[Cite as *Rosen v. Chesler*, 2009-Ohio-3163.]

STATE OF OHIO	)	IN THE COURT OF APPEALS
	)ss:	NINTH JUDICIAL DISTRICT
COUNTY OF LORAIN	)	

JOSHUA ROSEN	C.A. No. 08CA009419
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
MARK CHESLER	COURT OF COMMON PLEAS COUNTY OF LORAIN, OHIO
Appellant	CASE No. 07CV151232

DECISION AND JOURNAL ENTRY

Dated: June 30, 2009

MOORE, Presiding Judge.

{¶1} Appellant, Mark Chesler, appeals from the judgment of the Lorain County Court of Common Pleas granting a civil stalking protection order against him. This Court affirms.

I.

{¶2} On June 8, 2007, Appellee, Joshua Rosen, filed a petition for a civil stalking protection order ("CSPO") under R.C. 2903.214, against Appellant, Mark Chesler. That same day, a temporary CSPO was granted. On August 31, 2007, a hearing on the petition was held before a magistrate. On September 4, 2007, the magistrate issued a CSPO against Chesler, effective until August 1, 2012. In the decision, the magistrate made the following findings of fact:

> "Petitioner, Joshua Rosen, is involved in a land development project in Oberlin, Ohio. Respondent, Mark Chesler, is opposed to the development. Mark Chesler has vocally and publically opposed the project, well within his rights under the First Amendment. However, Respondent has also engaged in a pattern of harassing behavior directed at Petitioner. Specifically, Respondent has yelled things at Petitioner on the street and confronted him in public facilities. Petitioner

> testified that he has been confronted on 7-10 occasions during the two months preceding the grant of the exparte [sic] civil stalking protection order. When repeatedly asked to cease, Respondent will continue his verbal barrage. As a result of this behavior, Petitioner has suffered mental distress.
>
> "This court finds by a preponderance of the evidence that the Respondent has knowingly engaged in a pattern of conduct that caused Petitioner to believe that the Respondent will cause physical harm or cause or has caused mental distress."

The magistrate ordered that Chesler

> "not be present within 500 feet [] of [Rosen], wherever [Rosen] may be found, or any place [Chesler] knows or should know [Rosen] [is] likely to be, ***even with [Rosen's] permission***. If [Chesler] accidentally comes in contact with [Rosen] in any public or private place, [Chesler] must depart *immediately*. This order includes encounters on public and private roads, highways, and thoroughfares." (Emphasis sic.)

{¶3} On September 17, 2007, Chesler filed objections to the magistrate's decision. On March 24, 2008, Chesler filed a motion to expeditiously set a de novo appeal hearing. The trial court overruled Chesler's objections and adopted the magistrate's order. However, the trial court also modified the magistrate's order "so as to only prohibit [Chesler] from being within 20 feet of [Rosen] when both are attending public hearings before a Zoning Board, Planning Commission or Council Meeting." Chesler timely appealed the trial court's order. He has raised several arguments on appeal. Rosen has not filed an appellate brief.

II.

{¶4} Pursuant to App.R. 16(A)(3), "[t]he appellant shall include in its brief *** [a] statement of the assignments of error presented for review, with reference to the place in the record where each error is reflected." Chesler has failed to set forth a section in his brief entitled "Assignments of Error" with the appropriate references to the place in the record where each error is reflected. Chesler has, however, set forth a section entitled "Issues Presented for Review and Argument". Within this section, he has set forth three main arguments. We will construe these arguments as his assignments of error and designate them as such.

{¶5} Before this Court delves into Chesler's assignments of error, we must address, sua sponte, the matter of our jurisdiction to review his appeal. See *Whitaker-Merrell Co. v. Geupal Constr. Co.* (1972), 29 Ohio St.2d 184, 186. Based on this Court's analysis in *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶¶4-12, we have jurisdiction to review a civil protection order, or as in this case, a civil stalking protection order entered on a form approved by the Supreme Court of Ohio and signed by a magistrate and a judge. *Tabatabai*, at ¶11. See R.C. 2903.214(G) (stating that "[a]n order issued under this section, other than an ex parte order, that grants a protection order, or that refuses to grant a protection order, is a final, appealable order").

ASSIGNMENT OF ERROR I

"THE MAGISTRATE['S] VERDICT WAS NOT SUPPORTED BY THE SUFFICIENCY OF THE EVIDENCE[.]"

ASSIGNMENT OF ERROR II

"THE MAGISTRATE[']S VERDICT WAS AGAINST THE MANIFEST WETGHT [SIC] OF THE EVIDENCE[.]"

