[Cite as *McBride v. McBride*, 2012-Ohio-2146.]

IN THE COURT OF APPEALS

TWELFTH APPELLATE DISTRICT OF OHIO

BUTLER COUNTY

MELISSA MCBRIDE,	:	
Plaintiff-Appellee,	:	CASE NO. CA2011-03-061
	:	O P I N I O N
- vs -		5/14/2012
	:	
CHRISTOPHER MCBRIDE,	:	
Defendant-Appellant.	:	

APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS
DOMESTIC RELATIONS DIVISION
Case No. DV11010087

Fox & Scott, PLLC, Bradley Fox, J. Richard Scott, 517 Madison Avenue, Covington, KY 41011, for plaintiff-appellee

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HENDRICKSON, P.J.

{¶ 1} Appellant, Christopher McBride ("Father"), appeals a decision of the Butler County Court of Common Pleas, Domestic Relations Division, granting a civil protection order ("CPO") in favor of appellee, Melissa McBride ("Mother"), acting on behalf of the parties' minor children. For the reasons stated below, we affirm the trial court's decision.

{¶ 2} Mother and Father were married and had two children, C.M. and E.M. The

parties divorced and, pursuant to an agreed shared parenting plan, C.M. and E.M. live primarily with their mother in Ohio. Father remarried and currently lives in Kansas with his wife and two stepchildren. During December 26, 2010, through January 2, 2011, Father, his wife, and stepchildren had visitation with C.M. and E.M. for a week in Ohio. The family rotated between staying at the homes of Father's mother and her fiancé and then returned to their home in Kansas. Father came back to Ohio two weeks later and visited with the children on January 14, 2011.

{¶ 3} On January 31, 2011, Mother filed for and was granted an ex parte temporary CPO against Father on behalf of C.M. and E.M. The petition alleged that Father had spanked C.M. on the back, legs, and arms twice a day every day during the December 2010 visit and again on January 14, 2011. It was alleged that E.M. was punched and hit in the head with a shoe by Father two years ago. After conducting a full hearing on the matter, the trial court issued a five-year domestic violence CPO. The CPO named both children as protected persons and specified that Father is to have parenting time at the discretion of the children's counselor.

{¶ 4} Father now appeals from the trial court's order, raising a single assignment of error:

{¶ 5} THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT FOUND THAT RESPONDENT MCBRIDE HAD COMMITTED ABUSE AGAINST HIS MINOR CHILDREN AND THEY WERE ENTITLED TO HAVE A CIVIL PROTECTION ORDER ISSUED.

{¶ 6} In his sole assignment of error, Father argues that the trial court abused its discretion in granting a CPO on behalf of his children. Father claims that the evidence presented did not support the trial court's finding that he committed domestic violence against his children.

{¶ 7} In *Felton v. Felton,* 79 Ohio St.3d 34, 1997-Ohio-302, the Ohio Supreme

Court held that to obtain a CPO a petitioner must show by a preponderance of the evidence that the petitioner or the petitioner's family or household members are in danger of domestic violence. Although *Felton* established the level of proof necessary to obtain a CPO, the Court did not set forth the appellate standard of review for these orders. In the wake of this decision, "there has been noted inconsistency among the appellate courts." *Abuhamda-Sliman v. Sliman,* 161 Ohio App.3d 541, 2005-Ohio-2836, ¶ 8 (8th Dist.). The appellate districts have taken multiple approaches in evaluating CPOs. Many courts review CPOs under an abuse of discretion standard. *See, e.g., Smith v. Burroughs,* 3rd Dist. No. 16-09-23, 2010-Ohio-4806, ¶ 14; *Baranack v. Rose,* 5th Dist. Nos. 2010-AP-010004 and 2010-AP-020006, 2010-Ohio-2754, ¶ 7; *Rangel v. Woodbury,* 6th Dist. No. L-09-1084, 2009-Ohio-4407, ¶ 11; *Hoyt v. Heindell,* 191 Ohio App.3d 373, 2011-Ohio-1829, ¶ 39 (11th Dist.). Others consider the appeal under a manifest weight standard, that is whether the judgment was supported by competent credible evidence going to all the essential elements of the CPO. *See, e.g., Blocker v. Carron,* 5th Dist. No. 10-AP-110042, 2011-Ohio-3673, ¶ 6; *Jackson v. Jackson,* 6th Dist. No. L-11-1031, 2011-Ohio-5529, ¶ 6. Lastly, some courts apply some combination of the first two tests. *See, e.g., Traut v. Leibym* 5th Dist. No. 09-CA-130, 2010-Ohio-2563, ¶ 9-10; *Schultz v. Schultz,* 9th Dist. No. 09-CA-0048-M, 2010-Ohio-3665, ¶ 4-5.

