

[Cite as *Johnson v. Burke*, 2016-Ohio-2947.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 103702

LAUREN JOHNSON

PETITIONER-APPELLEE

vs.

RASHAWN D. BURKE

RESPONDENT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Domestic Relations Division
Case No. DV-15-357762

BEFORE: McCormack, P.J., S. Gallagher, J., and Blackmon, J.

RELEASED AND JOURNALIZED: May 12, 2016

ATTORNEY FOR APPELLANT

Tamara E. Robinson
Robinson Law L.L.C.
P.O. Box 771253
Lakewood, OH 44107

ATTORNEY FOR APPELLEE

Jazmine R. Greer
21403 Chagrin Blvd.
Suite 295
Cleveland, OH 44122

TIM McCORMACK, P.J.:

{¶1} Respondent-appellant, Rashawn D. Burke, appeals from the trial court's judgment adopting a magistrate's decision and granting a domestic violence civil protection order ("CPO"). For the reasons that follow, we affirm.

Procedural History

{¶2} On June 30, 2015, petitioner-appellee Lauren Johnson filed a petition for a domestic violence civil protection order ("CPO") against Burke pursuant to R.C. 3113.31.

The court granted an ex parte CPO that same day, for the protection of Johnson and her daughter, and scheduled the matter for hearing.

{¶3} On July 15, 2015, the magistrate held a full hearing. The magistrate heard testimony from the following: petitioner Johnson; respondent Burke; respondent's mother, Renita Seldon; and respondent's stepfather, Willie Seldon-Bey. Following the hearing, the magistrate granted the CPO, finding that Johnson established by a preponderance of the evidence that Burke committed domestic violence as defined in R.C. 3113.31(A) and that Johnson is in danger of domestic violence. The magistrate further found Johnson's testimony credible, Seldon-Bey's testimony "somewhat credible," and the testimony of both Burke and Renita Seldon "not credible."

{¶4} Burke filed objections to the magistrate's decision, which the trial court overruled. Having considered the protection order, the complete transcript of the hearing, and Burke's objections, the court found that the magistrate did not err in

determining the credibility of the parties and their witnesses. Upon reviewing Burke's objections, the court stated:

[Respondent's] main assertion is that the magistrate erred in finding the petitioner credible and the respondent not credible. The court trusts the trier of fact, in this case the magistrate, to determine the issues of credibility as she is able to observe the witnesses when they testify.

The trial court then adopted the magistrate's decision without modification.

{¶5} Respondent Burke now appeals the judgment of the trial court, assigning one error for our review: the trial court's judgment is against the manifest weight of the evidence and is an abuse of discretion.

The Hearing

{¶6} Johnson and Burke have a three year-old daughter, R.J. Johnson testified that her relationship with Burke has been "very difficult because he lets his mother take over more than she should" and that Burke does not make good choices. Johnson explained that Burke often brings their daughter to the "trailer park," where his mother and stepfather live. The incident that gave rise to the CPO occurred at this trailer.

{¶7} Johnson testified that on June 25, 2015, she received a call from Burke's mother, Renita Seldon, informing her that R.J. was at the trailer. When Johnson arrived to pick up R.J., she smelled marijuana. When Johnson began to tell her daughter that it was time to leave, Seldon interfered, and there was an exchange of words between Johnson and Seldon. Johnson explained to Seldon that R.J. was not supposed to be at

the trailer. At that point, Seldon “started to walk towards me and argue with me.” Johnson stated that Seldon told her “I’m tired of biting my tongue.”

{¶8} Johnson testified that Burke then “grabbed me by the arm, sla[mm]ed me down on the couch, and his mother proceeded to hit me three times in the back of my head. * * * [W]e tussled back and forth, [and] he let me go.” Johnson then told Burke and Seldon that she was reporting them, stating, “she’s not coming here anymore. Let me get my daughter and leave.” She further testified, “I was trying to get him off me when he was grabbing me. * * * He grabbed me by the waist. He grab[bed] me around my hip. It was a tussle. I wanted him to get his hands off of me. I wanted to take my child and leave.”

