

COURT OF APPEALS OF OHIO

**EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA**

S.E.E.,	:	
	:	
Petitioner-Appellee,	:	No. 108645
	:	
v.	:	
	:	
S.V.E.,	:	
	:	
Respondent-Appellant.	:	

JOURNAL ENTRY AND OPINION

JUDGMENT: AFFIRMED

RELEASED AND JOURNALIZED: November 21, 2019

Civil Appeal from the Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DV-18-374550

Appearances:

Kronenberg + Belovich Law, L.L.C., and Jacob A.H.
Kronenberg, *for appellee*.

Zashin & Rich Co., L.P.A., Deanna L. Dipetta, and
Jonathan A. Rich, *for appellant*.

EILEEN T. GALLAGHER, P.J.:

{¶ 1} Respondent-appellant, S.V.E¹ (“Husband”), appeals a judgment of the Cuyahoga County Court of Common Pleas, Domestic Relations Division, granting a domestic violence civil protection order (“CPO”) against him and in favor of petitioner-appellee, S.E.E. (“Wife”). He claims the following three errors:

1. The trial court’s determination that there was sufficient credible evidence to prove that appellee was in danger of domestic violence and therefore in need of a protection order to prevent abuse is against the manifest weight of the evidence.
2. The trial court’s determination that appellee proved by a preponderance of the evidence that she had been a victim of domestic violence under R.C. 3113.31 is against the manifest weight of the evidence.
3. The trial court’s determination that there was a “history of control” and “past acts of violence against appellee” which justified the issuance of a civil protection order was against the manifest weight of the evidence.

{¶ 2} We find no merit to the appeal and affirm the trial court’s judgment. The manifest weight of the evidence supports the trial court’s finding that Husband committed prior acts of domestic violence against Wife and that Husband posed a threat of future violence that justified the need for a CPO.

I. Facts and Procedural History

{¶ 3} On November 27, 2018, Wife filed a petition seeking a CPO against Husband on behalf of herself and her two children due to alleged acts of domestic violence. A magistrate granted an ex parte temporary protection order and

¹ In accordance with this court’s policy and with 18 U.S.C. 2265(d)(3), initials are used herein to protect the privacy of the protected party.

scheduled a full hearing on the matter in January 2019. Wife subsequently withdrew her request to include the children as protected parties under any order, whether the temporary order then in place or any future order that might be entered after the hearing.

{¶ 4} Wife testified at the hearing that she and Husband were married in June 2012, and subsequently had two children, C.E., who was two years old, and Z.E., who was five months old. Wife described several incidents during the marriage that she believes constituted domestic abuse. She testified that during an argument that occurred before the children were born, Husband grabbed her by the throat, carried her a few steps, and threw her on the couch. (Tr. 17.) He then asked her to apologize for causing him to do those things. (Tr. 17.) When Wife was pregnant with C.E., Husband threw a box at her head and asked Wife to apologize for causing that incident as well. (Tr. 17-18.) After Z.E. was born in June 2018, Husband pinched Wife's arm hard enough to cause three bruises. (Tr. 18, 139.)

{¶ 5} Wife finally decided to seek a protection order and a divorce in November 2018, following an incident at a Saturday night birthday party for Husband's brother ("M.E."). Husband's mother, M.B., and her boyfriend of 11 years, P.K., hosted the party at M.B.'s house on November 17, 2018. Husband and Wife attended the party with their children, and M.E. attended the party with his wife, N.E.

{¶ 6} After dinner, but before serving birthday cake, everyone left the dinner table except for Husband and Wife. Wife put her head on Husband's

shoulder, and he pushed it off. (Tr. 9.) Wife thought he was joking so she again placed her head on his shoulder, and he again pushed it off. Thereafter, Husband grabbed Wife, and she tried to pull away. Husband reached over and squeezed her neck for several seconds in the presence of P.K., who was still in the room. (Tr. 10.)

Wife explained:

In order to get him to let go, I was able to whisper, basically, that he was hurting me; and a few seconds later he finally let go.

