVERVIEW:** The former mayor argued that the trial court erred by issuing the CSPO. The appellate court held that there was sufficient evidence to support the trial court's conclusion to issue a CSPO. The former mayor admitted that after he left the mayor's office, he visited the "city building" 15 to 20 times between January and May, which was sufficient to establish a pattern of conduct under *Ohio Rev. Code Ann. § 2903.211(D)(1)*. Moreover, on one occasion, he hid in bushes and waited for the victim to come outside after work, and at another time, he cornered and blocked her from leaving a parking lot so that he could engage her in conversation. Also, the

victim testified that he had called her at home, followed her, and passed her driving to work in the morning and going home in the afternoon. Finally, the victim's testimony that she feared for her safety, coupled with the evidence that the mayor waited for her in the bushes outside her place of employment, followed her around town, and put himself in a position where he passed her going to and from work was sufficient to establish that he knowingly caused her "mental distress," pursuant to *Ohio Rev. Code Ann. § 2903.211(D)(2)*.

**OUTCOME:** The judgment of the trial court was affirmed.

**COUNSEL:** FOR APPELLANT: Michael N. Oser, Columbus, Ohio.

**JUDGES:** BY: Peter B. Abele, Presiding Judge. McFarland, J. & \* Grey, J.: Concur in Judgment & Opinion.

\* Judge Lawrence Grey, retired from the Fourth Appellate District, sitting by assignment of the Ohio Supreme Court in the Fourth Appellate District.

**OPINION BY:** Peter B. Abele

**OPINION**

[\*24] [\*\*\*759] DECISION AND JUDGMENT ENTRY

ABELE, P.J.

[\*\*P1] This is an appeal from a Hocking County Common Pleas Court civil stalking protection order ("CSPO") directing Ronny E. Wunsch, respondent below and appellant herein, to refrain from harassing, contacting or coming within 500 yards of Rachel Smith, petitioner below and appellee herein, and her husband Michael J. Smith.

[\*\*P2] The following errors are assigned for our review:

FIRST ASSIGNMENT OF ERROR:

"The trial court erred when it granted petitioner-appellee's request for a stalking civil protection order."

SECOND ASSIGNMENT OF ERROR:

"The trial court abused its discretion in granting petitioner-appellee's request for a stalking civil protection order because the evidence failed to support a finding that Mr. Wunsch caused petitioner-appellee mental distress."

[\*\*P3] Appellant served as Circleville Mayor from 2000 to 2003. In 2001, appellee worked as a typist/clerk in the Circleville city Services Department. During their employment for the city, they had daily contact that allegedly involved appellant touching appellee's shoulder, whispering in her ear, and making her feel uncomfortable.

[\*\*P4] Appellant left office in December 2003, but he and appellee had contact for several months thereafter. On May 28, 2004, appellee commenced the instant action and alleged that appellant persistently harassed her by (1) visiting her at work; (2) driving past her going to/from work; (3) sending e-mails; and (4) making phone calls. Appellee requested a (CSPO) to direct appellant to cease contacting, harassing, bothering, and annoying her and her husband.

[\*\*P5] At the July 23, 2004 hearing, appellee related how appellant continued to come see her at work after he left office. She further recounted that appellant had visited her office on numerous occasions and asked her to be his friend, that he had managed to drive by her in the morning on her way to work and then again on her way home <sup>1</sup> that he had waited in the afternoon for her outside her place of employment, and that he had followed her around town. In addition, appellee recounted two specific instances when this unwanted attention and contact [\*\*\*760] caused her particular concern: (1) when she spotted appellant hiding in the bushes outside her office waiting for her to leave work and (2) when [\*25] appellant followed her to a Dairy Queen in Circleville and blocked her car from leaving while he attempted to talk to her.

<sup>1</sup> Appellee and her husband live in Hocking County. Thus, it takes considerably more effort to pass her while she drives to and from work than if she lived in Circleville.

[\*\*P6] Appellee contacted the Circleville Police Department about these problems. Apparently, the police wanted more evidence before they took action. Nevertheless, Circleville Police Chief Wayne Gray testified that he warned appellant to stay away from appellee. Appellant did not heed that warning. Circleville Human Resources Director Teresa Cramer testified that she told appellant to stop coming around appellee but that he did not listen to her.