{¶ 8} The Eighth District and others have taken yet another approach to appellate review of CPOs. These districts reason that the wording of R.C. 3113.31 dictates that the standard of review "depend[s] on the nature of the challenge to the protection order." *Abuhamada-Sliman* at ¶ 9. *See Williams v. Hupp,* 7th Dist. No. 10-MA-112, 2011-Ohio-3403, ¶ 19; *Young v. Young,* 2nd Dist. No. 2005-CA-19, 2006-Ohio-978, ¶ 20; *Downs v. Strouse,* 10th Dist. No. 05AP-312, 2006-Ohio-505, at ¶ 10-11. The Eighth District noted that "[b]ecause R.C. 3113.31 expressly authorizes the courts to craft protection orders

that are tailored to the particular circumstances, it follows that the trial court has discretion in establishing the scope of a protection order, and that judgment ought not be disturbed absent an abuse of discretion." *Abuhamada-Sliman* at ¶ 9. The court went on to explain that the review of the issuance of a civil protection order should be under a manifest weight standard because the resolution of a challenge to the issuance of a CPO depends upon whether the petitioner has shown by a preponderance of the evidence that the petitioner is in danger of domestic violence. *Id*.

{¶ 9} In the past, we have applied many of the above mentioned standards of review in appeals of a CPO. *See Holland v. Garner,* 12th Dist. No. CA2009-09-226, 2010-Ohio-2963 (stating that abuse of discretion standard applies to challenges to the scope of a CPO and that manifest weight standard applies to challenges to the grant of a CPO); *Bargar v. Kirby,* 12th Dist. No. CA2010-12-334, 2011-Ohio-4904 (reviewing CPOs for an abuse of discretion); *Trent v. Trent,* 12th Dist. No. CA98-09-014 (May 10, 1999) (stating that a CPO must not be against the manifest weight of the evidence but also that the decision to grant a CPO is within the discretion of the trial court). Today, we take the opportunity to clarify our stance regarding the standard of review of CPOs.

{¶ 10} We find the Eighth District's reasoning persuasive and join our sister districts in holding that the standard employed by an appellate court is contingent upon the nature of the challenge to the CPO. Thus, in cases in which an appellant is challenging the scope of the protection order, the reviewing court will not overturn the trial court's decision absent an abuse of discretion. However, a dispute regarding whether a protection order should have been granted at all will be reviewed as to whether the issuance was against the manifest weight of the evidence. Because Father challenges the issuance of the CPO, we will follow the latter standard in our review.

{¶ 11} Under a manifest weight challenge, the appellate court will not reverse as

long as the judgment is supported by some competent credible evidence going to all the essential elements of the case. *C.E. Morris Co. v. Foley Construction*, *Co*., 54 Ohio St. 2d 279 (1978), syllabus. Further, the reviewing court will presume "that the findings of the trier of fact are correct." *State v. Wilson,* 113 Ohio St.3d 382, 2007-Ohio-2202, ¶ 24, citing *Seasons Coal Co. Inc. v. Cleveland* 10 Ohio St.3d 77, 80-81 (1984). The appellate court presumes this because the trial court had the opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections and use these observations in weighing the credibility of the proffered testimony." *Wilson* at ¶ 24, quoting *Seasons Coal* at 80. Moreover, "[a] reviewing court should not reverse a decision simply because it holds a different opinion concerning the credibility of the witnesses and evidence submitted before the trial court." *Id.* Appellate courts can reverse on a finding of an error of law but not "a difference of opinion on credibility of witness and evidence." *Id.*

{¶ 12} As noted above, in order to obtain a CPO the petitioner must prove by a preponderance of the evidence that the respondent has engaged in an act of domestic violence against petitioner, petitioner's family, or petitioner's household members. *Felton* at paragraph two of syllabus. Domestic violence includes "[c]ommitting any act with respect to a child that would result in the child being an abused child." R.C. 3113.31(A)(1)(c). An "abused child" includes any child who (1) "[e]xhibits evidence of any physical or mental injury or death, inflicted other than by accidental means" or (2) "[b]ecause of the acts of his parents * * * [the child] suffers a physical or mental injury that harms or threatens to harm the child's welfare." R.C. 2151.031 (C) and (D). An injury from corporal punishment will not result in child abuse unless the punishment is excessive under the circumstances and creates a substantial risk of serious physical harm to the child or the punishment is repeatedly administered, is unwarranted, and creates a substantial risk of seriously impairing the child's mental health or development. R.C.

2919.22 (B)(3) and (4).

{¶ 13} A "substantial risk" is a strong possibility that a certain result may occur. R.C. 2901.01(A)(8). "Serious physical harm" includes "[a]ny physical harm that involves acute pain of such duration as to result in substantial suffering or that involves any degree of prolonged or intractable pain." *Id.* at (A)(5)(e). Therefore, the issue before us is whether there was sufficient credible evidence that Father's acts caused C.M. or E.M. to suffer a physical or mental injury that threaten their welfare or Father's excessive corporal punishment created a strong possibility that C.M. or E.M. would suffer acute pain and substantial suffering, or prolonged pain.

