[Cite as *Ensley v. Glover*, 2012-Ohio-4487.]

IN THE COURT OF APPEALS OF OHIO
SIXTH APPELLATE DISTRICT
LUCAS COUNTY

Rosalene Ensley	Court of Appeals No. L-11-1026
Appellee	Trial Court No. CI201008246
v.	
Anthony Glover	**DECISION AND JUDGMENT**
Appellant	Decided: September 28, 2012

* * * * *

Bertrand R. Puligandla, for appellant.

* * * * *

PIETRYKOWSKI, J.

{¶ 1} This is an appeal from an order of protection issued by the Lucas County Court of Common Pleas, after petitioner-appellee, Rosalene Ensley, filed a request for a civil stalking protection order ("CSPO"). Respondent-appellant, Anthony Glover, now challenges that order through the following assignment of error:

> The issuance of a civil stalking protection order requires proof, by a preponderance of the evidence, that the respondent engaged in a pattern of

conduct and thereby knowingly caused another to believe that the respondent would cause them physical harm or mental distress. In this case, there was no pattern of conduct because (1) no evidence was provided as to when the claimed incidents occurred, and (2) the evidence establishes only one incident at best. Furthermore, because there was a dispute over a house, there is insufficient evidence that Glover acted knowingly. Finally, Ensley presented insufficient evidence that she suffered mental distress.

Did the trial court abuse its discretion because its judgment is not supported by competent, credible evidence establishing the required proof to the controlling standard?

{¶ 2} The facts of this case are as follows. On December 13, 2010, Ensley filed a petition for a CSPO pursuant to R.C. 2903.214. In the petition, Ensley described the pattern of conduct that caused her to believe that Glover would cause her physical harm or mental distress: "On one ocation [sic] he talked about what he would do and he didn't care who I told. Second time he threatened me and was carrying a gun in his pants." The court held an ex parte hearing on the same day, after which it issued an ex parte CSPO and set the matter for a full hearing.

{¶ 3} The case proceeded to a full hearing on January 6, 2011, at which both appellant and appellee testified, although neither was represented by counsel. Appellee testified that she and appellant are cousins who had a contentious nine to eleven month history regarding a house, which resulted in appellee putting a lien on the property. As a

result of those issues, appellee stated that people kept telling her that appellant was looking for her. She further testified that she then spoke with appellant personally and he told her "you got me riding around with my nine." Appellee told the court that "riding around with my nine" is slang for having a gun on one's person. She then told the court that she felt threatened by this.

{¶ 4} Appellant, in his testimony to the court, denied ever threatening appellee or telling her he was carrying a gun. He also denied owning a gun or having access to one.

{¶ 5} After listening to the parties' testimony, the court determined that appellee had satisfied the requirements for the issuance of a full CSPO. In reaching that determination, the court stated

> But it's clear there's something going on between the two of you. That's very clear. You're [sic] acting like there isn't anything only highlights how much there is. You're evading my questions and you're dancing around the issue really tells me that there's more going on than you're willing to admit.

{¶ 6} The court then issued the full CSPO for one year. It is from that judgment that appellant appeals.

{¶ 7} In his sole assignment of error, appellant asserts that the trial court's order was against the manifest weight of the evidence and was not supported by sufficient evidence. Specifically, appellant contends that there was no evidence to support a finding that he engaged in a "pattern of conduct," that the evidence was insufficient to

establish that he acted knowingly, and that the evidence was insufficient to establish that Ensley suffered from mental distress.

{¶ 8} A CSPO is preventative in nature, allowing a court to act before an alleged stalker can harm his or her victim. *Gruber v. Hart*, 6th Dist. No. OT-06-011, 2007-Ohio-873, ¶ 13, citing *Short v. Walker*, 12th Dist. No. CA2000-08-009, 2001 WL 32808, *2 (Jan. 16, 2001). Ensley filed her petition for a CSPO pursuant to R.C. 2903.214. That statute reads in relevant part

> (C) A person may seek relief under this section for the person * * * by filing a petition with the court. The petition shall contain or state all of the following:
>
> (1) An allegation that the respondent engaged in a violation of section 2903.211 [2903.21.1] of the Revised Code against the person to be protected by the protection order * * * including a description of the nature and extent of the violation[.]

{¶ 9} For a trial court to grant a CSPO, the petitioner must show, by a preponderance of the evidence, that the complained of conduct violates the menacing by stalking statute. *Striff v. Striff*, 6th Dist. No. WD-02-031, 2003-Ohio-794, ¶ 10. When reviewing the issuance of a CSPO on appeal we apply the civil manifest weight of the evidence standard. *Gruber, supra* at ¶ 17. Accordingly, "[j]udgments supported by some competent, credible evidence going to all the essential elements of the case will not be

reversed by a reviewing court as being against the manifest weight of the evidence." *C.E. Morris v. Foley Const. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978), syllabus.

