

**IN THE COURT OF APPEALS
ELEVENTH APPELLATE DISTRICT
LAKE COUNTY, OHIO**

KELLY J. DAGUE,	:	OPINION
Petitioner-Appellee,	:	
- vs -	:	CASE NO. 2011-L-076
KENNETH M. DAGUE,	:	
Respondent-Appellant.	:	

Civil Appeal from the Lake County Court of Common Pleas, Domestic Relations Division, Case No. 10DV000152.

Judgment: Affirmed.

Sandra A. Dray, Sandra A. Dray Co., L.P.A., 1111 Mentor Avenue, Painesville, OH 44077 (For Petitioner-Appellee).

L. Bryan Carr, Carr, Feneli & Carbone Co., L.P.A., 1392 S.O.M. Center Road, Mayfield Heights, OH 44124 (Respondent-Appellant).

MARY JANE TRAPP, J.

{¶1} Kenneth Dague appeals from the decision of the Lake County Court of Common Pleas, Domestic Relations Division, granting his estranged wife, Kelly Dague, a Domestic Violence Civil Protection Order (“DVCPO”) until September 29, 2015. Mr. Dague argues that the trial court was presented with insufficient competent, credible evidence to support the grant of a DVCPO, that the trial court erred in failing to dismiss the DVCPO petition on due process grounds because of a malfunction in the tape recording of the magistrate’s hearing, and that the trial court’s inclusion of a prohibition

from possessing, using, carrying, or obtaining a deadly weapon for the duration of the DVCPO was unwarranted.

{¶2} We find that Mrs. Dague submitted more than sufficient competent, credible evidence to support the grant of a DVCPO, and that the trial court did not err in failing to dismiss the petition because Mr. Dague's due process rights were adequately protected. Further, we find cause for the trial court's prohibition of Mr. Dague's possession and use of deadly weapons, based on evidence that he has, in the past, displayed his firearms in a menacing manner toward Mrs. Dague. Because we find Mr. Dague's appeal without merit, we affirm the decision of the Lake County Court of Common Pleas, Domestic Relations Division.

Substantive and Procedural History

{¶3} On September 29, 2010, Kelly Dague filed a petition for a DVCPO, in which she requested an order of protection for herself and her minor son from her husband, Kenneth Dague. A magistrate granted an ex parte order of protection that same day, and set a full hearing for October 7, 2010. Over 12 hours of testimony was taken by the Magistrate on October 7 and October 29, 2010, and January 14, 2011.

{¶4} Mrs. Dague presented testimonial evidence from: Ronald Bare, an across-the-street neighbor; Thomas Thompson, a next-door neighbor; Jessica Brandt, her 19-year-old daughter; and Crystal Brandt, her 23-year-old daughter. Mrs. Dague also took the stand in support of her petition, and produced tape recordings of altercations between Mr. Dague and herself, and photographs of property damage allegedly caused by Mr. Dague.

The Precipitating Event

{¶5} In late August of 2010, Mrs. Dague lost her job with Gabriel's, where she had worked as a retail clerk for almost three years. She testified that Mr. Dague was unhappy with this turn of events and became enraged with her. This led to an argument between the two on their front porch. Mrs. Dague explained that she was seated in a metal chair on her front porch when Mr. Dague approached her angrily. She described how he "came up and put his face to face with my head and was jamming it in a hard and heavy way on me head to head and was jerking the chair back and forth really hard. I thought I was going to break my neck."

{¶6} The Dagues' across-the-street neighbor, Ronald Bare, witnessed this incident from his home. He saw Mrs. Dague seated in a metal chair on the porch and Mr. Dague leaning over her within inches of her face, shaking the chair so violently that it was banging off the concrete and Mrs. Dague's head and hair were flopping considerably. He stated that Mrs. Dague could not get out of the chair because Mr. Dague was holding both arms of the chair and blocking her exit. Mr. Bare called the police after observing this continue for close to half-an-hour. This was not the first time the police had been called to respond to the Dague residence; another neighbor estimated that the police had been to the Dagues approximately 20 times over the previous seven years.

