[Cite as *Cross v. Bryant*, 2009-Ohio-6994.]

THE COURT OF APPEALS

ELEVENTH APPELLATE DISTRICT

PORTAGE COUNTY, OHIO

ELAYNE J. CROSS,	:	**O P I N I O N**
Plaintiff-Appellee,	:	**CASE NO. 2009-P-0017**
- vs -	:	
ROBERT L. BRYANT,	:	
Defendant-Appellant.	:	

Civil Appeal from the Portage County Court of Common Pleas, Domestic Relations Division, Case No. 2009 DR 0070.

Judgment: Reversed and remanded.

Elayne J. Cross, pro se, 321 Suzanne Drive, Kent, OH 44240 (Plaintiff-Appellee).

Mitchell A. Naumoff, 156 Sixth Street, N.W., Barberton, OH 44203 (For Defendant-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} This appeal emanates from the Portage County Court of Common Pleas, Domestic Relations Division. Appellant, Robert L. Bryant, appeals the trial court's February 23, 2009 judgment entering a domestic violence civil protection order against him and in favor of appellee, Elayne J. Cross. For the reasons discussed in this opinion, we reverse the judgment entry of the trial court and remand the matter for further proceedings.

{¶2} Appellant and appellee were divorced in 2003. Four children were born of the marriage. On December 18, 2003, the parties entered a "Consent Agreement and Domestic Violence Civil Protection Order." Among other things, appellant was ordered to refrain from harming, threatening, or harassing appellee and was required to stay "as far away from [appellee] as possible." The order was set to expire on December 18, 2008.

{¶3} On September 13, 2005, while the protection order was still active, the parties entered into an agreement relating to the visitation and the pick-up and drop-off of their children. This decree apparently merged with the orders within their original divorce decree and, inter alia, provided:

{¶4} "[A]ppellant shall have parenting time with the minor children of the parties every other weekend from Saturday at 1:00 p.m. until Sunday at 1:00 p.m. Drop off and pick up for this parenting time will be in the lobby of the Kent Police Station. ***"

{¶5} On December 27, 2008, nine days after the expiration of the 2003 protection order, appellant came to appellee's home in order to pick-up the children. Appellant did not exit his vehicle and appellee had no contact with appellant. Appellee's husband confronted appellant, still in his vehicle, and stated neither he nor appellee wanted appellant at their home. In the meantime, appellee had phoned the police. After police arrived, appellant left the home without incident.

{¶6} On February 11, 2009, appellee filed a petition for domestic violence civil protection order, pursuant to R.C. 3113.31. With respect to "act(s) of domestic violence," a necessary condition for such an order, appellee made the following allegations:

{¶7} "December 27, 2008

{¶8} "[Appellant] showed up at my house, which he is not supposed to do because of the CPO, but I was later informed that it expired. He called my son on his cell phone and I panicked and called 911. The police showed up and asked him to leave. Also, it's in our Divorce Decree that he must pick the kids up at the police department.

{¶9} "December 2003

{¶10} "A CPO was granted due to previous abuse I had experienced from [appellant], such as being choked, having things thrown at me and being threatened with a knife.

{¶11} "2004-2008

{¶12} "While CPO was in effect, [appellant] has violated the order multiple times. I've been to the police at least 3 times to report these violations. My own personal records show that he has called me 14 times and been to my house 7 times."

{¶13} On February 12, 2009, the matter came before the court on an ex parte hearing. After receiving testimony, the court concluded there was no immediate risk and thus, denied the request for an order ex parte. The matter was then set for an evidentiary hearing.

{¶14} On February 23, 2009, a hearing was held at which both appellant and appellee appeared pro se. During the hearing, appellee's testimony vis-à-vis appellant's arrival at her home on December 27, 2009 neither added nor varied from the allegations in her February 11, 2009 petition. She further stated on record that appellant had violated the previous order on various occasions; however, appellee did

not introduce any evidence of police reports or other documentation to specify the nature of the alleged violations. The only incident discussed with any specificity was an encounter she had with appellant at a high school football game in October of 2008, nearly one year and five months earlier.

{¶15} On this occasion, the local high school was conducting an annual ritual whereby the lights at the football stadium are turned off and the band marched on the field to script the word "Kent." Prior to the procession, appellee testified that she permitted at least one of the children to leave her company and sit with friends. She stated that they agreed to meet at a designated place once the lights were relit.

