

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

N.F., ¹	:	O P I N I O N
Petitioner-Appellee,	:	
- VS -	:	CASE NO. 2015-T-0011
M. F.-N.,	:	
Respondent-Appellant.	:	

Civil Appeal from the Trumbull County Court of Common Pleas, Case No. 2012 CV 02234.

Judgment: Affirmed.

Robert C. Kokor, 394 State Route 7, S.E., P.O. Box 236, Brookfield, OH 44403 (For Petitioner-Appellee).

Martin E. Yavorcik, 1675 W. Western Reserve Road, 1 G, Poland, OH 44514 (For Respondent-Appellant).

DIANE V. GRENDELL, J.

{¶1} Respondent-appellant, M.F.-N., appeals the judgment of the Trumbull County Court of Common Pleas, granting petitioner-appellee, N.F., a civil stalking protection order. The issues to be determined in this case are whether mental distress for the purposes of a civil protection order is proven when the victim seeks medical assistance, requests a police investigation of an alleged stalking incident, and sleeps on

1. The parties' names have been changed to initials to safeguard the identity of the party protected under the protection order.

the floor near her child's bed in response to the conduct; and whether a pattern of conduct is established based on a phone call of a sexual nature, two Facebook posts linking to the page of a known criminal, and a text message from a third party with a photograph of the respondent and the petitioner's boss. For the reasons that follow, we affirm the decision of the lower court.

{¶2} On October 1, 2012, N.F. filed a Petition for Civil Stalking Protection Order against her sister, M.F.-N. In response, an Ex Parte Protection Order was issued on October 3.

{¶3} A hearing was held on this matter on April 10 and May 13, 2013.

{¶4} N.F. testified regarding the incidents leading her to seek the protection order. In June of 2012, following an argument during which M.F.-N. became "very angry," N.F. requested that M.F.-N. no longer talk to her. This was based upon N.F.'s knowledge of M.F.-N.'s past physical aggression and concerns with her behavior.

{¶5} On August 13, 2012, N.F. received a call to her cell phone from a blocked number at around 2:30 a.m. The call was from a male and of a "sexual nature," with a message left stating her name and that the caller wanted "a piece of that hot booty." A recording of the message was submitted into evidence, in which the caller states that he found her phone number on a bathroom wall, and said "you got that booty that I want." N.F., a prosecutor, feared that the call may have been work-related, given that she prosecutes sex crimes. She explained, however, that in 2008, a similar incident occurred, where a caller made a statement that he wanted "a piece of that hot ass." It was later discovered that the call was from M.F.-N.'s ex-boyfriend and M.F.-N. confirmed to N.F. that she had "put [her boyfriend] up to" calling her. N.F. reported the

August 13 call to her supervisors at work and an investigation with the Sheriff's Department was initiated.

{¶6} On August 17, 2012, M.F.-N. posted a link on N.F.'s Facebook page relating to a Jim Traficant book signing, which stated "I can get you VIP access with Frankie Susany," a person she did not personally know but was aware, from her job, had a criminal history. N.F. stated that she believed the hyperlink posted by M.F.-N. gave Susany "access to [her] Facebook page," which was private and could only be viewed by her friends on Facebook.

{¶7} On August 23, 2012, M.F.-N. wrote a comment on N.F.'s Facebook page discussing craft supplies and a portion of the comment was a hyperlink, which, when clicked upon, linked to Susany's Facebook page. N.F. testified that these incidents caused her to "shut down" her Facebook page.

{¶8} In September, N.F. received a text message from a colleague. The message included a photo of M.F.-N. and N.F.'s boss, which caused her concern.

{¶9} According to N.F., following a pretrial related to this matter, Susany approached her and admitted to making the August 13 phone call. He stated that he had gotten the number from M.F.-N.'s cell phone.

{¶10} N.F. testified that, following the phone call, she visited her doctor due to heart palpitations and shortness of breath. Her doctor informed her that it was stress-related. The call raised N.F.'s anxiety levels and she could not sleep. She stated that she was sleeping on her daughter's floor outside of her crib due to the incidents. She was also afraid M.F.-N. would try to get her fired.

{¶11} Mahoning County Sheriff's Office Detective Patrick Mondora investigated the August 13 phone call. When he spoke with N.F. about the call she was very upset and concerned for her and her child's safety. Following his investigation and a subpoena, it was determined that the call came from Frank Susany's phone. Mondora testified that Susany had a criminal record, which included violence, information he provided to N.F.

{¶12} N.F.'s fiancé testified that N.F. and M.F.-N.'s relationship was not good over the past year and that N.F. did not want to have contact with her. When N.F. received the phone call, she was distraught and concerned for her safety.

