[Cite as *Martauz v. Martauz*, 2009-Ohio-2642.]

STATE OF OHIO, MAHONING COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

SHARON M. MARTAUZ	)	CASE NO. 08 MA 135
	)	
PLAINTIFF-APPELLEE	)	
	)	
VS.	)	OPINION
	)	
FRANCIS D. MARTAUZ	)	
	)	
DEFENDANT-APPELLANT	)	

CHARACTER OF PROCEEDINGS: Civil Appeal from the Court of Common Pleas, Domestic Relations Division, of Mahoning County, Ohio
Case No. 08 DV 37

JUDGMENT: Affirmed.

APPEARANCES:

For Plaintiff-Appellee: Atty. Donald J. DeSanto
DeSanto Law Firm
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For Defendant-Appellant: Francis Martauz, Pro se
9900 Cherry Hills Drive
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JUDGES:

Hon. Cheryl L. Waite
Hon. Gene Donofrio
Hon. Mary DeGenaro

Dated: June 3, 2009.

WAITE, J.

{¶1} Appellant, Francis D. Martauz, acting pro se, appeals the entry of a domestic relations civil protection order against him and in favor of his former spouse, Appellee, Sharon M. Martauz, pursuant to R.C. 3113.31, by the Mahoning County Court of Common Pleas, Domestic Relations Division on May 30, 2008. Appellant contends that Appellee failed to demonstrate that his behavior on the date at issue constituted a threat that would place a reasonable person in fear of imminent physical harm. For the reasons that follow, the trial court's decision is affirmed.

Facts and Procedural History

{¶2} The following facts are taken from the testimony of Appellee at the evidentiary hearing on the petition conducted on March 19, 2008 by the magistrate, unless otherwise noted. Appellant was present but did not testify at the evidentiary hearing.

{¶3} The magistrate read portions of the petition into the record at the hearing. According to the petition, on Thursday, January 17, 2008, Appellee received a message from Appellant attempting to change the terms of the shared parenting plan the parties entered into as a part of their divorce. Appellant wanted the children to remain at his residence throughout the upcoming weekend, despite the fact that it was Appellee's scheduled weekend with the children. (Tr., pp. 8-9.) In response, Appellee explained to Appellant that she was going out of town on Monday. As a consequence, she did not want to switch weekends. (Tr., p. 9.) However, she offered to share the children's time with Appellant on Sunday.

{¶4} Appellant proceeded to call Appellee twenty times and sent her eleven text messages throughout the day. When Appellee returned to her residence that evening, Appellee pulled up in the driveway behind her. Appellee speculated that he had followed her home. She quickly went into the house and locked the door. Appellant repeatedly knocked on the door, pounded on the window, rang the doorbell, and called Appellee on the telephone.

{¶5} According to the petition, Appellee became frightened by Appellant's "obsessive behavior" and called the police. She testified that she had spoken with a police detective about filing harassment charges against Appellant prior to the January 17, 2008 incident because he had been leaving voice and text messages that she characterized as "obsessive and bothersome" on a daily basis. (Tr., p. 9.)

{¶6} When the magistrate asked Appellee if any of the messages left on January 17, 2008 were threatening in any way, she responded that, although the messages did not contain any direct threats, she felt that "the whole day was threatening." (Tr., p. 10.) She characterized the many phone and text messages as "abnormal behavior," and stated that "quite often" since the divorce Appellant has called her twenty times insisting that they speak about an urgent matter, and that the subject of the resulting conversation was insignificant. (Tr., p. 11.)

{¶7} She conceded that Appellant never threatened to hurt her while he was pounding on the door and window. (Tr., pp. 12-13.) She nonetheless feared that he might break a window in order to "get at [her]." (Tr., p. 13.) Once the police arrived, Appellant left without incident. (Tr., p. 14.) Despite the fact that the police told Appellant to stop calling Appellee, he continued to call her after leaving her

residence. (Tr., p. 15.) She testified that the police told her to file a petition for a civil protection order the following day.