[\*\*P7] Appellant testified that he continued to visit the city administration building after he left office because he was still interested in the operation of city government--both as a concerned citizen and because he was interested in running for county commissioner. Appellant also explained that he attempted to converse with appellee on occasion because he was confused as to why she "wouldn't speak to [him] or acknowledge [him]" anymore and because he wanted to extend "an offer of friendship" between he and his wife and appellee and her husband. He explained that the Smiths seemed like a "nice young couple" who did not have a lot of other people around "to help them and support them."

[\*\*P8] On July 28, 2004 the trial court issued findings of fact and conclusions of law. The court found that in light of the many warnings that appellant had received to cease contact with appellee, and considering appellant's continued insistence on contacting appellee

despite those warnings, appellant knew he was causing her mental distress. The court found that appellant engaged in menacing by stalking and stated that a "separate order will be filed herewith" to afford protection to appellee. The court issued its judgment the same day and ordered appellant to, inter alia, stop harassing, annoying, or contacting appellee and her husband and to stay five hundred (500) yards away from them. This appeal followed.<sup>2</sup>

2 Appellant's notice of appeal incorrectly references the trial court's findings of fact and conclusions of law. Though denoted as a "judgment," that entry is not a final, appealable order because it did not enter judgment for one party or another, but simply called for the filing of a separate order that would in fact enter such a judgment. See *Prod. Credit Assn. v. Hedges* (1993), 87 Ohio App. 3d 207, 210, 621 N.E.2d 1360, at fn. 2; also see *Minix v. Collier* (Jul. 16, 1999), Scioto App. No. 98CA2619, 1999 Ohio App. LEXIS 3405. In the interests of justice, however, we will treat appellant's notice of appeal as referencing the CSPO which is, in fact, the final, appealable order in this case.

[\*\*P9] We jointly consider the two assignments of error, as they contain, in essence, the same argument that the trial court erred in granting the CSPO.

[\*\*P10] Our analysis begins from the premise that the decision to grant a CSPO is left to a trial court's sound discretion and will not be reversed on appeal absent an abuse of that discretion. See *Guthrie v. Long*, Franklin App. No. 04Ap-913, [\*26] 2005 Ohio 1541, at P9; *Van Vorce v. Van Vorce*, Auglaize App. No. 2-04-11, 2004 Ohio 5646, at P15; *Bucksbaum v. Mitchell*, Richland App. No. 2003-CA-0070, 2004 Ohio 2233, at P14. We note that an abuse of discretion is described as more than an error of law or judgment; rather, it implies that a trial court's attitude was unreasonable, arbitrary, or unconscionable. [\*\*\*761] See *Landis v. Grange Mut. Ins. Co.* (1998), 82 Ohio St.3d 339, 342, 1998 Ohio 387, 695 N.E.2d 1140; *Malone v. Courtyard by Marriott L.P.* (1996), 74 Ohio St.3d 440, 448, 1996 Ohio 311, 659 N.E.2d 1242; *State ex rel. Solomon v. Police & Firemen's Disability & Pension Fund Bd. of Trustees* (1995), 72 Ohio St.3d 62, 64, 1995 Ohio 172, 647 N.E.2d 486. When reviewing a matter under the abuse of discretion standard, appellate courts must not substitute their judgment for

that of the trial court. See *State ex rel. Duncan v. Chippewa Twp. Trustees* (1995), 73 Ohio St.3d 728, 732, 1995 Ohio 272, 654 N.E.2d 1254; *In re Jane Doe 1* (1991), 57 Ohio St.3d 135, 137-138, 566 N.E.2d 1181; *Berk v. Matthews* (1990), 53 Ohio St.3d 161, 169, 559 N.E.2d 1301. To establish an abuse of discretion, the result must be so palpably and grossly violative of fact or logic that it evidences not the exercise of will but the perversity of will, not the exercise of judgment but the defiance of judgment, not the exercise of reason, but instead passion or bias. *Vaught v. Cleveland Clinic Found.*, 98 Ohio St.3d 485, 787 N.E.2d 631, 2003 Ohio 2181, P13; *Nakoff v. Fairview Gen. Hosp.* (1996), 75 Ohio St.3d 254, 256, 1996 Ohio 159, 662 N.E.2d 1.

