

IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO

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|-------------------------|---|----------------------------|
| NICOLE MARIE NEEDHAMER, | : | O P I N I O N |
| Petitioner-Appellee, | : | |
| - vs - | : | CASE NO. 2010-L-015 |
| PAUL JOHN CARLOZZI, | : | |
| Respondent-Appellant. | : | |

Civil Appeal from the Lake County Court of Common Pleas, Case No. 09 CS 001841.

Judgment: Affirmed

James R. Flaiz, Carrabine & Reardon Co., L.P.A., 7445 Center Street, Mentor, OH 44060 (For Petitioner-Appellee).

James D. Falvey, Barthol & Staley, 7327 Center Street, Mentor, OH 44060 (For Respondent-Appellant).

DIANE V. GRENDELL, J.

{¶1} Respondent-appellant, Paul John Carlozzi, appeals the Judgment Entry of the Lake County Court of Common Pleas, adopting the Magistrate’s Decision granting petitioner-appellee, Nicole Marie Needhamer, a Civil Protection Order. For the following reasons, we affirm the decision of the court below.

{¶2} On June 10, 2009, Needhamer filed a Petition for Civil Stalking Order, pursuant to R.C. 2903.214, in the Lake County Court of Common Pleas.

{¶3} On the same date, the court issued, ex parte, an Order of Protection against Carlozzi.

{¶4} On September 14, 2009, a full hearing was held on Needhamer's Petition before a magistrate of the court. The following testimony was proffered.

{¶5} Patrolman James Daniel Zuber of the Mentor-on-the-Lake Police Department testified that, on the evening of May 5, 2009, Needhamer came to the station to report an incident of domestic violence and seek advice about obtaining a Protection Order. Needhamer claimed that Carlozzi had attacked her on May 3, 2009, at his home where she had been living. Zuber testified Needhamer had a mark on her forearm and a bruise on her thigh, which was photographed by a female police officer. Zuber returned to Carlozzi's residence with Needhamer so that she could collect some personal belongings. They spent about five minutes at the residence and Needhamer gathered her things quickly as she wanted to avoid meeting Carlozzi.

{¶6} Patrolman Zuber testified that, on May 6, 2009, Carlozzi came to the station to pick up some items of his (a garage-door opener, a key, and a credit card) that had been in Needhamer's possession. Carlozzi denied attacking Needhamer, claiming, instead, that she had attacked him. Zuber noted that Carlozzi weighs considerably more than Needhamer. Zuber charged Carlozzi with Domestic Violence.

{¶7} Needhamer testified that on May 3, 2009, she and Carlozzi were in an argument at his residence at 7911 Driftwood Drive, where she had been living for about two and a half to three years. Carlozzi exited the house into the garage, as though he were leaving, and Needhamer slammed the door behind him. The next instant, Carlozzi "came flying back through" the door, grabbed her by the neck, and "slammed [her] onto the couch." Carlozzi continued to choke Needhamer "very hard" and threatened to kill her. Needhamer testified she was "very scared," at various times crying, choking, foaming, and trying to pry his hands from her throat. Needhamer testified that Carlozzi kicked or kneed her in the thigh. Eventually, Carlozzi released her and walked away.

{¶8} Needhamer testified that Carlozzi was “high” at the time of the attack and began drinking afterwards. She spent the night on the couch, but noted that he had loaded firearms in his bedroom and a concealed carry permit.

{¶9} Needhamer testified that, on May 5, 2009, she went to the hospital for an examination and was told she had inflammation in the neck and a deep bruise on her thigh. She also began seeing a therapist who described her as a “battered woman.” Needhamer’s medical doctor issued her a prescription for Xanax.

{¶10} Needhamer testified that, in 2006, Carlozzi tried to run her down with his truck. She filed a police report at the time but did not press charges. Throughout their relationship, Carlozzi routinely threatened to kill her if she would cheat on him.

{¶11} Needhamer testified that, following the issuance of the ex parte Protection Order, she received several text messages stating, “hope you found better.” Needhamer believes Carlozzi sent these messages, noting that, when they had broken up in the past, he would not “let things go,” but would continue to badger, threaten, and try to intimidate her.

{¶12} Following the testimony, the parties stipulated that, as a result of the charge filed by Patrolman Zuber, Carlozzi pled no contest to second-degree misdemeanor Attempted Assault in Mentor Municipal Court.

{¶13} On October 14, 2009, the trial court granted Needhamer an Order of Protection against Carlozzi, effective until October 14, 2012. In support, the magistrate made the following findings of fact:

{¶14} Specifically, the magistrate finds that the parties had a dating relationship which abruptly ended shortly after the respondent brutally assaulted the petitioner on May 3, 2009. In the time since, the respondent has also sent several harassing and mildly threatening text messages to the petitioner. The magistrate finds that the assault and the subsequent text messages sufficiently establish that the respondent has engaged in the requisite pattern of conduct.

{¶15} In addition, however, the magistrate finds that the respondent engaged in further activity which caused the petitioner to fear for her physical safety while the parties were dating. Notwithstanding their on-going and seemingly consensual relationship, the magistrate finds that the respondent engaged in an obsessive and intimidating pattern of behavior, which not only caused the petitioner to fear for her physical safety, but also caused her mental distress as defined by the statute. The magistrate does not typically consider interaction which took place while the parties carried on a seemingly consensual relationship. However, such evidence was relevant in the within case given the previous cycles of violence in their relationship.