{¶9} Johnson testified that at that point, Burke told her that R.J. is “not going anywhere with you, you’re going to report us. We’re going to make sure she’s not going to see you again.” Johnson stated that she informed Burke that she was going to call the police, and in response, Seldon-Bey pushed her out of the door by her neck, and she fell down the steps. She stated that they continued being physical with her “even after I was outside the trailer.”

{¶10} According to Johnson, when she proceeded to call the police from outside, the following occurred:

I was outside, they were inside, we argued back and forth. I said, Rashawn, let me take my daughter. I’ll leave. He said no, [you’re] not taking her. We argued back and forth. That’s when I said she’s not coming to this trailer trash anymore. She’s not going to be allowed. I’m reporting.

Rashawn came outside, [Seldon-Bey] came outside. [Seldon-Bey] had me by the neck, and Rashawn had me by the hips. That's when he pushed me into the next trailer. They pushed me, breaking the window, pulling my [hair] out, all the while my daughter [is] crying for me.

{¶11} The police came to the trailer and completed an incident report. The report listed Burke, Seldon, Seldon-Bey, and a neighbor as the victims and Johnson as the suspected offender. It noted the offenses as domestic violence, assault, aggravated menacing, and criminal damaging. Johnson was arrested; however, she was released without being charged. According to Johnson, the investigator told her that he elected not to investigate the incident any further because "the stories [of the victims] just didn't add up."

{¶12} Johnson testified that following this incident, she does not feel safe. She explained that two weeks before the incident, she discovered that Burke had taken R.J. to the trailer and, upon returning home, R.J.'s clothes smelled like marijuana. Johnson told Burke that she would report him if he brought R.J. to the trailer again. Johnson testified that Burke became very angry and told her that if she reported him, he would stop her from breathing and she would never see her daughter again.

{¶13} Burke testified that on June 25, when Johnson arrived at the trailer to pick up their daughter, Johnson began "pushing on me and twisting my arm." When asked why Johnson would do that, he opined that maybe "she was having a bad day or

whatever.” Burke stated that while he had R.J. on his lap and he was tying her shoe, Johnson pinched him and she pinched his daughter, making her cry.

{¶14} Burke further stated that Johnson approached his mother in the kitchen and began to argue with her. According to Burke, Johnson was the aggressor, pushing him and trying to punch him, and he only tried to intervene in the situation. He denied throwing Johnson on the couch or hitting her. He stated that he was “only trying to position her, trying to [get her] out of the front door,” with his stepfather’s help. Seldon-Bey was able to successfully remove Johnson. Burke stated that he was injured during the altercation. He stated that after locking Johnson outside, he “saw [Johnson] run and jump her butt on the car, butt first on the hood of the car,” and he told his mother what he saw. He heard the neighbors yelling and then the police arrived.

{¶15} Respondent’s mother, Renita Seldon, testified that R.J. was visiting with her on June 25. As she was on her way to the kitchen to cut a piece of cake for R.J., she heard her son say “don’t do that,” and she looked over and saw Johnson “punching my son and twisting his skin” and then “twist [R.J.’s] skin” as well, which caused R.J. to cry.

Seldon stated that she remained in the kitchen while she addressed Johnson, indicating that she wanted to talk with Johnson about something. She stated that Johnson became aggressive with her, she told Johnson that she would not “disrespect me in my house,” and she told Johnson to leave. Thereafter, Burke “came in between us because she was aggressively in my face and she started immediately swinging [at Burke].”

{¶16} Seldon further testified that Johnson was “scratching and pushing and shoving,” and she and Burke asked her to leave. Seldon denied pushing or hitting Johnson, stating, “Nobody did anything.” In denying that Burke threw Johnson onto the couch, Seldon stated that her son “was trying to get her out of the door, trying to position her.” Thereafter, according to Seldon, her husband “heard all the ruckus” and entered the living room. Seldon-Bey then asked Johnson to leave, and Johnson spit in his face and told him that she did not have to go anywhere. At this point, Seldon-Bey “picked her up physically and put her out the door,” with Burke “helping him get her out the door.”