[\*\*P11] A petitioner is entitled to a CSPO if she alleges and proves that a respondent harassed her in such a way as to violate Ohio's "menacing by stalking" statute. See R.C. 2903.214(C)(1). This statute prohibits engaging in a pattern of conduct that knowingly causes mental distress to another person. R.C. 2903.211(A)(1). A "pattern of conduct" means two or more actions closely related in time, and "mental distress" means any mental illness or condition that involves "some temporary substantial incapacity" or any mental illness or condition that normally requires "psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services." R.C. 2903.211(D)(1) and (2)(a) and (b).

[\*\*P12] Appellant's first argument is that the trial court erred by issuing the CSPO because insufficient evidence exists to show that he engaged in a pattern of conduct that knowingly caused appellee mental distress. We disagree. A pattern of conduct, requires only two or more actions closely related in time. R.C. 2903.211(D)(1). Appellant admitted that after he left the mayor's office, he visited the "city building" 15 to 20 times between January and May 2004. This evidence is sufficient to establish a pattern of conduct. Though appellant claimed that he had official reasons to be in the building during those times, the trial [\*27] court may well have disbelieved him and concluded that his purpose was to encounter appellee for non-official reasons.

[\*\*P13] Even assuming that the court believed that appellant had visited the city building for official reasons, two other significant contacts occurred between appellant

and appellee that constitute a pattern of conduct: (1) when appellant hid in bushes and waited for appellee to come outside after work and (2) appellant's cornering and blocking appellee from leaving Dairy Queen so that he could engage her in conversation. While appellant had innocent explanations for these incidents, the trial court apparently did not believe his version of the events.

[\*\*P14] We further note that additional evidence could also have factored into the trial court's determination. Appellee testified that appellant called her at home, followed, her and passed her while she drove to work in the morning and went home in the afternoon. Although the testimony was somewhat uncertain as to the precise dates, this evidence is sufficient to [\*\*\*762] constitute a pattern of conduct for purposes of *R.C. 2903.211(D)(1)*.<sup>3</sup>

3 In determining what constitutes a "pattern of conduct" for purposes of *R.C. 2903.211(D)(1)*, courts must take every action into consideration "even if some of the person's actions may not, in isolation, seem particularly threatening." *Guthrie v. Long, Franklin App. No. 04AP-913, 2005 Ohio 1541, at P12; Miller v. Francisco, Lake App. No. 2002-L-097, 2003 Ohio 1978, at P11*

[\*\*P15] Appellant next argues that the trial court relied on evidence of acts outside the time frame of the alleged stalking. In particular, appellant objects to the trial court's finding of fact that he touched appellee's shoulder or whispered in her ear during the time that they worked together.

[\*\*P16] Appellant is correct insofar as he asserts that appellee only claims that appellant stalked her after he ceased serving as mayor. He is also correct that the trial court cited instances of conduct that transpired while he still held office and that the two had, presumably, an amicable working relationship. We are not persuaded, however, that the trial court relied on that conduct. Rather, we believe the court referenced those acts as supplemental information to lay the factual groundwork for this case and not evidence on which the court later relied in rendering its decision. Indeed, a review of the trial court's factual findings makes it patently clear the court relied on events that occurred after appellant left office (particularly his hiding in bushes waiting for appellee to leave work, the incident at Dairy Queen, and the fact that appellant ignored persistent warnings to stay away from appellee) in deciding that a CSPO was

warranted in this case.<sup>4</sup>

4 The trial court made no fewer than 15 findings of fact in its July 28, 2004 judgment. Its finding that appellant touched appellee's shoulder and whispered in her ear was made at factual finding number four. Appellant cites to other findings that the court made about the time he was in office as well. Again, however, we do not believe that this formed any basis for the court's decision.

[\*28] [\*\*P17] Appellant's next argument is that insufficient evidence exists to establish that any of his actions caused appellee mental distress. Again, we disagree.

[\*\*P18] "Mental distress" means any mental condition that involves some temporary, substantial incapacity or a mental condition that normally requires treatment or services whether or not they are requested. *R.C. 2903.211(D)(2)*. The trier of fact does not need expert testimony on this issue, but may rely on its knowledge and experience in determining whether mental distress has been caused. *Noah v. Brillhart, Wayne App. No. 02CA50, 2003 Ohio 2421, at P16; State v. Scott, Summit App. No. 20834, 2002 Ohio 3199, at P14*.

