

**IN THE COURT OF APPEALS OF OHIO
THIRD APPELLATE DISTRICT
PUTNAM COUNTY**

JENNIFER NICHOLS,

PETITIONER-APPELLEE,

CASE NO. 12-14-08

v.

JOSHUA YOUNG,

OPINION

RESPONDENT-APPELLANT.

JENNIFER NICHOLS,

PETITIONER-APPELLEE,

CASE NO. 12-14-09

v.

SAMANTHA YOUNG,

OPINION

RESPONDENT-APPELLANT.

**Appeals from Putnam County Common Pleas Court
Trial Court Nos. 2014 DV 102 and 2014 DV 104**

Judgments Affirmed

Date of Decision: March 23, 2015

APPEARANCES:

Clayton P. Osting for Appellants

Jennifer Nichols, Appellee

SHAW, J.

{¶1} Respondents-appellants, Joshua Young (“Joshua”) and Samantha Young (“Samantha”), appeal the judgments of the Putnam County Common Pleas Court granting petitioner-appellee, Jennifer Nichols (“Jennifer”), a domestic violence civil protection order pursuant to R.C. 3113.31 against Joshua and a civil stalking protection order pursuant to R.C. 2903.214 against Samantha.

{¶2} Jennifer and Joshua are siblings. Samantha is Joshua’s ex-wife and significant other.

{¶3} On July 15 and 16, 2014, respectively, Jennifer filed a petition for a domestic violence civil protection order against Joshua and a petition for a civil stalking protection order against Samantha. The trial court consolidated the two cases for the purpose of conducting an evidentiary hearing, which took place before the court on August 19, 2014. The testimony at the hearing revealed that Jennifer’s request for the civil protection orders was predicated upon three events.

{¶4} On November 2, 2013, Jennifer and her step-son, Isaac, were at Jennifer’s and Joshua’s grandfather’s home making apple cider when Joshua arrived. Jennifer and Isaac testified that Joshua made a derogatory comment towards them and then went outside to speak with his grandfather before leaving. Jennifer later received a phone call from a restricted number. She answered the phone and put it on speaker. Both Jennifer and Isaac recognized Joshua’s voice as

he stated “You’re going to die, bitch.” (Tr. at 6). Jennifer subsequently filed a report with the Putnam County Sheriff’s Office documenting the phone call.

{¶5} On June 12, 2014, Jennifer and her daughter, Chelsey, were riding their bicycles along State Route 190 in Putnam County. Jennifer and Chelsey testified that a van driven by Samantha intentionally swerved over the white line grazing Jennifer’s elbow with the side mirror and causing her to ride off the road and into the grass. They both recalled seeing Joshua in the passenger’s seat and estimated the van to be travelling 40 to 45 miles per hour. Chelsey, who was riding behind Jennifer, witnessed the entire event and testified that she was very upset “knowing that if [Jennifer] would have been by herself that she could have been dead if they would have hit her.” (Tr. at 33). Jennifer and Chelsey each filed a report with the Sheriff’s Office documenting the incident.

{¶6} On July 12, 2014, a month after the bicycle episode, Jennifer and her husband, Robert, were at their rental property in Delphos, Ohio, with their two sons, ages twelve and three. They were at the property to mow the lawn and take care of the landscaping when they noticed Samantha’s van driving towards them down the street. Jennifer testified that as they were unloading equipment from the trailer, Samantha passed their property and yelled “who the ‘F’ are you eyeballing, bitch” and other inappropriate words. (Tr. at 9). Jennifer and Robert recalled that Samantha drove by again fifteen minutes later this time with Joshua in the

passenger's seat and that the van proceeded to circle the block four times before parking down the street to watch them as they worked in the yard. Once they completed the yard work, they loaded the trailer and began to leave when Samantha pulled the van up to the house. Robert testified that he pulled back into the driveway of their property and waited for the van to pass. As they started to leave the area, Samantha followed them for approximately fourteen blocks pulling up right behind them at every stop sign. Jennifer and Robert immediately drove their vehicle to the police department and filed a report of the incident.

{¶7} Samantha and Joshua offered testimony in their defense denying the allegations. Specifically, Joshua claimed that he never made the November 2013 phone call to Jennifer. Samantha admitted that she drove past Jennifer and Chelsey on State Route 190 in June 2014, but maintained that she veered across the yellow line to ensure she passed them safely and offered the testimony of Joshua and Joshua's 15 and 11 year old daughters, who were also in the vehicle, to corroborate her statements. Samantha and Joshua also denied confronting Jennifer and Robert at their rental property in July 2014 and claimed that they happened to pull behind Jennifer and Robert's vehicle at a stop sign while on their way home at which point Robert exited his vehicle and became aggressive with them.

