

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

ALEXANDRA FORTNEY,	:	O P I N I O N
Petitioner-Appellee,	:	
- VS -	:	CASE NO. 2011-L-120
JASON C. WILLHOITE,	:	
Respondent-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Case No. 11CS000650.

Judgment: Affirmed.

Alexandra Fortney, pro se, 2335 Clearwater Lane, Painesville, OH 44077 (Petitioner-Appellee).

James D. Falvey, Barthol & Staley, 7327 Center Street, Mentor, OH 44060 (For Respondent-Appellant).

CYNTHIA WESTCOTT RICE, J.

{¶1} Appellant, Jason C. Willhoite, appeals the judgment of the Lake County Court of Common Pleas granting to appellee, Alexandra Fortney, a civil stalking protection order. At issue is whether the trial court abused its discretion in granting the protection order. For the reasons that follow, we affirm.

{¶2} On March 11, 2011, Alexandra filed a petition for civil stalking protection order, seeking relief on her behalf and on behalf of her young son and her father. On the same day, the magistrate entered an ex parte civil stalking protection order

protecting each of these individuals. The matter came on for a full hearing on the petition before the magistrate on March 22, 2011.

{¶3} The statement of facts that follows is based on the testimony presented at the hearing on Alexandra's petition. Alexandra testified that the parties' relationship began in October 2009. From the beginning, Jason was extremely jealous and the parties argued constantly. Each party instigated physical confrontations with the other. They would often break up only to get back together again within a matter of days.

{¶4} In May 2010, Alexandra moved into Jason's residence. Jason testified that between May 2010 and September 2010, Alexandra moved in and out of his house at least three times. In September 2010, she moved out of Jason's residence for the last time. Although she often spent the night or longer periods afterward, she never moved back in.

{¶5} On October 2, 2010, the parties became engaged. At the time Alexandra was staying with Jason off and on. Alexandra's parents did not approve of the relationship, and, as a result, she did not tell them about the engagement until after it ended.

{¶6} Jason testified that two weeks after the parties were engaged, on October 15, 2010, he accused her of seeing her ex-boyfriend. Alexandra testified an argument ensued. She told Jason the relationship was over and she was leaving. Jason physically restrained her. He held her arms down and she bit him. During this altercation, she sprayed him with pepper spray. Later that day, she left Jason's residence and, thereafter, the parties did not resume their relationship.

{¶7} Alexandra testified that on October 21, 2010, she discovered she was pregnant and told Jason. She testified she did not believe Jason was the father because she was still seeing her former boyfriend at the time. However, she testified she told Jason he was the father because she was afraid.

{¶8} Thereafter, the parties went shopping at the local mall and ate out a few times. Jason continued to pursue Alexandra. His persistence caused her significant distress. As a result, on November 19, 2010, she started treating with a psychologist at Psychological and Behavioral Counseling in Ashtabula. Alexandra testified that the reason she went into counseling was due to the stress and emotional harm Jason has caused her. As of the hearing date, she was treating with her psychologist about once a week.

{¶9} When the parties started dating in October 2009, Alexandra had begun paternity proceedings against the father of her son to establish child support. Alexandra testified that, while she and Jason were together, he told her not to pursue these proceedings because he wanted to be the boy's father. Alexandra complied with this request. Then, after they broke up on October 15, 2010, Alexandra decided to re-file paternity proceedings. Jason discovered the date of the paternity test, and contacted the boy's father. Jason told him he did not have to cooperate with the child support agency by providing a D.N.A. sample because there had been no court order requiring him to do so. After learning that Jason had contacted her son's father to interfere with her obtaining a child-support order for her son, Alexandra told Jason she wanted no further interaction with him.

{¶10} Catherine Phipps, Alexandra's mother, testified that after Jason and Alexandra broke up, between October and Christmas, 2010, Jason mailed three items of correspondence to Ms. Phipps' home for Alexandra. In October, Jason sent Alexandra a seven-page handwritten letter. Every sentence began with, "This I remember," and was followed by something he had done with Alexandra while they were together. Between December 15, 2010 and December 31, 2010, Jason also sent two cards to Ms. Phipps' home for Alexandra. Ms. Phipps opened one of them. The card was a Christmas card with a photo of Jason's niece and nephew in which Jason said they missed Alexandra. Ms. Phipps did not open the second card and threw it away. Ms. Phipps told Alexandra about these cards, but she did not show them to her for fear of causing her more distress. Ms. Phipps testified that Alexandra is in constant fear of Jason. Alexandra refuses to go anywhere except to and from school, and she always makes sure her doors are locked.