{¶ 14} At trial, C.M. testified that Father spanked him twice a day every day during Christmas break and on January 14.[1] He repeated this statement four times while he was on the stand and stated twice that he was spanked two times on January 14. C.M. said he was whipped with a belt, paddle, and "race car track". C.M. stated that he cried during the spankings because they hurt and the spankings did not occur in response to disobedience. He explained that during his visits with Father, he and his brother, E.M., stayed at his grandmother's house and at her fiancé's house. Although C.M. couldn't remember in what part of the house or at what time of day he was whipped, he knew that he was spanked at both houses. He told the court that he and Father were alone in a room during all the beatings except once when his stepmother held him down while Father hit him. C.M. first told the assistant principal at his school about the spankings when he got in trouble for passing a note in the classroom almost two weeks after the January 14th visitation. C.M. explained that he did not tell Mother about the beatings earlier because Father said he would hurt him if he told anyone.

{¶ 15} In addition to C.M.'s testimony, Mother testified that her children's normally

1. At the time of the hearing, C.M. was nine years old and E.M. was seven years old.

good behavior was disrupted after they spent time with Father during the 2010 Christmas break. She explained that they were angry, were repeating bad language, and were anxious when they spoke with Father over the phone. She first learned about the spankings after being informed by C.M.'s assistant principal. She then asked C.M. about the incidents and his statement corroborated the assistant principal's report. Initially, Mother testified that she did not see bruises on her children when they returned from Christmas because the boys shower and dress themselves. However, nearing the end of her testimony, she stated that she has since seen some dark circular marks on C.M. after visiting Father but was cautious not to immediately allege Father caused these injuries. Although Mother admitted that C.M. can "enlarge" the truth when he is playing, she also stated she has no reason to doubt his honesty about the beatings and that his story has remained consistent. Mother noted that Father punched E.M. in the stomach and hit him in the head with a shoe two years ago. This did not result in injury or require medical treatment. She disclosed that she was recently held in contempt for not allowing Father to have his parenting time with the children, however she denied that the CPO is a "conspiracy" to take the children away from Father as she still wants him to have supervised visitation with the children and for the family to attend counseling. Importantly, mother stated that she filed the petition for the CPO *before* the court granted Father's motion for contempt.

{¶ 16} When Father took the stand, he denied ever spanking C.M. during his recent visits or punching and hitting E.M. with a shoe two years ago. He also stated that he never saw anyone else spank C.M. during this time and denied ever owning a race car track or a paddle. He stated that either his second wife, his stepchild, his mother, or his mother's fiancé were continually around him and the boys during his parenting time. He also testified that in the past he has spanked the children for punishment but he has

always used either a belt or his hand. During his testimony, Father stated that he believes Mother is trying to deprive him of his time with the boys and that she has manipulated C.M. and E.M. into telling false stories that he has abused them.

{¶ 17} Finally, several other witnesses testified regarding the boys' visits with Father during Christmas break and January 14th. The grandmother stated that she was with the children during most of the time they spent with Father and she never saw any spankings. The stepmother also denied holding C.M. down for a beating or seeing Father hit C.M. She stated that they did not bring a paddle or a race car track with them during their visit. In addition, one of Father's stepchildren and his mother's fiancé both stated that they spent time with the boys and Father but did not observe any whippings or hear any complaints about whippings.

{¶ 18} After hearing two totally different versions of what occurred, the trial court ruled that Father's actions indeed went outside the scope of corporal punishment and resulted in domestic violence. In so ruling, the trial court set forth findings as to the credibility of the witnesses. The trial court noted:

> Of all the witnesses that testified, including Mother, I found [C.M.] to be probably the most forthright and truthful. * * * I did observe him flinch when you raised your voice, not that you did anything inappropriate, but, uh, he was nervous when he was being cross examined, as a nine-year-old would be.

The court went on to state:

> I find his [C.M.] testimony credible. I find that, uh, the paternal grandmother was confused as, us, what transpired, where the children spent the night. Uh, the daughter,* * *—I've been in—I was a trial attorney before I was a Magistrate and I was a Magistrate before I was a Judge and I've had a lot of people on the stand and I've had a lot of opportunity to determine whether people were solicitous or—and if they have bias towards one party or another. These are members of Respondent's family and the fact that they didn't see something happen isn't necessarily dispositive of whether or not something happened. Mother observed some marks on

> the child. [C.M]'s story was—I listened very carefully to his story, uh, and the nature of the questions asked, how they were asked, how they answered – how he answered them, when he asked for clarification, uh, had a lot of consistencies. I think that, uh, his testimony was consistent and I think it was truthful. I think domestic violence occurred. So I'm going to issue the Final Order.