{¶17} Seldon testified that “once [Seldon-Bey] got her out the door [and] down the steps, [Johnson] tried to come back in the house. That’s when my husband pinned her up against the trailer.” Seldon stated, however, that this action did not cause the window to break; rather, the window had been broken previously. After removing Johnson from the house, Burke and Seldon-Bey re-entered the home, and Seldon locked the door. Seldon stated that during this time, R.J. was standing in the living room, looking out of the window, eating cake.

{¶18} Finally, Seldon testified that after she locked Johnson out of the house, her son went to the window and said, “She just jumped on your car, mom.” Seldon stated that she looked out the window and saw her neighbors approaching Johnson. The neighbors told Johnson to leave. Seldon testified that she heard Johnson “threatening [my neighbors] and cussing them out, telling them she’ll kill them, she’ll take care of

them later.” Seldon made a claim with her insurance company for the damage to the hood of her car caused by Johnson.

{¶19} On cross-examination, Seldon admitted that many of the statements she made at the hearing were not included in the police report, including her statements that Johnson pinched Burke, spat in her husband’s face, and was “wailing and hitting and pushing,” prior to being kicked out of the house. Seldon offered that “maybe they made a mistake.”

{¶20} Seldon-Bey testified that on June 25, he discovered his wife and Johnson arguing and “fists were flying.” He asked Johnson to leave. When he asked her to leave, she refused and “[s]he started getting aggressive, spit in my face, that’s when I put her out of my house.” Seldon-Bey stated that after “I put her out of my house,” he “kept her out until the police came.” When asked if Johnson struck him at all, Seldon-Bey replied, “I can’t say she was hitting me upside my head, but I’ll stand by my principles * * *. When my wife asked her to leave, we was raised you’re supposed to leave.” Seldon-Bey further testified that a neighbor told them that Johnson was jumping on the car.

{¶21} On cross-examination, Seldon-Bey admitted that despite Johnson’s expressed desire to take her daughter home, she was prevented from doing so. He explained that “she was with her father and the child says she did not want to leave.” Seldon-Bey also stated that during the entire time of the altercation, when Johnson and

Seldon were arguing and fighting and Seldon-Bey and Burke were trying to break up the altercation, R.J. was running, playing, and eating cake.

Law and Analysis

{¶22} In his sole assignment of error, Burke claims that the trial court’s judgment is against the manifest weight of the evidence. In support, he essentially argues that the court improperly analyzed the credibility of the witnesses.

{¶23} The General Assembly enacted the domestic violence statutes in an effort to criminalize domestic violence and to authorize a court to issue protection orders that are designed to ensure the safety and protection of a complainant in a domestic violence case.

Allan v. Allan, 8th Dist. Cuyahoga No. 101212, 2014-Ohio-5039, ¶ 14, citing *Felton v. Felton*, 79 Ohio St.3d 34, 37, 679 N.E.2d 672 (1997). A petitioner seeking a CPO must demonstrate by a preponderance of the evidence that the petitioner or the petitioner’s family or household members are in danger of domestic violence. *Allan*, citing *Felton* at paragraph two of the syllabus. “Preponderance of the evidence” means the greater weight of the evidence, or evidence that leads the trier of fact to find that the existence of a contested fact is more probable than its nonexistence. *State v. Stumpf*, 32 Ohio St.3d 95, 102, 512 N.E.2d 598 (1987).

{¶24} R.C. 3113.31 governs a petition for a domestic violence CPO. Under this statute, “domestic violence” includes one or more of the following acts:

- (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

[menacing by stalking] or 2911.211 [aggravated trespass] of the Revised Code;

- (c) Committing any act with respect to a child that would result in the child being an abused child.

R.C. 3113.31(A)(1)(a)-(c).

