

COURT OF APPEALS
RICHLAND COUNTY, OHIO
FIFTH APPELLATE DISTRICT

CAROL SUE FINNEGAN

Petitioner-Appellee

-VS-

TRYSTON BARBER

Respondent-Appellant

: JUDGES:

:

: Hon. John W. Wise, P.J.

: Hon. Patricia A. Delaney, J.

: Hon. Earle E. Wise, Jr., J.

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: Case No. 2019 CA 0007

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O P I N I O N

CHARACTER OF PROCEEDING:

Appeal from the Richland County Court
of Common Pleas, Case No. 2018 CV
555 R

JUDGMENT:

AFFIRMED

DATE OF JUDGMENT ENTRY:

October 23 2019

APPEARANCES:

For Petitioner-Appellee:

CASSANDRA J.M. MAYER
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Mansfield, OH 44906

For Respondent-Appellant:

EDWARD CLARK CORLEY
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Delaney, J.

{¶1} Respondent-Appellant Tryston Barber appeals the December 27, 2018 judgment entry of the Richland County Court of Common Pleas.

FACTS AND PROCEDURAL HISTORY

{¶2} On August 10, 2018, Petitioner-Appellee Carol Sue Finnegan filed a Petition for Civil Stalking Protection Order (“CPO”) with the Richland County Court of Common Pleas on behalf of her minor son, D.F. In her petition, Finnegan alleged that on August 7, 2018, D.F. heard from multiple friends that Respondent-Appellant Tryston Barber was looking for him and was planning to jump him when D.F. came out of the rodeo at the Richland County Fair. D.F. was 16 years old and Barber was 19 years old. D.F. observed Barber run through the steer barn and D.F. followed Barber. D.F. confronted Barber and the two exchanged words. Barber asked D.F. to fight and called him a “pussy for backing down.” An adult intervened and Barber was escorted out of the fair by the Richland County Sheriff’s Office. On August 10, 2018, D.F. was told that Barber had posted a video of himself on Facebook stating what he and his friends were going to do to D.F. Finnegan contacted the Richland County Sheriff’s Office and they advised her to file a petition for a CPO.

{¶3} An ex parte hearing on the petition for CPO was heard before the magistrate. The magistrate denied the ex parte petition for CPO on August 10, 2018, but set the matter for full hearing on August 23, 2018.

{¶4} After a continuance, the matter came on for full hearing before the magistrate on September 14, 2018. Barber and D.F. testified at the hearing. The magistrate issued her decision on September 21, 2018, denying Finnegan’s petition for

CPO. The trial court judge did not sign the September 21, 2018 magistrate's denial of the CPO according to Civ.R. 65.1. In the entry, the magistrate made the following findings of fact:

{¶5} D.F. is friends with Barber's ex-girlfriend, E.B. On August 5, 2018, D.F. received a text from E.B.'s mother informing that Barber was looking for D.F. D.F. testified he ran into Barber and Barber said he better take care of E.B. or D.F. would have to deal with Barber.

{¶6} D.F. testified that Barber and his dog followed him around the Richland County Fair on Monday, Tuesday, and Wednesday. When D.F. walked away from Barber, Barber said, "ya, that's right, run pussy." On Tuesday, D.F. left the fair early because Barber was following him.

{¶7} On Thursday, when D.F. was at the rodeo, he received calls from friends and cousins that Barber was looking for him to jump him and/or to mess with D.F.'s two steers entered into the fair. D.F. received a phone call from a person named Nolan on D.F.'s cousin's cell phone. Nolan said he, Barber, and another person were in the poultry barn and wanted to meet. D.F. contacted E.B. who instructed him not to meet with Barber because Barber wanted to jump him. D.F. went to talk to the Richland County Sheriff's Office at the fairgrounds.

{¶8} D.F. learned Barber was seen in the steer barn. D.F. heard throughout the week that Barber was going to do something to D.F.'s steers and heard Barber carried a knife. When D.F. got to the steer barn, he did not see Barber but noticed that the ropes on his steers had been oddly tied.

{¶9} D.F. saw Barber running through the show arena and he chased him. D.F. confronted Barber with the hope of luring Barber to the sheriff's office. Barber and D.F. engaged in a screaming match and an adult separated the two boys. While they were yelling at each other, D.F. noticed Barber's friends coming to the show arena. Barber was escorted out of the fair by sheriff's deputies.