{¶16} After the ceremony, appellee went to the agreed location and waited for the children. While she waited, appellant approached her asking "'Where are the Kids?'" She testified "[appellant] just was beside himself because he felt there was too much chaos for the kids to be trusted or whatever to meet us ***." Appellee elaborated:

{¶17} "[H]e was screaming at me, telling me I was not - - I don't know - - in control of the kids, and it wasn't right, he was gonna - - something along the lines of he was gonna make sure something was taken care of with this situation. He didn't come over and say, "'I'm gonna,' you know, 'hit you,' per se. He was saying that he was going to - - I don't know - - I mean, it's been awhile. He was very - - I was trying not to engage him. I was trying to stay away from him. I was trying to keep him away from me. But he kept continuing to come closer and closer to me and yell at me and get ahold of the kids, and I just felt very, very threatened because he kept wanting to get closer to me. He was supposed to stay as far away from me as possible. ***"

{¶18} Appellee testified she eventually contacted a police officer who was working security at the game, Officer Marty Gilliland. Coincidentally, Officer Gilliland was a mutual acquaintance of both appellant and appellee and had associated with them while they were married. On direct examination, Officer Gilliland testified he had seen appellant and appellee argue in the past but had never observed anything about which he was "overly concerned."

{¶19} With respect to the incident at the football game, the officer testified appellee came to him and asked that he advise appellant to leave her alone. He testified he had not observed the encounter which prompted the request but appellee was obviously upset and he could tell she had been crying. The officer then confronted appellant and advised him to stay away from appellee. Officer Gilliland testified appellant was receptive and cooperative. The episode then concluded without further incident.

{¶20} Appellant testified on his own behalf. He stated he had never threatened appellee, nor did he violate the previous civil protection order. He also testified he went to appellee's residence on December 27, 2008 because he had waited at the police station to pick up the children but, when appellee did not show, he called his son who told him to come to appellee's residence for the pick-up. He conceded his actions violated the divorce decree and, as a result, had "made a mistake." Appellant emphasized that his mistake was occasioned only by his desire to see the children, not to harass appellee. Given this testimony, the magistrate asked appellant if he would be willing to enter another consent order requiring him stay away from appellee; appellant declined, stating:

{¶21} "I drive trucks. I operate equipment. And as I stated in a previous Court order, I hunt, also. Okay? And - - well, you're asking about employment, and I go onto government installations, I go to NASA, I have to have background checks, and this just doesn't look good. It's embarrassing having a civil protection order on me ***. I can stay away from her. I have no problem with that."

{¶22} The hearing subsequently concluded. The magistrate issued his decision from the bench granting the domestic violence civil protection order. The trial court adopted the decision the same day. Although no objections were filed to the magistrate's decision, the decision/order failed to provide any indication that appellant would be precluded from assigning any errors of law or fact adopted by the trial court without filing timely objections as required by Civ.R. 53(D)(3)(a)(iii). This timely appeal follows.

{¶23} Appellant's sole assignment of error provides:

{¶24} "The appellee has failed to meet the minimum burden of proof to justify the issuance of a civil protection order."

{¶25} Appellant's assignment of error challenges the sufficiency of the evidence as it relates to the proof of domestic violence under R.C. 3113.31. However, certain procedural errors inherent in the proceedings below are dispositive of the current appeal and, as will be discussed below, these errors render appellant's argument unripe for review at this time. The errors in question flow from a failure to adhere to the dictates of Civ.R. 53.

{¶26} Initially, appellee points out, and we recognize, that appellant failed to file objections to the magistrate's February 23, 2009 ruling. Civ.R. 53 (D) states in pertinent part:

{¶27} "(b) Objections to magistrate's decision.

{¶28} "(i) Time for filing. A party may file written objections to a magistrate's decision within fourteen days of the filing of the decision, whether or not the court has adopted the decision during that fourteen-day period as permitted by Civ.R. 53(D)(4)(e)(i). If any party timely files objections, any other party may also file objections not later than ten days after the first objections are filed. If a party makes a timely request for findings of fact and conclusions of law, the time for filing objections begins to run when the magistrate files a decision that includes findings of fact and conclusions of law.

{¶29} "(ii) Specificity of objection. An objection to a magistrate's decision shall be specific and state with particularity all grounds for objection.