{¶7} That neighbor, Thomas Thompson, also witnessed a portion of this altercation on the porch from his home next door. Mr. Thompson stated that he had observed the Dagues on the porch prior to things getting very heated. Mr. Thompson could see that Mr. Dague was physically blocking Mrs. Dague. He opined that "with his hands on the chair, there was no way she was getting out of there if she wanted to."

{¶8} This incident was the final culmination of a summer Mrs. Dague's witnesses described as rife with verbal altercations, and laced with abusive, demeaning and intimidating exchanges between the couple. Reflecting the intensified nature of the Dagues' altercations in the summer of 2010, Jessica, Mrs. Dague's youngest daughter, testified that her mother told her she "didn't trust that [she] was going to get out of this safely." Jessica stated that Mrs. Dague had said the same thing to a police officer in her presence, and that the police officer had encouraged Mrs. Dague to leave her husband because things could end badly.

{¶9} When asked about the porch incident by his attorney, Mr. Dague failed to provide a narrative of the events, but stressed he did not strike his wife at all during the argument on the porch.

{¶10} Spurred by the porch altercation, and fearful for her safety, Mrs. Dague filed for a DVCPO in late September of 2010, seeking protection for herself and her minor son, Jeffrey. It appears this was the last straw for Mrs. Dague in what was described as a severely hostile, acrimonious, and physically intimidating marriage.

Marital Strife and Escalating Altercations

{¶11} Mrs. Dague described how, over the 10 years she had been married to Mr. Dague, their relationship had become substantially strained; the level of his anger towards her had escalated considerably; his means of controlling and intimidating her had taken an increasingly physical turn; and he had begun threatening her physical safety. Mrs. Dague testified that she lived in fear of her husband, and that, on occasion, he had taken his firearms out to clean right in front of her upon her expression to him that she wanted to leave him. Mrs. Dague stated that Mr. Dague has expressed to both

her and her daughter, Jessica, that he had ways to kill people so that no one would ever know.

{¶12} In addition to the porch incident, Mrs. Dague recounted another incident in the summer of 2010 when the police were called after Mr. Dague had slapped her on the arm. She stated that she was so fearful of her husband that she was afraid to talk to the police; Jessica spoke to them on her behalf.

{¶13} Mrs. Dague also spoke of her fear that Mr. Dague would kill her with a pistachio. Mrs. Dague has a severe pistachio allergy, and testified that Mr. Dague had on occasion expressed that he could kill her by simply feeding her a pistachio nut. Mrs. Dague described yet another incident in the summer of 2010 when Mr. Dague placed a pistachio nut on the kitchen counter, because she believed he wanted her “gone, dead, buried.” She stated that she was in fear of imminent serious physical harm from Mr. Dague as a result of this incident and others.

{¶14} In explaining the deterioration of her marriage and why it was she had finally sought protection, Mrs. Dague described the general atmosphere in the marital home and the years of ongoing verbal abuse and physical intimidation. She reflected on Mr. Dague’s penchant for damaging walls and throwing objects around her when he became angry. She was hit by a shovel piece on the porch one day when Mr. Dague flew into one of his rages. Further, Mrs. Dague testified that Mr. Dague had engaged in sexual intercourse with her while she was asleep and without her permission. As a result, she had resigned herself to sleeping on the couch on a number of occasions during the summer of 2010.

{¶15} Mrs. Dague described Mr. Dague as excessively controlling and physically intimidating. On a number of occasions Mr. Dague would appear where she was,

whether it was her daughter's house to visit her grandson or the neighbor's house to have coffee, and demand she leave and come home with him immediately. The neighbor, Mr. Bare, also described an occasion where Mr. Dague came to his home looking for Mrs. Dague, who was there having coffee, and angrily ordered her home. As he described it, Mrs. Dague put her head down and followed him home, indicating it would be better if she did what he said. In regard to these incidents she explained that "[n]ow he ain't afraid to be physical or verbal towards me in front of anyone. He's lost his temper so much and gone so far in the last four months that I don't know what he's going to do. And I fear, because even the people I know fear for me."