{¶10} After Barber was ejected from the fair, Barber recorded a video on Facebook Live and posted the video on his Facebook account. The subject of the video was the confrontation between he and D.F. D.F. did not have a Facebook account but E.B. informed D.F. of the video. The video was played at the full hearing. In the video, Barber stated he was told that D.F. was going to stab him with a knife. During the confrontation, Barber saw D.F.'s friends and believed they were going to jump him. He said D.F. was crying during the confrontation. He told D.F. that his friends were about to get shot. Barber said he had his friends with him during the confrontation and were "gonna hit a lick on 'em." He admitted to wanting to fight D.F. because of the threats he had heard involving a knife.

{¶11} Based on these facts, the magistrate found the evidence did not establish that Barber engaged in a pattern of conduct to cause Finnegan to believe that Barber would cause D.F. physical harm or mental distress pursuant to R.C. 2903.211. The magistrate determined that D.F. did not receive direct threats from Barber, but instead the alleged threats were relayed to D.F. by other individuals. Further, Barber's Facebook Live video was not a threat but Barber's boasting as to his version of the confrontation.

{¶12} The magistrate's denial of the CPO contained Civ.R. 53 notifications. Finnegan filed objections to the magistrate's denial pursuant to Civ.R. 53. In support of

her objections, she submitted the record of the full hearing. Barber did not respond to Finnegan's objections.

{¶13} On December 27, 2018, the trial court issued a judgment entry sustaining Finnegan's objections and rejecting the magistrate's denial of the CPO. It first determined that under R.C. 2903.211, menacing by stalking does not require proof of direct threats. The trial court next found the preponderance of the evidence established that Barber engaged in a pattern of conduct which would cause Finnegan a belief of physical harm or mental distress towards her son. Barber and his pit bull dog followed D.F. around the Richland County Fair for three days, which a reasonable person could believe was both menacing and stalking. During the confrontation, Barber tried to provoke D.F. into a physical altercation and belittled D.F. when D.F. walked away. In his video, Barber said his friends had guns and were not afraid to shoot. Barber admitted on cross-examination that he intended for others to tell D.F. how dangerous Barber was and D.F. had better watch out. His intention at the fair and in the video was to intimidate D.F. into believing that Barber would physically harm him or scare him into believing Barber would harm him.

{¶14} The trial court issued the CPO effective until December 27, 2020.

{¶15} Barber filed a Notice of Appeal of the December 27, 2018 judgment.

ASSIGNMENTS OF ERROR

{¶16} Barber raises two Assignments of Error:

{¶17} "I. THE TRIAL COURT ABUSED ITS DISCRETION IN FINDING THAT THE APPELLANT'S ACTIONS CONSTITUTED A VIOLATION OF OHIO REVISED CODE SECTION 2903.211.

{¶18} “II. THE TRIAL COURT ERRED IN FINDING THAT THE APPELLANT’S ACTIONS CONSTITUTED A VIOLATION OF OHIO REVISED CODE SECTION 2903.211, AS BEING AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.”

ANALYSIS

I. and II.

{¶19} Barber contends in his first and second Assignments of Error that the trial court decision to grant the CPO was an abuse of discretion because it was not supported by competent, credible evidence. We disagree.

Civ.R. 65.1

{¶20} In this case, Finnegan filed a petition for a civil stalking protection order, which is governed by R.C. 2903.214 and Civ.R. 65.1. The matter was referred to the magistrate. Pursuant to Civ.R. 65.1, where there has been a full hearing, a magistrate can grant or deny a CPO, but the magistrate's denial or granting of a CPO is not effective unless signed by the court and filed with the clerk. Civ.R. 65.1(F)(3)(c)(i)(v). Civ.R. 65.1 exempts protection order proceedings from the requirements in Civ.R. 53(D)(2) or (3), which govern procedures for moving to set aside a magistrate's order and objecting to a magistrate's decision. *Runkle v. Stewart*, 2nd Dist. Miami No. 2018-CA-27, 2019-Ohio-2356, 2019 WL 2484457, ¶ 7; Civ.R. 65.1(F)(3)(b). Under Civ.R. 65.1(F)(3)(c), the trial court may adopt the magistrate’s denial or granting of a CPO after a review of the magistrate’s order, or the trial court may modify or reject the magistrate’s order. Civ.R. 65.1(F)(3)(c)(i-iii).