{¶8} The only physical altercation between the parties occurred approximately five months prior to the incident that prompted the petition. (Tr., p. 16.) In August of 2007, the parties, who were still married at the time, were arguing over the contents of a box in Appellee's hands. (Tr., pp. 27-28.) According to Appellee, Appellant "punched" the box out of her hands, and the box scratched her arm as it fell to the floor. Although he was charged with domestic violence, Appellant ultimately pleaded guilty to the lesser charge of disorderly conduct on October 19, 2007. According to Appellee's attorney, Appellant was still on probation for the disorderly conduct conviction when the incident giving rise to the petition occurred. (Tr., pp. 17-18.)

{¶9} The record also reflects that Appellant has a pending obstruction of justice charge based, apparently, on evasion of service of some legal filing.

{¶10} Throughout Appellee's testimony, she characterized Appellant's post-divorce behavior as obsessive, because he had a habit of leaving messages that were "rude," "disgustingly sexual," "deviant," "out of place," and "out of character." (Tr., pp. 22, 30.)

{¶11} She testified that Appellant knocked on the door twenty times, pounded on the window twenty times, and rang the doorbell ten times on January 17, 2008. (Tr., p. 33.) She further testified that she would have simply answered the door, rather than called the police, but the relentless knocking, pounding, and ringing

scared her. (Tr., p. 34.) She waited between five and seven minutes before calling the police. (Tr., p. 13.)

{¶12} Although she conceded that Appellant did not threaten to hurt her while he was pounding on the door and windows, she stated that his behavior had been "erratic" and "extremely unpredictable," and she feared "what might be next." (Tr., pp. 20, 32.)

{¶13} Finally, Appellee testified that Appellant had repeatedly asked her to dismiss the petition prior to the evidentiary hearing, and she had consistently declined, indicating that she needs to protect herself from him. (Tr., p. 18.) On two occasions, Appellant responded that a restraining order could not keep him away from her in the event that he "snap[s]." (Tr., p. 18.)

{¶14} The petition was filed on January 18, 2008. The magistrate issued an ex parte civil protection order on February 1, 2008. After the hearing on March 19, 2008, the magistrate issued a civil protection order which expires on March 19, 2010.

{¶15} Appellant filed his objections to the magistrate's decision on April 4, 2008. The domestic relations court conducted a hearing on the objections on May 8, 2008. The trial court issued a judgment entry adopting the decision of the magistrate on May 30, 2008.

{¶16} In the judgment entry, the trial court predicated the adoption of the magistrate's decision on the uncontroverted testimony of Appellee. The trial court concluded that Appellee's fear was reasonable, "in light of the past incident of domestic violence that occurred in 2007, the current obstruction of justice charge, and Respondent/Francis Martauz's comments to Petitioner/Sharon Martauz that a

restraining order will not keep him away from her if he were to snap." (5/30/08 J.E., pp. 4-5.) This timely appeal followed.

Law

{¶17} When reviewing an appeal from a trial court's decision to adopt a magistrate's decision, we must determine whether the trial court abused its discretion. *Solomon v. Solomon*, 157 Ohio App.3d 807, 2004-Ohio-2486, ¶16, 813 N.E.2d 918. An abuse of discretion connotes more than error of law or judgment, it indicates an unreasonable, arbitrary or unconscionable attitude by the court. Id.

{¶18} "[W]hen examining the decision by a trial court to adopt or not to adopt a magistrate's decision for an abuse of discretion, the focus of this court must be on the trial court's actions and not the decisions of the magistrate." Id. at ¶17.

{¶19} A petitioner seeking a civil protection order must demonstrate by a preponderance of the evidence that they are in danger of domestic violence. *Felton v. Felton* (1997), 79 Ohio St.3d 34, 679 N.E.2d 672, paragraph two of the syllabus. R.C. 3113.31(A)(1)(b) defines "domestic violence" to include, "[p]lacing another person by the threat of force in fear of imminent serious physical harm * * *."

{¶20} Appellate courts have permitted a trial court to consider past acts of domestic violence in order to determine whether the petitioner's fear in the present situation is reasonable. *Eichenberger v. Eichenberger* (1992), 82 Ohio App.3d 809, 816, 613 N.E.2d 678. However, the issuance of a civil protection order cannot be based solely on previous incidents of alleged domestic violence. *Bruner v. Bruner* (Sept. 22, 2000), 7th Dist. No. 99CA285, 2000 WL 1486452. In other words, "[a]bsent an initial, explicit indication that appellee [petitioner] was in fear of imminent

serious physical harm from appellant [respondent] on * * * [the date set forth in the petition for a civil protection order], the reasonableness of her alleged fear cannot be determined by reference to her past history with appellant." Id. at *3.