[\*\*P19] In the present case, the trial court found that the stress brought on by appellant's repeated stalking and unwanted attention would normally require mental health services and/or psychological treatment. We believe that ample evidence exists in the record to support the trial court's finding. Appellee testified that she feared for her safety. Chief Gray testified that appellee was "pretty shook up" and "upset" when she reported to police appellant's repeated efforts to make contact with her. Valerie Sanzone, an administrative assistant for the city of Circleville, was on a cell phone with appellee during the incident at Dairy Queen and related that appellee was "hysterical" when appellant blocked her car and tried to make contact with her. This testimony, coupled with the evidence that appellant [\*\*\*763] waited for appellee in the bushes outside her place of employment, followed her around town, and put himself in a position where he passed her going to and from work is sufficient for a reasonable trier of fact to conclude that appellant knowingly caused appellee mental distress.

[\*\*P20] We note that our conclusion on this point is buttressed by another factor. Appellee explained that

appellant's conduct was so "excruciating" that it was a "part of the reason [she] quit [her] job." Evidence of changed routine corroborates a finding of mental distress. See *Noah, supra* at P16; *Scott, supra* at P14. The fact that appellant's unwanted attention influenced appellee to terminate her job with the city of Circleville indicates that she was, indeed, under mental distress and thus supports the trial court's conclusion.

[\*\*P21] Finally, appellant argues that he reasonably explained the instances of stalking in his own testimony. He asserts that: (1) his continued appearance in the city building was to obtain information for another run for [\*29] office; (2) his presence in the bushes waiting for appellee one night after work was because of a prearranged meeting to which she consented and at which he was going to extend an offer of friendship to her and her husband; and (3) the Dairy Queen incident essentially did not happen and that he passed appellee's car just as she exited the parking lot.

[\*\*P22] We acknowledge that appellant offered an explanation for virtually every alleged instance of stalking. It is up to the trial court, however, to determine what weight and credibility to afford the appellant's version of the events and the appellee's version of the events. See *Cole v. Complete Auto Transit, Inc.* (1997), 119 Ohio App.3d 771, 777-778, 696 N.E.2d 289; *GTE Telephone Operations v. J & H Reinforcing & Structural Erectors, Inc.*, Scioto App. No. 01CA2808, 2002 Ohio 2553, at P10; *Reed v. Smith* (Mar. 14, 2001), Pike App. No. 00CA650, 2001 Ohio App. LEXIS 1214. Appellate courts typically defer to trial courts on issues of weight and credibility because, as the trier of fact, trial court is better able than appellate court to view the witnesses and to observe their demeanor, gestures, and voice inflections and then to use those observations in weighing credibility. See *Myers v. Garson* (1993), 66 Ohio St.3d 610, 615, 1993 Ohio 9, 614 N.E.2d 742; *Seasons Coal Co. v. Cleveland* (1984), 10 Ohio St.3d 77, 80, 10 Ohio B. 408, 461 N.E.2d 1273. Moreover, a trier of fact is free to believe all, part or none of the testimony of any witness who appears before it. *Rogers v. Hill* (1998), 124 Ohio App.3d 468, 470, 706 N.E.2d 438; *Stewart v. B.F. Goodrich Co.* (1993), 89 Ohio App.3d 35, 42, 623 N.E.2d 591; also see *State v. Nichols* (1993), 85 Ohio App.3d 65, 76, 619 N.E.2d 80; *State v. Harriston* (1989), 63 Ohio App.3d 58, 63, 577 N.E.2d 1144. In the case sub judice, the trial court opted to accord more weight to appellee's version of the events than appellant's version. This is well

within the trier of fact's province, and we find no error in that regard. <sup>5</sup>

5 Indeed, after appellant explained that he hid in the bushes to meet appellee and to extend an offer of friendship to her and her husband, the trial court even remarked that such course of action seemed odd. Appellant noted that people had told him the same thing before.

[\*\*P23] In summary, we find that sufficient evidence was adduced during the trial court proceedings to support the court's conclusion to issue a CSPO. Thus, we find no abuse of discretion in its decision. Accordingly, we conclude that appellant's two assignments of error are without merit [\*\*\*764] and are hereby overruled, and we hereby affirm the trial court's judgment.

Judgment affirmed.

#### JUDGMENT ENTRY

It is ordered that the judgment be affirmed and that appellee recover of appellant costs herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Hocking County Common Pleas Court to carry this judgment into execution.

A certified copy of this entry shall constitute that mandate pursuant to *Rule 27 of the Rules of Appellate Procedure*. Exceptions.

McFarland, and Grey, J.J., concur.

