[Cite as *J.H. v. S.P.*, 2013-Ohio-3833.]

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

J.H., minor by and through next of kin, S.H., mother, :

Petitioner-Appellee, : No. 13AP-70

(C.P.C. No. 11JU-12-16977)

v. : (REGULAR CALENDAR)

S.P., minor [by and through next of kin, T.P., mother], :

Respondent-Appellant. :

D E C I S I O N

Rendered on September 5, 2013

Tyack, Blackmore, Liston & Nigh Co., LPA, and *Joseph A. Nigh*, for appellee.

Elizabeth N. Gaba, for appellant.

APPEAL from the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch.

BROWN, J.

{¶ 1} S.P., by and through her mother, T.P., respondent-appellant, appeals the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, in which the court granted the request for a juvenile protection order filed by J.H., by and through her mother, S.H, petitioner-appellee.

{¶ 2} Appellant is a minor female and was a sophomore in high school at the time of the present incident. Appellee is a minor female and is in the same grade at the same high school as appellant. Appellant and appellee were friends from seventh to ninth

grade. However, starting in November 2010, when the girls were both in high school, appellant began threatening appellee via Twitter and text messages. Appellee and appellant reconciled briefly, but, starting in November/December 2011, appellant again began threatening appellee via Twitter and phone calls.

{¶ 3} On December 30, 2011, appellee's mother filed a petition for a juvenile civil protection order ("CPO") against appellant. The trial court granted an ex parte juvenile CPO. On January 10, 2012, the trial court entered another ex parte juvenile CPO. On May 18, 2012, the magistrate held a full hearing and subsequently issued a juvenile CPO against appellant. Appellant requested findings of fact and conclusions of law, and the magistrate issued an amended decision on July 31, 2012. Appellant filed objections, and the trial court issued a decision on August 24, 2012, overruling appellant's objections. Appellant appeals the judgment of the trial court, asserting the following assignments of error:

> 1. The trial court erred when it determined that the Appellant engaged in menacing by stalking even though no evidence was presented to establish the legal elements necessary to make such a finding. The evidence was insufficient to support the finding that the Appellant engaged in menacing by stalking.
>
> 2. The trial court erred when it determined that the Appellee's allegations and absence on the day of trial met the legal standards necessary to issue a juvenile order of protection pursuant to R.C. 2151.34(D)(1).
>
> 3. The decision of the trial court that the Appellant acted in a manner towards the Appellee which would allow the issuance of a juvenile protective order was against the manifest weight of the evidence.

{¶ 4} We will address appellant's first and third assignments of error together, as they both raise essentially the same argument. Appellant argues in her first assignment of error that the trial court's determination that she engaged in menacing by stalking was based upon insufficient evidence. Appellant argues in her third assignment of error that the trial court's decision was against the manifest weight of the evidence.

{¶ 5} R.C. 2151.34 provides, in pertinent part:

> (C)(1) Any of the following persons may seek relief under this section by filing a petition with the court:
>
> * * *
>
> (b) Any parent or adult family or household member on behalf of any other family or household member;
>
> * * *
>
> (2) The petition shall contain or state all of the following:
>
> (a) An allegation that the respondent engaged in a violation of section 2903.11, 2903.12, 2903.13, 2903.21, 2903.211, 2903.22, or 2911.211 of the Revised Code, committed a sexually oriented offense, or engaged in a violation of any municipal ordinance that is substantially equivalent to any of those offenses against the person to be protected by the protection order, including a description of the nature and extent of the violation;
>
> * * *
>
> (E)(1)(a) After an ex parte or full hearing, the court may issue any protection order, with or without bond, that contains terms designed to ensure the safety and protection of the person to be protected by the protection order.