{¶6} In his first two assignments of error, Chesler has argued that the magistrate's decision was unsupported by the sufficiency of the evidence and was against the manifest weight of the evidence. We disagree.

{¶7} This appeal arises from the trial court's affirmance and modification of the magistrate's decision. Such a decision to modify, affirm, or reverse a magistrate's decision lies within the discretion of the trial court and should not be reversed on appeal absent an abuse of discretion. *Kalail v. Dave Walter, Inc.*, 9th Dist. No. 22817, 2006-Ohio-157, at ¶5, citing *Blakemore v. Blakemore* (1983), 5 Ohio St.3d 217, 219. An abuse of discretion is more than a

mere error of judgment, but instead demonstrates "perversity of will, passion, prejudice, partiality, or moral delinquency." *Pons v. Ohio State Med. Bd.* (1993), 66 Ohio St.3d 619, 621.

{¶8} In *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918, at ¶3, the Ohio Supreme Court set forth the civil standards of review for manifest weight and sufficiency challenges:

> "When applying a sufficiency-of-the-evidence standard, a court of appeals should affirm a trial court when the evidence is legally sufficient to support the jury verdict as a matter of law. When applying a civil manifest-weight-of-the-evidence standard, a court of appeals should affirm a trial court when the trial court's decision is supported by some competent, credible evidence." (Internal citations and quotations omitted.)

{¶9} In the instant case, Rosen filed his petition for a protection order under R.C. 2903.214 for a violation of R.C. 2903.211, menacing by stalking. R.C. 2903.211(A)(1) states 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."

{¶10} Chesler has essentially challenged the magistrate's finding that his conduct constituted a "pattern of conduct". He argues that Rosen presented no evidence at the hearing, other than his own testimony, to support his petition for a CSPO. Chesler asserts that Rosen only testified to "at most three purported encounters in a twenty-two month period[.]"

{¶11} Chesler has failed to set forth any case law to support his assertion that his actions with regard to Rosen did not constitute a "pattern of conduct". An appellant must affirmatively demonstrate error on appeal and must provide legal arguments that substantiate the alleged error. *State v. Humphries*, 9th Dist. No. 06CA00156, 2008-Ohio-388, at ¶47-48. "If an argument exists that can support this assignment of error, it is not this court's duty to root it out." *Cardone v.*

Cardone, (May 6, 1998), 9th Dist. No. 18349, at *8. This Court "will not guess at undeveloped claims on appeal." *State v. Wharton*, 9th Dist. No. 23300, 2007-Ohio-1817, at ¶42.

{¶12} We note that Chesler has presented his argument before this Court pro se. With respect to pro se litigants, this Court has observed:

> "[P]ro se litigants should be granted reasonable leeway such that their motions and pleadings should be liberally construed so as to decide the issues on the merits, as opposed to technicalities. However, a pro se litigant is presumed to have knowledge of the law and correct legal procedures so that he remains subject to the same rules and procedures to which represented litigants are bound. He is not given greater rights than represented parties, and must bear the consequences of his mistakes. This Court, therefore, must hold [pro se appellants] to the same standard as any represented party." (Internal citations omitted.) *Sherlock v. Myers*, 9th Dist. No. 22071, 2004-Ohio-5178, at ¶3.

{¶13} Even a liberal reading of Chesler's brief does not reveal that he has presented any case law to support his assertion that his actions did not constitute a pattern of conduct. While, pursuant to App.R. 12(A)(2), we need not address his contention, we nonetheless find that the trial court's decision that Chesler engaged "in a pattern of conduct [that has] knowingly cause[d] [Rosen] to believe that [Chesler] will cause [him] physical harm" or mental distress was supported by competent, credible evidence and was legally sufficient. R.C. 2903.211(A)(1).

{¶14} R.C. 2903.211(D)(1) defines "[p]attern of conduct", 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." Rosen testified at the hearing that between five and ten times in two years, every time he encountered Chesler, Chesler would scream at him and accost him. Rosen testified to several specific interactions with Chesler including an incident at a restaurant where Chesler accosted him, yelling "I got you now". Rosen testified that a few days after the incident at the restaurant, Chesler confronted him as he was walking through downtown Oberlin. Rosen testified to two other specific encounters with Chesler, including one

time when he was sitting outside a bakery and another time when he was walking through a place called Tappan Square. He described Chesler's behavior as "bizarre and erratic". Rosen testified that Chesler's actions made him feel nervous and fearful and that Chesler's actions have caused him mental distress because, as he stated at the hearing, he does not "feel secure when I walk around Oberlin. And I'm not sure --- I'm not sure where his behavior is going, where it's leading to." Chesler also testified at the hearing. In his testimony, Chesler largely disputed Rosen's testimony.

