

[Cite as *Bush v. Bush*, 2015-Ohio-2017.]

COURT OF APPEALS
LICKING COUNTY, OHIO
FIFTH APPELLATE DISTRICT

JEANNETTE BUSH	:	JUDGES:
	:	Hon. William B. Hoffman, P.J.
Petitioner-Appellee	:	Hon. Sheila G. Farmer, J.
	:	Hon. Patricia A. Delaney, J.
-vs-	:	
	:	
MICHAEL BUSH	:	Case No. 14-CA-97
	:	
Respondent-Appellant	:	<u>OPINION</u>

CHARACTER OF PROCEEDING: Appeal from the Court of Common Pleas, Case No. 2014 DR 01142 DF

JUDGMENT: Affirmed/Reversed in Part and Remanded

DATE OF JUDGMENT: May 22, 2015

APPEARANCES:

For Plaintiff-Appellee

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Farmer, J.

{¶1} On June 3, 2008, the marriage of appellant, Michael Bush, and appellee, Jeannette Bush, was terminated by a dissolution order. Two children were born as issue of the marriage, twins, Bro. and Bre., born May 26, 2000. The parties agreed to a shared parenting plan.

{¶2} On September 26, 2014, appellee filed a petition for a civil protection order on behalf of the twins. A hearing was held on October 10, 2014. By judgment entry filed October 14, 2014, the trial court granted the petition and the next day issued a civil protection order against appellant to protect appellee and the twins for five years.

{¶3} Appellant filed an appeal and this matter is now before this court for consideration. Assignments of error are as follows:

I

{¶4} "THE TRIAL COURT ERRED IN GRANTING A CIVIL PROTECTION ORDER TO PETITIONER, JEANNETTE BUSH."

II

{¶5} "THE TRIAL COURT ERRED IN GRANTING A CIVIL PROTECTION ORDER TO PETITIONER AND RESPONDENT'S CHILDREN AS PROTECTED PERSONS."

I

{¶6} Appellant claims the trial court erred in including appellee as a protected person in the civil protection order. Appellee agrees and concedes the issue. Appellee's Brief at 7.

{¶7} Assignment of Error I is granted.

II

{¶8} Appellant claims the trial court erred in granting a civil protection order against him and naming the twins as protected persons.

{¶9} A petition for a domestic violence civil protection order is governed by R.C. 3113.31. Subsection (A) states the following:

(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;

(c) Committing any act with respect to a child that would result in the child being an abused child, as defined in section 2151.031 of the Revised Code;

(d) Committing a sexually oriented offense.

{¶10} A "family or household member" includes: "A parent or a child of a spouse, person living as a spouse, or former spouse of the respondent, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the respondent." R.C. 3113.31(A)(3)(a)(iii).

{¶11} "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. R.C. 3113.31(D)." *Felton v. Felton*, 79 Ohio St.3d 34, 1997-Ohio-302, paragraph two of the syllabus.

{¶12} We will review this issue under a manifest weight standard: a reviewing court is to examine the entire record, weigh the evidence and all reasonable inferences, consider the credibility of witnesses and determine "whether in resolving conflicts in the evidence, the jury [or finder of fact] clearly lost its way and created such a manifest miscarriage of justice that the conviction must be reversed and a new trial ordered." *State v. Martin*, 20 Ohio App.3d 172, 175 (1983). See also *State v. Thompkins*, 78 Ohio St.3d 380, 1997-Ohio-52; *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179. In weighing the evidence, however, we are always mindful of the presumption in favor of the trial court's factual findings. *Eastley* at ¶ 21. This presumption arises because the trier of fact "has the best opportunity to view the demeanor, attitude, and credibility of each witness, something that does not translate well on the written page." *Davis v. Flickinger*, 77 Ohio St.3d 415, 418, 1997-Ohio-260.

{¶13} On October 10, 2014, the trial court conducted a full hearing, did an extensive review of the evidence presented, and concluded the following via its judgment entry filed October 14, 2014:

The Court has considered the testimony of the witnesses and finds the events recounted by the two protected persons to be more credible than the version given by the respondent.

The Court finds by a preponderance of the evidence that the respondent knowingly caused, attempted to cause or recklessly caused bodily injury to [Bro.] [B.] and [Bre.] [B.], committing acts of domestic violence as defined in section 3113.31 of the Revised Code.

Further, the Court finds by a preponderance of the evidence that the respondent placed the protected persons 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.

Finally, the Court finds by a preponderance of the evidence that the two aforementioned protected persons are in danger of domestic violence by the respondent.