{¶16} On October 26, 2009, Carlozzi filed an Objection to Magistrate's Decision of 10/14/09.

{¶17} On January 7, 2010, the trial court entered a Judgment Entry Adopting Magistrate's Decision, overruling Carlozzi's Objection.

{¶18} On January 24, 2010, Carlozzi filed his Notice of Appeal.¹ On appeal, Carlozzi raises the following assignment of error:

{¶19} "[1.] The court erred to the prejudice of respondent-appellant by adopting the magistrate's decision to grant a civil order of protection against him."

{¶20} A Protection Order may be granted if, "[a]fter a full hearing at which the [petitioner]² presents evidence in support of the request for a protection order and the [respondent] is afforded an opportunity to defend against that evidence, the court determines that the petitioner has committed a violation of section 2903.211 [2903.21.1] of the Revised Code against the person to be protected by the protection order ***." R.C. 2903.214(E)(3)(d). The petitioner must demonstrate, by a preponderance of the evidence, that they are entitled to a civil Protection Order. *Tuuri v. Snyder*, 11th Dist.

1. On March 2, 2010, this court remanded the case to the trial court, noting that the October 14, 2009 Magistrate's Decision was, in fact, "a combined magistrate's decision and judgment entry" and, so, not a final order. On March 12, 2010, the trial court issued an Order Amending, Nunc pro Tunc, Judgment Entry Adopting Magistrate's Decision.

2. The text of the statute incongruously reads: "[a]fter 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."

No. 2000-G-2325, 2002-Ohio-2107, at ¶12, citing *Felton v. Felton* (1997), 79 Ohio St.3d 34, paragraph two of the syllabus.

{¶21} Section 2903.211(A)(1) of the Revised Code defines the crime of Menacing by Stalking as follows: “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.” “Pattern of conduct” is defined as “two or more actions or incidents closely related in time.” R.C. 2903.211(D)(1). “Mental distress” is defined as “[a]ny mental illness or condition that involves some temporary substantial incapacity,” or “[a]ny mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services.” R.C. 2903.211(D)(2)(a) and (b).

{¶22} The “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.” *Caban v. Ransome*, 7th Dist. No. 08 MA 36, 2009-Ohio-1034, at ¶7, citing *Abuhamda-Sliman v. Sliman*, 161 Ohio App.3d 541, 2005-Ohio-2836, at ¶¶9-10. In a civil context, “[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence.” *C.E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, syllabus.

{¶23} Carlozzi argues that the “harassing and mildly threatening” text messages Needhamer received “do not rise to the level of causing a reasonable person to feel threatened of physical harm [sic] or to cause that person mental distress as defined by statute.” We disagree. There was competent, credible evidence before the trial court

that Carlozzi knowingly engaged in a pattern of conduct that caused Needhamer to believe he would cause her physical harm or that caused her mental distress.

{¶24} The evidence of the May 3, 2009 attack, when coupled with the subsequent text messages, constitutes a pattern of conduct sufficient to support the granting of the Protection Order. The text messages, “hope you found better,” while not directly threatening, must be considered in light of the prior attack and threats. *State v. Smith* (1998), 126 Ohio App.3d 193, 200 (“explicit threats are not necessary to establish the elements of menacing by stalking as set forth in R.C. 2903.211”). As described by Needhamer, the assault and messages were consistent with a pattern established after prior break ups, in which Carlozzi continued to badger, threaten, and intimidate her. Needhamer testified that Carlozzi’s threats were constant throughout the relationship. Moreover, these text messages were sent after the issuance of, and thus in violation of, the ex parte Protection Order. Needhamer testified that she had “had enough,” was “scared,” and “fearful for [her] life.” Contributing to Needhamer’s fears were Carlozzi’s substance abuse and possession of firearms.

{¶25} Additionally, there was evidence that Carlozzi’s conduct caused Needhamer mental distress, in that she began seeing a therapist soon after the May 3, 2009 attack and began taking the anti-anxiety drug, Xanax.

{¶26} Circumstances such as those present in this case have been held sufficient to support the grant of a Protection Order. See *Bryant v. Spear-Hardy*, 2nd Dist. No. 23449, 2010-Ohio-1903, at ¶26 (indirect threats and hostile demeanor); *Liles v. Keith*, 3rd Dist. No. 2-09-22, 2009-Ohio-6874, at ¶12 (menacing operation of a motor vehicle and intimidating hand gestures); *Rauser v. Ghaster*, 8th Dist. No. 92699, 2009-Ohio-5698, at ¶21 and ¶29 (seemingly “friendly” encounters between the parties were

actually menacing behavior in light of prior indirect threats, such as “you’ll be sorry,” and given that a Protection Order had already been issued).

{¶27} The sole assignment of error is without merit.

{¶28} For the foregoing reasons, the Judgment of the Lake County Court of Common Pleas, adopting the Magistrate’s Decision to grant Needhamer a Protection Order, is affirmed. Costs to be taxed against appellant.

CYNTHIA WESTCOTT RICE, J.,

TIMOTHY P. CANNON, J.,

concur.