{¶16} Those people she referenced include her neighbor, Mr. Bare, who testified that, prior to the porch incident, he had heard Mr. Dague yelling and screaming profanities and abusive language at Mrs. Dague on a number of occasions, as well as the sounds of breaking objects coming from the Dagues' home. From Mr. Bare's observations, Mrs. Dague does not raise her voice at Mr. Dague. Further, Mr. Bare testified that Mrs. Dague had confided in him regarding the slapping incident in the summer of 2010, and Mr. Dague's threat to poison her and bury her in the backyard. As a result of his growing concerns for Mrs. Dague's safety, Mr. Bare has called the Mentor Police on four or five occasions in response to disturbances at the Dague home.

{¶17} The next-door neighbor, Mr. Thompson, also observed Mr. Dague's profane outbursts towards Mrs. Dague on a number of occasions. He even stated that he had chosen not to invite Mr. Dague to an anniversary party he had thrown in the summer of 2010, out of fear for what Mr. Dague might do if he became angered.

Family Members Describe the Household Environment

{¶18} Jessica Brandt, Mrs. Dague's youngest daughter, testified that she had lived in the marital residence from the age of four until 17, and she described the hostility present in the household, including numerous fights between the Dagues. She recounted stories of Mr. Dague punching holes in doors and walls when he became angry, describing Mr. Dague's verbal attacks as "constant, like terrorism."

{¶19} The abuse and discomfort was not only directed toward Mrs. Dague. Jessica testified that Mr. Dague watched her and her sister as they bathed on a regular basis, and that Mrs. Dague finally caught him with the assistance of her two daughters. Mr. Dague was arrested and pled no-contest to voyeurism. This incident only deepened the culture of fear and violation present within the Dague home.

{¶20} Crystal Brandt, Mrs. Dague's middle daughter, also recounted incidents that had occurred throughout their childhood. Crystal spoke of the way in which she observed Mr. Dague physically intimidate Mrs. Dague by blocking her from leaving a room, pulling her back into a room to continue berating her, or shoving her around with his body weight. Crystal recounted an incident in the summer of 2010, during which Mr. Dague physically tried to prevent Mrs. Dague from leaving in her car to drive her third daughter back to college, by reaching into the passenger compartment of the car, through the driver's side window, and yank the keys out of the ignition, all while verbally berating Mrs. Dague.

Mr. Dague's Account

{¶21} Mr. Dague took the stand in his own defense, arguing that while he and Mrs. Dague did fight, he never laid a hand on her. Mr. Dague professed his love for his wife and his desire to fix any problems between them. He denied ever bringing a pistachio into the marital home, denied threatening to kill her and bury her in the

backyard, and denied slapping her any harder than in a playful manner on a single occasion. Mr. Dague admitted to causing the damage to the walls and doors in the marital home with Mrs. Dague in the room. Throughout his testimony, he attempted to establish a lack of physicality between him and his wife.

{¶22} During the third day of hearing there was a discrete malfunction in the recording device. When the malfunction was discovered, Mr. Dague reserved the right to make a motion to dismiss the petition on due process grounds, because an unknown portion of the testimony was not recorded.

The Magistrate's Decision

{¶23} Upon conclusion of the hearing and review of the evidence, the Magistrate issued a decision finding that Mrs. Dague had “shown by a preponderance of the evidence that Petitioner is in danger of domestic violence. Petitioner presented evidence sufficient to support the issuance of the attached Domestic Violence Civil Protection Order, pursuant to O.R.C. 3113.31, and *Felton v. Felton* (1979), 79 Ohio St.3d 34.” Mr. Dague filed objections to the Magistrate’s decision, arguing that Mrs. Dague had not sustained her burden of proof by a preponderance of the evidence. He also filed a motion to dismiss based on the recorder malfunction.

{¶24} The trial court issued a judgment denying Mr. Dague’s motion to dismiss and adopting the Magistrate’s decision in its entirety. The court issued a DVCPO to Mrs. Dague for protection from Mr. Dague until September 29, 2015.