{¶11} Alexandra testified that between the parties' break-up on October 15, 2010 and February 14, 2011, Jason sent her two to three text messages each week encouraging her to go back with him. In one of these messages, he told her, "I know if our lips ever touched again we would fall madly deeply in love." Alexandra did not respond to these text messages.

{¶12} On December 14, 2010, Alexandra texted Jason telling him to leave her alone. Despite this plea, he continued to text her.

{¶13} On Christmas Eve, Jason texted Alexandra, saying that he and his family had presents for her and the baby and asking if she wanted to come to get them. She

responded, “no thank you.” Jason sent another text to Alexandra on New Year’s Eve telling her he wished they could be together. Alexandra did not respond.

{¶14} Jason admitted that in early January and again in late January, he texted Alexandra. She did not respond to either of these messages.

{¶15} Alexandra testified that in late January, she texted Jason, again telling him to leave her alone. Between January and Valentine’s Day, Jason sent her between ten and 15 text messages. He would say, “I don’t know why you are doing this to me, I love you so much. I want you back. How is [your son]? I miss him.” Alexandra testified that Jason used these text messages to make her feel guilty.

{¶16} It is undisputed that on Valentine’s Day, February 14, 2011, at about 8:00 a.m., Jason went to Alexandra’s school, the Cleveland Institute of Dental/Medical Assistants, on Hopkins Road in Mentor, Ohio. He dropped off flowers and two cards for Alexandra, and left them with one of her instructors. Alexandra testified she had previously asked Jason several times not to come to her school. In one of the cards Jason left for her, he said he knew Alexandra was 20 weeks pregnant. In the other card, he said that he was in love with her; that she would fall in love with him if their lips ever met again; and that she needed to remember why she loved him.

{¶17} Later on February 14, 2011, the school contacted Jason and told him he was no longer permitted to come on school property and that he could not have any further contact with the school or with Alexandra when she was at the school.

{¶18} Later that day, Alexandra went to her doctor complaining of severe cramping that, she said, was caused by the stress she experienced from Jason

pursuing her. Her cramping was so severe her doctor referred her to the hospital for an ultrasound.

{¶19} The next day, February 15, 2011, Alexandra filed a police report with the Mentor Police Department about Jason coming to her school on Valentine's Day. A police officer called Jason, and instructed him not to return to the school and not to have any further contact with Alexandra.

{¶20} On or about February 19, 2011, Alexandra called and texted Jason telling him to leave her alone and that she did not believe he was the baby's father. She told him that what he had heard was true, namely, that she had been intimate with her ex-boyfriend while she was dating Jason. As a result, she said she believed her ex-boyfriend was the baby's father. Jason begged her to tell him who she was sleeping with, but she refused and told him to leave her alone. Jason testified that Alexandra asked him to sign papers so she could give the child up for adoption. According to Jason, Alexandra said that if Jason and her ex-boyfriend did not sign these papers, she would have the pregnancy terminated.

{¶21} After the police advised Jason on February 15, 2011 to have no further contact with Alexandra, he contacted Alexandra's best friend, Alyssa, and one of Alexandra's other friends in efforts to use them to communicate with Alexandra.

{¶22} Also, on Alexandra's birthday, March 3, 2011, after the police had told Jason to leave her alone, he sent her a text message wishing her a happy birthday and stating, "My Allie girl is now 22 years old." She did not respond.

{¶23} Alexandra's father, Jason Fortney, testified that one week later, on March 10, 2011, he drove Alexandra to school in the morning. He said that after he dropped

her off, he noticed he was being followed by a silver Toyota. That vehicle followed Mr. Fortney's car (1) from Alexandra's school on Hopkins Road in Mentor, (2) onto Route 2 westbound, (3) then off at the Route 306 exit, (4) into the parking lot of Mr. Fortney's bank, (5) then back onto Route 2, this time going eastbound, (6) then off at the Route 615 exit, (7) then onto Tyler Boulevard, (8) then to the post office on Tyler, (9) back onto Route 2 eastbound, (10) then off at the Fairport Nursery Road exit, (11) and then on Route 20 eastbound. While the two men were driving on Route 20, the Toyota pulled up alongside Mr. Fortney's car. The driver of the Toyota took several quick looks at Mr. Fortney trying to see who he was. Both men made eye contact. Mr. Fortney realized that Jason was the driver of the Toyota. At the same time, Jason recognized Mr. Fortney. Jason then stopped following Mr. Fortney and drove away.