{¶21} After the trial court adopts, modifies, or rejects the magistrate’s denial or granting of a CPO after a full hearing, a party may file written objections, supported by a

transcript, within 14 days of the court's filing of the order. Civ.R. 65.1(F)(d)(i)(iv). The party filing the objections has the burden of showing that an error of law or other defect is evident on the face of the order, that the credible evidence of the record is insufficient to support the granting or denial of the CPO, or the magistrate abused his or her discretion in including or failing to include specific terms in the CPO. Civ.R. 65.1(F)(d)(iii). An order entered by the court under Civ.R. 65.1(F)(3)(c) is a final, appealable order, but Civ.R. 65.1 requires that a party file timely objections to such an order and the filing of the objections stays the running of the time for the appeal. Civ.R. 65.1(G).

{¶22} A review of the procedural history of this case shows that Finnegan filed objections to the magistrate's denial of the CPO after a full hearing before the trial court adopted, modified, or rejected the magistrate's order pursuant to Civ.R. 65.1. The trial court reviewed the record and ruled on Finnegan's objections, rejecting the magistrate's denial of Finnegan's CPO. It issued its judgment entry on December 27, 2018, to which Barber did not file objections. It has been held that an appellant's failure to file timely objections to the trial court's adoption of a magistrate's denial or granting of a CPO pursuant to Civ.R. 65.1 requires the appellate court to dismiss the appeal. *Runkle*, 2019-Ohio-2356, ¶ 9 quoting *C.F. v. T.H.R.*, 10th Dist. Franklin No. 18AP-536, 2019-Ohio-488, ¶ 6, quoting *K.R. v. T.B.*, 10th Dist. Franklin No. 17AP-302, 2017-Ohio-8647, ¶ 5. In this case, however, we find that any failure to follow the requirements of Civ.R. 65.1 was harmless and the December 27, 2018 judgment entry is a final, appealable order.

R.C. 2903.214

{¶23} R.C. 2903.214 governs protection orders. Subsection (C)(1) states as follows:

(C) A person may seek relief under this section for the person, or any parent or adult household member may seek relief under this section on behalf of any other family or household member, by filing a petition with the court.

The petition shall contain or state all of the following:

(1) An allegation that the respondent is eighteen years of age or older and engaged in a violation of section 2903.211 of the Revised Code against the person to be protected by the protection order or committed a sexually oriented offense against the person to be protected by the protection order, including a description of the nature and extent of the violation;

{¶24} R.C. 2903.211 governs “menacing by stalking” and states the following at subsection (A):

(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 a family or household member of the other person or cause mental distress to the other person or a family or household member of the other person. In addition to any other basis for the other person's belief that the offender will cause physical harm to the other person or the other person's family or household member or mental distress to the other person or the other person's family or household member, the other person's belief or mental distress may be based on words or conduct of the offender that

are directed at or identify a corporation, association, or other organization that employs the other person or to which the other person belongs.

(2) No person, through the use of any form of written communication or any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, computer system, or telecommunication device shall post a message or use any intentionally written or verbal graphic gesture with purpose to do either of the following:

(a) Violate division (A)(1) of this section;

(b) Urge or incite another to commit a violation of division (A)(1) of this section.

The petitioner must show, by a preponderance of the evidence, that the respondent committed a violation of R.C. 2903.211 against each family or household member to be protected. *M.J.W. v. T.S.*, 8th Dist. Cuyahoga No. 108014, 2019-Ohio-3573, 2019 WL 4201478, ¶ 21 citing *Prater v. Mullins*, 3rd Dist. Auglaize No. 2-13-04, 2013-Ohio-3981, ¶ 8.

{¶25} The trier of fact must determine whether the preponderance of the evidence presented at the hearing establishes that the respondent violated R.C. 2903.211, the menacing by stalking statute. R.C. 2903.214(C)(1). *M.J.W. v. T.S.*, 8th Dist. Cuyahoga No. 108014, 2019-Ohio-3573, 2019 WL 4201478, ¶ 22. On appeal, we determine whether there is competent, credible evidence to support the elements of menacing by stalking. *Strausser v. White*, 8th Dist. Cuyahoga No. 92091, 2009-Ohio-3597, ¶ 33, citing *Reynolds v. White*, 8th Dist. Cuyahoga No. 74506, 1999 WL 754496