And then afterwards, he told me that I needed to apologize, because it was my fault that he did that to me, and I was ruining his night.

(Tr. 11.) Wife apologized because she “wanted the night to go smoothly.” (Tr. 11.)

Thereafter, family photographs were taken and cake was served. Wife testified that after the cake, she went to the bathroom because she “had a few tears” and wanted to shake it off so she could “put on a happy face and get through the night.”

(Tr. 136.) Wife pretended to be happy, explaining at the hearing “I knew that if I acted any other way, things would be far worse for me when I got home.” (Tr. 138.)

She further stated: “In the past when I confronted my husband about a situation that I didn’t like, he only ever escalated it to make it worse until I backed off and said I was sorry.” (Tr. 146.)

{¶ 7} Later that night, when Husband and Wife were in bed falling asleep, Husband rolled over and pinched Wife’s nostrils closed. (Tr. 13.) Wife opened her mouth so she could breathe, and Husband let go, rolled over, and went to sleep. (Tr. 13.) Thereafter, Wife went to the bathroom and cried for about an hour. Wife

ultimately returned to the marital bed, but slept “on the four inches of the mattress closest to the edge” because she “was afraid.” (Tr. 45.)

{¶ 8} Husband was angry the next morning and repeatedly tried to draw Wife into an argument. He complained that the freezer was not organized, that Wife was not taking proper care of the children, and that Wife did not clean the house the way she said she would. (Tr. 14.) According to Wife, Husband was “regularly critical of [her].” (Tr. 14.) Wife nevertheless initiated sex with Husband that afternoon while the children were napping. (Tr. 51.)

{¶ 9} The next morning, a Monday, Husband woke Wife up, yelled at her, and whipped a sock into her eye because she mismatched two gray socks. (Tr. 14-15.) He was also angry because there were not enough lids for all the baby bottles in the cupboard. He blamed Wife for the missing lids, saying this was never a problem until Wife started picking up the children from daycare. (Tr. 15.) Later, Husband expressed his displeasure after Wife opened a dog gate that allowed their dog to enter the family room where he ate their two-year-old daughter’s cereal. (Tr. 15-16.)

{¶ 10} When asked on cross-examination why Wife returned to the marital bed after Husband allegedly choked her at the party, Wife explained that she was afraid that sleeping in another room “would have made things worse.” (Tr. 51.) When Husband’s lawyer suggested that Wife must not have been afraid because she did not leave the house, Wife replied: “I was afraid, but I didn’t know what my rights were so I wasn’t willing to take a risk until after I knew.” (Tr. 50.) Indeed, after consulting with an attorney and “the abuse hotline” on Monday morning, Wife

decided not to return to the marital home. (Tr. 54-55.) Although Husband and Wife had planned to leave together on Tuesday to visit Wife's parents in Peoria, Illinois for Thanksgiving, Wife left with the children on Monday without Husband. (Tr. 56.)

{¶ 11} On redirect examination, Wife's counsel asked Wife why she stayed in the marital home on Saturday and Sunday instead of leaving the home sooner. Wife explained:

A: I didn't want to make things worse. I knew if I tried to leave, things would be worse. I knew if I tried to take the girls, things could get worse. I knew that I could get hurt.

Q: Why do you think * * * it would have been worse to act in any of those ways?

A: Because in the past when I tried to defend myself from violence, verbally, physically, it always escalates until I give in.

(Tr. 60.) Wife also testified that she did not have access to all the marital funds and that Husband kept money that she was not allowed to know about. (Tr. 60.)

{¶ 12} Wife testified that she wanted a restraining order because she does not want Husband to hurt her anymore. (Tr. 20.) When asked why Wife was only now seeking a restraining order if the abuse had been going on for years, Wife explained:

Because up until November 17th, every instance of violence he was able to convince me that it was my fault that it happened. On November 17th, I knew that what I did was too trivial to have been choked for, and it was obvious to me that I needed to leave.

