[Cite as *Wootten v. Culp*, 2017-Ohio-665.]

IN THE COURT OF APPEALS OF OHIO
FOURTH APPELLATE DISTRICT
ADAMS COUNTY

KELLY WOOTTEN,	:	Case No. 16CA1026
Petitioner-Appellee,	:	
v.	:	DECISION AND JUDGMENT ENTRY
DOUGLAS CULP, JR.,	:	
Respondent-Appellant.	:	**RELEASED: 2/15/2017**

APPEARANCES:

Lee D. Koogler, Hillsboro, Ohio, for appellant.[1]

Harsha, J.

{¶1} Following an evidentiary hearing the Adams County Court of Common Pleas issued a domestic violence civil protection order ("CPO") against Douglas Culp, Jr., and in favor of his wife, Kelly Wootten, and their children. Culp challenges the order on appeal.

{¶2} Initially, Culp asserts that the trial court's finding that Wootten proved she suffered domestic violence or the threat of domestic violence was against the manifest weight of the evidence. However, Wootten testified that Culp threatened to "end" her. She also testified that Culp told her that if he saw her with anybody else, he would beat him and her. She further responded affirmatively to the trial court's question whether she felt she was in imminent fear of bodily harm because of Culp's threats to her. This constituted competent, credible evidence that Culp had engaged in domestic violence against his wife, i.e., that by the threat of force he placed her in fear of imminent serious

[1] Appellee did not file a brief or otherwise make an appearance in this appeal.

physical harm. The manifest weight of the evidence supports the trial court's order. We reject Culp's first assignment of error.

{¶3} Next Culp contends that the trial court abused its discretion by including the parties' two minor children in the CPO and restricting his visitation time with them. There was no evidence that Culp ever threatened or harmed the parties' children, and Wootten indicated that the children needed to see Culp and that she did not want to keep them away from him. The trial court itself noted that Wootten would be the only protected person under its CPO. Under these circumstances it could be that the court's order merely contains a scrivener's error, or alternatively that the trial court abused its discretion by including the parties' children as persons protected by the CPO. In either case, a remand is necessary.

{¶4} Nevertheless, the trial court did not act in an unreasonable, unconscionable, or arbitrary manner by limiting Culp's visitation time with the children to every other weekend. In fact, his trial counsel requested this standard visitation. We sustain in part and overrule in part Culp's second assignment of error.

{¶5} Because we sustain part of Culp's second assignment of error, we reverse that portion of the judgment of the trial court including the parties' children within the scope of the CPO and remand the cause to the trial court to remove this part of the order either by a nunc pro tunc entry or an amended entry as noted below. Having overruled the remainder of his assignments of error, we affirm the CPO in all other respects.

I. FACTS

{¶6} Kelly Wootten filed a petition for a domestic violence CPO against her husband, Douglas Culp, Jr., in the Adams County Court of Common Pleas, Domestic Relations Division. Wootten is married to Culp, and they have two minor children, a

daughter and a son. Wootten alleged in her petition that after Culp moved out of their residence in October 2015, he had done "everything in his power to make [her] miserable," including falsely claiming to the police that she had abused their daughter in a Wal-Mart store in May 2016, and threatening to kill her in April 2016. She requested the CPO on behalf of herself and her children, although she did not allege that Culp had threatened to harm the children. That same day, the trial court issued an ex parte CPO protecting Wootten and the children from Culp and scheduled the matter for a full hearing.

{¶7} Shortly thereafter the trial court held a full hearing on the petition, which produced the following evidence. Wootten testified that in April, about a month before the hearing, Culp called her and threatened to "end" her or "take her out," i.e. kill her. She further testified that Culp additionally threatened to beat her and any other man she was seeing if he saw her with anybody else. She responded affirmatively to the trial court's question whether Culp's threats made her feel in fear of imminent bodily harm:

> COURT: You feel in fear of bodily harm, that uh, imminently harm's gonna come to you?
>
> MS. WOOTTEN: I have no idea what he's capable of, so yes. Uncomfortable. Very uncomfortable.
>
> COURT: Okay. The threats he makes on the phone, that you have in your petition, are they about uh, what you talked about that I'm gonna take you out?
>
> MS. WOOTTEN: Yes.

