[Cite as *Morris v. Morris*, 2009-Ohio-5164.]

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

TERRI H. MORRIS	C.A. No. 24664
Appellee	
v.	APPEAL FROM JUDGMENT ENTERED IN THE
JAMES J. MORRIS	COURT OF COMMON PLEAS COUNTY OF SUMMIT, OHIO
Appellant	CASE No. 2008-07-2197

DECISION AND JOURNAL ENTRY

Dated: September 30, 2009

MOORE, Presiding Judge.

{¶1} Appellant, James Morris, appeals from the judgment of the Summit County Court of Common Pleas, Domestic Relations Division. This Court affirms.

I.

{¶2} On July 23, 2008, Appellee, Terri Morris, was granted an ex parte domestic violence civil protection order against her husband, James Morris. On August 7, 2008, a magistrate of the Summit County Court of Common Pleas, Domestic Relations Division conducted a full hearing to determine if a domestic violence civil protection order ("CPO") was appropriate. On September 2, 2008, the magistrate granted Terri a CPO effective from July 23, 2008 through July 23, 2013. The judge of the Domestic Relations Division of the court approved and adopted the CPO by signing a separate line on the same document. The CPO included a shared parenting plan and child support order.

{¶3} On September 16, 2008, James filed objections to the magistrate's decision. On November 17, 2008, he supplemented the objections after reviewing the transcript of the hearing. On December 12, 2008, a judge of the Domestic Relations Division filed a journal entry overruling James' objection and adopting the order filed September 2, 2008. James filed a timely notice of appeal.

Procedural History

{¶4} This matter was previously before this Court in case number 24564. On January 28, 2009, we relied on our precedent in *Mills v. Mills*, 9th Dist. No. 24063, 2008-Ohio-3774, in dismissing the appeal. The original journal entry from the trial court did not reiterate any provisions set forth in the CPO. It merely adopted and approved the magistrate's decision. We held that such an entry was not a final, appealable order.

{¶5} We have since overruled *Mills*, concluding that "a civil protection order *** signed by a magistrate and a judge is, pursuant to R.C. 3113.31(G), a final, appealable order." (Citations omitted.) *Tabatabai v. Tabatabai*, 9th Dist. No. 08CA0049-M, 2009-Ohio-3139, at ¶11.

{¶6} Nonetheless, on February 26, 2009, upon James' motion for a final appealable order, the Domestic Relations Division issued a journal entry. That journal entry sets forth the provisions of the CPO and includes a shared parenting plan and child support order.

CPO Hearing

{¶7} At the hearing, Terri testified to a domestic violence incident that occurred on February 7, 2008. Terri stated that she was approximately seven months pregnant at the time of the incident. She testified that during the incident, James pulled her hair and pushed her. Terri

filed criminal charges as a result of the incident. James entered a plea of no contest to the charge of domestic violence, consenting to the court's finding of guilty.

{¶8} Terri also stated that James sometimes made a fist and waved it in her face while laughing. These incidents frightened her. She believed it was James' intention to frighten her.

{¶9} She stated that the most recent incident occurred on July 22, 2008. That evening, James stated that he would kill her if he lost his nursing license as a result of his domestic violence conviction from the February incident. She stated that she was terrified to leave James because she was afraid she would not wake up the next morning.

{¶10} On cross-examination, Terri revealed that earlier in the evening of July 22, 2008, she and James had discussed the fact that she wanted to separate. James had been aware of this desire for some time. In response, James expressed doubt that he was the father of their youngest child. The couple had recently watched a television show about husbands who had killed wives. Terri identified Bobby Cutts and Peterson, presumably Scott Peterson, as examples. She informed James that she was concerned that he, too, had the capability to kill her. James' statement that he would kill her if he lost his nursing license came in response to this expression of concern.

{¶11} Terri also admitted that she slept in the same bed with James the night of July 22, 2008. Additionally, prior to making a police report on July 23, 2008, Terri ate lunch and went to see a movie with her mother. She further stated her belief that James was not at any time in danger of losing his nursing license.

{¶12} The parties stipulated that, as of the date of the hearing, Terri had a romantic interest in another man for approximately six to eight months and that this interest was a source of tension between them.

