[Cite as *Weismuller v. Polston*, 2012-Ohio-1476.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BROWN COUNTY

TAMARA LEE WEISMULLER,	:	
Petitioner-Appellant,	:	CASE NO. CA2011-06-014
	:	
- vs -	:	O P I N I O N
	:	4/2/2012
CALEB POLSTON,	:	
Respondent-Appellee.	:	

APPEAL FROM BROWN COUNTY COURT OF COMMON PLEAS
Case No. 20110010

Jason A. Fountain, 215 East Ninth Street, Suite 500, Cincinnati, Ohio 45202, for petitioner-appellant

Caleb Polston, 21630 U.S. Highway 68, Blanchester, Ohio 45107, respondent-appellee, pro se

HENDRICKSON, J.

{¶ 1} Petitioner-appellant, Tamara Weismuller, appeals a decision of the Brown County Court of Common Pleas denying a sexually oriented offense civil protection order prohibiting respondent-appellee, Caleb Polston, from contacting her. For the reasons discussed below, we reverse the decision of the trial court and remand this matter for further proceedings.

{¶ 2} On January 4, 2011, Weismuller filed a petition for a sexually oriented offense civil protection order (CPO), alleging that on August 31, 2010, Polston came to her home and raped her. A magistrate issued an *ex parte* protection order that same day. A full hearing on the order was held on January 18, 2011.

{¶ 3} At the hearing, Weismuller, a 51-year-old woman, testified that she lives with Michael E. Jones on his farm in Blanchester, Ohio. Weismuller testified that she met Polston in late March 2010 when Polston, a 27-year-old man who lives with his parents on a neighboring farm, visited Jones. According to Weismuller, although Polston and Jones had a somewhat volatile friendship, Polston often visited Jones' farm so the two men could drink together and go fishing.

{¶ 4} Weismuller testified that Polston visited Jones' farm on August 30, 2010. At the time of this visit, Weismuller was recovering from three hours of physical therapy, which left her mentally and physically tired. Weismuller testified she has a spinal injury that causes numbness in her legs, she regularly takes medication for this injury, and the medication causes sleepiness and can impair her memory. Weismuller stated that Polston is aware of her injury and knows that her therapy and medication cause her to be "down" for the rest of the day and to suffer reduced mobility.

{¶ 5} Weismuller testified that on August 30, 2010, she was lying on the couch in the living room icing her back when Polston began making sexual advances and innuendoes towards her after Jones left the room, including stroking her hair and asking her why she lived with Jones. Weismuller testified that she told Polston to "stop it" at least five times, but he ignored her. It was only when Jones returned that Polston stopped touching her and left her alone.

{¶ 6} Later that evening, while Weismuller was sitting in a chair in the kitchen, Polston began making sexual advances again. Weismuller testified she had to physically

block Polston and kept him away by holding her arms up in front of her body and telling him "no." Weismuller testified that when she went to get Jones after Polston made the advances in the kitchen, Polston left the home.

{¶ 7} The next evening, August 31, 2010, Polston returned to Jones' home. Weismuller testified she had already taken her prescribed medication for her injury, and was preparing to go to sleep. Between 8:30 p.m. and 9:30 p.m., Weismuller went to her bedroom to get some sleep. Weismuller testified she and Jones do not share a bedroom, and her bedroom is located near the living room. Jones' bedroom is on the opposite end of the house. At the time she retired for the night, Jones and Polston were in the living room watching TV together.

{¶ 8} Weismuller testified later that evening "someone came barreling through the bedroom" and turned on her lights. Weismuller said she felt scared and "freaked out." She heard a man say her name, and then the man pulled her nightgown up over her face. Weismuller testified she could see that the man was Polston.