(Sept. 23, 1999). “Generally, the decision of whether or not to grant a CPO lies within the sound discretion of the trial court.” *J.W. v. D.W.*, 10th Dist. Franklin No. 19AP-52, 2019-Ohio-4018, 2019 WL 4757959, ¶ 15 quoting *C.L. v. T.B.*, 10th Dist. Franklin No. 17AP-813, 2018-Ohio-1074, ¶ 5. *Peterson v. Butikofer*, 10th Dist. No. 18AP-364, 2019-Ohio-2456, ¶ 38. An abuse of discretion connotes a decision that was unreasonable, arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219, 450 N.E.2d 1140 (1983). The scope and duration of a CPO is within the sound discretion of the trial court and will not be reversed on appeal absent a showing that the decision was arbitrary, unconscionable, or unreasonable. *Campbell v. Underwood*, 10th Dist. Franklin No. 09AP-1125, 2010-Ohio-2909, ¶ 11; *T.S. v. B.S.*, 10th Dist. No. 18AP-302, 2018-Ohio-4987, ¶ 27. Legal questions, including interpreting statutory authority, are reviewed de novo on appeal. *Martin v. Martin*, 10th Dist. Franklin No. 13AP-171, 2013-Ohio-5703, ¶ 6.

{¶26} Barber contends the evidence was insufficient to establish he engaged in a pattern of conduct that would cause Finnegan to believe that Barber would cause her minor son mental distress or physical harm. The statute does not require a person to actually suffer physical harm or mental distress; instead, a petitioner only needs to show, by a preponderance of the evidence that the respondent will cause the petitioner to believe that the respondent will cause the petitioner mental distress or physical harm. *M.J.W. v. T.S.*, 8th Dist. Cuyahoga No. 108014, 2019-Ohio-3573, 2019 WL 4201478, ¶ 23 citing *M.D. v. M.D.*, 2018-Ohio-4218, 121 N.E.3d 819, ¶ 98-99 (8th Dist.), citing *State v. Spaulding*, 151 Ohio St.3d 378, 2016-Ohio-8126, 89 N.E.3d 554, and *State v. Horsley*, 10th Dist. Franklin No. 05AP-350, 2006-Ohio-1208, ¶ 48.

{¶27} A pattern of conduct is defined as two or more actions or incidents closely related in time. R.C. 2903.211(D)(1). Two incidents are enough to establish a pattern of conduct for purposes of R.C. 2903.211(A)(1). *M.J.W.*, 2019-Ohio-3574, ¶ 24 citing *State v. O'Reilly*, 8th Dist. Cuyahoga No. 92210, 2009-Ohio-6099, ¶ 34, citing *State v. Rucker*, 12th Dist. Butler No. CA2001-04-076, 2002-Ohio-172. “The incidents need not occur within any specific temporal period.” *Rufener v. Hutson*, 8th Dist. Cuyahoga No. 97635, 2012-Ohio-5061, ¶ 16, citing *Jenkins v. Jenkins*, 10th Dist. Franklin No. 06AP-652, 2007-Ohio-422. In fact, “‘[t]he temporal period within which the two or more actions or incidents must occur is a matter to be determined by the trier of fact on a case-by-case basis.’” *N.P. v. T.N.*, 8th Dist. Cuyahoga No. 106314, 2018-Ohio-2647, ¶ 22, quoting *Elkins v. Manley*, 8th Dist. Cuyahoga No. 104393, 2016-Ohio-8307.

{¶28} The trial court found that Barber engaged in a pattern of conduct to cause the victim to believe that Barber would cause him physical harm. Barber dispatched threats and/or warnings to D.F. through third-parties that he was looking for D.F. at the Richland County Fair and he was going to cause harm to D.F. or D.F.’s steer entered into the Fair. For three days at the Richland County Fair, Barber and his pit bull dog followed D.F. Barber attempted to provoke D.F. into a physical altercation, taunting D.F. when D.F. chose to walk away. After the almost altercation, Barber recorded a video streamed on Facebook Live discussing his version of the events and bragging that Barber’s friends were “packing” and “not afraid to shoot.” Barber testified at the full hearing that he intended others to tell D.F. that Barber was dangerous. Barber’s intent with the Facebook Live video was to scare D.F. into believing that Barber would cause him physical harm. In the video, Barber referred to guns and shooting.

{¶29} Based on this record, we find there was competent, credible evidence to support the trial court's determination that Barber's activities towards D.F. during the Richland County Fair qualified as a pattern of conduct that would cause the petitioner to believe that Barber would cause D.F. physical harm. We find no abuse of discretion for the trial court to grant the CPO for two years.

{¶30} Barber's two Assignments of Error are overruled.

CONCLUSION

{¶31} The judgment of the Richland County Court of Common Pleas is affirmed.

By: Delaney, J.,

Wise, John, P.J. and

Wise, Earle, J., concur.