{¶8} After the presentation of the evidence, the trial court asked for final remarks from counsel. Joshua's counsel challenged the adequacy of Jennifer's

showing that Joshua is a family or household member for purposes of the domestic violence civil protection order. The trial court then permitted Jennifer's counsel to "reopen" the case to allow him to elicit additional testimony to establish that Jennifer and Joshua had resided in the same household until Joshua was 19 years old and Jennifer was 16 years old. Jennifer also stated that Joshua lived with her for couple weeks in 2007 when he was going through "detox." (Tr. at 104).

{¶9} The trial court then issued its ruling from the bench. The trial court granted Jennifer a domestic violence civil protection order against Joshua and ordered that Chelsey and Isaac would also be protected under the order which would remain in effect for two years. The trial court granted Jennifer a civil stalking protection order against Samantha and ordered that Robert would also be protected under the order which would remain in effect for two years.

{¶10} Upon Joshua's and Samantha's request the trial court modified the protection order and permitted them to attend the same school, church, public events and activities but ordered them to avoid direct contact with Jennifer. This condition was incorporated into the civil protection orders issued by the trial court.

{¶11} Joshua and Samantha together filed this appeal, asserting the following assignments of error.¹

¹ The two cases were consolidated on appeal.

ASSIGNMENT OF ERROR NO. I

THE EVIDENCE AT TRIAL WAS INSUFFICIENT TO SUPPORT A FINDING, AND THE TRIAL COURT'S CONCLUSIONS WAS [SIC] AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE.

ASSIGNMENT OF ERROR NO. II

THE TRIAL COURT ERRED IN GRANTING AN ORDER OF PROTECTION AGAINST APPELLANTS UPON THE EVIDENCE PRESENTED AT THE HEARING AND, IN ADDITION, IN BOTH CASES THE FINDING [SIC] AND RULINGS AND ORDER OF THE COURT CONSTITUTE AN ABUSE OF DISCRETION.

ASSIGNMENT OF ERROR NO. III

THE TRIAL COURT ERRED IN INITIATING THE REOPENING OF PETITIONER'S CASE AND ALLOWING THE PETITIONER TO REOPEN HER CASE AGAINST PETITIONER [SIC] JOSHUA YOUNG AFTER THE CLOSE OF ALL EVIDENCE AND AFTER THE RESPONDENT [SIC] MADE HER CLOSING STATEMENT.

First and Second Assignments of Error

{¶12} In their first and second assignments of error, the appellants challenge the trial court's decisions granting Jennifer's petitions for protection orders against them. Generally, when reviewing a trial court's decision to grant a civil protection order, we will not reverse the decision absent an abuse of discretion. *Prater v. Mullins*, 3d Dist. Auglaize No. 2-13-04, 2013-Ohio-3981, ¶ 5. An abuse of discretion implies that the court's attitude was unreasonable,

arbitrary, or unconscionable. *Blakemore v. Blakemore*, 5 Ohio St.3d 217, 219 (1983).

{¶13} The appellants also challenge the sufficiency of the evidence presented by Jennifer at the evidentiary hearing and claim that the trial court's decisions are against the manifest weight of the evidence. Weight of the evidence concerns the greater amount of credible evidence offered in trial to support one side or the other of an issue. The party having the burden of proof will be entitled to a verdict if the trier of fact, on weighing the evidence, finds that the greater amount of credible evidence sustains the issue to be determined. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, ¶ 12, citing *State v. Thompkins*, 78 Ohio St.3d 380, 387 (1997). On review, there is a presumption in favor of the decision of the trier of fact. *Eastley* at ¶ 21. The appeals court acts as a “thirteenth juror” to determine whether the trier of fact lost its way and created such a manifest miscarriage of justice that the verdict must be overturned and a new trial ordered. *Thompkins* at 387.

{¶14} With respect to sufficiency of the evidence, the court must determine whether the evidence submitted is legally sufficient to support all of the elements of the offense charged. *Thompkins* at 386–387. Specifically, we must determine whether the petitioner has presented evidence which, if believed, would satisfy all of the elements that must be established. *Id.* at 390 (Cook, J., concurring); *State v.*

Jenks, 61 Ohio St.3d 259, paragraph two of the syllabus. With these parameters in mind, we turn to address the appellants' arguments on appeal.