{¶30} "(iii) Objection to magistrate's factual finding; transcript or affidavit. An objection to a factual finding, whether or not specifically designated as a finding of fact under Civ.R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding or an affidavit of that evidence if a transcript is not available. With leave of court, alternative technology or manner of reviewing the relevant evidence may be considered. The objecting party shall file the transcript or affidavit with the court within thirty days after filing objections unless the court extends the time in writing for preparation of the transcript or other good cause. If

a party files timely objections prior to the date on which a transcript is prepared, the party may seek leave of court to supplement the objections.

{¶31} "(iv) Waiver of right to assign adoption by court as error on appeal. Except for a claim of plain error, a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party has objected to that finding or conclusion as required by Civ.R. 53(D)(3)(b)."

{¶32} Pursuant to the foregoing rules, a party's failure to file objections to a magistrate's decision waives all but plain error. Civ.R. 53(D)(b)(iv). This is the general rule. However, this general rule does not apply where, as here, the magistrate's decision failed to include a notification that appellant was required to object or waive his challenges save plain error. Civ.R. 53(D)(3)(a)(iii) provides:

{¶33} "Form; filing, and service of magistrate's decision. A magistrate's decision shall be in writing, identified as a magistrate's decision in the caption, signed by the magistrate, filed with the clerk, and served by the clerk on all parties or their attorneys no later than three days after the decision is filed. A magistrate's decision shall indicate conspicuously that a party shall not assign as error on appeal the court's adoption of any factual finding or legal conclusion, whether or not specifically designated as a finding of fact or conclusion of law under Civ.R. 53(D)(3)(a)(ii), unless the party timely and specifically objects to that factual finding or legal conclusion as required by Civ.R. 53(D)(3)(b)."

{¶34} In this case, the magistrate's decision did not indicate it was a "magistrate's decision" in its caption; more importantly, however, the decision failed to

indicate at all, let alone conspicuously, that appellant was required to file objections to preserve any alleged factual or legal errors on appeal. Courts have held that "[t]he clear import of [Civ.R. 53(D)] is to provide litigants with a meaningful opportunity to register objections to a report of the [magistrate] before action is taken on such a report. *** The glaring failure to comply with the clearly delineated procedure of [Civ.R. 53(D)] was error prejudicial to the rights of defendant." *Pinkerson v. Pinkerson* (1982), 7 Ohio App.3d 319, 320; see, also, *Ulrich v. Mercedes-Benz USA, LLC*, 9th Dist. No. 23550, 2007-Ohio-5034, at ¶15; *Busuladzic v. Busuladzic*, 8th Dist. No. 86034, 2006-Ohio-541, at ¶15-16.

{¶35} The magistrate failed to include the requisite notice regarding objections required by rule; this flaw, unto itself, was prejudicial. Here, however, the problem was compounded by the court's failure to include a designation in the caption that the document was a "magistrate's decision," the designation at the bottom of the decision that the document itself represented a final appealable order, *and* the trial court judge's signature on the order.[1] Under these circumstances, it cannot be said that appellant was given a meaningful opportunity to object to the magistrate's decision.

{¶36} We point out that, by rule, the judgment became a final order fourteen days after it was entered as no objections or motions for extension were filed. Because the order was final, it was properly appealed to this court. However, the substantive issues with which appellant takes issue cannot be addressed at this point. That is, as our disposition is premised upon a unique procedural irregularity, we cannot speculate

1. The trial court adopted the magistrate's decision on the same day the decision was filed. Under these circumstances, i.e., where no notice that appellant was required to file objections pursuant to Civ.R. 53(D)(3)(b), the signature was misleading; however, such a practice is procedurally appropriate under Civ.R. 53(D)(4)(e)(ii), the section governing "interim orders."

whether the magistrate's decision will be readopted once the court has considered whatever objections might be raised. Under such circumstances, the arguments appellant raises are not yet ripe for review.

{¶37} The Ohio Constitution provides that "courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse * * * final orders of the courts of record inferior to the court of appeals within the district." Section 3(B)(2), Article IV, Ohio Constitution. Because the order at issue was final and the trial court's error was prejudicial to appellant's rights under the civil rules, we reverse the trial court's judgment for reasons other than those assigned as error in appellant's appeal and remand the matter for further proceedings not inconsistent with this decision.

COLLEEN MARY O'TOOLE, J.,

TIMOTHY P. CANNON, J.,

concur.