{¶24} Mr. Fortney testified that Jason's following him was no coincidence. After Jason's pursuit was finally concluded, Mr. Fortney realized that Jason had been at Alexandra's school to watch her go into the school. Mr. Fortney was wearing a hat, which, he said, would have made it difficult for Jason to recognize him. Mr. Fortney said that Jason followed him because he wanted to see who had dropped Alexandra off at the school. On March 11, 2011, Mr. Forney went to the Mentor Police Department and made a report concerning the incident.

{¶25} Jason admitted he was driving on Route 2 between the Richmond Road exit for the city of Painesville and the Fairport Nursery Road exit when he saw Mr. Fortney. Jason said he just passed him on Route 2, looked over, saw him, and went on his way. He said he was not following Mr. Fortney, and that this interaction was a mere coincidence. However, the magistrate found the testimony of Mr. Fortney to be more

credible than Jason's. The magistrate found that Jason was at Alexandra's school that morning when he noticed her being dropped off by a male he did not recognize. The magistrate found that Jason proceeded to follow Mr. Fortney for an extended period of time covering a large geographical area in Lake County until, once on Route 20, Jason discovered the male he was following was actually Alexandra's father.

{¶26} Alexandra testified that Jason's actions have caused her mental and emotional injury, requiring her to seek treatment with a psychologist. She began seeing her psychologist after she broke up with Jason, and continues to treat with her. Alexandra said she has asked Jason to leave her alone many times, but he continues to pursue her. She has also asked him not to come to her school, but he persists in doing so. She has made it clear to him that she wants him to leave her alone, but he will not and his persistence has caused her a great amount of stress. He has contacted her friends, former boyfriend, and instructors at her school. She testified that Jason is obsessed with her and has exhibited obsessive behaviors. In addition to following her father, he followed her many times after their arguments during the summer of 2010. Consequently, she always feels like she is being followed. She said that she is afraid of Jason. She said his constant pursuit of her puts her "over the edge" and she "cannot handle it." She is afraid to go anywhere, and stays with various family members because she does not want Jason to know where she is.

{¶27} The magistrate found that, notwithstanding notice from the police on February 14, 2011 that Jason was to keep away from Alexandra, he continued to pursue her. The magistrate noted the following three incidents that occurred after this notice: (1) On March 3, 2011, Jason sent a text to Alexandra on her birthday referring

to her as “My Allie girl.” (2) Jason contacted two of Alexandra’s friends and tried to use them to rekindle his relationship with Alexandra. (3) On March 10, 2011, Jason waited at Alexandra’s school in the morning, and followed the car that dropped her off in an attempt to discover the identity of the driver. The court found that after Alexandra involved the police on February 15, 2011, Jason was on notice that his actions were being perceived by her as unwanted stalking. The magistrate recommended that the court grant a civil protection order for the protection of Alexandra, but not for the protection of her or her father, through March 11, 2012, which was one year from the date of filing Alexandra’s petition.

{¶28} On June 8, 2011, Jason filed an objection to the magistrate’s decision. Following a hearing on the objection, the court overruled the objection and adopted the magistrate’s decision. Jason appeals the trial court’s judgment, asserting the following for his sole assignment of error:

{¶29} “The Trial Court erred to the prejudice of Appellant by adopting The Magistrate’s Decision and thereby granting a civil Order of Protection against him.”

{¶30} Jason argues the trial court abused its discretion in granting Alexandra’s petition for a protection order because, he claims, she failed to present any evidence that he caused her to believe he would physically harm her or cause her mental distress. We do not agree.

{¶31} As a preliminary matter, we note that the protection order expired on March 11, 2012, while this appeal was pending. At first blush, the appeal might thus appear to be moot; however, it is not. In *Cauwenbergh v. Cauwenbergh*, 11th Dist. No. 2006-A-0008, 2007-Ohio-1070, this court held that when a civil protection order expires

while an appeal from a judgment granting it is pending, the appeal is not moot. *Id.* at ¶19. This court held that the exception to the mootness doctrine for issues that are capable of repetition, yet evading review applies. In citing *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231 (2000), this court, in *Cauwenbergh*, stated that this exception applies when: (1) the challenged action is too short in its duration to be fully litigated before its expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *Id.* at ¶16.

{¶32} In this case, the duration of the civil protection order was one year, but by the time its entry became a final, appealable order, on August 9, 2011, the protection order was to be in effect for only seven more months. This is too short a time for the judgment entry to be reviewed by this court. In *Cauwenbergh*, this court noted that a majority of states has held that appeals from entries granting civil protection orders are not rendered moot by the expiration of the protection order, either (1) because they are capable of repetition, yet evading review or (2) because of the collateral consequences caused by such orders. As a result, this court held that, although the civil protection order had expired while the appeal was pending, the appeal was not moot. This court reached the opposite conclusion six months later in a memorandum opinion in *Hughes v. Hughes*, 11th Dist. No. 2006-L-196, 2007-Ohio-4774, ¶4. We find the opinion in *Hughes* to be incorrect and we therefore overrule it.

