[Cite as *Miller v. Shaw*, 2009-Ohio-6753.]

STATE OF OHIO, CARROLL COUNTY

IN THE COURT OF APPEALS

SEVENTH DISTRICT

ALAN MILLER,	)	
	)	
PETITIONER-APPELLANT,	)	
	)	
VS.	)	CASE NO. 09-CA-858
	)	
BRANDON SHAW,	)	OPINION
	)	
RESPONDENT-APPELLEE.	)	

CHARACTER OF PROCEEDINGS:	Civil Appeal from Court of Common Pleas, Domestic Relations Division of Carroll County, Ohio Case No. 09DRH25817
JUDGMENT:	Affirmed
APPEARANCES: For Petitioner-Appellant	Attorney John A. Burnworth Attorney Matthew R. Hunt Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A. 4775 Munson Street, N.W. P.O. Box 36963 Canton, Ohio 44735-6963
For Respondent-Appellee	Attorney Steven J. Kandel 1101 Central Plaza S. Suite 1003 Canton, Ohio 44702

JUDGES:

Hon. Gene Donofrio
Hon. Joseph J. Vukovich
Hon. Mary DeGenaro

Dated: December 21, 2009

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DONOFRIO, J.

{¶1} Petitioner-appellant, Alan Miller, appeals from a Carroll County Common Pleas Court judgment dismissing his petition for a civil stalking protective order against respondent-appellee, Brandon Shaw.

{¶2} Appellant has had an on-going extramarital affair with appellee's wife. On June 2, 2007, at a festival, appellant and appellee got into a physical altercation. On February 18, 2009, the parties were involved in another physical altercation in the parking lot of Carroll Healthcare Center (CHC). Appellant works at CHC, as does appellee's wife. Appellee was in the parking lot dropping off items into his wife's car for their children. At this time, appellee and his wife were separated.

{¶3} On February 20, 2009, appellant filed a petition for a civil stalking protection order (CSPO). For support, he alleged that appellee assaulted him at CHC and verbally threatened him.

{¶4} The court held a hearing on appellant's petition where it heard evidence from both parties and one other witness. The court determined that appellant did not meet his burden of proof. Therefore, the court dismissed appellant's CSPO petition.

{¶5} Appellant subsequently filed a timely notice of appeal on March 17, 2009.

{¶6} Appellant raises a single assignment of error, which states:

{¶7} "THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S PETITION FOR A CIVIL STALKING PROTECTIVE ORDER."

{¶8} Appellant argues that the two physical altercations between him and appellee within the last two years established a "pattern of conduct" as is required for a CSPO. In addition to these two physical altercations, appellant asserts that appellee has threatened to kill him, slammed on his brakes in an attempt to have appellant hit him with his car from behind, and made obscene gestures at him. Appellant contends that due to the evidence of these occurrences, the trial court should have granted him the CSPO.

{¶9} Appellant cites to numerous cases where courts issued protective orders based on verbal threats and other non-physical acts. See *Szymanski v. Trendel*, 6th Dist. Nos. L-08-1110, L-08-1111, 2009-Ohio-992; *Sobieniak v.*

Chapdelaine, 6th Dist. No. L-08-1173, 2008-Ohio-6403; *Walker v. Edgington*, 2d Dist. No. 07-CA-75, 2008-Ohio-3478; *Guthrie v. Long*, 10th Dist. No. 04AP-913, 2005-Ohio-1541; *Luikart v. Shumate*, 3d Dist. No. 9-02-69, 2003-Ohio-2130; *Mann v. Sumser*, 5th Dist. No. 2001CA00350, 2002-Ohio-5130. Appellant contends that because this case involved physical altercations in addition to the other non-physical acts, the trial court's decision to dismiss the CSPO petition was against the weight of the evidence.