{¶ 10} R.C. 2903.211(A)(1) proscribes menacing by stalking and reads "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." As used in R.C. 2903.211, "'pattern of conduct' means 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." R.C. 2903.211(D)(1). The statute, however, does not define "closely related in time." Accordingly, "the temporal period within which the two or more actions or incidents must occur * * * [is a] matter to be determined by the trier of fact on a case-by-case basis." *Ellet v. Falk*, 6th Dist. No. L-09-1313, 2010-Ohio-6219, ¶ 22. As the court in *Middletown v. Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E.2d 1003, ¶ 10 (12th Dist.) explained,

> Because the statute does not specifically state what constitutes incidents "closely related in time," whether the incidents in question were "closely related in time" should be resolved by the trier of fact "considering the evidence in the context of all the circumstances of the case" *State v. Honeycutt*, Montgomery App. No. 19004, 2002-Ohio-3490, 2002 WL 1438648, ¶ 26, citing *State v. Dario* (1995), 106 Ohio App.3d 232, 238, 665 N.E.2d 759. In determining what constitutes a pattern of conduct for purposes of R.C. 2903.211(D)(1), courts must take every action into

consideration even if , as appellant argues, "some of the persons actions may not, in isolation, seem particularly threatening." *Guthrie v. Long*, Franklin App. No. 04AP-913, 2005-Ohio-1541, 2005 WL 737402, ¶ 12; *Miller v. Francisco*, Lake App. No. 2002-L-097, 2003-Ohio-1978, 2003 WL 1904066, ¶ 11.

{¶ 11} The culpable mental state for the issuance of a CSPO is "knowing." A person acts knowingly when, regardless of his purpose, "he is aware that his conduct will probably cause a certain result or will probably be of a certain nature." R.C. 2901.22(B). "A person has knowledge of circumstances when he is aware that such circumstances probably exist." *Id.*

{¶ 12} Finally, "mental distress" is defined under R.C. 2903.211(D)(2) as either of following

(a) Any mental illness or condition that involves some temporary substantial incapacity;

(b) Any mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services, whether or not any person requested or received psychiatric treatment, psychological treatment, or other mental health services.

{¶ 13} The statute, however, "does not require that the victim actually experience mental distress, but only that the victim believes the stalker would cause mental distress or physical harm." *Bloom v. Macbeth*, 5th Dist. No. 2007-COA-050, 2008-Ohio-4564,

¶ 11, citing *State v. Horsley*, 10th Dist. No. 05AP-350, 2006-Ohio-1208. Moreover, the testimony of the victim herself as to her fear is sufficient to establish mental distress. *Horsley* at ¶ 48.

{¶ 14} In the hearing below, Ensley testified that she and Glover were cousins who had a contentious nine to eleven month history regarding issues surrounding a house. Because of those issues, Ensley evidently put a lien on the house. After that, Ensley was told by a number of people that "Anthony looking for you; Anthony looking for you." Then, when Ensley and Glover met up, Glover indicated that he was carrying a gun. Ensley testified that because of those incidents, she felt threatened by Glover.

{¶ 15} In our view, this was insufficient evidence to establish that appellant had engaged in a "pattern of conduct." The only "conduct" on the part of appellant to which appellee testified was the one incident in which he indicated to her he was carrying a gun. Appellee's testimony that she heard from unnamed others that appellant was looking for her was inadmissible hearsay. That is, it was a statement made by another, offered in evidence to prove the truth of the matter asserted, i.e. to prove that appellant was looking for her in some menacing way. R.C. 2903.211(D)(1) refers to "actions" or "incidents" on the part of the respondent. In our view, the hearsay statements testified to by appellee do not suffice to establish an "action" or "incident" to support a finding of a "pattern of conduct" as that phrase is used in R.C. 2903.211(D)(1).

{¶ 16} The lower court clearly recognized tension between the parties and determined that appellee had felt threatened by appellant. Nevertheless, for the court to

issue a CSPO, R.C. 2903.214 and 2903.211 demand proof by a preponderance of the evidence, of a "pattern of conduct," meaning more than one "incident" or "action," on the part of appellant. *State v. Scruggs*, 136 Ohio App.3d 631, 737 N.E.2d 574 (2d Dist.2000).

{¶ 17} Finding insufficient evidence to support the trial court's issuance of a CSPO, the sole assignment of error is well-taken.

{¶ 18} On consideration whereof, the court finds that substantial justice has not been done the party complaining and the judgment of the Lucas County Court of Common Pleas is reversed and vacated. Pursuant to App.R. 13(B), judgment is hereby rendered for appellant. Appellee is ordered to pay the costs of this appeal pursuant to App.R. 24.

Judgment reversed.

A certified copy of this entry shall constitute the mandate pursuant to App.R. 27. *See also* 6th Dist.Loc.App.R. 4.

Mark L. Pietrykowski, J. _____
JUDGE

Thomas J. Osowik, J. _____
JUDGE

Stephen A. Yarbrough, J. _____
CONCUR.
JUDGE