

[Cite as *Vega v. Thomas*, 2017-Ohio-298.]

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 104647

REBECCA VEGA

PETITIONER-APPELLEE

vs.

MARINKO TOMAS

RESPONDENT-APPELLANT

JUDGMENT:
AFFIRMED

Civil Appeal from the
Cuyahoga County Court of Common Pleas
Case No. CV-16-862459

BEFORE: Stewart, J., McCormack, P.J., and Boyle, J.

RELEASED AND JOURNALIZED: January 26, 2017

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MELODY J. STEWART, J.:

{¶1} This appeal is before the court on the accelerated docket pursuant to App.R. 11.1 and Loc. App.R. 11.1. In this appeal, appellant Marinko Tomas challenges a decision of the trial court granting a R.C. 2903.214 civil stalking protection order against him.

{¶2} On April 27, 2016, petitioner-appellee Rebecca Vega, on her own behalf and on behalf of her three children, sought a civil stalking protection order (“CSPO”) against her neighbors Marinko and Angela Tomas. Following an ex parte hearing where Vega gave testimony, the court issued a temporary protection order against the Tomases pending a formal hearing on the full/permanent CSPO. At the ex parte hearing, Vega explained that her family lives next door to the Tomas family and had been friends with the Tomases until Vega’s husband was arrested in February 2016 and charged with domestic violence. Vega testified that since that time, the Tomases have been hostile to her and her daughters, have yelled expletives and directed obscene gestures at them from their porch, and have aided her husband in violating a temporary protection order she secured against him, by allowing her husband to visit the Tomases’ home. Vega further testified that the Tomases installed video cameras pointed at her house and have given information to her husband, who is under a no-contact order, about visitors to her home and regarding her children’s whereabouts. Lastly, Vega recalled several unusual happenings around her home that she believed were associated with the Tomas family.

These incidents include rocks being thrown at her house, mail taken out of her mailbox and opened, car tires that were flattened in her driveway, and threats to kill her family dog.

{¶3} The sheriff served Marinko and Angela Tomas with notice of the temporary protection order on April 29, 2016. On May 13, 2016, the court held a formal hearing on whether the temporary protection order should be extended to a permanent protection order. Vega and Angela Tomas were the only witnesses who testified at the hearing.

{¶4} At the hearing, Vega reiterated some of her earlier testimony from the ex parte hearing, but the testimony on the whole was much less specific and focused mostly on Marinko's behavior in shouting expletives at her children, allowing her husband to visit the Tomas home, and relaying information to her husband about visitors coming to her home. Nevertheless, Vega did state that since the issuance of the temporary protection order, the Tomases have, for the most part, ceased their disturbing behavior. The only lingering problems she had involved certain cameras that the Tomases had pointed at her home, and a single occasion following the issuance of the temporary protection order where a friend of the Tomases took pictures of her daughter from the Tomases' porch. In support of her testimony, Vega introduced cell phone records that showed the numerous times and occasions that her husband had been in contact with the Tomases following his arrest. Vega also introduced records she obtained through a public records search showing several phone calls made by either Angela or Marinko to the police, which she maintained were false police reports.

{¶5} When Angela Tomas testified, she flatly denied the allegations against her and her husband and explained that the incidents Vega described were generally things that Vega and her children were doing to her family, not vice versa. According to Angela, her family had been friends with the Vega family and remained friends with them even after Vega's husband's arrest until Vega became hostile towards them. Angela denied the allegations that Vega's husband had been over to her home or on their property following his arrest for domestic violence. Angela also denied making false police reports.

{¶6} Following the hearing, the court granted the full CSPO against Marinko only, after finding insufficient evidence to support a CSPO against Angela. As a result, the court dissolved Angela's temporary protection order. The CSPO against Marinko is set to expire on December 31, 2017.

{¶7} Marinko appeals from the CSPO by raising two assignments of error for our review: 1) the court erred in determining that Vega had provided sufficient evidence in support of her petition for a CSPO, and 2) the court's issuance of the CSPO was against the manifest weight of the evidence. Having reviewed the record and applicable law, we affirm the trial court's order.

{¶8} Appellate review on the issues of sufficiency and manifest weight of the evidence in civil cases is the same as in criminal cases. *Eastley v. Volkman*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, ¶ 17.