{¶ 19} Father argues that the trial court erred in relying on C.M.'s testimony for a finding of domestic violence because the discrepancies in C.M.'s testimony reduce his credibility. Father points to C.M.'s failure to mention the beatings until he was in trouble at school, his description of the paddle as three feet long, his earlier testimony that he was hit with a race car track, belt, and paddle separately, and his later testimony that he was hit with all these items at once. As mentioned above, the trial court is in the best position to assess a witness' veracity as an appellate court is not able to observe a witness' demeanor, voice inflection, and hesitation. *Seasons Coal,* 10 Ohio St.3d at 80. As the trier of fact, the trial court was "free to believe all, part, or none of the testimony of any witness who appears before it." *Smith v. Wunsch,* 162 Ohio App.3d 21, 2005-Ohio-3498, ¶ 22 (4th Dist.). The trial court simply chose to believe C.M. and Mother over Father and Father's witnesses. Moreover, the trial court did not have to find all of Father's witnesses were lying or had an ill motive. In its findings the trial court expressly noted that "the fact that they didn't see something happen isn't necessarily dispositive of whether or not something happened." The trial court simply believed that it is very unlikely that a family member was with Father and C.M. during every moment of the 84 hour period the family spent together over Christmas break.

{¶ 20} Moreover, the evidence presented at trial may explain some of C.M.'s behavior regarding the abuse. Father's threat to hurt C.M. if he told anyone about the beatings may explain why C.M. did not immediately tell his mother. Also, although C.M. described the paddle he was hit with as abnormally large, he described the race car track

in a believable way and said that it was from the basement of his grandmother's fiancé's. Father admitted into evidence six photographs taken over the seven-day period C.M. and E.M. visited with him that show the family smiling. This was purportedly to help prove his case that no abuse occurred. These photographs captured only mere seconds in time over the 84-hour period the family spent together. The fact that the photos show the children smiling is neither conclusive nor inconclusive that abuse occurred.

{¶ 21} Though C.M.'s testimony has some discrepancies, testimonial inconsistencies generally do not render decisions against the manifest weight of the evidence. *Hunter v. Hunter,* 2nd Dist. No. 21285, 2006-Ohio-6307, ¶ 9. In a similar case, the Seventh District found that the issuance of a civil protection order was supported by sufficient credible evidence even where the petitioner's testimony contained some contradictions and the petitioner did not immediately contact the police after the incident. *Rosine v. Rosine,* 7th Dist. No. 09-MA-18, 2010-Ohio-613. *See Rajani v. Rajani,* 7th Dist. No. 307, 2003-Ohio-5012 (civil protection order not against manifest weight of evidence although petitioner returned to property where abuse occurred several times, did not leave that property for several days, and her testimony contained some inconsistencies regarding events that occurred during abuse).

{¶ 22} The dissent claims that Mother had a bad motive because she denied Father's visitation in the past. However, any perceived ill motive is not consistent with the events in the case. At the outset, the abuse allegations came to light when C.M. reported them to the assistant principal. Moreover, Mother filed the CPO petition at the end of January, after Father had already seen the children twice. If Mother was truly intending to conspire against Father, the abuse allegations would have surfaced before Father's parenting time. Also, Mother did not request at the hearing that Father's visitation rights be abolished but instead that the time he spent with the children be supervised in the

future.

{¶ 23} During Mother's testimony she implied that E.M. would take the stand and corroborate C.M.'s testimony. The dissent argues that this was impermissible vouching by Mother because E.M. did not testify at trial. While it was incorrect for the trial court to state that it would give "limited weight" to mother's statements regarding what E.M. stated, this is not so prejudicial as to warrant reversal. The dissent cites *State v. Butcher,* 170 Ohio App.3d 52, 2007-Ohio-118 (11th Dist.), in support of his argument of the prejudicial effect of impermissible vouching. Although the defendant's conviction was reversed in *Butcher* it was reversed because there were four different adult witnesses who testified to "significant" hearsay statements that supported the victim's testimony. Unlike *Butcher*, mother only implied that E.M. would also be testifying to incidents that occurred. The trial court based its decision to issue a CPO almost entirely on C.M.'s testimony and never mentioned E.M. in its decision as having any weight whatsoever.