{¶10} In reviewing a trial court's judgment on whether to grant or deny a CSPO, this court applies a manifest weight of the evidence assessment. *Caban v. Ransome*, 7th Dist. No. 08-MA36, 2009-Ohio-1034, at ¶7. Because a CSPO action is a civil action, we must give deference to the trial court and affirm its decision if it is supported by some competent, credible evidence. Id. at ¶8. We will not reverse a trial court's decision denying a CSPO as against the weight of the evidence as long as there is some competent, credible evidence to support it. *C.E. Morris Co. v. Foley Constr. Co.* (1978), 54 Ohio St.2d 279, 280.

{¶11} In ruling on whether or not to issue a CSPO, the trial court must determine whether the preponderance of the evidence presented at the hearing establishes that the defendant engaged in a violation of the menacing by stalking statute. *Caban*, 7th Dist. No. 08-MA36, at ¶5.

{¶12} The menacing by stalking statute provides, in relevant part: "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). A "pattern of conduct" consists of "two or more actions or incidents closely related in time." R.C. 2903.211(D)(1). The statute does not define what constitutes "closely related in time." Whether two incidents are closely related in time is a question for the trier of fact. *State v. Dario* (1995), 106 Ohio App.3d 232, 238.

{¶13} Thus, in this case we must determine whether the trial court's decision that appellant failed to meet his burden of proving that appellee engaged in a pattern of conduct that knowingly caused appellant to believe that appellee would cause

physical harm or mental distress to him is supported by some competent, credible evidence.

{¶14} We must examine the evidence presented at the hearing to see if it supports the trial court's decision. Three witnesses testified: appellant; appellee; and Lori Farrow, a CHC employee who witnessed the altercation between the parties in CHC's parking lot.

{¶15} Appellant admitted that he was having an affair with appellee's wife. (Tr. 45). And appellee stated that he was aware of the affair. (Tr. 89).

{¶16} Appellant first testified that on June 2, 2007, he and appellee were talking at a rib burn-off festival and appellee hit him in the cheek. (Tr. 34-35).

{¶17} Appellant next testified that on February 20, 2009, he saw appellee in the parking lot at Wendy's while he was on his lunch break from CHC. (Tr. 36-37). Appellant was pulling out and appellee was pulling in. (Tr. 37). Appellant stated that he left Wendy's and went to McDonald's. (Tr. 37). He stated that as he waited to pull out of McDonald's parking lot onto Route 43, he saw appellee drive by and appellee gave him "the finger." (Tr. 37). Appellant pulled out behind appellee. (Tr. 37). Appellant stated that he thought he forgot some papers he needed at CHC so he headed back to work. (Tr. 37). Appellee was driving in front of him. (Tr. 37). Appellant testified that appellee slammed on his brakes and started to get out of his car. (Tr. 38). Appellant stated that he went past appellee and pulled into CHC's parking lot. (Tr. 38). He then realized he had the papers he needed, so appellant began to leave CHC's parking lot. (Tr. 38-39).

{¶18} By this time, appellee was also in CHC's parking lot and had exited his vehicle. (Tr. 39). Appellant testified that he pulled his vehicle in front of appellee's truck and got out to talk to him. (Tr. 39). Appellant stated that appellee immediately threatened to kill him. (Tr. 39). He stated that appellee then hit him in the cheek and the two wrestled until someone broke them up. (Tr. 39). He stated that appellee then punched him one more time in the eye, breaking his glasses and resulting in his needing 12 stitches. (Tr. 40-41).

{¶19} Appellant admitted that he could have avoided appellee and the fight in CHC's parking lot by simply staying in his truck and continuing on his way. (Tr. 40, 63-64). He also testified that appellee has never stalked him at his home. (Tr. 47). And he testified that appellee has never bothered him at work or in CHC's parking lot other than the February 2009 incident. (Tr. 56).

{¶20} Appellant testified that his reason for seeking the CSPO was that he was concerned about future incidences with appellee given the history and animosity between them. (Tr. 42).

{¶21} Appellee also testified as to the two fights. As to the June 2007 incident, appellee admitted that he hit appellant after appellant made some comments to him about his wife. (Tr. 74).