Case No. 12-14-09 Jennifer v. Samantha

{¶15} The trial court granted Jennifer's petition for a civil stalking protection order ("CSPO") against Samantha pursuant to R.C. 2903.214. Section 2903.214(C)(1) of the Revised Code sets forth the requirements for a petition seeking a civil protection order and states the following in pertinent part:

(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 or state all of the following:

(1) An allegation that the respondent is eighteen years of age or older and engaged in a violation of section 2903.211 of the Revised Code against the person to be protected by the protection order or committed a sexually oriented offense against the person to be protected by the protection order, including a description of the nature and extent of the violation[.]

{¶16} Section 2903.211(A)(1) of the Revised Code prohibits menacing by stalking: "(A)(1) No person by engaging in a pattern of conduct shall knowingly cause another person to believe that the offender will cause physical harm to the other person or cause mental distress to the other person." Section 2903.211(D)(1) of the Revised Code defines pattern of conduct as "two or more actions or incidents closely related in time, whether or not there has been a prior conviction

based on any of those actions or incidents.” Thus, in order to obtain a CSPO, Jennifer had to establish by a preponderance of the evidence that Samantha engaged in a violation of R.C. 2903.211, the menacing by stalking statute, against her. *Warnecke v. Whitaker*, 3d Dist. Putnam No. 12-11-03, 2011-Ohio-5442, ¶ 13

{¶17} Samantha argues that Jennifer’s evidence did not establish that she believed Samantha would cause her physical harm or mental distress. Jennifer presented evidence that on June 12, 2014, Samantha intentionally drove her van over the white line causing Jennifer to ride her bicycle off the road. Jennifer testified that the side mirror of the van grazed her elbow. Jennifer’s daughter, Chelsey, who was fifteen years old at the time, provided testimony to corroborate Jennifer’s recollection and described herself as being very upset upon witnessing the incident and expressed fear for her mother’s life. Jennifer expressed that up until this incident she thought she could handle the hostility between the parties by simply avoiding Joshua and Samantha. However, after the bicycle incident, she believed that a protection order issued by the court was necessary to keep herself and her family safe.

{¶18} Jennifer also presented testimony that a month after the bicycle incident Samantha drove by her rental property and yelled hostile words towards her while she was with her husband and two minor children. Jennifer and her husband also provided testimony that Samantha engaged in threatening or

intimidating behavior by picking up Joshua, circling the van around the block several times, parking down the street while staring at them work in the yard, and then following them for several blocks until Jennifer and Robert drove to the police department. It is notable that Jennifer filed her petition for the CSPO just four days after this incident.

{¶19} The trial court found by a preponderance of the evidence that Samantha “has engaged in threatening and stalking behavior towards petitioner” and that she “has knowingly engaged in a pattern of conduct that caused petitioner to believe that respondent will cause physical harm or has caused mental distress.” (Tr. at 111-12). We acknowledge that Samantha presented testimony in her defense attempting to challenge the credibility of Jennifer’s statements. However, we defer to the fact-finder who is best able to weigh the evidence and judge the credibility of witnesses by viewing the demeanor, voice inflections, eye movements, and gestures of the witnesses testifying before it. *See Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80 (1984); *State v. DeHass*, 10 Ohio St.2d 230, 231 (1967). Therefore, we find no error with the trial court’s decision granting Jennifer’s petition for a CSPO against Samantha.

Case No. 12-14-08 Jennifer v. Joshua

{¶20} The trial court granted Jennifer’s petition for a domestic violence civil protection order against Joshua. To grant this type of protection order, the

trial court must find that the petitioner has shown by a preponderance of the evidence that petitioner or petitioner's family or household members are in danger of domestic violence. *Felton v. Felton*, 79 Ohio St.3d 34, 1997-Ohio-302, paragraph two of the syllabus; R.C. 3113.31(D). Section 3113.31 of the Revised Code governs the issuance of a petition for a domestic violence civil protection order. Subsection (A) states the following, in relevant part:

(A) As used in this section:

(1) "Domestic violence" means the occurrence of one or more of the following acts against a family or household member:

(a) Attempting to cause or recklessly causing bodily injury;

(b) Placing another person by the threat of force in fear of imminent serious physical harm or committing a violation of section 2903.211 or 2911.211 of the Revised Code[.]

{¶21} Section 3113.31(A)(3) of the Revised Code defines a "family or household member" to include:

"Family or household member" means any of the following:

(a) Any of the following who is residing with or has resided with the respondent:

(ii) A parent, a foster parent, or a child of the respondent, or another person related by consanguinity or affinity to the respondent[.]

{¶22} Jennifer presented testimony at the hearing that Joshua called her phone, stated "You're going to die, bitch," and hung up the phone. Jennifer and

her step-son, Isaac, both recognized Joshua's voice over the speaker and recalled that the phone call occurred after Joshua saw them at their grandfather's home and uttered a demeaning comment to them. Jennifer characterized the phone call as a "death threat." Jennifer presented evidence that Joshua was present in the van with Samantha during the two episodes in June and July 2014. Jennifer also testified that she and Joshua lived in the same household growing up as siblings and that Joshua lived with her more recently for a short period of time.