[\*30] Lawrence Grey, J. retired from the Court of Fourth Appeals, Fourth District, sitting by assignment.

For the Court

BY: Peter B. Abele

Presiding Judge

#### NOTICE TO COUNSEL

Pursuant to *Local Rule No. 14*, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the

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clerk.



STATE OF OHIO, Appellee v. MICHAEL A. PAYNE, Appellant

C.A. No. 24081

COURT OF APPEALS OF OHIO, NINTH JUDICIAL DISTRICT, SUMMIT COUNTY

*178 Ohio App. 3d 617; 2008 Ohio 5447; 899 N.E.2d 1011; 2008 Ohio App. LEXIS 4615*

October 22, 2008, Decided

**SUBSEQUENT HISTORY:** Writ of habeas corpus dismissed, Dismissed without prejudice by, Certificate of appealability denied, Request granted *Payne v. Hall*, 2009 U.S. Dist. LEXIS 55022 (N.D. Ohio, Mar. 11, 2009)

**PRIOR HISTORY:**

APPEAL FROM JUDGMENT ENTERED IN THE COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO. CASE No. CR 07 09 3188.

**DISPOSITION:** Judgment affirmed.

**CASE SUMMARY:**

**PROCEDURAL POSTURE:** Defendant appealed a judgment from the Summit County Court of Common Pleas (Ohio), which convicted him of menacing by stalking, in violation of *R.C. 2903.211(A)*. The trial court imposed a term of imprisonment on defendant.

**OVERVIEW:** Defendant allegedly drove his car through a victim's neighborhood in a manner that was knowingly intended to cause her mental distress. He was charged with menacing by stalking and he entered a not guilty plea. After counsel was appointed for defendant due to his indigency and a jury trial was held, defendant was convicted and sentenced. On appeal, the court held that the evidence was sufficient to support the conviction, as the State provided sufficient proof of the victim's mental distress and defendant's "pattern of conduct" in driving

past the victim's home more than once. Testimony from defendant's former girlfriend was properly admitted to show defendant's history of violence and his prior conviction, both of which were relevant to increase the degree of the offense. The evidence was not unfairly prejudicial or cumulative under *Evid. R. 403(B)*. Defendant's counsel was not ineffective in failing to object to evidence of defendant's prior bad acts, as there was no prejudice where sufficient other evidence supported the conviction. The initials of the jury foreperson on the indictment were sufficient to satisfy *R.C. 2939.20*.

**OUTCOME:** The court affirmed the judgment of the trial court.

**COUNSEL:** SHERRI BEVAN WALSH, Prosecuting Attorney, and GRETA L. JOHNSON, Assistant Prosecuting Attorney, for Appellant.

THOMAS M. PARKER, Attorney at Law, for Appellee.

**JUDGES:** CARLA MOORE, Presiding Judge. SLABY, J., WHITMORE, J., CONCUR.

**OPINION BY:** CARLA MOORE

**OPINION**

## DECISION AND JOURNAL ENTRY

[\*620] [\*\*\*1013] MOORE, Presiding Judge.

[\*\*P1] Appellant, Michael Payne, appeals his conviction from the Summit County Court of Common Pleas. This Court affirms.

## I.

[\*\*P2] Payne was indicted on October 1, 2007 on one count of menacing by stalking in violation of *R.C. 2903.211(A)*, a fourth-degree felony. The indictment alleged that on September 18, 2007, Payne drove his car through the neighborhood of the victim, Alesha Austin, in a manner knowingly intended to cause her mental distress. Payne pled not guilty.

[\*\*P3] On October 10, 2007, Payne filed an affidavit of indigency, seeking appointed counsel. On October 22, 2007, the trial court appointed defense counsel for Payne. On January 7, 2008, following discovery and a pretrial hearing, the case proceeded to jury trial. Payne was convicted on January 9, 2008 and later sentenced to 18 months of incarceration.

[\*\*P4] Payne filed a notice of appeal to this Court on February 14, 2008. He raises four assignments of error for our review.

## II.

**ASSIGNMENT OF ERROR I**

"THE JURY VERDICT UNDER WHICH MICHAEL PAYNE WAS CONVICTED OF MENACING BY STALKING WAS BASED ON INSUFFICIENT EVIDENCE[.]"

[\*\*P5] In his first assignment of error, Payne contends that his conviction was based on insufficient evidence as a matter of law. We disagree.