{¶ 6} In 2010, R.C. 2151.34, the Shynerra Grant Law, was enacted to provide juvenile courts with jurisdiction to issue CPOs between minors. It has been held that " '[t]he juvenile civil protection order statute, R.C. 2151.34, is similar to the civil domestic violence statute, R.C. 3113.31, in that both are designed to protect the petitioner from *future* harm.' (Emphasis sic.)" *Wetterman v. B.C.*, 9th Dist. No. 12CA0021-M, 2013-Ohio-57, ¶ 10, quoting *In re E.P.*, 8th Dist. No. 96602, 2011-Ohio-5829, ¶ 29. Evidence of past abuse, however, is relevant and may be an important factor in determining whether there is a reasonable fear of further harm. *Id.* at ¶ 12, citing *Solomon v. Solomon*, 157 Ohio App.3d 807, 2004-Ohio-2486, ¶ 27 (7th Dist.). Nevertheless, even with established past abuse there must be some competent, credible evidence that there is a present fear of

harm. *Id.*, citing *Holland v. Garner*, 12th Dist. No. CA2009-09-226, 2010-Ohio-2963, ¶ 9, quoting *Solomon* at ¶ 27.

{¶ 7} The petitioner's burden of proof in obtaining a juvenile CPO and the standard for reviewing such orders comes from analogous case law addressing adult CPOs. *Insani v. Federici*, 2d Dist. No. 2010 CA 79, 2011-Ohio-6322, ¶ 22, citing *In re E.P.* at ¶ 14. Thus, "the trial court must find that petitioner has shown by a preponderance of the evidence that petitioner [is] in danger of * * * violence." *Felton v. Felton*, 79 Ohio St.3d 34 (1997), paragraph two of the syllabus. Preponderance of the evidence is defined as "that measure of proof that convinces the judge or jury that the existence of the fact sought to be proved is more likely than its nonexistence." *State ex rel. Doner v. Zody*, 130 Ohio St.3d 446, 2011-Ohio-6117, ¶ 54. Like the statute in *Felton*, R.C. 2151.34 simply requires proof by a preponderance of the evidence that, if the juvenile CPO is not granted, the petitioner is in danger of one of the enumerated offenses in R.C. 2151.34(C)(2). *Insani* at ¶ 23, citing *In re E.P.* at ¶ 16. Accordingly, whether the CPO should have been issued at all (i.e., whether the petitioner met his or her burden by a preponderance of the evidence) is essentially a manifest weight of the evidence review. *In re E.P.* at ¶ 18, citing *Rauser v. Ghaster*, 8th Dist. No. 92699, 2009-Ohio-5698, ¶ 12, citing *Caban v. Ransome*, 7th Dist. No. 08 MA 36, 2009-Ohio-1034, ¶ 7. Judgments supported by competent, credible evidence going to all the essential elements of the claim will not be reversed on appeal as being against the manifest weight of the evidence. *State v. Schiebel*, 55 Ohio St.3d 71, 74 (1990).

{¶ 8} To obtain a juvenile CPO under R.C. 2151.34(C)(2), the petitioner must establish that the respondent engaged in a violation of one of the offenses listed in the statute: felonious assault pursuant to R.C. 2903.11; aggravated assault pursuant to R.C. 2903.12; assault pursuant to R.C. 2903.13; aggravated menacing pursuant to R.C. 2903.21; menacing by stalking pursuant to R.C. 2903.211; menacing pursuant to R.C. 2903.22; aggravated trespass pursuant to R.C. 2911.21; and a sexually oriented offense. The present case seemed to revolve around two of the menacing offenses. R.C. 2903.211, menacing by stalking, provides, in pertinent part:

> (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 cause mental distress to the other person.
>
> (2) No person, through the use of any electronic method of remotely transferring information, including, but not limited to, any computer, computer network, computer program, or computer system, shall post a message with purpose to urge or incite another to commit a violation of division (A)(1) of this section.
>
> * * *
>
> (D) As used in this section:
>
> (1) "Pattern of conduct" means two or more actions or incidents closely related in time, whether or not there has been a prior conviction based on any of those actions or incidents. * * * [T]he posting of messages or receipt of information or data through the use of an electronic method of remotely transferring information, including, but not limited to, a computer, computer network, computer program, computer system, or telecommunications device, may constitute a "pattern of conduct."
>
> (2) "Mental distress" means any of the following:
>
> (a) Any mental illness or condition that involves some temporary substantial incapacity;
>
> (b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

R.C. 2903.22(A), menacing, provides, in pertinent part: "No person shall knowingly cause another to believe that the offender will cause physical harm to the person or property of the other person."