{¶25} Where a trial court grants a CPO based upon a petitioner’s fear of “imminent serious physical harm,” the relevant inquiry under R.C. 3113.31 is “whether a reasonable person would be placed in fear of imminent (in the sense of unconditional, non-contingent), serious physical harm.” *Strong v. Bauman*, 2d Dist. Montgomery Nos. 17256 and 17414, 1999 Ohio App. LEXIS 2272, * 11 (May 21, 1999). Threats of violence constitute domestic violence for the purposes of R.C. 3113.31, providing that the fear resulting from those threats is reasonable. *Lavery v. Lavery*, 9th Dist. Summit No. 20616, 2001 Ohio App. LEXIS 5360, * 4 (Dec. 5, 2001). The reasonableness of the petitioner’s fear should be determined with reference to the petitioner’s history with the respondent. *Lavery* at *4-5, citing *Eichenberger v. Eichenberger*, 82 Ohio App.3d 809, 815, 613 N.E.2d 678 (10th Dist.1992).

{¶26} A trial court’s decision to grant or deny a CPO will not be reversed where the decision was supported by the manifest weight of the evidence.¹ *Croone v. Arif*, 8th Dist. Cuyahoga No. 101103, 2014-Ohio-5546, ¶ 16. Upon review, this court

¹ Because this appeal addresses whether a CPO should have been granted and does not address the scope of the order, the question on review is whether there was sufficient credible evidence to support a finding that respondent engaged in acts of domestic violence; it is not whether the court abused its discretion. *See Allan*, 8th Dist. Cuyahoga No. 101212, 2014-Ohio-5039, at ¶ 11, quoting *Reynolds v. White*, 8th Dist. Cuyahoga No. 74506, 1999 Ohio App. LEXIS 4454, *10-11

weighs the evidence and all reasonable inferences, considers the credibility of 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 and a new trial ordered.

Id., citing *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶

20. Judgments 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. *Seasons Coal Co. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), citing *C. E. Morris Co. v. Foley Constr. Co.*, 54 Ohio St.2d 279, 376 N.E.2d 578 (1978).

{¶27} And in reviewing a manifest weight challenge, the appellate court must be mindful of the presumption in favor of the factfinder. *Croone* at ¶ 17; *Seasons Coal Co.* at 80. The trial court is in the best position to view witnesses and observe their demeanor, voice inflection, and gestures, and to use those observations in weighing the credibility of the testimony. *Id.*

{¶28} Here, we find that the record demonstrates there was competent, credible evidence presented to establish that Burke committed acts of domestic violence against Johnson within the meaning of R.C. 3113.31. Johnson testified that when she arrived to pick up her daughter, and stated that R.J. was not supposed to be there, Burke grabbed her by the arm, the waist, and the hips, and he slammed her down onto a couch. With the help of his stepfather, Burke also pushed Johnson onto the trailer, breaking the window,

and he pulled her hair out. Johnson also testified that following the incident on June 25, she does not feel safe. She explained that two weeks prior to the incident, Burke told her that if she reported him for bringing R.J. to the trailer, he would stop her from breathing and she would never see her daughter again.

{¶29} Moreover, we note that the magistrate found Johnson’s testimony to be credible, while finding the testimony of Burke and Seldon “not credible,” and the testimony of Seldon-Bey “somewhat credible.” Because the trial court is in the best position to view the witnesses and observe their demeanor when weighing the credibility of their testimony, we give deference to its findings. *Seasons Coal Co.*, 10 Ohio St.3d at 80, 461 N.E.2d 1273.

{¶30} Accordingly, we do not find the judgment of the trial court is against the manifest weight of the evidence. Burke’s sole assignment of error is therefore overruled.

{¶31} Judgment affirmed.

It is ordered that appellee recover of appellant costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the common pleas court to carry this judgment into execution.

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

TIM McCORMACK, PRESIDING JUDGE

SEAN C. GALLAGHER, J., and
PATRICIA ANN BLACKMON, J., CONCUR