[\*\*P6] When considering a challenge based on the sufficiency of the evidence, this Court must determine whether the prosecution has met its burden of production. *State v. Thompkins (1997)*, 78 Ohio St.3d 380, 390, 1997 Ohio 52, 678 N.E.2d 541 (Cook, J., concurring). In determining whether the evidence was sufficient to sustain a conviction, a court must view that evidence in a

light most favorable to the prosecution:

"An appellate court's function when reviewing the sufficiency of the evidence to support a criminal conviction is to examine the evidence admitted at trial to determine whether such evidence, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt. The relevant inquiry is 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 [\*621] crime proven beyond a reasonable doubt." *State v. Jenks (1991)*, 61 Ohio St.3d 259, 574 N.E.2d 492, paragraph two of the syllabus.

Payne was convicted under *R.C. 2903.211*, which provides in part:

"(A)(1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person."

[\*\*P7] Payne challenges the sufficiency of the evidence leading to his conviction with respect to two elements of the offense: the victim's mental distress or, alternatively, the victim's belief that the offender would cause physical harm to the victim; and the existence of a "pattern of conduct."

[\*\*\*1014] [\*\*P8] The Ohio Revised Code defines "mental distress" as any of the following:

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

"(b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services." *R.C. 2903.211(D)(2)(a), (b)*.

Austin testified that "[she] was afraid to leave" because Payne was driving down her street, explaining that "I didn't know what he was going to do \*\*\* I didn't know why he was riding past my house." She later testified that she was terrified for approximately six hours. The officer who arrived at the scene following a call placed by Myron Austin, the victim's father, described her demeanor as "intimidated, nervous, very timid, like something was wrong." He also noted that "[s]he seemed kind of fearful."

[\*\*P9] Austin's inability to leave her house due to her fear of Payne is sufficient to find that she suffered some "temporary substantial incapacity" due to the mental distress caused by Payne's conduct. "Substantial incapacity does not mean that the victim must be hospitalized, or totally unable to care for herself. Incapacity is substantial if it has a significant impact upon the victim's daily life." *State v. Horsley, 10th Dist. No. 05AP-350, 2006 Ohio 1208, at P48*. It is sufficient that Austin was so fearful as to be unable to leave her home for the approximately six and one-half hours Payne continued to drive past. This incident, albeit brief, made a significant impact on Austin's daily activities.

[\*\*P10] Evidence may also be considered in light of the recent history between the victim and the defendant. *State v. Secession, 9th Dist. No. 23958, 2008 Ohio 2531, at P9*. Austin testified that her relationship with Payne was "a rocky one" and that he was "abusive mentally and physically," describing the time during which they were dating as "very, very stressful." Austin also testified that Payne had been previously convicted of domestic violence against [\*622] her, from which she received an injury to her right eye, and that Payne's past actions had made her afraid of him. She recounted an incident in which Payne followed her while she was riding in a cab, prompting the cab driver to stop a police cruiser. Considering such evidence in the light most favorable to the State, Austin had ample reason to fear that Payne would cause her physical injury. We therefore conclude that the evidence was sufficient for a rational juror to find, beyond a reasonable doubt, that Payne caused mental distress to Austin.

[\*\*P11] Payne also contends that his actions did not constitute a "pattern of conduct," claiming that he engaged in only a single act that day--driving through Alesha Austin's neighborhood. The statute defines

"pattern of conduct," in relevant part, as "two or more actions or incidents closely related in time[.]" *R.C. 2903.211(D)(1)*. However, we consider each of Payne's acts of driving past Austin's home a separate "action" or "incident" under the statute. At least two of the State's witnesses saw Payne drive past Austin's home multiple times. Barbara Walker testified that "[Payne] passed by here at least twice." Also, Myron Austin testified that he "personally saw him" drive by "[a]t least three or four" times.

[\*\*P12] To determine whether two or more incidents were "closely related in time," the incidents in question should be resolved by the trier of fact "considering the evidence in the context of all the circumstances [\*\*\*1015] of the case." *Middletown v. Jones (2006), 167 Ohio App.3d 679, 2006 Ohio 3465, at P10, 856 N.E.2d 1003*, quoting *State v. Honeycutt, 2d Dist. No. 19004, 2002 Ohio 3490, at P26*. Walker testified that Payne began driving past Austin's house around 2:45 p.m., shortly before Austin and her father arrived home. Alesha Austin testified that Payne continued to drive past Austin's home until around 9:00 p.m., when the police arrived. The relatively short time between each of the incidents, taken in the context of Austin's prior relationship with Payne and the belief that he may have intended to cause her physical harm, renders them "closely related in time." This constitutes a "pattern of conduct" sufficient for the jury to find Payne guilty of violating the statute. Accordingly, Payne's first assignment of error is overruled.