{¶ 9} The relevant testimony at trial was as follows. Phillip Smith, the assistant principal at appellant and appellee's high school, testified that, in November 2010, the school gave appellant an in-school suspension for threats she made toward appellee after previously being warned to cease such activities. He then testified that, in January 2012,

S.H. complained to him about more threatening tweets and texts appellant was posting and sending appellee. He met with appellant and warned her to discontinue such activities.

{¶ 10} Appellee testified that, in November 2010, appellant told her on the phone that she was going to beat her up. Appellant also texted her and told her she needed to watch her back because she was going to beat her up. Appellee believed these communications were threatening. The two girls briefly reconciled and became friends again until November 2011, when appellant began posting threatening Twitter messages and making threatening phone calls.

{¶ 11} Appellee testified that, on December 27, 2011, appellant tweeted "yeah you are scared considering you won't answer your fucking phone! Pussy ass bitch." Appellee said she felt threatened by this tweet. Appellee stated that her mother immediately called appellant and told her to stop. Appellant then tweeted, appellee "is really havin her mom call me? Hahahhha #mature." Also on December 27, 2011, appellant tweeted, "[appellee] * * * him while we were dating," which refers to appellant's belief that appellee had sexual contact with appellant's boyfriend. Around the same time, appellant phoned appellee and told her she needed to watch her back because appellant was going to "beat [appellee's] ass." Appellee then tweeted, "After that call I'm really scared #not." Appellee said the tweet was in response to the call from appellant, and appellee said she really was not scared.

{¶ 12} Appellee further testified that, on January 4, 2012, the day appellant was served with the temporary CPO, appellant tweeted, "haha wow you are a scared little bitch." In March 2012, while the temporary CPO was in effect, appellant asked appellee as they passed in the school hallway if she had a problem with her, to which appellee responded "no." She asked appellant if she had a problem with her, and appellant said, "yes." Appellant's actions violated the specific terms of the CPO. Appellee reported such to school officials. Also, appellee stated that appellant had walked through the gym on her way to softball practice and would stand with her arms crossed staring at her during cheerleading practice, which was also in violation of the CPO. Appellee reported this to school officials. Appellee said she feels threatened by appellant. Appellee also testified that, after the temporary CPO was issued, appellee tweeted from school, "I'm scared of my

life of her but I'm still walking behind her." Appellee stated that she can block messages posted on Twitter by appellant, but she did not block appellant because she felt the need to see what appellant was saying about her so she could be warned if appellant said she was going to beat her up. Appellee admitted that appellant never physically touched her and never told her face to face she was going to hit her.

{¶ 13} A photograph was presented during appellee's testimony in which appellee and appellant were sitting near each other at a high school softball game the weekend before the hearing. Appellee testified she knew appellant was at the game but she was not afraid because she was with her family. Appellee also said that she sat on the opponent's bleachers to stay away from appellant, and she was in the photograph in close proximity to appellant because she was with her mom speaking to a friend's mom at the time. Appellee said that appellant's actions have ruined her first two years of high school, and she wants them to stop so she can enjoy her last two years.

{¶ 14} T.P., appellant's mother, testified that she monitored appellant's tweets and other electronic communications and discussed and reviewed her Twitter postings with her every night. T.P. said appellant now used her Twitter account appropriately.