(Tr. 21.) Wife also testified that she does not feel safe without the restraining order.

(Tr. 21.)

{¶ 13} Husband testified on his own behalf and called M.E. and P.K. as witnesses. P.K. testified that although he was present in the dining room after dinner and before the cake was served, he went into the kitchen briefly because he was cleaning up plates. (Tr. 72.) He observed Wife put her head on Husband's shoulder and testified that Husband pushed her off "two or three times." (Tr. 73.) He stated:

And then the next thing I remember seeing was: [Husband] had his arm on [Wife's] shoulder, kind of holding her from coming back over on top of him again.

* * *

The next thing I remember is, [Wife] said either "Ow, you hurt my neck," or "Ow, you are hurting my neck."

(Tr. 73-74.) According to P.K., the incident "ended at that point," and he observed "a look of anger" on Wife's face. (Tr. 74.) P.K. testified that he never saw Husband choke Wife, nor did he observe any redness or bruises on Wife's neck. (Tr. 74.) He stated that Wife smiled for family pictures, and he did not observe any change in her demeanor. When M.E. invited Husband and Wife to use the hot tub at his house sometime, Wife replied: "That would be great." (Tr. 79).

{¶ 14} Husband's brother, M.E., testified that he was seated at a piano with his wife, N.E., and Husband's two-year-old daughter after dinner. M.E. testified that the piano was "six or seven feet" from the dining room table and he could hear everything that was said in the dining room even though the two year old was playing the piano. (Tr. 86.) M.E. testified that he never saw any confrontation between his

brother and Wife, but admitted he was focusing on the two-year-old child and was not concentrating on what was happening in the dining room. (Tr. 91.)

{¶ 15} Husband testified that he asked Wife “three to five times to please take her head off his shoulder * * *.” (Tr. 99.) He described the incident as follows:

She had come back in to come on my shoulder again, and I pretty much twisted my arm out of the way. And somehow when I did that, I must have come in contact accidentally with her somewhere, because she did say, “Ow, that hurt.”

And I turned and I said “Sorry,” and that was the end of that incident. (Tr. 99.) Husband denied that Wife whispered any words and claimed that she used a regular voice. (Tr. 100.) He also stated that there was no change in Wife’s demeanor after the incident. (Tr. 101).

{¶ 16} With respect to the alleged prior acts of abuse, Husband denied that he ever choked Wife and lifted her up and threw her on the couch. (Tr. 102-103.) He explained that he was not strong enough to throw Wife because he is five foot, seven inches tall and weighs 145 pounds, whereas Wife is five foot, five inches tall and weighs 170 pounds. (Tr. 102-103). However, he admitted on cross-examination that Wife had recently gained 20 pounds. (Tr. 123.)

{¶ 17} Husband also admitted that he threw a box at Wife’s head when she was pregnant, but claimed it was an accident. (Tr. 110.) He testified that he was aiming for the garbage can when he threw it, but it “curved and hit her.” (Tr. 110.) According to Husband, both he and Wife laughed about it. (Tr. 110.)

{¶ 18} Husband acknowledged that there was “a small argument” regarding not having enough lids for the baby bottles, but asserted there was no physical

violence. (Tr. 110-111.) He also conceded that he commented on Wife's act of letting the dog into the family room where the dog ate their two-year-old's cereal, but denied there was any shouting, screaming, or violence. (Tr. 111.) Husband also admitted that he pinched Wife, but he claimed it was a flirtatious game and that Wife did not sustain any bruises. (Tr. 112-113.)

{¶ 19} Wife suffers from bipolar disorder and had a psychotic episode in September 2012. Wife has been treating regularly with a counselor and a psychiatrist and has not had any other psychotic events since 2012. She experienced a mild case of postpartum depression in the summer of 2018, after the birth of Z.E., but her psychiatric conditions have been well controlled with medication.