## ASSIGNMENT OF ERROR II

"THE TRIAL COURT ERRED BY  
IMPROPERLY ADMITTING CERTAIN  
EVIDENCE OF OTHER ACTS  
ATTRIBUTED TO MICHAEL  
PAYNE[.]"

[\*\*P13] In his second assignment of error, Payne argues that the trial court improperly admitted testimony from his former girlfriend, Sharon Kaiser, regarding his history of violence during and after their relationship. We disagree.

[\*\*P14] We review the admission of Kaiser's testimony under an abuse of discretion standard. The term "abuse of discretion" connotes more than an error [\*623] of law or judgment; it implies that the court's

attitude is unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219, 5 Ohio B. 481, 450 N.E.2d 1140. Trial courts have broad discretion over whether to admit or exclude relevant, admissible evidence as unduly cumulative or prejudicial. *Evid.R. 403(B)*; see, also, *State v. Davis*, 116 Ohio St.3d 404, 2008 Ohio 2, at P172, 880 N.E.2d 31, quoting *State v. Sage* (1987), 31 Ohio St.3d 173, 31 Ohio B. 375, 510 N.E.2d 343, paragraph two of the syllabus. Payne's counsel objected to questions as to why Kaiser's relationship with Payne was "[h]orrible," Kaiser's testimony that Payne entered her home without her permission, and her state of mind "when that was going on," as well as to Kaiser being allowed to read from a 1999 complaint she had filed against Payne. Menacing by stalking, normally a first-degree misdemeanor, is a fourth-degree felony if a jury finds that any of eight circumstances exist. *R.C. 2903.211(B)(2)*. One of the circumstances is where the offender has a history of violent acts toward the victim or "any other person[.]" *R.C. 2903.211(B)(2)(e)*. Another exists where the offender has a prior menacing by stalking conviction. *R.C. 2903.211(B)(2)(a)*. In this case, the State offered Kaiser's testimony both to show Payne's history of violence in their relationship, as well as to prove Payne's prior menacing by stalking conviction.

[\*\*P15] Payne concedes that Kaiser's testimony was admitted for a proper purpose, as an alternative to admission as proof of motive pursuant to *R.C. 2945.59*. Nevertheless, he contends that in light of the other evidence presented, under *Evid.R. 403*, Kaiser's testimony was unduly cumulative and prejudicial. However, neither *R.C. 2903.211* nor *Evid.R. 403(B)* limits the State to only one method of proof. Payne's felony conviction could have been based on any of four factors, including his history of violence toward Kaiser or Austin, or either of his prior convictions for domestic violence or menacing by stalking. Conversely, they could have chosen to discount evidence of any or all of the other factors as of little or no weight. Thus, the trial court did not allow a "needless presentation of cumulative evidence."

[\*\*\*1016] [\*\*P16] Neither do we find the admission of Kaiser's testimony to be unfairly prejudicial to Payne. Although relevant, evidence may be inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice. *Evid.R. 403(A)*. However, the decision of whether to exclude

evidence under 403(A) lies with the sound discretion of the trial court. *Sage*, 31 Ohio St.3d at paragraph two of the syllabus. Kaiser's testimony was highly probative of two of the eight circumstances in which Payne's offense could be enhanced from a misdemeanor to a felony. We are unconvinced that in light of this probative value, the trial court was "unreasonable, arbitrary, or unconscionable" in admitting Kaiser's testimony. Accordingly, Payne's second assignment of error is overruled.

#### [\*624] ASSIGNMENT OF ERROR III

"MICHAEL PAYNE RECEIVED  
INEFFECTIVE ASSISTANCE OF  
COUNSEL WHEN HIS COUNSEL DID  
NOT OBJECT TO ALL 'OTHER ACTS'  
EVIDENCE OFFERED BY THE  
PROSECUTION."

[\*\*P17] In his third assignment of error, Payne claims that his trial counsel was ineffective in failing to object to the admission of State's Exhibits 3 and 4 and Kaiser's testimony as to Payne's prior bad acts. We do not agree.