{¶ 15} Appellant first argues that appellee never testified that she feared appellant would commit future offenses against her. Although we agree appellee never explicitly testified to such, the trial court had sufficient testimony to conclude such. Appellant was previously warned by the school to cease making threats to appellee, but she failed to do so. In November 2010, the school gave appellant an in-school suspension for continuing to make threats against appellee. Appellee's mother also asked appellant to stop making threats in December 2011, but the threats continued. The school again warned appellant in January 2012 to stop. Appellant's threats included threats of physical violence, and appellee testified that she, in fact, felt threatened by them. Appellee also testified that, even after the temporary CPO went into effect, appellant still spoke to her in the hallway in an aggressive manner and stared at her in the gym with her arms folded, both violations of the CPO. After the temporary CPO was issued, appellee tweeted from school, "I'm scared of my life." Appellee also said that she wanted the CPO so that appellant's actions would stop and she could enjoy her final two years of high school. Therefore, it was apparent by the evidence presented that appellee feared appellant would continue

with the same acts. It is also clear that appellant was not going to be deterred by any authority figures or risk of school discipline but was going to continue to threaten appellee. Appellant's continued menacing behavior in the face of punishment demonstrates her incorrigibility and the need for a CPO going forward. Thus, the trial court had sufficient evidence to believe that appellee feared appellant would continue to commit the same acts in the future.

{¶ 16} Appellant next asserts that there was no evidence presented to support that appellee suffers a present risk of harm from appellant. We disagree. Appellant has repeatedly threatened appellee that she needed to watch her back and that she would beat her up. Appellee feels threatened by appellant's behavior. Appellant has been suspended for her actions and reprimanded by school officials but continues to engage in menacing behavior. The evidence supports that appellee suffers a present risk of harm from appellant.

{¶ 17} Appellant next argues that appellee failed to demonstrate any "pattern of conduct," as defined by the menacing by stalking statute, because both girls would engage in tweeting and "sniping" at each other, and appellant never actually harmed appellee. Appellant contends that appellee had no reason to believe her words were anything more than words without significance. Appellant points out that appellee never cried or cowered in fear or suffered depression. We disagree with appellant's contentions. As is plainly evident by the testimony summarized above, a pattern of abusive and threatening conduct existed, starting with multiple incidents in November 2010 and continuing on multiple occasions in December 2011 and January 2012. Although appellant seeks to characterize the behavior as mere mutual "sniping," the record contains no evidence of threats made by appellee toward appellant. Furthermore, despite the lack of actual physical harm or cowering, neither of which are necessary prerequisites to granting a CPO, appellee testified that appellant's words and actions instilled fear in her and she felt threatened by them. Although appellant takes the position that her words were "without significance," appellee's testimony evinces otherwise, and the trial court apparently believed appellee.

{¶ 18} Appellant further argues that appellee failed to demonstrate that appellant "knowingly" caused appellee to believe she would cause her physical harm or mental

distress. Appellant also contends there was no evidence she tried to hurt or scare appellee. R.C. 2901.22(B) provides: "[a] person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist." With respect to the mens rea of a crime, "courts will generally presume a person intends the natural, reasonable, and probable consequences of his or her voluntary acts." *State v. Nadock*, 11th Dist. No. 2009-L-042, 2010-Ohio-1161, ¶ 63.

{¶ 19} Although we agree there was no evidence that appellant actually carried out her threats of physical violence against appellee, the trial court had sufficient evidence to conclude that appellant knowingly caused appellee to believe she would cause her physical harm or mental distress. Appellant's repeated tweets and text messages threatening to beat appellee up can be characterized as nothing less than knowing attempts to cause appellee to believe appellant would cause her physical harm.

{¶ 20} In sum, appellee presented evidence from which the trial court could have concluded, by a preponderance of the evidence, that if a juvenile CPO were not granted, appellee was in danger of physical harm or mental distress. The trial court's conclusion was not against the manifest weight of the evidence. Appellant's first and third assignments of error are overruled.