{¶ 20} Wife testified that she wants to move to Colorado. Husband alleged that Wife petitioned the court for a civil protection order in order to bolster her chances of obtaining full custody of the parties' children so she can take them with her to Colorado. Wife conceded that she wants to move to Colorado, but denied having any ulterior motives for seeking a civil protection order. (Tr. 28-29, 140, 144.)

{¶ 21} After considering the evidence presented at the hearing and the parties' written closing arguments, a magistrate granted the CPO, naming Wife the protected person, and ordered it effective until November 26, 2019. Husband filed timely objections to the magistrate's decision. The trial court overruled Husband's objections and affirmed that the CPO should remain in effect until November 26, 2019. Husband now appeals the trial court's judgment.

II. Law and Analysis

{¶ 22} In the first assignment of error, Husband argues the trial court's determination that a CPO is necessary to prevent domestic violence is against the manifest weight of the evidence. In the second and third assignments of error, he argues that the trial court's findings that Wife had been a victim of domestic violence and that there was a "history of control" and "past acts of violence" were also against the manifest weight of the evidence. We discuss these assigned errors together because they are interrelated.

{¶ 23} To obtain a CPO under R.C. 3113.31, the petitioner must prove, by a preponderance of the evidence, that the petitioner or petitioner's family or household members are in danger of domestic violence. R.C. 3113.31(D)(1); *Croone v. Arif*, 8th Dist. Cuyahoga No. 101103, 2014-Ohio-5546, ¶ 18, citing *Felton v. Felton*, 79 Ohio St.3d 34, 679 N.E.2d 672 (1997), paragraph two of the syllabus. "Preponderance of the evidence' means the greater weight of the evidence, or evidence that leads the trier of fact to find that the existence of a contested fact is more probable than its nonexistence." *Id.*, quoting *State v. Stumpf*, 32 Ohio St.3d 95, 102, 512 N.E.2d 598 (1987).

{¶ 24} A petition for a CPO involves a civil proceeding. *Y.H. v. C.C.*, 8th Dist. Cuyahoga No. 107892, 2019-Ohio-2922, ¶ 15. Nevertheless, the standard of review applied to a manifest weight of the evidence challenge in a civil case is the same as that applied in a criminal case. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17.

{¶ 25} A manifest weight of the evidence challenge concerns “the inclination of the greater amount of credible evidence, offered in a trial, to support one side of the issue rather than the other.” (Emphasis omitted.) *Id.* at ¶ 12, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997). A reviewing court “weighs the evidence and all reasonable inferences, considers the credibility of witnesses and determines whether in resolving conflicts in the evidence, the [factfinder] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered.” *Thompkins* at 387, quoting *State v. Martin*, 20 Ohio App.3d 172, 175, 485 N.E.2d 717 (1st Dist.1983). Reversal on manifest weight grounds is reserved for the “exceptional case in which the evidence weighs heavily against the conviction.” *Id.*

{¶ 26} Husband argues the trial court’s finding that a CPO was necessary to prevent domestic violence is against the manifest weight of the evidence. He contends Wife’s actions after the alleged choking incident demonstrate there was no threat of physical harm and, therefore, no need for protection. He asserts that Wife (1) never made a police report of the choking incident, (2) never sought medical attention for injuries sustained as a result of the incident, (3) failed to submit any photographs of injuries into evidence, and (4) happily accepted an invitation to enjoy M.E.’s hot tub sometime in the future. Husband also argues that Wife voluntarily slept in the marital bed and initiated sexual relations with Husband after Husband allegedly choked her and pinched her nostrils closed. Husband asserts

these actions are not consistent with someone who has been a victim of domestic violence and demonstrate that Wife had no fear of him and does not need protection.