[\*\*P18] In considering a defendant's claim of ineffective assistance of counsel, this Court employs a two-step process. *Strickland v. Washington* (1984), 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674. First, we must determine whether trial counsel engaged in a "substantial violation of any \*\*\* essential duties to his client." *State v. Bradley* (1989), 42 Ohio St.3d 136, 141, 538 N.E.2d 373, quoting *State v. Lytle* (1976), 48 Ohio St.2d 391, 396, 358 N.E.2d 623, vacated in part on other grounds. Second, we must determine if the trial counsel's ineffectiveness resulted in prejudice to the defendant. *Bradley*, 42 Ohio St.3d at 141-142, quoting *Lytle*, 48 Ohio St.2d at 396-397.

[\*\*P19] "An appellate court may analyze the prejudice prong of the *Strickland* test alone if such analysis will dispose of a claim of ineffective assistance of counsel on the ground that the defendant did not suffer sufficient prejudice." *State v. Kordeleski*, 9th Dist. No. 02CA008046, 2003 Ohio 641, at P37, citing *State v. Loza* (1994), 71 Ohio St.3d 61, 83, 1994 Ohio 409, 641 N.E.2d 1082, overruled on other grounds. A defendant may demonstrate prejudice in cases where there is a reasonable probability that the trial result would have

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899 N.E.2d 1011, \*\*\*1016; 2008 Ohio App. LEXIS 4615

been different but for the alleged deficiencies of counsel. *Bradley*, 42 Ohio St.3d 136, 538 N.E.2d 373, at paragraph three of the syllabus. To make a sufficient showing of prejudice, a defendant must demonstrate that "'counsel's errors were so serious as to deprive the defendant of a fair trial \*\*\* whose result is reliable.'" *State v. Colon*, 9th Dist. No. 20949, 2002 Ohio 3985, at P48, quoting *Strickland*, 466 U.S. at 687.

[\*\*P20] We fail to see how exclusion of Sharon Kaiser's testimony, along with the State's Exhibits 3 and 4, would have changed the outcome for Payne. As previously noted, even had the trial court excluded Kaiser from testifying, there existed sufficient evidence to find Payne guilty of each of the elements of the crime beyond a reasonable doubt and subject him to the enhancement provision in *R.C. 2903.211(B)(2)*. He also would have remained subject to *R.C. 2903.211(B)(2)(e)* as an offender with a "history of violence toward the victim or \*\*\* of other violent acts toward the victim," as Alesha Austin's testimony made clear. Payne has failed to [\*\*\*1017] demonstrate a reasonable probability that the outcome of his trial would have been different but for the alleged errors of his trial counsel. Accordingly, Payne's third assignment of error is overruled.

[\*625] **ASSIGNMENT OF ERROR IV**

"THE INDICTMENT FILED  
AGAINST MICHAEL PAYNE WAS  
INVALID PURSUANT TO THE OHIO  
REVISED CODE AND THE OHIO  
RULES OF CRIMINAL  
PROCEDURE[.]"

[\*\*P21] In his fourth assignment of error, Payne argues that his indictment was invalid because it was initialed, rather than signed, by the grand jury foreperson. We disagree.

[\*\*P22] Ohio law requires that an indictment be indorsed by the foreperson, by including the words "A true bill" and subscribing his or her name. *R.C. 2939.20*. Ohio courts have long recognized a signature by mark as legally valid where the signer intended to be so bound. *In*

*re Young* (1978), 60 Ohio App.2d 390, 393, 397 N.E.2d 1223, quoting *Sterba v. Lienhard* (1950), 58 Ohio Law Abs. 65, 95 N.E.2d 12. Ohio courts have also held that a foreperson's initials are a sufficient subscription. *State v. Creasey* (2001), 8th Dist. Nos. 65717, 65718, 2001 Ohio App. LEXIS 3953, \*7, citing *Dun v. State* (1922), 17 Ohio App. 10; see, also, *R.C. 2939.20*. Therefore, Payne's fourth assignment of error is overruled.

III.

[\*\*P23] Payne's assignments of error are overruled. The judgment of the Summit County Court of Common Pleas is affirmed.

Judgment affirmed.

The Court finds that there were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Summit, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to *App.R. 27*.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. *App.R. 22(E)*. The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to *App.R. 30*.

Costs taxed to Appellant.

CARLA MOORE

FOR THE COURT

SLABY, J.

WHITMORE, J.

CONCUR