{¶13} James' testimony differed from Terri's on nearly every point. For the most part, he offered innocent explanations for his behavior. In the case of waving his fist in front of Terri's face, he suggested he does that as a joke to make light of situations. With regard to the domestic violence incident from February, he suggested that he was touching Terri's hair to calm her, and that his hand became stuck, causing him to pull her hair by accident. He denied that his actions constituted domestic violence and maintained that he only pleaded no contest in order to move on with his life. He did acknowledge the July 22, 2008 discussion about husbands who killed their wives and that Terri was concerned that he was capable of killing her. However, he maintains that in an effort to reassure Terri he told her that even if he lost his nursing license he would not consider killing her.

{¶14} James timely filed a notice of appeal from the February 26, 2009 CPO entered against him. He raises one assignment of error for our review.

II.

ASSIGNMENT OF ERROR

"THE TRIAL COURT ERRED IN FINDING [TERRI] WAS A VICTIM OF DOMESTIC VIOLENCE."

{¶15} James argues that the trial court erred in finding that Terri was a victim of domestic violence and granting the CPO. His primary reasoning is that Terri's testimony was not credible, and that, even assuming she was credible, she did not fear imminent, serious physical harm. We disagree.

{¶16} James' assignment of error does not set forth a standard of review by which we should evaluate the lower court's decision. However, his arguments indicate that he wishes this Court to examine the lower court's decision "for sufficient competent, credible evidence." He uses the language of, and we apply, a civil manifest-weight-of-the-evidence standard. *Williams*

v. Workman, 9th Dist. No. 22626, 2005-Ohio-5388, at ¶9 (holding that, in reviewing the grant of a CPO, this Court will not reverse the trial court if its decision is supported "by some competent, credible evidence" (internal quotations and citations omitted.) Id.); *Bryan-Wollman v. Domonko*, 115 Ohio St.3d 291, 2007-Ohio-4918, at ¶3.

{¶17} In order to issue a CPO, "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." *Felton v. Felton* (1997), 79 Ohio St.3d 34, paragraph two of the syllabus. Domestic violence CPOs are issued under R.C. 3113.31. R.C. 3113.31(A)(1)(b) defines "domestic violence" to include "[p]lacing [a family or household member] by the threat of force in fear of imminent serious physical harm[.]" Terri's petition alleges that James threatened to kill her if he loses his nursing license.

{¶18} As to James' claim that Terri's testimony was not credible, this Court has repeatedly stated that, "as the trier of fact, the magistrate [is] best able to view the witnesses and observe their demeanor, gestures and voice inflections, and use these observations in weighing the credibility of the pro[f]fered testimony." (Internal citations and quotations omitted.) *Truax v. Regal*, 9th Dist. No. 20902, 2002-Ohio-4867, at ¶26.

{¶19} We next consider whether the trial court erred in finding that Terri was a victim of domestic violence and granting the CPO in light of James' argument that Terri was not in fear of imminent harm. His brief defines "imminent" as "about to occur at any moment," citing Webster's II New Riverside University Dictionary (1984) 611. Several cases define imminent in a similar manner. See, e.g., *State v. McKinney*, 9th Dist. No. 24430, 2009-Ohio-2225, at ¶11 (defining imminent as

> "'ready to take place,' 'near at hand,' 'impending,' 'hanging threateningly over one's head,' or 'menacingly near.' 'Imminent' does not mean that 'the offender

> carry out the threat immediately or be in the process of carrying it out.' Rather, the critical inquiry is 'whether a reasonable person would be placed in fear of imminent (in the sense of unconditional, non-contingent), serious physical harm[.]'" (Internal quotations and citations omitted.) *State v. Tackett*, 4th Dist. No. 04CA12, 2005-Ohio-1437, at ¶14)

{¶20} *Henry v. Henry*, 4th Dist. No. 04CA2781, 2005-Ohio-67, at ¶19; *State v. Collie* (1996), 108 Ohio App.3d 580, 583.

{¶21} James argues that because his threat was conditional, namely that he would kill Terri only if he lost his nursing license, she cannot have been in fear of imminent harm. For this proposition, James cites *State v. Diroll*, 11th Dist. No. 2006-P-0110, 2007-Ohio-6930, at ¶57.