{¶ 9} After her nightgown was yanked over her head, Weismuller stated that Polston pushed her face up and away, pulled her right breast very hard, and forced vaginal intercourse on her. When Weismuller tried to scream for help, Polston told her to be quiet and not to scream before pressing a pillow over her face. Weismuller testified that Polston continued to penetrate her for about five minutes before ejaculating on her face. Polston then returned the pillow to her face and left her bedroom. Weismuller testified that she got up from her bed, noticed Jones was standing in her doorway, and she ran into the bathroom. Weismuller testified she stayed in her bedroom the rest of the night and did not tell Jones about the incident because she was afraid he would get angry with her, blame her, or throw her out of his house. She also feared that Polston would come back and hurt her again. Weismuller denied having any sexual contact with Polston prior to the August 31, 2010

attack. Weismuller testified that an investigation of the attack began in November 2010, after a friend she had confided in contacted the police.

{¶ 10} Jones testified Weismuller had been living with him since March 2010, and the two maintained separate bedrooms. Jones testified that he began drinking around 2:00 p.m. on August 31, 2010, and continued to drink throughout the day. He believes he went to bed around 10:00 p.m., and at that time, Weismuller and Polston were both awake and were watching TV. Jones stated that about an hour after he went to bed, he woke up from a dead sleep when he thought he heard Weismuller yell for him. When he came out to the living room, he found Polston sitting in a chair "look[ing] like he just ate a squirrel."[1] Jones stated he did not see Weismuller at this time, so he decided to get a drink of water and return to bed.

{¶ 11} Polston testified that he frequently went over to Jones' farm to "hang out," drink

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1. **{¶ a}** "When asked to explain what he meant by the expression "look[ing] like he just ate a squirrel," the following discussion took place between Jones and Weismuller's attorney:

{¶ b} "[JONES]: I came out of the room. I believe it was about an hour. I was woke up from a dead sleep, and I came out. They said I was - - just had a T-shirt on. And [Polston] looked like he just ate a squirrel, and he was sitting - -

{¶ c} "[ATTORNEY]: What do you mean when you say he ate a squirrel?

{¶ d} "[JONES]: Well, he's kind of like - - I - - you know, just like - - I don't know.

{¶ e} "[ATTORNEY]: Can you do your best when you [sic] describe his demeanor when you say that?

{¶ f} "[JONES]: Well, it was just - -

{¶ g} "[ATTORNEY]: Was he still there?

{¶ h} "[JONES]: Yeah, he was sitting in a chair. I guess he come [sic] out and sitting - - and he was sitting in a chair there.

{¶ i} "[ATTORNEY]: Uh-huh.

{¶ j} "[JONES]: And I thought [Weismuller] yelled for me, but I couldn't find - - I didn't see her, and he was still in the chair, and I didn't think anything about it. I got a drink of water and went back to bed."

and fish. He claimed that he and Weismuller had consensual sexual contact in July 2010. Polston claims that when he learned about Weismuller's rape allegations in November 2010, he voluntarily went to speak to the police. However, before talking with the police, Polston claims that he sent a text message to Jones apologizing for having a sexual relationship with Weismuller. Polston further testified that although Weismuller's claims regarding the August 31, 2010 sexual assault went before a grand jury in December 2010, no indictment was handed down. At no point during his testimony did Polston deny sexually assaulting Weismuller on August 31, 2010. Rather, Polston waited until closing arguments to deny raping Weismuller.

{¶ 12} On February 8, 2011, the magistrate issued an order denying the CPO petition and vacating the *ex parte* protection order. Weismuller filed objections to the magistrate's decision, claiming that the magistrate did not give proper weight to her testimony and failed to apply the proper burden of proof to the petition. On May 9, 2011, the trial court overruled Weismuller's objections and adopted the magistrate's decision.

{¶ 13} Weismuller timely appealed the trial court's decision, raising one assignment of error.

{¶ 14} Assignment of Error No. 1:

{¶ 15} THE TRIAL COURT ERRED AS A MATTER OF LAW IN HOLDING THAT IT IS IMPOSSIBLE FOR A PETITIONER TO MEET HER BURDEN BY A PREPONDERANCE OF THE EVIDENCE WITHOUT ADDITIONAL CORROBORATING EVIDENCE WHERE RESPONDENT PRESENTS A GENERAL DENIAL OF THE PETITIONER'S ALLEGATIONS.