{¶25} In denying the motion to dismiss, the trial court pointed out that Mr. Dague “had the opportunity, pursuant to Civil Rule 53(D)(3)(b)(iii), to submit an affidavit of the evidence not recorded if a transcript is not available. [Mr. Dague] chose not to

avail himself of this procedure to provide said evidence to the Court. * * * [Mr. Dague's] motion to dismiss is not the appropriate remedy for an equipment malfunction."

{¶26} In its independent review of the Magistrate's decision, the trial court reviewed all of the testimony taken by the Magistrate and all of the evidentiary materials submitted to the court. The trial court specifically found Mrs. Dague and her evidence to be credible. The trial court succinctly ruled that Mrs. Dague "by threat and force, was in fear of imminent serious physical harm. She has met the burden of proof as required. Furthermore, the statute by its very definition in Revised Code 3113.31(A)(1)(a)-(d) does not require bruises, blood or broken limbs to satisfy the burden of proof. Husband in essence argues such consequences are necessary for the Petitioner to satisfy the burden of proof. Ohio law provides otherwise."

{¶27} Mr. Dague timely appealed and now brings the following assignments of error:

{¶28} "[1.] The trial court committed prejudicial error when it adopted the magistrate's decision given that there was insufficient competent, credible evidence to support a finding of domestic violence."

{¶29} "[2.] The trial court erred in prohibiting the appellant from possessing, using, carrying or obtaining a deadly weapon for the duration of the domestic violence civil protection order."

{¶30} "[3.] The trial court erred in denying the appellant's motion to dismiss."

{¶31} Mrs. Dague has not filed a brief in response.

Adoption of the Magistrate's Decision

{¶32} In his first assignment of error, Mr. Dague challenges the trial court's adoption of the Magistrate's decision. He argues that Mrs. Dague failed to present

sufficient competent, credible evidence to carry her burden in the DVCPO proceeding. Because we find that the Magistrate was presented with more than sufficient evidence, and that the trial court did not abuse its discretion in adopting the Magistrate's findings, Mr. Dague's first assignment of error is without merit.

Standard of Review

{¶33} “On appeal, a trial court’s adoption of a magistrate’s decision will not be overruled unless the trial court abused its discretion in adopting the decision.” *Brown v. Gabram*, 11th Dist. No. 2004-G-2605, 2005-Ohio-6416, ¶11, citing *Lovas v. Mullett*, 11th Dist. No. 2000-G-2289, 2001 Ohio App. LEXIS 2951, *5-6 (July 29, 2001). As this court recently stated, the term “abuse of discretion” is one of art, “connoting judgment exercised by a court, which does not comport with reason or the record.” *State v. Underwood*, 11th Dist. No. 2008-L-113, 2009-Ohio-2089, ¶30, citing *State v. Ferranto*, 112 Ohio St. 667, 676-678 (1925). The Second Appellate District also recently adopted a similar definition of the abuse-of-discretion standard: an abuse of discretion is the trial court’s “failure to exercise sound, reasonable, and legal decision-making.” *State v. Beechler*, 2d Dist. No. 09-CA-54, 2010-Ohio-1900, ¶62, quoting Black’s Law Dictionary (8 Ed.Rev.2004) 11. As Judge Fain explained, when an appellate court is reviewing a pure issue of law, “the mere fact that the reviewing court would decide the issue differently is enough to find error (of course, not all errors are reversible. Some are harmless; others are not preserved for appellate review). By contrast, where the issue on review has been confined to the discretion of the trial court, the mere fact that the reviewing court would have reached a different result is not enough, without more, to find error.” *Id.* ¶67.

Evidence in Support of Magistrate’s Decision is Abundant

{¶34} “The burden of proof in the trial court upon a petitioner for a civil protection order is by a preponderance of the evidence.” *Cauwenbergh v. Cauwenbergh*, 11th Dist. No. 2006-A-0008, 2007-Ohio-1070, citing *Felton v. Felton*, 79 Ohio St.3d 34 (1997), paragraph two of the syllabus. A review of the hearing transcripts reveals that Mrs. Dague’s evidence exceeds a preponderance. “The decision to issue a civil protection order lies within the sound discretion of the trial court.” *Hoyt v. Heindell*, 191 Ohio App.3d 373, 2010-Ohio-6058 (11th Dist.), ¶39, citing *Maglionico v. Maglionico*, 11th Dist. No. 2000-P-0115, 2001 Ohio App. LEXIS 5053, *4 (Nov. 9, 2001).