{¶22} However, *Diroll*, as cited by James, actually states that "'[g]enerally, a conditional threat, standing alone, is insufficient to satisfy the imminent physical harm element.'" *Diroll*, supra, at ¶57, quoting *Jackson v. Adams* (Nov. 8, 2001), 4th Dist. No. 01 CA2, at *3. Several cases, including *Jackson*, further provide that the imminent physical harm requirement may be established by a conditional threat and other circumstances. *Jackson*, supra, at *3; *State v. Drake* (1999), 135 Ohio App.3d 507, 510 (holding that a court may consider a conditional threat along with the totality of the circumstances); *State v. Shahan*, 5th Dist. No. 2005 AP 06 0041, 2006-Ohio-402, at ¶19 (holding that the victim's state of mind is relevant in determining whether a threat of harm is imminent). "Additionally, the fact that the victim went to the police may serve as evidence that demonstrates the victim's belief that physical harm was imminent." *Tackett*, supra, at ¶15, citing *Jackson*, supra, at *4.

{¶23} We acknowledge that the facts of this case indicate a conditional threat and thus do not satisfy the traditional dictionary definition of "imminent." However, under the unique and disturbing circumstances of this case, we are persuaded by the reasoning of our sister courts in *Jackson* and *Drake*, which allows for the consideration of a conditional threat and its

surrounding circumstances to establish imminence. We are also mindful that "[c]ourts cannot look at incidents of domestic violence in a vacuum. Domestic violence is almost always a series of incidents that gradually escalate into increasing acts of brutality, repeating themselves in cycles." *Parrish v. Parrish* (2002), 95 Ohio St.3d 1201, 1207 (Lundberg Stratton, J., dissenting).

{¶24} James' conditional threat differs from a typical conditional threat in that Terri did not have any control over the condition. See *Henry*, supra, at ¶22 (appellant threatened to kill the victim if she tried to gain custody of their child); *Jackson*, supra, at *4, (similar custody scenario); *Drake*, 135 Ohio App.3d at 509 (appellant threatened that if victim did not leave she "would be part of the river"). Unlike the victim who could leave the scene, Terri had no control over whether James would lose his nursing license. Additionally, although she testified that James was never in danger of losing his nursing license, there is no reliable, independent manner in which Terri could be expected to know the status of James' license. It is conceivable that James could have walked to the mailbox on any given day and learned that his license was being suspended or revoked. Like the judge of the Domestic Relations Division, under the unique circumstances of this case, this Court will not place the burden of determining whether the condition precedent to James' threat has occurred before sanctioning the issuance of a CPO.

{¶25} In addition to the conditional death threat, Terri and James have a history of domestic violence. Terri testified that while she was pregnant, James pulled her hair and pushed her. The judge specifically noted in the journal entry that there was a previous domestic violence incident. That event occurred six months prior to the hearing on the CPO in question. James questioned whether he was the father of her child. Just as disturbing is the fact that prior to the threat, James and Terri had a chilling discussion about husbands who had killed their wives. Terri stated that she believed James was capable of such an action. That confluence of factors

resulted in James' statement that he would kill Terri if he lost his nursing license. While James denies having made the statement, it was up to the trier of fact to assess the credibility of witnesses, and the fact-finder did not believe James.

{¶26} Terri did wait one day to contact the police, but she testified that she did not do so sooner because she was afraid she would not wake up the next morning. The fact that Terri contacted the police demonstrates that she feared harm was imminent. *Tackett*, supra, at ¶15.

{¶27} Taken together, the conditional death threat plus the surrounding circumstances provide "some competent, credible evidence" that Terri feared imminent serious physical harm. *Bryan-Wollman*, at ¶32. Accordingly, after reviewing the record we cannot say that the judge of the Domestic Relations Division erred in granting a CPO in favor of Terri. James' single assignment of error is overruled.

III.

{¶28} James' single assignment of error is overruled. The judgment of the Summit County Court of Common Pleas, Domestic Relations Division, 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 Summit, 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.
BELFANCE, J.
CONCUR

APPEARANCES:

HANS C. KUENZI, Attorney at Law, for Appellant.

JOY L. CHICATELLI, Attorney at Law, for Appellee.