{¶ 16} Weismuller argues that the trial court erred when it denied her petition for a CPO because her testimony constituted sufficient credible evidence that Polston committed a sexually oriented offense against her. Weismuller contends her testimony that Polston raped

her on August 31, 2010 was uncontroverted and additional corroborating evidence was unnecessary to meet a preponderance of the evidence standard.

{¶ 17} R.C. 2903.214(C)(1) provides for the issuance of a protection order to protect those individuals who demonstrate that another has committed a sexually oriented offense against their person. A sexually oriented offense has been defined to include rape in violation of R.C. 2907.02. R.C. 2950.01(A)(1). Pursuant to R.C. 2907.02(A)(1)(c),

> [n]o person shall engage in sexual conduct with another * * * when * * * [t]he other person's ability to resist or consent is substantially impaired because of a mental or physical condition * * * and the offender knows or has reasonable cause to believe that the other person's ability to resist or consent is substantially impaired because of a mental or physical condition.

Further, "[n]o person shall engage in sexual conduct with another when the offender purposely compels the other person to submit by force or threat of force." R.C. 2907.02(A)(2).

{¶ 18} We have previously adopted the First District Court of Appeals' holding that a preponderance of the evidence standard applies to the granting of a menacing by stalking protection order issued pursuant to R.C. 2903.214. *Henry v. Coogan*, 12th Dist. No. CA2002-05-042, 2002-Ohio-6519, ¶ 15, citing *Lindsay v. Jackson*, 1st Dist. Nos. C-990786, A-9905306, 2000 WL 1268810 (Sept. 8, 2000). In *Lindsay*, the First District Court of Appeals found the following:

> R.C. 2903.214 is silent as to the burden of proof required to issue a stalking protection order. Similarly, R.C. 3113.31, which relates to domestic-violence protection orders, does not specify a burden of proof. In discussing the issue in relation to R.C. 3113.31, the Ohio Supreme Court noted that appellate courts had been divided on the issue. Some courts had held that a clear-and-convincing standard was appropriate, because a protection order was akin to an injunction, which requires clear and convincing evidence for its issuance. See *Felton v. Felton* (1997), 79 Ohio St.3d 34, 41, 679 N.E.2d 672, 677; *Reynolds v. White* (Sept. 23, 1999), Cuyahoga App. No. 74506, unreported. The supreme court rejected that argument, holding that if the

> legislature had wanted to require clear and convincing evidence, it would have specified that standard as it had in other statutes. See *Felton, supra,* at 42, 679 N.E.2d at 679. Consequently, the court held that a preponderance-of-the-evidence standard applied. See *id.* at paragraph two of the syllabus. We find the same logic to be applicable to a stalking protection order, and we, therefore, apply a preponderance-of-the-evidence standard in this case.

2000 WL 1268810 at *4. As a sexually oriented offense protection order is set forth in the same statute authorizing a menacing by stalking protection order, we find the logic set forth in *Lindsay* to be applicable to the present case. Accordingly, we find that a preponderance of the evidence standard applies to the issuance of a sexually oriented offense protection order.

{¶ 19} When assessing whether a protection order should have been issued, the reviewing court must determine whether there was sufficient credible evidence to prove by a preponderance of the evidence that the petitioner was entitled to relief. *Olenik v. Huff*, 5th Dist. No. 02-COA-058, 2003-Ohio-4621, ¶ 16-18. Accordingly, a manifest weight of the evidence standard is applied. *Gruber v. Hart*, 6th Dist. No. OT-06-011, 2007-Ohio-873, ¶ 17; *Young v. Young*, 2d Dist. No. 2005-CA-19, 2006-Ohio-978, ¶ 22; *Mann v. Sumser*, 5th Dist. No. 2001CA00350, 2002-Ohio-5103, ¶ 23. 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 Const. Co.*, 54 Ohio St.2d 279, syllabus (1978). "Evaluating evidence and assessing its credibility are the primary functions of the trier of fact, not the appellate court." *Lay v. Chamberlain*, 12th Dist. No. CA99-11-030, 2000 WL 1819060, *5 (Dec. 11, 2000). The trial court's findings are given deference because "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984).