{¶ 24} After a thorough review of the evidence presented to the trial court, we find that there was sufficient credible evidence to support the finding that Father engaged in domestic violence against C.M. As an appellate court, we defer to the trial court's determinations of credibility as it had the only opportunity "to view the witnesses and observe their demeanor, gestures and voice inflections * * *". *Seasons Coal,* 10 Ohio St.3d at ¶ 80.[2]

{¶ 25} We also find that there was sufficient credible evidence to support a domestic violence finding in relation to the younger son, E.M. E.M. was also visiting Father during the 2010 Christmas Break and on January 14, 2011 when C.M. was whipped several times. Clearly, E.M.'s presence at the homes where father was

2. Nor have we considered a Butler County Children's Services letter regarding the child abuse investigation as this was not present before the trial court.

repeatedly beating his brother place E.M. in an unsafe environment. The trial court did not err in issuing a CPO on behalf of E.M. in light of our previous holding that "placing children in an environment where there is a substantial risk to their health and safety constitutes one form of domestic violence." *Ferris,* 2006-Ohio-878 at ¶ 28. *See Hicks v. Barber,* 12th Dist. No. CA2008-12-151, 2009-Ohio-2445 (reasoning in a case of child abuse against one child that the CPO should also be extended to protect the other child because mother's actions put both children in an environment where there was a substantial risk to their health and safety).

{¶ 26} Father's assignment of error is overruled.

{¶ 27} Judgment affirmed.

RINGLAND, J., concurs.

PIPER, J., dissents.

PIPER, J., dissenting.

{¶ 28} Father says the things he is accused of doing never happened. There is no corroboration of any kind, in any way. The nine-year-old's accusations arose as a way of getting out of trouble at school. His subsequent testimony was vague and extremely inconsistent. There was a history of problems between Mother and Father over Father's visitation schedule with his sons. Impermissible vouching for the nine-year-old's credibility occurred. A crucial factual finding was erroneously made by the court because it had no support in the record. I cannot find there to be competent, credible evidence that the accusations occurred and thus that Father should be denied access to his sons.

{¶ 29} With no motive suggested, we are to believe that Father, over a period of time, without injuries to, or complaints from, his young sons, exercised a pattern of

physically "whipping" and "beating" his nine-year-old – although the nine-year-old himself referred to the events as "spankings". Further, without credible evidence, we are to believe others committed perjury and formed a ring of silence to facilitate this abuse. This would make Father worthy of a zealous criminal prosecution which, from the record, has not occurred. Upon thorough examination of the totality of the evidence, there is no competent, credible evidence that presently suggests Father did any of the things his nine-year-old son accuses him of doing.

{¶ 30} To find some evidence upon which to rely, the majority, in my opinion, isolates pieces of testimony out of context and does not view the picture as a whole. For example, in relying heavily upon Mother's testimony, the majority dispels any ill motive she might have because her *finding* of contempt came after her request for a CPO. This perspective fails to consider all the problems with visitation earlier in the summer, potential difficulties arising from Father's remarriage, and Mother's demands upon Father (prior to December) that he acquiesce to a change in his Christmas visitation, which Father refused to do.

{¶ 31} As an additional example, the majority suggests that Father is able to conduct this pattern of cruelty twice a day, every day, because he was able to successfully conceal, from all those who testified, a three-foot paddle, a piece of race-car track, and a belt used for spanking. Father's mother testified that she was present (at least on January 14), and the nine-year-old boy testified that his grandmother knew about the two spankings that day. The boy suggests that Father "whispered," and this would presumably be so that others present in the house could not hear. The record is void of any suggestions that the stepdaughter, Father's mother, or Father's new wife were routinely separated from Father or from the nine-year-old so that the spankings, or any consequences of the spankings, could be concealed.

{¶ 32} The majority rightly points out that an appellate court should not reverse based on a difference of opinion as to the credibility of witnesses. Yet my dissent is misunderstood since I do not dissent because my opinion differs from the trial court regarding the child's credibility, but rather because the trial court's decision when considered in its totality and in context of all the other evidentiary frailties, is not supported by competent, credible evidence.

{¶ 33} In determining whether there is competent, credible evidence supporting a decision to grant a CPO, I agree that a trial court's determination of credibility is given substantial deference. *Abu-Nada v. Abu*-Nada, 12th Dist. No. CA98-07-054 (Mar. 15, 1999). While a trial court's determination of witness credibility is to be highly valued, a trial court's perception as to the credibility of witnesses is not impervious to review. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 89 S.Ct. 1562 (1969).

{¶ 34} Appellate review is not an empty exercise just because credibility is the crux of the issues. *Koon v. United States*, 518 U.S. 81, 89, 116 S.Ct. 2035 (1996). As stated by the United States Supreme Court, "the court of appeals shall give due regard to the opportunity of the [trial court] to judge the credibility of the witnesses, and shall accept the findings of fact of the [trial court] *unless they are clearly erroneous*." (Emphasis added.) *Id.* at 97.

{¶ 35} While Father's parental rights were not completely terminated, the protective order issued has effectively denied him the opportunity to parent his young sons, unless and until a therapist deems visitation to be acceptable. This delegation of the visitation determination to a counselor may be inappropriate, particularly if the counselor requires the accused to admit to conduct that did not occur. Parents have a fundamental liberty interest in the care, custody, and management of his or her child. The termination of parental rights is "the family law equivalent of the death penalty." *In re Sheffey*, 167 Ohio

App.3d 141, 2006-Ohio-619, ¶ 10 (11th Dist.), quoting *In re Phillips*, 11th Dist. No. 2005-A-0020, 2005-Ohio-3774, ¶ 22.