{¶23} At the hearing, Joshua admitted to being at his grandfather's house that day but denied calling Jennifer and threatening her. He also presented the testimony of his grandfather who did not recognize the voice on the phone as Joshua's and who did not recall hearing a threat. However, when asked for further details about the incident, the grandfather did not remember Joshua being at his house and stated "he might have been, yeah. Hell, that's been 10 months ago." (Tr. at 49). Isaac also testified that the grandfather is "very hard of hearing, he doesn't understand a lot of things." (Tr. at 29).

{¶24} Despite the evidence presented by Joshua in his defense, the trial court found by a preponderance of the evidence that Joshua "has engaged in threatening behavior towards petitioner" and that "the petitioner or family members are in danger or have been victims of either domestic violence as defined in 3113.31 of the Revised Code, and that these orders are necessary." (Tr. at 106-

107). Again, it was within the province of the trier of fact to assess the credibility of the witnesses' statements and weigh the evidence. Accordingly, we defer to the determinations of the trial court in this regard and find no error with the trial court's decision granting Jennifer a domestic violence civil protection order against Joshua.

{¶25} In sum, we find that the trial court's decisions granting Jennifer's petitions for the civil protection orders against Joshua and Samantha were based upon sufficient evidence and not against the manifest weight of the evidence. Likewise, we do not find the trial court's issuance of the civil protection orders to be an abuse of its discretion. Therefore, the first and second assignments of error are overruled.

Third Assignment of Error

{¶26} In the third assignment of error, Joshua claims that the trial court abused its discretion in "initiating" and allowing Jennifer to reopen the case to present additional testimony establishing that Jennifer and Joshua once resided together in order to satisfy the statutory requirement of a family or household member under R.C. 3113.31. A trial court has the discretion to permit a party to reopen her case after resting in order to offer additional evidence and such decision will not be disturbed on appeal absent an abuse of discretion. *See, State*

v. Salaam, 1st Dist. Hamilton App. No. C-020324, 2003-Ohio-1021, ¶ 13; citing *Columbus v. Grant*, 1 Ohio App.3d 96, 97, (1981).

{¶27} The following exchange took place between the trial court and counsel after the defense rested its case:

Trial Court: Do you have anything further, Mr. Benavidez?

Jennifer's Counsel: No, Your Honor.

Trial Court: Willing to waive any remarks, Mr. Benavidez?

Jennifer's Counsel: Your Honor, we just ask the Court rule accordingly, based upon the testimony and the evidence that was introduced today.

Trial Court: Mr. Osting?

Joshua's Counsel: Yes, Your Honor. Just one comment. I believe the statutory requirement showing the family and household [sic] has not been made in the case against Joshua Young and we'd ask that the case be dismissed.

Trial Court: Mr. Benavidez, what's your response?

Jennifer's Counsel: I did not hear what his objection was, Your Honor.

Trial Court: The objection is that in the 14-102 case, that there's not a showing that petitioner has resided at any time with the respondent. Is that your objection, Mr. Osting?

Joshua's Counsel: That is my objection, Your Honor.

Jennifer's Counsel: Their [sic] brother and sister, and I believe that they did live together as minors up until at least the age of 18.

Joshua's Counsel: Objection.

Jennifer's Counsel: And there was also testimony, their mother came in and testified, that they had a familiar affection.

Trial Court: Are you asking to reopen your case to establish that fact, Mr. Benavidez?

Jennifer's Counsel: That would be fine.

Trial Court: I'm granting that request.

Joshua's Counsel: Objection, Your Honor.

Trial Court: Overruled.

(Tr. 102-104).

{¶28} At the outset, we disagree with Joshua's suggestion that the trial court's actions amounted to a *sua sponte* reopening of Jennifer's case. The record reveals that the trial court attempted to clarify if Jennifer's counsel was making a request to reopen the case, which was within the trial court's discretion to grant. Moreover, Joshua cites no authority in support of his argument that a trial court cannot act in such a manner.

{¶29} In addition, the uncontroverted evidence before the trial court demonstrated that Jennifer and Joshua are siblings. The trial court heard testimony from several family members establishing this fact. In this case, we do not find that trial court's decision to permit Jennifer to reopen her case to be an abuse of discretion. The third assignment of error is overruled.

Case No. 12-14-09

{¶30} Based on the foregoing, the judgments of the trial court are affirmed.

Judgments Affirmed

ROGERS, P.J. and PRESTON, J., concur.

/jlr