First Assignment of Error

{¶21} "The court erred by determining the petitioner's testimony credible."

{¶22} Appellant contends that Appellee's testimony was contradictory and at times unworthy of credence. For instance, Appellee testified that Appellant pounded on a window, then she later testified that he could not determine whether she was in the house because "[t]here's no window." (Tr., p. 23.) Obviously, Appellee meant that she was in a part of the house where she could not be seen through a window, and, as a consequence, it does not appear that she contradicted her earlier testimony.

{¶23} Appellant also asserts that Appellee was intentionally withholding information from the trial court. For instance, when she was asked about the contents of the box that scratched her arm, she responded that she did not know what was in the box and that the contents of the box did not matter. However, when the magistrate asked her if the argument was over the contents of the box she answered "yes." (Tr., p. 28.) Similarly, when she was asked if she knew why Appellant appeared at her door on January 17, 2008, Appellant testified that she did not know the purpose of his visit. (Tr., p. 25.) Appellant argues that his purpose was clear, he wanted to discuss his issues about the children's visitation over the weekend.

{¶24} We must presume the validity of the trial court's factual findings because the trial court is in the best position to observe the witnesses and weigh the credibility of the proffered testimony. *Seasons Coal Co. v. City of Cleveland* (1984), 10 Ohio St.3d 77, 80, 461 N.E.2d 1273. It is clear that the trial court credited Appellee's testimony, and, despite Appellant's efforts in his appellate brief, he has not revealed any clear inconsistencies that demonstrate that the trial court abused its discretion in accepting Appellee's uncontested version of the relevant events. As a consequence, Appellant's first assignment of error is overruled.

{¶25} Appellant's remaining assignments of error and his allegations as to "first abuse of discretion" challenge the reasonableness of Appellant's fear. Accordingly, we will address these together.

Second Assignment of Error

{¶26} "The court erred by finding that the Petitioner's fear to be reasonable [sic] based on an alleged/unproven past incident of domestic violence."

Third Assignment of Error

{¶27} "The court erred by finding that the Petitioner's fear to be reasonable [sic] based on the Respondent having a current charge of obstructing justice."

Fourth Assignment of Error

{¶28} "The court erred by finding that the Petitioner's fear to be reasonable [sic] based on the Respondent having made a statement of sound logic to the petitioner about the how a person [sic] in a psychotic state would not consider the consequences of violating a restraining order."

First Abuse of Discretion

{¶29} "The court abused it's [sic] discretion by finding telephone calls, text messages, knocking on the door, ringing the door bell and pounding on the window are sufficient evidence of threat of force."

{¶30} Appellant contends that he did not verbally threaten Appellee on January 17, 2008, and, therefore, her fear of imminent serious physical harm was unreasonable.

{¶31} The trial court cited two cases in its judgment entry to support the conclusion that threats do not need to be verbal in order to invoke the statute. In *Siouffi v. Siouffi* (December 18, 1998), 2nd Dist. No 17113, the respondent took a twelve-inch knife from the couple's kitchen, went outside to the area where the petitioner's car was parked, and slashed at least one of her tires. He then forced his way back in to the residence. The Second District Court of Appeals characterized the respondent's conduct as "frightening and extreme" and concluded that it constituted the type of threat contemplated by the statute. *Siouffi* at *4.

{¶32} In *State v. McCord* (August 4, 1998), 5th Dist. No. CA-97-57, the defendant refused to leave his girlfriend's residence, and while he spoke with her he struck his palm with his fist. The defendant attempted to justify his behavior stating that he was not threatening his girlfriend, he was threatening the man she was allegedly dating. The Fifth District Court of Appeals concluded that the defendant had admitted that his gesture was threatening and declined to reverse his domestic violence conviction.

{¶33} R.C. Chapter 3113 does not define "serious physical harm." However, R.C. 2901.01(A)(5) defines "serious physical harm to persons" as any of the following:

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

{¶35} "(b) Any physical harm that carries a substantial risk of death;

{¶36} "(c) Any physical harm that involves some permanent incapacity, whether partial or total, or that involves some temporary, substantial incapacity;

{¶37} "(d) Any physical harm that involves some permanent disfigurement or that involves some temporary, serious disfigurement;

{¶38} "(e) Any physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain."