{¶ 36} In issuing a civil protection order (CPO), a trial court cannot require physical corroborating evidence. Instead, the testimony of a victim alone can meet the requisite burden of proof. *Felton v. Felton*, 79 Ohio St.3d 34, 1997-Ohio-302. In *Felton*, the court found that the victim's testimony was sufficient to warrant the issuance of a CPO without physical corroboration. However, the victim in *Felton* was a competent adult, subject to cross-examination, without apparent motive to fabricate her testimony. Furthermore, the victim's testimony was internally consistent, as well as externally consistent with the testimony of others. The quantity and quality of evidence in *Felton* was radically different than the state of the evidence herein.

{¶ 37} The majority opinion correctly emphasizes that a trial court has the ability to *hear* and *observe* the testimony. Yet, seeing and hearing testimony is not the "stand-alone" or sole criteria for judging credibility. Multiple factors must be considered when analyzing credibility: (1) seeing and hearing firsthand the demeanor of the witness, (2) consistency of the witness on direct, cross, and as compared with others testifying about the facts, (3) motive, and (4) believability.[3] "Believability" is fundamentally rooted in common sense as to whether or not the nature of circumstances as a whole are likely within the range of known probabilities. When put into the context of all the other circumstances, even testimony that is delivered with sincerity may not have "believability."

{¶ 38} Father presented his own testimony and the testimony of three other adults and a 12-year-old: his mother, his mother's fiancé, Father's new wife, and his stepdaughter. This testimony is highly relevant because when Father traveled to Ohio

3. Very similar to the facts sub judice is *Martin v. Hanood*, 7th Dist. No. 08 JE 6, 2009-Ohio-1501, where the court of appeals affirmed the decision of the trial court denying a CPO where mother's timing of the petition indicated an ulterior motive of thwarting father's visitation rights with the couple's child during Christmas. *See also*, Evid.R. 404(B); R.C. 2945.59.

from Kansas for visitation purposes, he brought along his wife and stepdaughter. Thus Father's visitation with his sons always took place in the presence of others, and with others participating. It is noteworthy that Father's difficulties with his ex-wife over summer visitation began shortly after Father remarried. Not only did he have earlier problems being allowed to exercise visitation, but Father would not agree to his ex-wife's demands to modify Christmas visitation. Ultimately, due to the ongoing difficulties that continued to arise, Father filed a motion wherein his ex-wife was eventually found to be in contempt of court for obstructing his visitation.

{¶ 39} Curiously, the nine-year-old's allegations indicated that his new stepmother was an accomplice on one occasion, holding him down while Father spanked him. There is no explanation in the record as to why Father would need help on one occasion and would not need help on all the other occasions, nor is there a believable reason offered as to why Father's new wife would even take part in a spanking or commit perjury at the hearing.

{¶ 40} Also curious is the allegation from the nine-year-old that spankings occurred *exactly* twice a day – no more, no less – every day of visitation. Two spankings a day with multiple objects for a week would have significantly compounded one another, day after day. Yet, remarkably the child did not complain of any pain, showed no signs of injuries, and no one witnessed the acts. Additionally, his younger brother told no one of his older brother's spankings nor did he express any worry such spankings would happen to him.

{¶ 41} Significantly contradicting the nine-year-old's testimony, is the 12-year-old stepdaughter (a person presumed to be competent due to age) who consistently articulated the family's activities. She remembered the movie they went to see and the particular games they played. She *never* observed the nine-year-old in trouble, crying, or

being disciplined. Her testimony was internally consistent, and was also consistent with the testimony of others. Despite her consistency and no apparent ill-motive, the trial court relying on its pre-judicial litigation experiences appeared to wholly disregard the 12-year-old's testimony.

{¶ 42} In addition to the significant testimony of Father's witnesses, meaningful review of whether there is competent, credible evidence supporting the trial court's decision requires that we consider *all* the other evidence. While Mother (not Father) owns and disciplines with a paddle, no one saw Father with a three-foot paddle as described by the nine-year-old. Also, no one observed a piece of race car track (allegedly used for spanking). A three-foot paddle cannot be concealed and most certainly would leave compounding injuries if used every day, twice a day. Yet, there were no complaints made and no observations of any such discipline. Father admitted into evidence photographs from visitation, which showed everyone in good spirits; no one appears to be sulking, sad, despondent, or brokenhearted. Yet, the majority opinion minimizes the circumstantial value of the photos because they are not "conclusive."[4]

{¶ 43} Moreover, while the trial court was given the impression that the seven-year-old brother would corroborate the testimony of his nine-year-old brother, this *never* happened. The seven-year-old boy never testified as to any allegations involving himself, let alone substantiate the allegations of his older brother.