{¶35} The trial court issued a DVCPO pursuant to R.C. 3113.31, which provides, in part: “Domestic violence’ means the occurrence of one or more of the following acts against a family or household member:

{¶36} “(a) Attempting to cause or recklessly causing bodily injury;

{¶37} “(b) Placing another person by the threat of force in fear of imminent serious physical harm or committing a violation of section 2903.211 [2903.21.1] or 2911.211 [2911.21.1] of the Revised Code;

{¶38} “(c) Committing any act with respect to a child that would result in the child being an abused child, as defined in section 2151.031 [2151.03.1] of the Revised Code;

{¶39} “(d) Committing a sexually oriented offense.”

{¶40} From the evidence presented, the Magistrate found that Mr. Dague had committed acts that placed Mrs. Dague in imminent serious physical harm. ‘Some of the abusive acts committed by [Mr. Dague] include: physically restraining [Mrs. Dague] with his weight and his body to prevent her from leaving so that he could continue to scream at her and profanely berate her for hours on end; threatening [Mrs. Dague], who

had a potentially deadly allergy to nuts, by putting pistachio nuts on the counter; threatening to kill [Mrs. Dague] and bury her body in the backyard where would it [sic] never be found; similarly threatening [Mrs. Dague's] daughter by declaring that he * * * knew how to kill someone, pull their teeth and cut off their fingers so they could never be identified; punching holes in walls while [Mrs. Dague] was present; throwing things across the room; throwing a chair; shoving [Mrs. Dague] across the room; and slapping [Mrs. Dague's] arm.”

{¶41} The Magistrate correctly explained that proof of actual violence is not required under R.C. 3113.31, merely the threat of violence is sufficient, and that, furthermore, Mr. Dague had been convicted of “voyeurism where the victims were [Mrs. Dague's] minor daughter(s) who were living with the parties at the time of the offense. Under the definition section of R.C. 3113.31, Domestic Violence includes: ‘Committing any act with respect to a child that would result in the child being an abused child ...,’ and also includes: ‘Committing a sexually oriented offense.’” Lastly, the Magistrate cited well-established law that a petitioner for a DVCPO may rely on past acts of the respondent to establish a genuine fear of violence in the present situation. See *Solomon v. Solomon*, 157 Ohio App.3d 807, 2004-Ohio-2486 (7th Dist.). Given Mr. Dague's history of overtly and impliedly threatening Mrs. Dague's physical safety, especially now that the condition of the threat has materialized (that is she has left him), her fear of immediate harm is rational. It is not unreasonable that Mrs. Dague would fear for her imminent safety as she pursues a divorce, and the trial court did not abuse its discretion in finding such fear reasonable and genuine.

{¶42} The record demonstrates that the Magistrate's evidentiary findings, independently reviewed and cited by the trial court, are supported by the record, and we

find that the trial court did not abuse its discretion in adopting the Magistrate's findings given the abundant evidence. Assignment of error one is without merit.

The Prohibition on Possessing a Deadly Weapon

{¶43} In his second assignment of error, Mr. Dague argues that the trial court erred in prohibiting him from possessing, using, carrying, or obtaining a deadly weapon for the duration of the DVCPO. He suggests that “there was no evidence in the record that supported such a finding, as there was no testimony that the Appellant threatened the Appellee with such an instrument or acted in any manner that would necessitate or justify such a prohibition.”

{¶44} “In issuing a civil protection order, the trial court may add restrictions, provided they are ‘equitable and fair.’ R.C. 3113.31(E)(1)(h). ‘While R.C. 3113.31 affords trial courts discretion in imposing restrictions corresponding to a [civil protection order], this discretion is not limitless.’” *Hoyt, supra*, at ¶67, quoting *Maag v. Maag*, 3d Dist. No. 16-01-16, 2002 Ohio App. LEXIS 1409, **9 (Mar. 28, 2002). This court has held that “restrictions must bear a sufficient nexus to the conduct that the trial court is attempting to prevent.” (Citation omitted.) *Sistek v. Gredence*, 11th Dist. No. 2005-L-212, 2006-Ohio-4169, ¶36.