{¶ 27} Wife, however, argues that her continued presence in the marital home, sleeping in the marital bed, and the initiation of sexual relations were “palliative behaviors” aimed at preventing additional acts of violence. Wife testified that she slept in the marital bed after the choking incident because she was afraid that if she slept in another room “[i]t would have made things worse.” (Tr. 51.) Wife also explained that she did not leave the marital home on the Saturday and Sunday after the choking incident because she was “afraid,” “didn’t know what [her] rights were,” and “wasn’t willing to take a risk until after [she] knew.” (Tr. 50.) She also stayed in the marital home because she did not “want to make things worse.” (Tr. 60.) However, she vacated the marital home the following Monday, after consulting with an attorney and the abuse hotline.

{¶ 28} Wife concedes that she smiled for photographs after the choking incident and does not deny that she accepted an invitation to visit M.E.’s hot tub on some unspecified date in the future. However, despite Husband’s argument to the contrary, these actions do not necessarily prove that Wife was feeling safe and secure. She testified that after the choking incident at the party, she went to the bathroom to regain her composure and “put on a happy face and get through the night.” (Tr. 136.)

{¶ 29} Moreover, Wife argues, citing the Ohio Supreme Court’s Guide to Domestic Violence & Allocation of Parental Rights, that Husband’s behaviors are

known indicators and risk factors of domestic violence. Under a section titled “Lethality or Risk Factors,” the Ohio Supreme Court’s Guide identifies strangulation, controlling behaviors, and abuse during pregnancy as factors indicating a heightened risk of serious physical harm. Ohio Supreme Court, *Domestic Violence & Allocation of Parental Rights and Responsibilities Court Guide* 3 (2016). The guide explains that these risk factors “are evidence-based, provide an indicia of how past or ongoing domestic violence heightens risks of harm to child or parents, and may indicate a marked risk for future serious injury or homicide.” *Id.*

{¶ 30} The guide also describes the various behaviors constituting each risk factor. As relevant here, the guide describes “strangulation” as “One parent has strangled, choked, or suffocated the other parent or has placed his/her hands around the other parent’s neck.” *Id.* Notably, the description does not require marks or bruising on the neck or a loss of consciousness. “Abuse during pregnancy” is described acts of “violence against the other parent while that parent was pregnant.” Examples of “controlling behaviors” occur when one parent or spouse “controlled or attempted to control the other parent’s daily activities,” or “imposed rules the other parent must follow.” *Id.*

{¶ 31} Wife testified that Husband twice put his hands on her neck as if to choke her; once before their children were born and once at M.E.’s birthday party. She also stated that Husband threw a box at her head while she was pregnant. With respect to controlling behaviors, Wife testified that Husband generally made Wife

apologize for his abusive actions as if they were her fault. Whenever Wife confronted Husband about something she did not like, he “escalated” and made the situation worse until Wife surrendered and apologized. (Tr. 146.) Wife explained: “[H]e was able to convince me that it was my fault that it happened.” (Tr. 21.) She also stated that Husband was regularly critical of her and that he secretly kept money away from her. Thus, there was evidence supporting several risk factors of domestic violence listed in the Ohio Supreme Court’s Guide.

{¶ 32} Husband admitted that he threw a box that hit Wife’s head, but claimed it was an accident. He also admitted that he pinched Wife, but denied it caused any bruises. Thus, Husband concedes that these events occurred, but disagrees with Wife’s characterization of them. Nevertheless, there was sufficient evidence of past acts of abuse and controlling behaviors. When asked why Wife wanted a CPO, she replied: “I don’t want him to hurt me anymore.” (Tr. 20.) Therefore, there was sufficient evidence that a CPO order was necessary to protect Wife from future violence.

{¶ 33} Husband argues, however, that Wife was not a credible witness because she has bipolar disorder, psychosis, and postpartum depression. (Appellant’s brief p.14.) He asserts that he was a more credible witness because “there is no evidence in the record to indicate that [he] was similarly mentally impaired.” (Appellant’s brief p. 14.) He also contends that Wife’s testimony is not credible because she did not cry out for help when Husband allegedly choked her, remained at the dining room table next to husband after the choking incident, and

smiled for family photographs. He contends these actions “cast doubt on her version of events” and are “against the manifest weight of the evidence.” (Appellant’s brief p. 15.)