{¶ 44} The trial court also issued a protective order preventing Father from having contact with his youngest son, yet there was no admissible evidence regarding any allegations involving the seven-year-old. The prejudicial hearsay that was admitted indicated that over one and one-half years ago, the father kicked his son (then five years

4. I would also note that the stepdaughter, who I have assumed is the young Caucasian girl in the photograph, is seen smiling in the company of her stepbrothers, and appears to be ingratiated into the visits.

old) in the stomach while in Kansas. This allegation is not only distant in time but completely different in the nature, manner, and place of occurrence. Without personal knowledge from any witness as to the younger brother's allegations, we are reminded that written allegations contained within an affidavit submitted with the petition Mother filed are not to be considered as evidence. *Felton*, 1997-Ohio-203.

{¶ 45} Mother's attorney implied through questions that the younger brother's testimony would corroborate the nine-year-old's testimony. Without the seven-year-old actually testifying, this hearsay became impermissible vouching. *See State v. Butcher*, 170 Ohio App.3d 52, 2007-Ohio-118 (11th Dist.) (reversing conviction where appellant was prejudiced by hearsay testimony that vouched for the alleged victim's credibility). This prejudicial effect upon the fact-finder in making its credibility determination is unknown.

{¶ 46} In essence, the trial court was led to believe the younger boy would give testimony supporting his older brother's allegations. When Father's attorney objected to the hearsay, the trial court indicated it would give the hearsay "limited weight." Albeit inadvertently admitted, such prejudicial hearsay must not be given *any weight*, particularly to bolster another witness' credibility. The record is silent as to how the seven-year-old's allegations surfaced. There is *no evidence* in the record that the younger brother was threatened by Father, was fearful of Father, or that continued contact with Father might result in domestic violence. Contrary to the trial court's finding, there is *no evidence* that the younger boy, by virtue of being a household member, was in danger himself of domestic violence. *Felton,* 1997-Ohio-203.

{¶ 47} At the conclusion of the hearing, the trial court disregarded Father's testimony, and summarily disregarded the testimony of the 12-year-old stepdaughter and the testimony of the other adults who demonstrated the indicia of credibility discussed

above. Determining that a nine-year-old's testimony is sufficient to meet the burden of proof would require considering such testimony within the context of *all* the circumstances, including other credible testimony offered into evidence. Although we cannot observe the demeanor of Father and his witnesses while testifying, their testimony appears consistent, without ill-motive, and with believability.[5] There is no evidence whatsoever to suggest all the defense witnesses would have been unable to detect this abuse if it were occurring or that they entered into a conspiracy to commit perjury and lie in court against the nine-year-old.

{¶ 48} In determining that the nine-year-old was credible, the trial court announced its decision specifically relying on the "physical marks" upon the nine-year-old's body. Yet, Mother *never* connected the dark spots to Father or his visitation.[6] Whether getting ready for school, in the bathroom, getting ready for bed or just running around the house, Mother testified that she *never* sees her seven-year-old or nine-year-old sons with their shirts off. For most households with active young boys, this would be unbelievable. Regardless, Mother indicated the marks were dark spots *not* healing wounds or scabs. On cross-examination, (the test of credibility) she emphatically stated that she *never* alleged that the physical marks were from "injuries." Mother's testimony was the opposite of the court's conclusion.

{¶ 49} Even more significantly, Mother indicated that once she did observe the marks, she asked the nine-year-old how he acquired the marks. While in the care and security of her protection, *the nine-year-old told his mother he did not know how the marks occurred*. Yet, the trial court used these "physical marks" as one of its primary

5. During cross-examination of Father, counsel insinuated that Father is fighting the allegations because he recently applied for a law enforcement position and the issuance of a protection order brings along with it *Brady* prohibitions which might negate Father's chances of employment. However, the *Brady* law has exceptions for police officers, as pertaining to protective orders. 18 U.S.C. 925.

6. A three-foot paddle would leave lineal marks, not the little dark spots described.

findings of fact supporting the issuance of a protective order.

{¶ 50} The nine-year-old's allegations surfaced approximately two weeks after the last visitation which occurred on January 14, 2011 (which was the day Mother was found in contempt because of the proceedings initiated earlier by Father). The nine-year-old, for no reason, either did not tell his mother the truth, or he was incompetent in reporting accurately to his mother. Thus, the physical marks are not corroborative of the nine-year-old's credibility, but they erode either his credibility in telling the truth or his competency to relate information. Attributing those marks to Father was clearly erroneous. However, what other evidence might further support the nine-year-old's credibility?

{¶ 51} When examining the nine-year-old's credibility itself, his competency to testify appears marginal. In determining the weight of credibility to assign his testimony, his ability to relate competent testimony becomes important.