{¶39} Imminence is not defined in the code. As a consequence, it must be construed according to its ordinary meaning. *State v. S.R.* (1992), 63 Ohio St.3d 590, 595, 589 N.E.2d 1319. "Imminent" means, "about to occur at any moment: impending." Webster's II New Riverside University Dictionary (1984).

{¶40} Therefore, "the critical inquiry under [R.C. 3113.31] is whether a reasonable person would be placed in fear of imminent (in the sense of unconditional, non-contingent), serious physical harm." *Fleckner v. Fleckner* (2008), 177 Ohio App.3d 706, 2008-Ohio-4000, ¶20, 895 N.E.2d 896 (internal quotations omitted). The inquiry involves both subjective and objective elements. Id.

{¶41} The record reflects that the subjective element was met in this case. Appellee testified numerous times that she feels threatened by Appellant and believes that she needs to protect herself from him. Therefore, this appeal turns on whether the trial court abused its discretion in concluding that Appellee's fear is reasonable.

{¶42} In his brief, Appellant claims that because Appellee conceded at trial that he never hit her during the marriage or verbally threatened her on January 17, 2008, the trial court erred in concluding that her fear is reasonable. Specifically, Appellant argues that the trial court should not have predicated the issuance of the civil protection order on his obstruction of justice charge, because obstruction of justice is not a violent crime. He further argues that the trial court should not have relied upon his observation that a civil protection order could not protect Appellee if he "snapped." He contends that, "the statement was not a threat but a statement of logic." (Appellant's Brf., p. 7.) Finally, he argues that the trial court's reliance on *Siouffi* and *McCord*, supra, was misplaced, because the behavior at issue in those cases, "implies I'm going to get you," whereas, "[p]hone calls imply I want to talk to you," and, "[t]ext messages imply here is something I want to say to you." (Appellant's Brf., pp. 8-9.)

{¶43} While it is true that the obstruction of justice charge would have little or no relevance to the trial court's determination of reasonableness, Appellant's statements regarding the effectiveness of the civil protection order are certainly germane to the issue of fear. A reasonable person could conclude that Appellant's statements were a thinly-veiled threat, particularly in light of the barrage of daily

phone calls and inappropriate text messages received by Appellee in the weeks leading up to January 17, 2008.

{¶44} Furthermore, while Appellant's behavior on January 17, 2008 did not involve a verbal threat, his refusal to leave the residence when it would have been obvious to a rational person that Appellee had no intention of answering the door, combined with fifteen minutes of relentless knocking, ringing, pounding, and calling support the trial court's conclusion that Appellee's fear is reasonable. (Tr., p. 30.) That conclusion is further supported by the fact that Appellant continued to call Appellee after the police had instructed him to stop.

{¶45} Moreover, although Appellant correctly argues that a phone call implies "I want to talk to you," Appellant fails to appreciate that twenty phone calls, eleven text messages and fifteen minutes of knocking, ringing, pounding, and calling demonstrate that his behavior had become irrational. It does not appear from his pro se brief that he recognizes that his behavior appears to be inappropriate and disturbing. As a matter of fact, at oral argument he openly characterized his behavior on January 17, 2008, as merely "persistence."

{¶46} Finally, the fact that Appellant had lost his temper and reacted with physical aggression toward Appellee during a previous disagreement supports the trial court's conclusion that Appellee's fear was reasonable. It is important to note that Appellant was still on probation for the disorderly conduct conviction on January 17, 2008.

{¶47} In order to establish that the trial court abused its discretion, the result must be, "so palpably and grossly violative of fact and logic that it evidences not the

exercise of will but perversity of will, not the exercise of judgment but defiance thereof, not the exercise of reason but rather of passion or bias." *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, 473 N.E.2d 264.

{¶48} The trial court concluded, based on Appellee's uncontroverted testimony regarding Appellant's behavior on January 17, 2008, as well as his behavior prior to and following that day, that Appellee's fear is reasonable. Based on this record it does not appear that the decision of the trial court was unreasonable, arbitrary, or unconscionable. Accordingly, all of Appellant's assignments of error and his claims as to abuse of discretion are overruled and the judgment of the trial court is affirmed.

Donofrio, J., concurs.

DeGenaro, J., concurs.