{¶22} As to the February 2009 incident, appellee stated that as he was pulling into Wendy's parking lot, appellant was walking out. (Tr. 75). After he got his lunch, appellee stated that he pulled out onto Route 43 and headed toward CHC. (Tr. 77). He stated that his wife works there and he regularly drops off clothes and a breathing machine for his children into his wife's car in the CHC parking lot. (Tr. 77). Appellee testified that as he was driving toward CHC, appellant came speeding up behind him so he pulled over to let appellant pass. (Tr. 79).

{¶23} Appellee stated that he then went to his wife's car in CHC's parking lot and got out of his truck to put his children's things in her car. (Tr. 80). He testified that appellant pulled up, got out of his car, threatened him, and took a swing at him. (Tr. 81). From there, appellee stated, a fight ensued. (Tr. 81).

{¶24} Additionally, appellee testified that he never threatened appellant. (Tr. 72, 75).

{¶25} Lori Farrow also testified. Farrow works at CHC with appellee's wife and appellant. She was in the "smoke hut" in CHC's parking lot and witnessed the fight between the parties. Farrow stated that appellee drove to his wife's car and got out of his truck. (Tr. 12-13). She stated that appellant then backed up from his parking spot and drove over to appellee. (Tr. 12-13). Farrow did not see who started the fight. (Tr. 14). The next thing she noticed was that the two men were pushing

and shoving each other. (Tr. 14). When Farrow saw that appellant was bleeding, she went over to see if she could break up the fight. (Tr. 14-15). Once the two stopped and the fight appeared to be over, Farrow stated that appellee punched appellant one more time. (Tr. 16).

{¶26} Based on this testimony, the trial court's decision was supported by some competent, credible evidence. Appellant did not establish that appellee knowingly engaged in a pattern of conduct which caused appellant to believe that appellee would cause physical harm to appellant, or caused appellant mental distress.

{¶27} The evidence demonstrated that in a 20-month period appellant and appellee got into two fist fights. Although it was not specifically testified to, the cause of these fights appears to have been the fact that appellant was having an affair with appellee's wife. The first fight simply involved words by appellant to appellee and appellee punching appellant one time. Both men participated in the second fight and it is not clear who started it. What is clear about the second fight, however, is that appellant could have easily avoided it. Appellant chose to stop his car by appellee and get out. He could have simply driven away. Instead, he stopped to "talk" to the man whose wife he was having an affair with. If appellant was truly afraid of appellee or concerned as to what appellee might do to him, he would have went about his business instead of stopping by to talk with appellee.

{¶28} Furthermore, appellant testified that appellee had never stalked him at his home nor had appellee bothered him at work or in the parking lot. And while appellant testified that appellee threatened to kill him, appellee denied ever threatening appellant.

{¶29} Based on the evidence, the trial court was left with only two mutual fights, 20 months apart, between a husband and the man with whom his wife was having an affair. This does not seem to be the type of situation that warrants a CSPO. While the two men clearly do not get along, that does not lead to the conclusion that the court must step in and issue a CSPO. Furthermore, given that

the two events were 20 months apart, it is reasonable that the court may have concluded that the incidents were not closely enough related in time.

{¶30} Moreover, the cases appellant cites to are all easily distinguishable from this case. First, in all of the cited cases, the trial courts issued the CSPOs. In this case, the trial court did not. Given our standard of review, because there is *some* competent, credible evidence supporting the court's decision, this court must affirm the dismissal of the CSPO petition. Second, in all of the cited cases, the incidents occurred within much shorter time periods than in the case at bar. The time periods in those cases were anywhere from a few days to a few months in which several "incidents" occurred. Thus, in those cases the "pattern of conduct" closely related in time element was satisfied. Here only two incidents occurred separated by 20 months. It is questionable, if not doubtful, that these two incidents were closely related in time so as to constitute a pattern of conduct.

{¶31} Consequently, because the trial court's judgment is not against the weight of the evidence, the decision to dismiss the CSPO petition was not in error. Accordingly, appellant's sole assignment of error is without merit.

{¶32} For the reasons stated above, the trial court's judgment is hereby affirmed.

Vukovich, P.J., concurs.
DeGenaro, J., concurs.