{¶8} According to Wootten after Culp had threatened her, he brought over roses to her on Mother's Day in early May, and they and their children went to Wal-Mart. Wootten claimed while they were there, Culp screamed at her for choking their daughter, who was trying on shoes, even though Wooten was not choking her. Wootten testified that the rest of their day together went fine—they went out to lunch and to a

lake and he gave her his car for an upcoming driver's test. But when they got back to her residence, Culp got down on his knees and asked her what he had to do to get her back; Wootten told him that it was over because of what he had done. Wootten testified that subsequently, Culp filed a false police report stating that Wootten had choked their daughter in Wal-Mart.

{¶9} Wootten additionally testified that after the Mother's Day incident, Culp threatened that she would be getting a visit from one of his friends. On the day before she filed her petition requesting a CPO, Wootten claimed that she was followed by a man in a white SUV whom she did not recognize.

{¶10} Wootten stated that the goal of her request for a CPO was not "to keep the children away from" Culp and that she believed that "the children need to see their father."

{¶11} Culp denied ever threatening Wootten or having someone follow her. He testified that he would never harm his wife. According to Culp, he called Children Services because Wootten hit their daughter in her lip at Wal-Mart on Mother's Day.

{¶12} After the parties testified Culp's trial counsel made a closing argument asking that if the court determined Wootten met her burden of proof for the issuance of a CPO, Culp requested visitation for "at least the standard every other weekend visitation, or something, in the meantime, so that he can still see his kids."

{¶13} The trial court then announced that it was granting the petition because it found by a preponderance of the evidence that Wootten was in danger of being a victim of domestic violence. The trial court advised Wootten that Culp's trial attorney "is suggesting what is the standard visitation order * * * [which] is in essence every other weekend," and Wootten agreed that this would be appropriate. Neither Culp nor his trial

counsel suggested that he was requesting more than this amount of visitation with his children.

{¶14} The trial court also repeatedly indicated to the parties that the CPO it was issuing included only Wootten herself—and not the children—as the protected persons under the order:

> COURT: * * * Ms. Wootten, you are the petitioner, or the protected person.
>
> * * * and the only protected person at this time is Ms. Kelly Wootten * * *.
>
> * * * The respondent, Mr. Culp, shall stay away from the petitioner, Ms. Wootten, and all other protected persons-- again, it's only Ms. Wootten—and not be present within five hundred feet of any of the protected persons—again, Ms. Wootten—wherever uh, those protected persons may be found * * *.

{¶15} The trial court entered a judgment granting the CPO, but notwithstanding the court's repeated statements at the hearing, it included the parties' children as protected persons. For a two-year period the court ordered that Culp stay at least 500 feet away from Wootten and their two minor children, that he not initiate contact with them, and that his contact with the children be limited to visitation every other weekend.

II. ASSIGNMENTS OF ERROR

{¶16} Culp assigns the following errors for our review:

> I. THE TRIAL COURT ERRED BY ISSUING THE DOMESTIC VIOLENCE CIVIL PROTECTION ORDER, AS THE TRIAL COURT'S FINDING THAT APPELLEE PROVED DOMESTIC VIOLENCE OR THE THREAT OF DOMESTIC VIOLENCE BY A PREPONDERANCE OF THE EVIDENCE WAS AGAINST THE WEIGHT OF THE EVIDENCE.
>
> II. THE TRIAL COURT ERRED AND ABUSED ITS DISCRETION AS TO THE SCOPE OF THE DOMESTIC VIOLENCE PROTECTION ORDER BY INCLUDING APPELLANT'S MINOR CHILDREN AS PERSONS PROTECTED BY THE ORDER AND RESTRICTING APPELLANT'S VISITATION TIME WITH HIS CHILDREN TO EVERY OTHER WEEKEND.

III. LAW AND ANALYSIS

A. Issuance of the CPO:

Manifest Weight of the Evidence

{¶17} In his first assignment of error Culp asserts that the trial court's finding that Wootten proved domestic violence or the threat of domestic violence by a preponderance of the evidence was against the manifest weight of the evidence.