{¶9} Under the sufficiency standard, appellate courts review the evidence presented in the light most favorable to the appellee to determine whether the appellee presented some evidence going to every element of the claim or offense. *See State v. Jones*, 8th Dist. Cuyahoga Nos. 103290 and 103302, 2016-Ohio-7702, ¶ 38. Under a manifest weight challenge, appellate courts are charged with

“weigh[ing] the evidence and all reasonable inferences, consider[ing] the credibility of witnesses and determin[ing] 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.”

Eastley at ¶ 20, quoting *State v. Thompkins*, 78 Ohio St.3d 380, 387, 678 N.E.2d 541 (1997).

{¶10} For a civil stalking protection order to issue, the trial court must find that the petitioner has shown by a preponderance of the evidence the respondent committed an act against the petitioner that would constitute menacing by stalking under R.C. 2903.211. *Lewis v. Jacobs*, 2d Dist. Montgomery No. 25566, 2013-Ohio-3461, ¶ 9. R.C. 2903.211(A)(1), in turn, provides that “[n]o 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.”

{¶11} In his first assignment of error, Marinko argues that Vega failed to present any evidence showing his actions rose to the level of either a threat of physical harm or mental distress, that he engaged in a pattern of conduct, or that any of his actions were knowing. We disagree.

{¶12} At the hearing, Vega testified that her children are afraid to enter and exit their home for fear of encountering Marinko, that Marinko threatened to kill their dog, and that Marinko was filming her family. Marinko's strange and alarming behavior, if believed, is sufficient evidence for the court to draw a conclusion that Vega and her children suffered mental distress or were in fear of physical injury as a result of Marinko's actions. *Accord Williams v. Flannery*, 8th Dist. Cuyahoga No. 101880, 2015-Ohio-2040 (explaining that the trier of fact must decide if a victim suffered mental distress as a result of the offender's actions, and in doing so can rely on his knowledge and experience in determining whether mental distress has been caused).

{¶13} Vega also presented sufficient evidence that Marinko knowingly engaged in a pattern of conduct that caused her and her family distress. According to the criminal code,

A person acts knowingly, regardless of his purpose, when he is aware that his conduct will probably cause a certain result or will probably be of a certain nature. A person has knowledge of circumstances when he is aware that such circumstances probably exist.

R.C. 2901.22(B).

{¶14} Pattern of conduct is defined, in relevant part, 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
* * * [O]r the posting of messages, use of intentionally written or verbal graphic gestures, or receipt of information or data through the use of any form of written communication or an electronic method of remotely transferring information, including, but not limited to, a computer, computer network, computer program, computer system, or telecommunications device, may constitute a "pattern of conduct."

R.C. 2903.211(D)(1)

{¶15} Marinko relies on the fact that Vega did not mention any specific threats against her family to support his argument that Vega failed to show that he acted knowingly to cause her fear of physical harm or mental distress. He also argues that there is no evidence in the record that he acted in any knowing manner that would reach the level of approximating mental distress. It does not matter whether Marinko intended that his actions cause fear of physical harm or mental distress, instead what is important is that he knew his actions would probably result in such fear and mental distress. R.C. 2901.22(B).

{¶16} Vega gave testimony regarding Marinko's acts and statements that were directed exclusively at her and her children. Whether those acts were done under circumstances that show Marinko had knowledge that they would probably cause mental distress or fear of harm, is a question for the trier of fact. In this case, there was sufficient evidence for the court to make that determination.

{¶17} Marinko further contends that Vega did not show a pattern of contact because she failed to give specific dates that the alleged actions occurred. To the contrary, Vega testified that all of the acts she referred to, with the exception of the pictures taken in May 2016, occurred between the time of her husband's arrest on February 12, 2016, and the time the court issued the temporary protection order against Marinko on April 29, 2016. This time frame represents a period of approximately two and one-half months. It does not matter that Marinko's actions may have taken on different forms (such as yelling expletives or filming the Vega family). What matters is that there were a series of alleged hostile actions that were related in time and directed toward the Vega family.

{¶18} Lastly, Marinko takes issue with the court's journal entry finding that the cell phone records submitted by Vega supported her testimony. Marinko contends that the cell phone records do not support the testimony because the records reflect calls made between Vega's husband and Marinko for the month of February 2016. Because Vega's husband was not arrested until February 12, 2016, Marinko argues that many of the phone calls do not establish that he was in contact with him after his arrest.