{¶33} Generally, an appellate court considering whether a trial court properly issued a civil protection order reviews the record to determine whether there is some competent, credible evidence to support the trial court's determination. *J.L. v. M.D.*, 11th Dist. No. 2011-L-042, 2011-Ohio-6208, ¶56. However, when a magistrate issues a

protection order, and the trial court adopts the magistrate's decision, we review the trial court's adoption of the decision for an abuse of discretion. *Id.* An abuse of discretion is a term of art, connoting a judgment that fails to comport with reason or the record. See *e.g. Janecek v. Marshall*, 11th Dist. No. 2010-L-059, 2011-Ohio-2994, ¶7.

{¶34} R.C. 2903.214, regarding protection orders, provides:

{¶35} (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 * * *:

{¶36} (1) An allegation that the respondent * * * engaged in a violation of [R.C. 2903.211, menacing by stalking] against the person to be protected by the protection order * * *.

{¶37} R.C. 2903.211, “menacing by stalking,” provides: “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.” R.C. 2903.211(A)(1).

{¶38} Further, a “pattern of conduct” means “two or more actions or incidents closely related in time * * *.” R.C. 2903.211(C)(1). R.C. 2903.211 does not define the phrase “closely related in time.” Consequently, whether the incidents are “closely related in time” is to be resolved by the trier of fact, “considering the evidence in the context of all the circumstances in the case.” *Cooper v. Manta*, 11th Dist. No. 2011-L-035, 2012-Ohio-867, ¶39. In *Cooper, supra*, this court indicated that incidents occurring in the same year the petition was filed were “closely related in time” for purposes of

establishing the required pattern of conduct. *Id.* at ¶41. This court further indicated that incidents occurring two years earlier could be considered “as providing a context for understanding how subsequent seemingly innocent incidents could be deemed threatening by [the petitioner].” *Cooper, supra*, at ¶40.

{¶39} When looking at a pattern of conduct, the court “must take into consideration everything, i.e., * * * the phone calls, the thinly veiled threats, and the face-to-face meetings between the parties, ‘even if some of [the respondent’s] actions comprising this behavior, considered in isolation might not appear to be particularly threatening.’” (Emphasis omitted) *Tuuri v. Snyder*, 11th Dist. No. 2000-G-2325, 2002 Ohio App. LEXIS 2060, *9 (Apr. 30, 2002), quoting *Still v. Still*, 2d Dist. No. 17416, 1999 Ohio App. LEXIS 1808, *5 (Apr. 23, 1999).

{¶40} “Mental distress” is defined as “[a]ny mental * * * condition that involves some temporary substantial incapacity,” or “[a]ny mental * * * condition that would normally require psychiatric treatment, psychological treatment, or other mental health services.” R.C. 2903.211(D)(2)(a) and (b).

{¶41} R.C. 2903.211, menacing by stalking, does not require the petitioner to prove that she actually received treatment for mental distress. *Lane v. Brewster*, 12th Dist. No. CA2011-08-060, 2012-Ohio-1290, ¶64. However, where the petitioner seeks treatment for the stress the respondent caused, such circumstance is evidence of mental distress. *Id.* Further, where the respondent engages in conduct that frightens the petitioner to the point that she feels compelled to contact the police, such circumstance is also evidence of mental distress. *Id.*

{¶42} A protection order may be granted if, “[a]fter a full hearing at which the [petitioner] presents evidence in support of the request for a protection order and the respondent has an opportunity to defend against that evidence, the court determines that the petitioner has committed a violation of R.C. 2903.211 * * * against the person to be protected by the protection order * * *.” R.C. 2903.214(E)(3)(d). The petitioner must demonstrate, by a preponderance of the evidence, that he or she is entitled to a civil protection order. *Needhamer v. Carlozzi*, 11th Dist. No. 2010-L-015, 2010-Ohio-4562, ¶20, citing *Tuuri, supra*, at *5, citing *Felton v. Felton*, 79 Ohio St.3d 34, 1997-Ohio-302 (1997), paragraph two of the syllabus.