{¶13} The colleague who text messaged the picture of N.F.'s boss and M.F.-N. together explained that he took it at the fair and told M.F.-N. that he was going to send it to N.F. M.F.-N. said "yeah, go ahead and send it to her." He was unaware of the conflict between the two sisters.

{¶14} Frank Susany testified that he was good friends with M.F.-N. On the night of the phone call, he was making prank calls with friends, and either he or a friend made the call to N.F. as a "joke." He had M.F.-N.'s phone at the time the call was made, and got N.F.'s phone number from her phone. He testified that M.F.-N. did not tell him to make the phone call.

{¶15} M.F.-N. testified that in the past, she had sent a text message of a sexual nature from her boyfriend's phone to N.F. She had never been told by N.F. not to contact her. M.F.-N. explained that she sent the Facebook invitation to go to the Traficant event because her grandmother liked him and M.F.-N. wanted to take pictures. She explained that the Facebook posts merely related to activities with which she and

Susany were involved. Regarding the picture with N.F.'s boss, she testified that it was the colleague's idea to take and send the picture, with which she agreed. She also denied asking Susany to make the phone call to N.F.

{¶16} On May 14, 2013, a Magistrate's Decision was filed, finding that N.F. had proven, by a preponderance of the evidence, that M.F.-N. engaged in a violation of R.C. 2903.211 and that N.F. was entitled to a civil stalking protection order pursuant to R.C. 2903.214. The order was filed on the same date, effective for five years.

{¶17} M.F.-N. filed a Notice of Filing Objections to Magistrate's Decision on May 28, 2013. She filed Supplemental Objections to Magistrate's Decision on August 8, 2013, arguing, inter alia, that the "pattern of conduct," did not constitute stalking. N.F. filed a Response to the Objections on October 8, 2013.

{¶18} On January 15, 2015, the trial court issued a Judgment Entry overruling the Objections, except with respect to the imposition of a weapons restriction, which was removed in a modified protection order issued with the Judgment to replace the prior protection order.

{¶19} M.F.-N. timely appeals and raises the following assignments of error:

{¶20} "[1.] The trial court erred in granting a court protective order as against the manifest weight of the evidence insofar as the allegations at bar are insufficient to support the reasonable person standard of emotional distress.

{¶21} "[2.] The trial court erred in granting a court protective order as against the manifest weight of the evidence insofar as the allegations at bar are insufficient to support a CPO because the basis of a 'pattern' involves independent actors, who no one proved acted at the behest of [M.F.-N]."

{¶22} Pursuant to R.C. 2903.214(C)(1), a person may seek a protection order based upon 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 * * *.” The petitioner must demonstrate, “by a preponderance of the evidence,” that she is entitled to a civil protection order. *Tuuri v. Snyder*, 11th Dist. Geauga No. 2000-G-2325, 2002-Ohio-2107, ¶ 12.

{¶23} R.C. 2903.211 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).

{¶24} The “standard of review for whether the protection order should have been granted and thus whether the elements of menacing by stalking were established by the preponderance of the evidence entails a manifest weight of the evidence review.” (Citation omitted.) *Needhamer v. Carlozzi*, 11th Dist. Lake No. 2010-L-015, 2010-Ohio-4562, ¶ 22. Weight of the evidence 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.”” (Citations omitted.) (Emphasis deleted.) *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 12.

{¶25} In her first assignment of error, M.F.-N. argues that the evidence was insufficient to support the “reasonable person” standard of “emotional distress” and, thus, the protective order was against the manifest weight of the evidence.

{¶26} The finding that Menacing by Stalking was committed requires that the party’s conduct did “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). “Mental distress” is defined as “[a]ny mental illness or condition that involves some temporary substantial incapacity,” or “[a]ny mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services.” R.C. 2903.211(D)(2)(a) and (b).

{¶27} As an initial matter, we note that M.F.-N.’s assignment of error states that the evidence was “insufficient to support the reasonable person standard of emotional distress.” This is not the appropriate standard. “In determining whether the petitioner suffered mental distress, the focus is on the petitioner’s fear, not that of an objective, reasonable person. * * * The court employs a subjective test, rather than an objective, reasonable person test.” *Fortney v. Willhoite*, 11th Dist. Lake No. 2011-L-120, 2012-Ohio-3024, ¶ 43.