{¶18} "Our standard of review upon a challenge to a CPO depends upon the nature of the challenge to the CPO." *Walters v. Walters*, 150 Ohio App.3d 287, 2002-Ohio-6455, 780 N.E.2d 1032, ¶ 9 (4th Dist.), citing *Gooderham v. Patterson*, 4th Dist. Gallia No. 99CA01, 1999 WL 1034472 (Nov. 9, 1999); *see also Corrao v. Corrao*, 8th Dist. Cuyahoga No. 103411, 2016-Ohio-4682, 16 ("Our standard of review depends on the nature of the challenge"). When—as in Culp's first assignment of error—the issue is whether the CPO should have been issued at all, we must determine whether the trial court's finding that the petitioner has shown by the preponderance of the evidence that the petitioner or petitioner's family or household members are in danger of the domestic violence is against the manifest weight of the evidence. *See, e.g., Lewis v. Gravely*, 4th Dist. Adams No. 14CA990, 2016-Ohio-1502, ¶ 23.

{¶19} When an appellate court reviews whether a trial court's decision is against the manifest weight of the evidence, the court weighs the evidence and all reasonable inferences, considers the credibility of the witnesses and determines whether in resolving conflicts in the evidence, the finder of fact clearly lost its way and created such a manifest miscarriage of justice that the judgment must be reversed. *See Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17-20; *Lewis* at ¶ 23 (applying this standard of review in a CPO case).

{¶20} Moreover, when reviewing the evidence under this standard, we are aware that the weight and credibility of the evidence are to be determined by the trier of fact; we thus defer to the trier of fact on these issues because it is in the best position to gauge the witnesses' demeanor, gestures, and voice inflections, and to use these observations to weigh their credibility. *See State v. Kirkland*, 140 Ohio St.3d 73, 2014-Ohio-1966, 15 N.E.3d 818, ¶ 132; *State v. Reyes-Rosales*, 4th Dist. Adams No. 15CA1010, 2016-Ohio-3338, ¶ 17. The trier of fact is free is believe all, part, or none of any witness's testimony. *Id.* citing *State v. West*, 4th Dist. Scioto No. 12CA3507, 2014-Ohio-1941, ¶ 23.

{¶21} Ultimately, a reviewing court should find a trial court's decision is against the manifest weight of the evidence only in the exceptional case in which the evidence weighs heavily against the decision. *State v. McKelton*, __ Ohio St.3d __, 2016-Ohio-5735, __ N.E.3d __, ¶ 330; *Lewis*, 2016-Ohio-1502, at ¶ 23.

{¶22} R.C. 3113.31(E)(1) authorizes a trial court, to issue a CPO "to bring about the cessation of domestic violence against the family or household members." The CPO may "direct the respondent to refrain from abusing * * * the family or household members." R.C. 3113.31(E)(1)(a). "When granting a protection order, the trial court must find that 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, 679 N.E.2d 672 (1997), paragraph two of the syllabus.

{¶23} "Domestic violence includes acts that place 'another person by the threat of force in fear of imminent serious physical harm.' " *Lewis* at ¶ 28, quoting R.C. 3113.31(A)(1)(b). "Force" is defined as "any violence, compulsion, or constraint physically exerted by any means upon or against a person or thing,"; "serious physical harm" includes "[a]ny physical harm that carries a substantial risk of death," and, "[a]ny

physical harm that involves acute pain of such duration as to result in substantial suffering…"; "imminent" means ready to take place, near at hand, impending, hanging threateningly over one's head, or menacingly near. *See* R.C. 2901.01(A)(1), R.C. 2901.01(A)(5)(b) and (e), and *State v. Tackett*, 4th Dist. Jackson No. 04CA12, 2005-Ohio-1437, ¶ 14.

{¶24} The record of the full hearing includes credible evidence that Culp's threatened use of force against Wootten placed her in fear of imminent serious physical harm. Wootten testified that Culp threatened to "end" her, i.e., kill her. She also testified that Culp threatened to beat her and any man he found her with. And she responded affirmatively to the trial court's question about whether she felt "in fear of bodily harm, that * * * imminently harm's gonna come to" her. Although Culp argues that Wootten's affirmative response to the trial court's question was tempered by her further use of the terms "[u]ncomfortable" and "[v]ery uncomfortable" when describing how his threats made her feel, the trial court was free to credit her positive response to the question without ascribing any qualification by these additional terms. *Reyes-Rosales*, 2016-Ohio-3338, at ¶ 17 (trier of fact free to believe all, part, or none of each witness's testimony).