{¶15} Given Rosen's testimony that Chesler accosted him several times within a two year period and that these actions caused him to believe that Chesler would cause him physical harm, we conclude that the evidence was legally sufficient to support a finding that Chesler's conduct constituted menacing by stalking and the trial court did not abuse its discretion in adopting the magistrate's decision.

{¶16} Further, the magistrate had the opportunity to view the witnesses and observe their demeanor, etc. The magistrate used these observations in weighing the credibility of the witnesses and determined that Rosen was more credible than Chesler. Accordingly, we conclude that the trial court's decision was supported by competent, credible evidence. Therefore, for this additional reason, we conclude that the trial court did not abuse its discretion in adopting the magistrate's decision.

{¶17} Lastly, we note that Chesler has challenged the magistrate's decision that he must not be present within 500 feet of Rosen. He argues that this decision "creates the potential for abuse of a civil protection order in a small town with a cocentric [sic] commercial sector and a kaleidoscope of clubs and associations that serve as forums for debate and discussion of municipal issues."

{¶18} Chesler has not acknowledged the trial court's decision reducing the magistrate's 500 foot requirement "so as to only prohibit [Chesler] from being within 20 feet of [Rosen] when both are attending public hearings before a Zoning Board, Planning Commission or Council Meeting." As the trial court modified the magistrate's decision with regard to the 500 foot requirement, Chesler's argument is moot.

{¶19} Chesler's first and second assignments of error are overruled.

ASSIGNMENT OF ERROR III

"THE MAGISTRATE ABUSED HER DISCRETION OR COMMITTED PLAIN ERROR[.]"

{¶20} In Chesler's third assignment of error he argues that the magistrate abused her discretion or committed plain error in several respects. Chesler raises a litany of issues regarding the magistrate's admission of certain testimony, her questioning of Chesler at the hearing and her alleged "extra-judicial investigation".

{¶21} Civ.R. 53 governs proceedings before a magistrate and sets forth the trial court's duties in adopting or rejecting a magistrate's rulings. Civ.R. 53(D)(3)(b)(iv) provides that, except for a claim of plain error, a party waives the right to assign error on appeal with respect to the trial court's adoption of any factual finding or legal conclusion "unless the party has objected to that finding or conclusion as required by Civ. R. 53(D)(3)(b)." Such objections must be specific and all grounds must be stated with particularity. Civ. R. 53(D)(3)(b)(ii).

{¶22} Chesler filed timely objections to the magistrate's decision. However, he failed to object to any of the issues he has raised relating to this assignment of error. In failing to do so, Chesler waived any error in that regard. The failure to raise this matter before the trial court deprived the court of an opportunity to correct any errors and waives the right to challenge those issues on appeal. *Hawkins v. Innovative Property Mgt.* 9th Dist. No. 23122, 2006-Ohio-6153, at

fn. 1. Consequently, Chesler has waived the right to assign these matters as error on appeal. His third assignment of error is overruled.

III.

{¶23} Chesler's assignments of error are overruled. The judgment of the Lorain County Court of Common Pleas is affirmed.

Judgment affirmed.

There were reasonable grounds for this appeal.

We order that a special mandate issue out of this Court, directing the Court of Common Pleas, County of Lorain, State of Ohio, to carry this judgment into execution. A certified copy of this journal entry shall constitute the mandate, pursuant to App.R. 27.

Immediately upon the filing hereof, this document shall constitute the journal entry of judgment, and it shall be file stamped by the Clerk of the Court of Appeals at which time the period for review shall begin to run. App.R. 22(E). The Clerk of the Court of Appeals is instructed to mail a notice of entry of this judgment to the parties and to make a notation of the mailing in the docket, pursuant to App.R. 30.

Costs taxed to Appellant.

CARLA MOORE
FOR THE COURT

CARR, J.
CONCURS IN JUDGMENT ONLY, SAYING:

{¶24} While I agree with the reasoning set forth in Judge Whitmore's dissent, I am bound by stare decisis to follow our prior caselaw, namely this Court's recent decision in *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139. Therefore, I concur in the majority's decision.

WHITMORE, J.
DISSENTS, SAYING:

{¶25} I respectfully dissent on the basis of my dissent in *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139.

APPEARANCES:

MARK CHESLER, pro se, Appellant.

JOSHUA ROSEN, pro se, Appellee.