{¶43} In determining whether the petitioner suffered mental distress, the focus is on the petitioner’s fear, not that of an objective, reasonable person. *Lane, supra*, at ¶21. The trial court is thus required to determine the effect of the respondent’s actions on the petitioner, not on an objective, “reasonable” person. *Id.* at ¶20. The court employs a subjective test, rather than an objective, reasonable person test. *Id.* at ¶23.

{¶44} Moreover, this court has stated that “[s]talkers engage in psychological warfare, which by its nature is devious, insidious, and subtle.” *State v. Werfel*, 11th Dist. No. 2006-L-163, 2007-Ohio-5198, ¶34, quoting *Paulus v. Rucker*, 11th Dist. No. 2002-P-0080, 2003-Ohio-2816, ¶35 (Christley, J., concurring).

{¶45} This court has further stated that in granting a civil protection order, the trial court may consider the petitioner’s unequivocal expression of her fear of the respondent. *Cooper, supra*, at ¶41.

{¶46} Applying these principles to the instant case, Alexandra demonstrated a pattern of conduct such that Jason knowingly caused her to believe he would cause her

physical harm or mental distress. (1) During an argument on October 15, 2010, when Alexandra told Jason she was leaving him, he physically restrained her by holding her arms down. (2) After the break-up, Jason contacted her son's father to thwart Alexandra's attempt to seek a child-support order on the child's behalf. (3) After Alexandra told Jason to leave her alone, he repeatedly sent her letters, cards, and text messages. Jason sent her a seven-page letter and two cards through her mother between October 15, 2010 and December 2010. Jason repeatedly sent Alexandra texts between October 15, 2010 and February 14, 2011. He sent her a text message on Christmas Eve offering presents and another on New Year's Eve wishing they were together. Jason admitted he also sent her two texts in January 2011. (4) Further, Jason followed her many times during the summer of 2010. (5) Alexandra repeatedly told Jason to leave her alone, but he failed to comply. She also told him not to come to her school, but to no avail. (6) On February 14, 2011, four months after the break-up, Jason came to her school, leaving flowers and a romantic card. Moreover, the following three additional incidents occurred *after* the police instructed Jason to leave Alexandra alone: (7) Jason sent her a text message on her birthday on March 3, 2011, in which he referred to her as "My Allie girl." (8) Jason contacted two of Alexandra's friends attempting to use them to help rekindle his relationship with Alexandra. (9) Jason waited at Alexandra's school on the morning of March 10, 2011, and followed the car that dropped her off in an effort to determine the identity of the driver.

{¶47} Alexandra also presented evidence of mental distress. (1) She described the stress and fear she has experienced as a result of Jason's actions between October 15, 2010 and March 10, 2011. Her mother, Catherine Phipps, corroborated Alexandra's

fear of Jason during Ms. Phipps' testimony. (2) Alexandra testified that Jason's conduct caused her to seek psychological treatment. (3) As a result of the stress she suffered on Valentine's Day, she experienced severe cramping for which she sought medical attention on the same day. Her doctor referred her to the hospital for an ultrasound. (4) Alexandra found the incident in which Jason came to her school on Valentine's Day so upsetting she reported it to the police.

{¶48} Contrary to Jason's argument, Alexandra was not required to prove she suffered a substantial incapacity as a result of his actions in order to prove mental distress. It was sufficient that she had a mental condition that required psychological treatment or other mental health services. R.C. 2903.211(D)(2)(a) and (b). Alexandra testified that Jason's conduct caused her to seek treatment with a psychologist and that she continues to treat with her on a weekly basis.

{¶49} Further, while Alexandra began treatment before the occurrence of many of the incidents about which she testified, she continued to treat with her psychologist during Jason's commission of the subsequent incidents up to and including March 10, 2011, the date on which Jason followed her father. In any event, Alexandra testified the reason she sought treatment and continues to treat with her psychologist is due to the stress she has endured as a result of Jason's actions.

{¶50} Finally, contrary to Jason's argument, the trial court, via the magistrate's decision, found that Alexandra had proven a pattern of conduct. The court highlighted three specific incidents between February 15, 2011 and March 10, 2011, which demonstrated a pattern of conduct.

{¶51} While each of the incidents referenced by Alexandra, when viewed in isolation, could be seen as not particularly threatening or distressful, when viewed in context, Alexandra demonstrated by a preponderance of the evidence a pattern of conduct by which Jason knowingly caused her to believe he would cause her physical harm or mental distress.

{¶52} We therefore hold the trial court did not abuse its discretion in granting to Alexandra a civil stalking protection order.

{¶53} For the reasons stated in this opinion, appellant's assignment of error is overruled. It is the judgment and order of this court that the judgment of the Lake County Court of Common Pleas is affirmed.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.