{¶14} Bre. testified to an incident that had occurred on May 26, 2013, the twins' birthday. T. at 37. Appellant, his girlfriend, her daughter, and the twins attended the Utica ice cream festival. T. at 17-18. Appellant yanked her hard out of the car by her arm and threw her up against the car. T. at 17, 38. Her back "[k]ind of" hurt when he did that. T. at 38. Bre. testified she was scared of appellant "[b]ecause I don't know if he's ever going to hurt me." T. at 22. On another day (September 24, 2014), Bre. witnessed appellant dragging her twin by the arm from the kitchen to the living room and the twin "was screaming for me to call my mom." T. at 16, 35. Bre. did not call their mom because she was afraid, "I didn't know what he would do to me if I did." T. at 16. She stated appellant "doesn't like me to call my mom because he says I use my phone as a tool because he doesn't want me to tell her what he does to us." T. at 17. Bre.

conceded that she and her twin could be "real disrespectful" to appellant sometimes. T. at 24. They tell appellant they hate him and he is a liar. *Id.* When appellant disciplines them, they are placed in "time-out." T. at 25.

{¶15} Bro. testified to the September incident that Bre. referenced. Bro. stated "I was cutting an apple and he freaked out on me because he didn't want me to use the knife." T. at 45. Appellant "put his hand in my face, and tried to hit me." T. at 46. She tossed a plate of apples and appellant grabbed her face and "slammed me down and held me down," hurting her back. T. at 46, 48. He then dragged her by the arm. *Id.* He hurt her nose when he tried to hit her, "[t]here was a red mark on it." T. at 46-47, 64-65. Bro. testified to other incidents of appellant grabbing her and pulling her. T. at 54. She stated she was scared of appellant because "I don't know what he's going to do to me, if he is going to hurt me worse than he has." T. at 57. Bro. admitted that she sometimes "mouths off" to appellant, tells him she hates him, calls him a liar, and sometimes doesn't listen to him when he tells her to stop. T. at 58. Bro. corroborated Bre.'s account of the incident at the ice cream festival. T. at 72-73. Bro. testified Bre. was crying and appeared to be in pain. T. at 73.

{¶16} Appellee testified and conceded that although in her dissolution petition she had indicated appellant "was violent" with her when the children were young, she agreed to shared parenting. T. at 80. She admitted to calling appellant on occasion for "assistance" when the twins were behaving badly. T. at 86.

{¶17} Lori Wells, the twins' guardian ad litem, testified she received various versions of past incidents and felt appellant was strict and overbearing; however, she did not form an opinion that appellant was abusive. T. at 114-122, 128.

{¶18} Appellant presented character witnesses and testified himself. Appellant explained the twins "will tell me to be quiet, shut up, I'm stupid, I'm a liar." T. at 148. Appellant's version of the apple incident was that Bro. walked into the kitchen, grabbed an apple, walked back into the living room, and threw the apple at him. T. at 149. He told her to go get another apple and cut it up herself. T. at 150. He then heard her cutting the apple and became worried because she was "chopping it kind of hard and I didn't want her to hurt herself." *Id.* He went into the kitchen and asked for the knife and she argued with him, called him stupid, and would not hand over the knife. *Id.* Eventually she surrendered the knife and he finished cutting up the apple and gave it to her. T. at 151. She called him names, he "put my finger towards" her face, and she threw the plate of apples in his face. *Id.* She then pushed him and swung at him, hitting his left shoulder. *Id.* He "grabbed ahold (sic) of her like a bear hug and I pulled her down to the ground." *Id.* He never pulled her into the living room, and he told her to call appellee if she wanted. T. at 153, 158, 159. The twins stayed the night and went to school the next morning. T. at 154. Appellant denied being violent with the twins. T. at 155-156.

{¶19} The trial court acknowledged conflicting testimony, and specifically found the twins' testimony to be more credible. As noted by the trial court in his judgment entry filed October 14, 2014, preponderance of the evidence means the greater weight of the evidence, and "[t]he greater weight may be infinitesimal, and it is only necessary that it be sufficient to destroy the equilibrium." *Travelers' Insurance Company of Hartford, Conn. v. Gath*, 118 Ohio St. 257, 261 (1928). See also *Schwingle v. Stull*, 7th

Dist. Harrison No. 07 HA 5, 2008-Ohio-3093, ¶ 15, citing *State v. Stumpf*, 32 Ohio St.3d 95, 102 (1987).

{¶20} Upon review, we find sufficient evidence was presented to support the trial court's decision on meeting the preponderance of the evidence standard and issuing the civil protection order.

{¶21} Assignment of Error II is denied.

{¶22} The judgment of the Court of Common Pleas of Licking County, Ohio is hereby affirmed in part and reversed in part, and the matter is remanded to said court to remove appellee as a protected person in the civil protection order.

By Farmer, J.

Hoffman, P.J. and

Delaney, J. concur.

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