{¶ 21} Appellant argues in her second assignment of error that the trial court erred when it determined that appellee's allegations and absence on the day of trial met the legal standards necessary to issue a juvenile CPO pursuant to R.C. 2151.34. Specifically, appellant contends that she was denied due process because she was not able to confront her accuser, appellee's mother, S.H., due to S.H.'s failure to appear at the full hearing. Appellant asserts that S.H., through her own testimony, was required to prove the allegations because she was the petitioner who actually filed the complaint. Appellant also seems to suggest that S.H. had to prove that she believed that appellant would cause physical harm or mental distress to S.H., as she was the petitioner.

{¶ 22} Appellant's arguments are without merit. We first note that appellant failed to raise this issue before the trial court. It is axiomatic that a litigant's failure to raise an issue at the trial court level waives the litigant's right to raise that issue on appeal. *Shover*

v. Cordis Corp., 61 Ohio St.3d 213, 220 (1991), overruled on other grounds in *Collins v. Sotka*, 81 Ohio St.3d 506 (1998). Thus, appellate courts generally will not consider any error a party failed to bring to the trial court's attention at a time when the trial court could have avoided or corrected the error. *Schade v. Carnegie Body Co.*, 70 Ohio St.2d 207, 210 (1982). Appellant's failure to raise this issue before the magistrate or trial court waives the issue for purposes of appeal.

{¶ 23} We also note that motions for CPOs are civil in nature, not criminal. *See Butcher v. Stevens*, 182 Ohio App.3d 77, 2009-Ohio-1754 (4th Dist.2009). The right to confront one's accusers is a fundamental right embodied in the Sixth Amendment to the U.S. Constitution and applies to state criminal trials under the Fourteenth Amendment Due Process Clause. *State v. Good*, 12th Dist. No. CA86-11-168 (Dec. 28, 1987), citing *Pointer v. Texas*, 380 U.S. 400 (1965). Thus, the Confrontation Clauses of the U.S. and Ohio Constitutions apply only to criminal matters. *State v. Hayden*, 96 Ohio St.3d 211, 2002-Ohio-4169, ¶ 4.

{¶ 24} Also, as appellee points out, there is no requirement in a civil case that the party to that action be personally in the courtroom during trial. *Williams v. Bolding*, 6 Ohio App.3d 48, 49 (10th Dist.1982). Despite S.H.'s absence at the full hearing, she and appellee were represented by counsel. Further, a subpoena was not issued for the appearance of S.H., which would be a prerequisite to requiring her presence at the trial. *See id.* If it was necessary to appellant's defense that S.H. be available for cross-examination, it was her obligation to serve her with a subpoena. *See Dornbirer v. Osborn*, 10th Dist. No. 94APG01-43 (May 31, 1994), citing *Williams.*

{¶ 25} Nevertheless, as quoted above, R.C. 2151.34(C)(1)(b) provides that "[a]ny parent or adult family or household member on behalf of any other family or household member" could "seek relief under this section by filing a petition with the court." Thus, although S.H. was technically the petitioner, she was clearly seeking relief on behalf of appellee, as indicated in the heading of the petition. Therefore, the real "accuser" appellant needed to confront was appellee, not appellee's mother. Appellee appeared at the full hearing and was cross-examined by appellant's counsel. For all of these reasons, we find appellant's due process rights were not violated by S.H.'s absence at the full hearing, and appellant's second assignment of error is overruled.

{¶ 26} Accordingly, appellant's three assignments of error are overruled, and the judgment of the Franklin County Court of Common Pleas, Division of Domestic Relations, Juvenile Branch, is affirmed.

Judgment affirmed.

KLATT, P.J., and T. BRYANT, J., concur.

T. BRYANT, J., retired of the Third Appellate District, assigned to active duty under authority of the Ohio Constitution, Article IV, Section 6(C).