{¶25} Culp also argues that there was insufficient evidence that Wootten was in fear of "imminent" serious physical harm because his purported threats to her in April 2016 did not prevent her from spending time with him thereafter on Mother's Day in early May 2016. But "a domestic violence victim's subjective belief that serious physical harm was imminent constitutes evidence of imminence." *Lewis*, 2016-Ohio-1502, at ¶ 28. Wootten testified that Culp's threats made her fearful of imminent serious physical harm. In addition, "a victim's actions following the incident may also help establish that

the victim believed serious physical harm was imminent." *Id.* After Culp's threats, Wootten's filing of a petition for a CPO supports that conclusion.

{¶26} Culp relies primarily on our decision in *Murral v. Thompson*, 4th Dist. Hocking No. 03CA8, 2004-Ohio-432, to support his manifest-weight argument. In *Murral* at ¶ 12 we held that the trial court erred in granting a CPO based on certain threats because the petitioner offered no testimony or other proof that the threats or other behavior placed her in fear of imminent serious physical harm.[2] Culp's reliance on *Murral* is misplaced because here, Wootten specifically testified that she believed that Culp's threats placed her in fear of imminent serious physical harm. The petitioner in *Murral* did not testify similarly.

{¶27} In addition in *Murral* at ¶ 10, we held that "R.C. 3113.31 provides no specific time limit for bringing allegations to the court in petitioning for a protective order." Culp's threats here—about a month before Wootten filed her petition for a CPO—were not so remote in time as to preclude the issuance of a CPO.

{¶28} Consequently, this is not an exceptional case in which the evidence weighs heavily against the trial court's issuance of the CPO. The trial court neither clearly lost its way nor created a manifest miscarriage of justice by finding Wootten was in danger of domestic violence, i.e., that Culp's threats placed her in fear of imminent serious physical harm. We overrule Culp's first assignment of error.

B. Scope of the CPO

{¶29} In his second assignment of error Culp contends that the trial court abused its discretion by including the parties' minor children as protected persons in the order and restricting his visitation time with his children to every other weekend.

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[2] That finding did not result in reversal because we held that the trial court properly issued the CPO in that case based on a separate incident of domestic violence. *Id.* at ¶ 12.

{¶30} In this assignment of error Culp argues that the CPO's scope was too broad. "[W]hen the challenge to the CPO involves the scope of the order, we review the order for an abuse of discretion." *Walters*, 2002-Ohio-6455, 780 N.E.2d 1032, at ¶ 10; *Corrao*, 2016-Ohio-4862, at ¶ 16, quoting *Allan v. Allan*, 8th Dist. Cuyahoga No. 101212, 2014-Ohio-5039, ¶ 11, quoting *Reynolds v. White*, 8th Dist. Cuyahoga No. 74506, 1999 WL 754496 (Sept. 23, 1999) ("R.C. 3113.31 expressly authorizes trial courts to ' "craft protection orders that are tailored to the particular circumstances," ' and therefore, challenges to the scope of a protection order are reviewed for an abuse of discretion"); *Denney v. Sanders*, 1st Dist. Hamilton No. C-150556, 2016-Ohio-5113, ¶ 19 ("As the trial court has discretion over the scope of the civil protection order, we review challenges to the scope of a [protection order] under an abuse of discretion standard").

{¶31} " 'A trial court abuses its discretion when it makes a decision that is unreasonable, unconscionable, or arbitrary.' " *State v. Keenan*, 143 Ohio St.3d 397, 2015-Ohio-2484, 38 N.E.3d 870, ¶ 7, quoting *State v. Darmond*, 135 Ohio St.3d 343, 2013-Ohio-966, 986 N.E.2d 971, ¶ 34. "An abuse of discretion includes a situation in which a trial court did not engage in a 'sound reasoning process'; this review is deferential and does not permit an appellate court to simply substitute its judgment for that of the trial court." *State v. Felts*, 2016-Ohio-2755, 52 N.E.3d 1223, ¶ 29 (4th Dist.), quoting *Darmond* at ¶ 34.

{¶32} First Culp argues that the trial court abused its discretion by including the parties' two minor children in the CPO. He claims that there was "no evidence or testimony presented to suggest that [he] had made any threats toward the parties[']minor children."