{¶ 34} However, Wife explained that she pretended to be happy after Husband choked her in order to avoid additional conflict with Husband. Wife testified that whenever she attempted to defend herself from Husband’s violence, “it always escalates * * *.” (Tr. 60.) Therefore, it was not unreasonable for Wife to feign happiness under the circumstances.

{¶ 35} Moreover, there is nothing to suggest that Wife’s mental illness affected the reliability of her testimony. Wife testified that although she has been diagnosed with bipolar disorder and psychosis, she has not had a psychotic episode since 2012. She explained that she suffered a mild case of postpartum depression after Z.E. was born in June 2018, but she has been closely monitored by a psychiatrist, and her condition has been well controlled with medication. Furthermore, there is nothing in the record to suggest that her mental illness affected her recollection of events. Therefore, her mental health diagnoses are irrelevant to her credibility.

{¶ 36} Husband nevertheless argues that Wife was not a credible witness because she sought the CPO in order to boost her chances of obtaining sole custody of the parties’ children so she could move with them to Colorado. Husband made this argument in the trial court, and the court considered it in assessing Wife’s credibility. Moreover, Wife’s testimony was corroborated, at least in part, by P.K.

P.K. testified that he observed Wife place her head on Husband's shoulder and that Husband pushed it off a few times. He also testified that he heard Wife say: "Ow, you hurt my neck," or "Ow, you are hurting my neck." (Tr. 74.) Although P.K. testified that he did not see Husband choke Wife, he never stated that it did not happen. P.K. also conceded that he observed a look of anger on Wife's face after hearing her complain about Husband hurting her neck. Thus, P.K.'s testimony is consistent with Wife's description of the choking incident.

{¶ 37} As previously stated, Husband described the incident as follows:

She had come back in to come on my shoulder again, and I pretty much twisted my arm out of the way. And somehow when I did that, I must have come in contact accidentally with her somewhere, because she did say, "Ow, that hurt."

And I turned and I said "Sorry," and that was the end of that incident.

(Tr. 99.)

{¶ 38} Husband conceded that he inflicted pain on Wife, and his description of the incident fails to provide a reasonable explanation as to what happened. He claims that he "somehow" came into contact with her "somewhere," and that it was an accident. He does not articulate what part of his body came into contact with Wife, what part of Wife's body came into contact him, or how their bodies made contact. Such a vague description carries virtually no evidentiary weight. Moreover, Husband's account of the incident differs from P.K.'s testimony since P.K. confirms that he heard Wife complain that Husband was hurting her neck.

{¶ 39} M.E. testified that he did not see Husband choke Wife at the dining room table even though he was sitting seven feet away at the piano. He also stated

that he observed no marks or bruises on Wife's neck to suggest she had been choked. In fact, he did not see any change in Wife's demeanor during the party. However, M.E. admitted that he was not focusing on Husband and Wife when the choking incident occurred because he was focusing on the two-year-old seated with him at the piano. And, as previously stated, Wife's appearance of happiness does not prove that no choking incident occurred. Therefore, M.E.'s testimony did not add much to the weight of the evidence either in favor of, or against, Husband or Wife.

{¶ 40} Wife's testimony was more specific than Husband's, and her testimony was corroborated, at least in part, by P.K. In resolving conflicting testimony, in the absence of objective evidence, we must give deference to the trier of fact's ability to view the witnesses' demeanor and assess the witnesses' credibility. We, therefore, agree with the trial court that Wife was a credible witness and that her testimony established, by a preponderance of the evidence, that she had been a victim of domestic violence, that she was in danger of future domestic violence, and that she was in need of a CPO for protection. Husband's three assignments of error are overruled.

{¶ 41} Judgment affirmed.

It is ordered that appellee recover from appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate be sent to the Cuyahoga County Court of Common Pleas, Domestic Relations Division, to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

EILEEN T. GALLAGHER, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
RAYMOND C. HEADEN, J., CONCUR