{¶ 20} In the case *sub judice*, the trial court denied Weismuller's petition for a CPO after it found the following:

> The Court finds that [Polston] has presented sufficient evidence before the Court to constitute a denial of [Weismuller's] basic allegations that she was sexually assaulted on August 31, 2010. Given that there is basically no other corroborative evidence to support [Weismuller's] allegations, it is impossible for this Court to determine, even by a preponderance of the evidence, whether or not [Polston] sexually assaulted [Weismuller] on August 31, 2010.

{¶ 21} Weismuller contends that the trial court's decision contravenes the Supreme Court's decision in *Felton v. Felton*, 79 Ohio St.3d 34. In *Felton*, the petitioner sought a domestic violence protection order pursuant to R.C. 3113.31. *Id.* at 35. The petitioner testified in detail regarding multiple assaults that respondent, her ex-husband, had committed against her. *Id.* She also presented a witness who testified that she had seen bruises on petitioner's shoulders about one and one-half years prior to the hearing. *Id.* at 36. The witness testified that petitioner had remarked that the bruises were from where respondent had hit her. *Id.* Respondent had filed a written answer denying petitioner's allegations, but did not present any evidence at the hearing. *Id.* The trial court, although finding petitioner's evidence to be credible, ultimately held that the evidence did not meet the preponderance of the evidence standard. *Id*. at 36, 44. Upon reaching its decision to deny the petition, the trial court in *Felton* stated the following:

> [Respondent and his attorney have the burden of proving nothing. [Petitioner] carries the burden of proving that these incidents took place by a preponderance of the evidence. We have no police reports. We have no physician or hospital reports. We have no eyewitnesses. We have no admission by the, other than her [sic]. We have no admission from the defendant and I thought surely you would have called the son to testify because he is the one that uh, according to your client's testimony, was the one who pulled the father off and stopped the strangulation, at least for the purpose of corroborating that the incident took place.

* * *

> Well, how as a matter of law does this rise to a preponderance of the evidence? I'm not disputing that what your client said isn't true, but I'm saying from a purely legal standpoint when he has entered a denial by virtue of his answer and has to prove nothing how, how on earth can I find that by a preponderance of the evidence your client has established a case. She says it happened. He says it didn't. Does [that] not make the evidence equally balanced?

Felton, 79 Ohio St.3d, 34, 44, fn. 9.

{¶ 22} The Supreme Court expressly rejected the trial court's holding, finding that the evidence submitted by the petitioner, without other corroborating evidence, was sufficient to meet the preponderance of the evidence standard. *Id*. at 44-45. The Supreme Court remarked that the trial court erred in determining that "a victim's testimony, standing alone, would never be sufficient to establish proof by a preponderance of the evidence." *Id*. at 44.

{¶ 23} As in *Felton*, the majority of the evidence submitted in the present case was derived from the victim's testimony. Weismuller testified that her ability to resist a sexual assault was substantially impaired as a result of her physical injury and medication, and Polston had knowledge of her impairment. She further presented evidence that Polston sexually penetrated her over her objections and by using force. This evidence was not controverted by Polston.[2] Accordingly, Weismuller's testimony, if found to be credible, may be sufficient to meet the preponderance of the evidence standard.

{¶ 24} The trial court did not address the credibility of Weismuller's testimony. As we previously noted, "the trial judge is best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the proffered testimony." *Seasons Coal Co.*, 10 Ohio St.3d at 80. It is not the

2. We agree with the trial court's determination that Polston's denial of the August 31, 2010 sexual assault during his closing argument could not be considered as evidence in determining the merits of Weismuller's petition for a CPO.

role of the appellate court to substitute its own determination of credibility in place of the trial court.

{¶ 25} We therefore reverse the judgment of the trial court and remand the matter back to the court for a determination of whether Weismuller's testimony was credible and whether she has met her burden of establishing by a preponderance of the evidence that she is entitled to relief pursuant to R.C. 2903.214.

{¶ 26} Judgment reversed and the cause remanded to the trial court for further proceedings consistent with this opinion.

POWELL, P.J., and RINGLAND, J., concur.