{¶28} Under that standard, the weight of the evidence supported the magistrate’s determination, properly adopted by the trial court, that N.F. suffered the required mental distress from M.F.-N.’s conduct. The testimony established that N.F. was distressed, afraid, went to the doctor and the police, and slept on the floor of her child’s bedroom. Although it is not required to be proven that “a person requested or received psychiatric treatment, psychological treatment, or other mental health services in order to show that the person was caused mental distress,” the fact that N.F. sought “treatment for the stress the respondent caused * * * is evidence of mental distress.” R.C. 2903.211(E); *Fortney* at ¶ 41. Likewise, the fact that N.F. contacted police to investigate the matter was also evidence of mental distress. *Fortney* at ¶ 41 (finding

evidence of mental distress “where the respondent engages in conduct that frightens the petitioner to the point that she feels compelled to contact the police”).

{¶29} M.F.-N. cites *Darden v. Fambrough*, 2013-Ohio-5583, 5 N.E.3d 712 (8th Dist.) for the proposition that mental distress related to the threat of losing one’s job does not support a finding of menacing by stalking and that job loss is not a basis for a finding of a danger of bodily harm. Here, however, there is evidence to support more than just a fear of N.F. losing her job, as outlined above and, given that mental distress was shown, it was unnecessary to prove a fear of physical harm. R.C. 2903.211(A)(1) (a respondent must cause a belief of physical harm *or* cause mental distress).

{¶30} We also find *Baker v. Inman*, 5th Dist. Delaware No. 04CAE06045, 2004-Ohio-6133, to be distinguishable. There, mental distress was not found based on the fact that the victim expressed “no fears about leaving her home in pursuit of her daily life.” *Id.* at ¶ 24. The fact that N.F. felt compelled to sleep on the floor, contact police, and seek treatment from her doctor, supported the additional testimony that she experienced mental distress. This is especially true given that the trier of fact was in the best position to evaluate N.F.’s testimony and level of distress. *Cooper v. Manta*, 11th Dist. Lake No. 2011-L-035, 2012-Ohio-867, ¶ 37.

{¶31} The first assignment of error is without merit.

{¶32} In her second assignment of error, M.F.-N. argues that no pattern of conduct was proven, since two of the incidents involved other individuals’ actions and the other two could not be found to have caused N.F. distress.

{¶33} The “pattern of conduct” required for a civil stalking protection order is defined as “two or more actions or incidents closely related in time.” R.C.

2903.211(D)(1). 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.’” (Citation omitted.) *Tuuri*, 2002-Ohio-2107, at ¶ 18.

{¶34} M.F.-N. argues specifically that both the phone call and the text message with the photograph were the actions of third parties. While the testimony does raise some question about whether M.F.-N. was involved in the text messaging of the photograph, evidence was presented to support the conclusion that M.F.-N. had responsibility in the phone call. Susany, who was a close friend of M.F.-N., made the call to N.F. Although he stated that M.F.-N. did not request that he make the call, the court was free to disbelieve that statement. The phone call received was similar to a call of a sexual nature made by M.F.-N.’s boyfriend in 2008, a call which N.F. testified M.F.-N. admitted was made pursuant to her request. See *Fortney*, 2012-Ohio-3024, at ¶ 38 (incidents occurring two years earlier provided context for understanding subsequent conduct). It is reasonable to conclude that M.F.-N. was involved in Susany’s phone call rather than that Susany happened to coincidentally choose N.F.’s phone number out of M.F.-N.’s phone to make a call of a sexual nature.

{¶35} Regarding the two Facebook posts, exactly what data was transmitted via Facebook about Susany is a source of conflict between the parties, with M.F.-N. portraying her posts as innocent and N.F. testifying that they provided links to her private information. While it is unclear whether the links provided actually allowed Susany to access N.F.’s private profile, this was N.F.’s testimony. Regardless, it was

not against the weight of the evidence for the magistrate to conclude that the act of posting links to the profile of a man with a known criminal record, who was ultimately discovered to have made the offensive phone call, when N.F. had requested no contact with M.F.-N., could cause her mental distress. M.F.-N.'s description of the incidents may also be questioned, given that it seems unbelievable that she merely "tagged" Susany's Facebook profile so he could view a post about craft supplies.

{¶36} While some of these events individually may not appear to be threatening, given M.F.-N.'s past conduct and that three of the incidents involved a man with a known criminal history, we cannot find that the protection order was issued against the manifest weight of the evidence or in the absence of a pattern of conduct. *Tuuri*, 2002-Ohio-2107, at ¶ 18.

{¶37} The second assignment of error is without merit.

{¶38} For the foregoing reasons, the judgment of the Trumbull County Court of Common Pleas, granting N.F. a civil stalking protection order, is affirmed. Costs to be taxed against appellant.

TIMOTHY P. CANNON, P.J.,

CYNTHIA WESTCOTT RICE, J.

concur.