{¶ 52} In the matter sub judice, the inquiry into the nine-year-old's competency was brief. The trial court did stress the importance of telling the truth and aptly eased the young person's tension with dialogue. While asked about his grades and teachers' names, there was little dialogue to determine the boy's recollection abilities and/or his abilities to communicate those recollections truthfully. The purpose of this dissent is not to question the trial court's finding of competency, as such argument was not raised on appeal. Nevertheless, the child's lack of ability to recollect and communicate becomes significant when reviewing his testimony. See *State v. Said*, 71 Ohio St.3d 473, 476 (1994).

{¶ 53} The nine-year-old initially revealed his accusations (in defense of his misconduct at school) with his school principal, then with his Mother, and then Mother's attorney, yet his actual testimony was significantly vague and inconsistent. Although there is little significance in the nine-year-old not knowing the current date, it is

remarkable that he could not recollect or relate what he did on his last birthday. Nor was he capable of articulating when Christmas was, which occurred recently and in the middle of the time frame of the accusations. While the child alleged that he was spanked *exactly* twice a day, every day, he could only state in vague terms that the spankings occurred where visitation took place.

{¶ 54} While the majority does not take issue with the fact that the child was not able to relate many specific facts regarding the location the spankings occurred, I find it incredulous that the child was not capable of recollecting or communicating in what room *any* of the activities occurred, or even on what floor the spankings occurred [i.e., upstairs, downstairs, or basement]. He also could not communicate at what time or what part of day these spankings occurred. He could not say how far apart in time any of the spankings occurred. The nine-year-old indicated that he was spanked with several items that were held in Father's hand *simultaneously*, one of the items being a three-foot paddle. *Initially*, the boy testified that Father said nothing to him when spanking him, but later indicated that Father told him "to be bad and to be good" (which in-and-of itself makes no sense).

{¶ 55} The question of credibility is highlighted by the child's stated reasons for revealing his accusations to the school principal. The boy was furtively passing notes with another student during class, and Mother testified that he makes things up and exaggerates when playing with his friends. The child told his school principal that Father was responsible for him getting in trouble saying "since somebody got me in trouble * * * I was doing what I was doing because my dad told me to be bad and be good * * * and he spanked me." Despite the words "beating" and "whipping" used by the attorneys, the boy referred to "spankings." The belief that the child only had behavioral problems after his visits with Father is misplaced because Mother testified that the child had been in trouble

at school well *before* these incidences were alleged to have occurred.

{¶ 56} We all are sympathetic to a young boy, nervous in the spotlight of an adult world. However, the inconsistencies and inability to recollect severely diminished any meaningful cross-examination aimed at determining the boy's credibility. While one might disregard the fact that the nine-year-old's statements are irreconcilable with the testimony of others, it is not possible to disregard the significant internal inconsistencies of the nine-year-old's testimony. The content of the child's statements render sketchy details that defy common sense, and diminish the believability of his accusations. Are we really to believe the boy was following his father's instructions to "act bad, act good" by *secretly* trying to pass a note? Are we to believe that furtive communication by note is a form of "acting out" behavior that is the result of ongoing and continuous mental and physical abuse?

{¶ 57} The boy *initially* indicated that he was spanked with different objects, but changed his testimony saying he was spanked with a three-foot paddle, a belt, and a piece of race car track all in his father's hand *at the same time*, on *each* and every occasion. The court itself asked for clarification asking the nine-year-old if this is what happened to him on January 14, 2011 (the day Mother was found in contempt for interfering with Father's visitation). In response to the trial court, the boy *again* changed his story saying, "no, I was only spanked with the belt and the paddle." Compounding the circumstances is the boy's indication that his mother spanks him with a belt and her acknowledgement that she possesses a paddle.

{¶ 58} When considering all the circumstances, the boy's testimony is incapable of demonstrating by a preponderance of the evidence that the CPO was warranted. In light of the unbelievable explanations and the inability of the nine-year-old to recollect and communicate, I cannot find that the issuance of CPO was supported by competent,

credible evidence. Nor can I support the conclusion the majority reaches that the boy was "whipped" and received repeated "beatings" when the nine-year-old himself did not say such (his terminology was "spankings"). The mental and physical evidence one would reasonably expect from such abuse is completely absent from the record.

{¶ 59} While I do not dispute that a trial court has discretion in determining credibility, the law is also clear that if the allegations are equally likely to have not occurred as they are to have occurred, the need for a civil protection order has not been sufficiently demonstrated by the required degree of proof. In stepping back from the forest, and looking at all the circumstances, one can see through the trees, and thus I see the state of the evidence drastically different than my honorable colleagues. I therefore respectfully dissent due to the compounding frailties found within the proceedings and the lack of competent, credible evidence. I would therefore reverse the judgment of the trial court.

{¶ 60} I note that, as the majority has indicated, Ohio's appellate districts possess a conflict regarding the proper standard by which to review a trial court's decision when a CPO has been issued. This case may present an opportunity for the Supreme Court to speak definitively on this issue.