{¶45} The argument is advanced that no one testified that Mr. Dague used a deadly weapon to threaten Mrs. Dague. This is simply untrue. Mrs. Dague specifically testified that Mr. Dague owned guns and that he brought them out on at least one occasion to clean them just as Mrs. Dague told him she wanted to leave him.

{¶46} Just as in a general CPO case, a court must consider patterns of conduct and take into consideration everything that has transpired between the petitioner and the respondent. See *Tuuri v. Snyder*, 11th Dist. No. 2000-G-2325, 2002-Ohio-2107.

When innocent and non-threatening activity, such as cleaning a firearm, is viewed in the context of ongoing marital discord and a statement of intention by Mrs. Dague to leave the marriage, Mr. Dague's display of a weapon in front of his wife may be taken by her as another method of intimidation. See, e.g., *Still v. Still*, 2d Dist. No. 17416, 1999 Ohio App. LEXIS 1808 (April 23, 1999) (finding that husband's act of sending his estranged wife a letter and a t-shirt that had "angels" lettered on it to be a veiled threat when considered within the context of all his other bizarre and overly aggressive actions, because wife said she interpreted it as a "suicide homicide" letter and it frightened her very much).

{¶47} Although he did not cock the gun and point it at her head, it cannot be said the trial court was unreasonable in finding the use or presence of the guns to be threatening and intimidating within this specific context. See, e.g., *Everitt v. Everitt*, 9th Dist. No. 24860, 2010-Ohio-875 (finding that a father's hand gestures, as if he was shooting a gun at his son from a car, and approaching of the son rapidly from his home where he kept firearms, with his hands in his pockets, amounted to conduct that would cause the son to believe he would be physically harmed). We cannot say that the trial court abused its discretion when it imposed a prohibition on the use and possession of deadly weapons for the duration of the DVCPO. Assignment of error two is without merit.

Denial of the Motion to Dismiss was Proper

{¶48} In his third and final assignment of error, Mr. Dague argues that the trial court erred when it denied his motion to dismiss the DVCPO petition. He suggests his due process rights have been violated because the trial court could not engage in a

complete review of the hearing before the Magistrate and Magistrate's decision as a result of the tape-recorder malfunction.

{¶49} We find no violation of Mr. Dague's due process rights. As the trial court pointed out when it denied his motion to dismiss, Mr. Dague had the opportunity to submit an affidavit of the evidence not recorded pursuant to Civ.R. 53(D)(3)(b)(iii), which states that: "[a]n objection to a factual finding, whether or not specifically designated as a finding of fact under Civ. R. 53(D)(3)(a)(ii), shall be supported by a transcript of all the evidence submitted to the magistrate relevant to that finding *or an affidavit* of that evidence if a transcript is not available." (Emphasis added.) He submitted no such affidavit.

{¶50} If Mr. Dague felt that important evidence had been lost due to the malfunction, he was obligated to bring that evidence to the trial court's attention via an affidavit. He failed to do so.

{¶51} A motion to dismiss the petition was not the appropriate vehicle for curing a deficiency in the hearing transcript, as Mr. Dague is unable to demonstrate any incurable prejudice as a result of the alleged omissions. *See, e.g., Nemeth v. Nemeth*, 11th Dist. No. 2007-G-2791, 2008-Ohio-3263 (finding that appellant failed to show that "she was prejudiced by the existence of any of the alleged omissions or alterations in the record. She does not argue that if any particular omission or addition was corrected, it would evidence error. Nor does she state that due to any particular omission or alteration, she has been prevented from asserting a specific assignment of error.")

{¶52} Thus, the trial court did not err in denying such a motion without a demonstration of prejudice by Mr. Dague. Mr. Dague's third assignment of error is

without merit and we affirm the decision of the Lake County Court of Common Pleas,
Domestic Relations Division.

TIMOTHY P. CANNON, P.J.,

THOMAS R. WRIGHT, J.,

concur.