{¶19} Our review of the record shows that the cell phone exhibits stipulated to by the defense do not show any calls made before February 15, 2016. Therefore, Marinko's argument that the court may have considered calls made before Vega's husband was under a restraining order, lacks merit. Moreover, the cell phone data shows numerous calls between Vega's husband and Marinko on the dates of February 21, which supports Vega's testimony that Marinko was in contact with her husband on this day and gave him information regarding their daughter's whereabouts. Consequently, we do not find error in the court's consideration of this evidence, and further find that the evidence, in toto, was sufficient to support the CSPO.

{¶20} In his second assigned error, Marinko asserts that the court's decision to grant the CSPO was against the manifest weight of the evidence. Specifically, Marinko argues that Vega's credibility as a witness was undermined by her inconsistent testimony and evidence tending to show that Vega's actions in seeking a protection order were motivated by jealousy over the Tomases remaining friends with her husband following the domestic violence incident.

{¶21} In arguing that Vega’s testimony was inconsistent, Marinko points to the differences in Vega’s testimony at the ex parte hearing compared to the full adversarial hearing on the CSPO. Marinko makes the point that Vega gave very detailed information regarding both his and Angela’s behavior at the ex parte hearing but at the full hearing gave only limited testimony that focused on Marinko’s foul language directed toward her daughter. Marinko also references a police report Vega made in late February, the body of which accuses her husband of violating his restraining order to visit his “girlfriend” at the Tomas residence — thus suggesting an extramarital affair with Angela. Marinko notes that when questioned about the report, Vega was evasive, giving testimony that denied ever telling police that her husband was visiting a girlfriend. According to Marinko, Vega’s testimony hurts her credibility because it failed to account for the fact that police do not generally include information in police reports not given to them by the complainant. Similarly, Marinko points to Vega’s flippant dismissal of evidence establishing that the Tomases did not make any false police reports, as also damaging to her credibility. Marinko also argues that Vega’s testimony revealed that she was jealous that the Tomases remained friends with her husband after his arrest, which led her to make a false police report insinuating that Angela was having an affair with her husband. Accordingly, Marinko maintains that the CSPO was motivated by Vega’s jealous feelings that the Tomases were taking her husband’s side in the domestic dispute.

{¶22} Although these are compelling arguments that warrant attention, we cannot say that the court abused its discretion when it decided to issue the CSPO. We nevertheless answer Marinko's argument in turn.

{¶23} The transcript shows that Vega provided more specific details of the Tomases' alleged alarming behavior at the ex parte hearing than she did at the full hearing; however, her testimony was not inconsistent between the two hearings. In fact, much of the same information was given to the court at both hearings in more or less greater detail.

{¶24} Further, Vega's failure to explain how or why the February 2016 police report came to be written in such a way as to suggest an affair between her husband and Angela, does raise concerns. The report's narrative shows that the officer wrote what the victim stated. Thus, without further explanation from Vega, it is not reasonable to assume that the police made this fact up on their own without some sort of miscommunication or misunderstanding. However, we cannot find that this hurts Vega's credibility to the extent that the court erred in issuing the CSPO.

{¶25} Lastly, we are not inclined to take a position on Vega's motivations or, for that matter, Marinko's. In this case, the record supports motivations towards hostile reactions from both sides. When weighing evidence, including the potential motives of the parties and the credibility of the witnesses, appellate courts are to give great deference to the factfinder's decision. *See Eastley*, 132 Ohio St.3d 328, 2012-Ohio-2179, 972 N.E.2d 517, at ¶ 21 ("If the evidence is susceptible of more than one construction, the reviewing court is bound to give it that interpretation which is consistent with the verdict and judgment, most favorable to sustaining the verdict and judgment.") quoting *Seasons Coal Co., Inc. v. Cleveland*, 10 Ohio St.3d 77, 80, 461 N.E.2d 1273 (1984), fn. 3.). In this case, we cannot say with any certainty that Vega had any motive for seeking the protection order beyond securing her and her children's safety. Nor can we say that her credibility was so destroyed as to believe the court clearly lost its way and created such a manifest miscarriage of justice that the CSPO must be reversed.

{¶26} 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.

MELODY J. STEWART, JUDGE

TIM McCORMACK, P.J., and
MARY J. BOYLE, J., CONCUR