{¶33} We agree the record of the hearing contains no evidence that Culp had ever harmed or threatened to harm the parties' children. And Wootten herself testified that the children needed to see Culp. Based on this uncontroverted testimony, the trial court could not reasonably conclude that Culp had threatened the children, thus warranting their inclusion in the CPO.

{¶34} However, from our review of the hearing it appears that the trial court never intended to extend the CPO to include the parties' children. Instead, the trial court repeatedly told the parties that Wootten would be the only person protected by the CPO. It is true that in general, "a court speaks only through its journal entries" and that "[n]either the parties nor a reviewing court should have to review the trial court record to determine the court's intentions [;] [r]ather, the entry must reflect the trial court's action in clear and succinct terms." *Infinite Security Solutions, L.L.C. v. Karam Properties, II, Ltd.*, 143 Ohio St.3d 346, 2015-Ohio-1101, 37 N.E.3d 1211, ¶ 29. Nevertheless, "[a]lthough a court generally speaks only through its journal entries, the reviewing court must examine the entire entry and proceedings when it is in the interest of justice to ascertain the grounds upon which a judgment is rendered." *See State v. Nguyen*, 4th Dist. Athens No. 14CA42, 2015-Ohio-4414, ¶ 28, citing *Joyce v. Gen. Motors Corp.*, 49 Ohio St.3d 93, 551 N.E.2d 172 (1990), paragraph one of the syllabus.

{¶35} The fact that the trial court consistently stated at the full hearing that the order would name only Wootten indicates that the order it issued the same day contained a clerical error naming the children. However, it is possible that the court changed its mind before entering its judgment.

{¶36} If the CPO merely contains a scrivener's error, upon remand the trial court may enter a nunc pro tunc entry to correct its mistake. However, if in fact the court changed its mind and intended to include the children, the trial court acted in an

unreasonable, arbitrary, or unconscionable manner in setting the scope of the CPO. In that instance we sustain this part of Culp's second assignment of error, reverse and remand with instructions for the court to file an amended CPO that deletes the children from its scope.

{¶37} Next Culp claims that the trial court abused its discretion by restricting his visitation with the children to every other weekend. However, his trial counsel requested this schedule at the hearing. " 'Under [the invited-error] doctrine, a party is not entitled to take advantage of an error that he himself invited or induced the court to make.' " *Martin v. Jones*, 2015–Ohio–3168, 41 N.E.3d 123, ¶ 2 (4th Dist.), quoting *State ex rel. Kline v. Carroll*, 96 Ohio St.3d 494, 2002–Ohio–4849, 775 N .E.2d 517, ¶ 27. We overrule this part of Culp's second assignment of error.

V. CONCLUSION

{¶38} The trial court's issuance of the CPO was not against the manifest weight of the evidence, and the trial court did not abuse its discretion in restricting Culp's visitation with his children to every other weekend when his trial counsel requested it. However, the trial court either mistakenly included the children and should correct this oversight by use of a nunc pro tunc entry reflecting its actual intent as expressed at the hearing; or in the alternative, if the inclusion of the children was intentional, the court abused its discretion by extending the scope of the CPO to include the parties' children because there was no evidence that Culp had harmed or threatened to harm them. Having sustained part of Culp's second assignment of error, we reverse that portion of the CPO including the parties' children as protected persons in the order and remand the cause to the trial court to either file a nunc pro tunc order or amend that part of the order depending upon the true nature of the inclusion of the children within the order.

Having overruled Culp's remaining assignments of error, we affirm the remainder of the judgment of the trial court.

JUDGMENT AFFIRMED IN PART
AND REVERSED IN PART
AND CAUSE REMANDED.

JUDGMENT ENTRY

It is ordered that the JUDGMENT IS AFFIRMED IN PART AND REVERSED IN PART and that the CAUSE IS REMANDED. Appellant and Appellee shall split the costs.

The Court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this Court directing the Adams County Court of Common Pleas, Domestic Relations Division, to carry this judgment into execution.

Any stay previously granted by this Court is hereby terminated as of the date of this entry.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

J. Abele & J. Hoover: Concur in Judgment and Opinion.

For the Court

BY: _____
William H. Harsha, Judge

NOTICE TO COUNSEL

Pursuant to Local Rule No. 14, this document constitutes a final judgment entry and the time period for further appeal commences from the date of filing with the clerk.