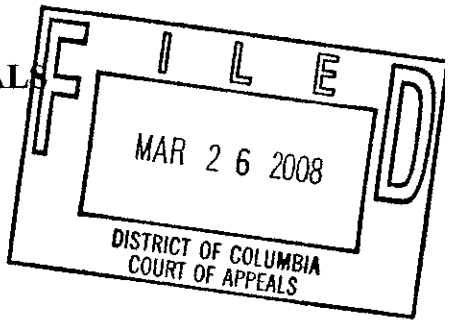

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 06-FM-473

JORGE ANTONIO YANES, APPELLANT,

v. 06-CPO-248

SENIA ELIZABETH VENTURA, APPELLEE.

Appeal from the Superior Court of the
District of Columbia
Domestic Violence Unit

(Hon. Robert I. Richter, Trial Judge)

(Submitted February 1, 2007 Decided March 26, 2008)

Before RUIZ and KRAMER, *Associate Judges* and KERN, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Following a two-day hearing, the trial court granted appellee Senia Ventura's petition for a civil protection order (CPO) that she had applied for after her husband, appellant Jorge Yanes, allegedly assaulted her. The order required that for a period of twelve months, Mr. Yanes was not to assault, threaten, harass, or stalk Ms. Ventura; not to destroy any of her property; and to stay at least 100 feet away from her home (which the parties had formerly shared), workplace or person. It also forbade him from contacting Ms. Ventura except by telephone for matters related to their children, a girl age 5 and a boy age 6. It permitted him, however, to contact the children directly by telephone between the hours of 5:00 p.m. and 6:00 p.m. The court also entered a temporary order for joint custody of the children, with Mr. Yanes caring for them between 9:30 a.m. Saturday morning and the time that he dropped them off for school on Monday morning. He was further required to complete a domestic violence counseling program.[1] Mr. Yanes appeals the trial court's decision, claiming that the court mis-allocated the

[1] The order was subsequently modified on two occasions. On April 25, 2006, in response to cross-motions by the parties, Judge Bartnoff added the following specifications: the children may not be subject to physical discipline by either parent or other caretakers; the parties may modify the custody schedule to accommodate special events of either party; both parties may attend school events, notwithstanding the CPO; and each party may travel within the United States with the children,

(continued...)

burden of proof, made findings that were not supported by sufficient evidence, and focused too narrowly on the alleged assault without properly considering the mosaic of factors presented by the evidence. We disagree and affirm.

I.

At the hearing addressing whether a CPO should issue, the evidence showed that on the night of the events in question, the parties were involved in a confrontation that resulted from Mr. Yanes having found pictures and messages on Ms. Ventura's cell phone that he believed indicated marital infidelity on her part. The parties agree that thereafter, he confronted her outside the apartment building where they lived together with their children as Ms. Ventura returned home with their daughter. Ms. Ventura testified that he grabbed her cell phone and hit her in the face with it, causing a blister and soreness. She also testified that he punched her in the arm, causing a big bruise that turned red, purple and blue, and that he threatened to kill her and her sister. It is undisputed that later the same evening, Ms. Ventura's sister, accompanied by her boyfriend and others, came to the apartment, and that Mr. Yanes and the sister's boyfriend became involved in a physical altercation. Mr. Yanes testified that the boyfriend drew a knife on him and cut his shirt while slashing at his chest, but that he disarmed the boyfriend and removed him from the apartment.

At the hearing on the CPO, Ms. Ventura's evidence consisted of her own testimony and the two previously-mentioned photographs. Although the specifics of her story changed at different times during the proceeding, she consistently maintained that the injuries depicted in the photographs were caused by Mr. Yanes when he assaulted her during the confrontation over the messages that he discovered on her cell phone. Specifically she stated that the cheek injury was caused by Mr. Yanes hitting her in the face with her cell phone, while the bruise on her arm resulted from him punching her.

Mr. Yanes, on the other hand, denied that he assaulted his wife on that or any other occasion and added that he would never do so. He admitted that the two argued outside their apartment building on the date in question, but said that Ms. Ventura and their daughter then went inside, while he remained outside. According to Mr. Yanes, he returned to the apartment about ten minutes later and found Ms. Ventura telling her sister over the telephone that he had been fighting with her. Mr. Yanes maintained that when he told Ms. Ventura that he intended to leave the house, she told him that he had to stay and pay the bills, and that she would bruise herself so he would go to jail. Mr. Yanes testified that Ms. Ventura made good on her threat by slamming her own arm against an armchair.

Mr. Yanes also testified that on the night of the events at issue, he had been "resting at home and [he] suddenly had the feeling that [he] should check her cell phone because a friend of

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(...continued)

provided that the other party is provided with an itinerary and contact information. Judge Bartnoff again modified the custody schedule on May 26, 2006, in response to a joint motion of the parties.

[his] had told [him] that [Ms. Ventura] was seeing someone and that's when [he] found. . . photographs of two guys with love messages written underneath the photographs." While Ms. Ventura was not at home when Mr. Yanes made this discovery, he testified that "[w]hen she came home I was outside the building because I wanted her to give me an explanation about these photos."

Mr. Yanes also testified that at some point after the day of the alleged assault, he was "talking to his wife on the phone and she told [him] that she had put [him] in jail because of this bruise that she had done on her own arm." Indeed, he recorded this conversation and a transcript of it was admitted into evidence. The transcript reflects an effort on Mr. Yanes' part to induce Ms. Ventura to admit that she had a boyfriend and that she injured her own arm in order to induce the police to arrest Mr. Yanes. It also reflects that Ms. Ventura initially denied both of these accusations, but that after Mr. Yanes reiterated them several times, she acquiesced to his claims. From this record, it is not clear, however, whether these statements were truly admissions of wrong-doing or attempts to placate, mollify or anger Mr. Yanes.

Sybill Gorham, the manager of the apartment building where the parties had lived together, testified on Mr. Yanes' behalf. She said that, although she is able to hear noises from the hallway outside her apartment door, she did not hear anything on the night in question, nor did any residents call her to complain about noise, as usually happens in such situations. She did observe an unfamiliar man running down the stairs with a knife and saw that the windows in Mr. Yanes' car had been broken.

Mr. Yanes also called as a witness Ms. Ventura's cousin and ostensible confidant, Minerva Lazo, who testified that about a week after the alleged assault, she had a conversation with Ms. Ventura. In that conversation, according to Ms. Lazo, Ms. Ventura treated the incident with Mr. Yanes "like everything was a joke, like it was funny." According to Ms. Lazo, appellee

> started telling me that her and Jorge had gotten into an argument with each other and that she had pressed charges on him and that she had told the police that he had hit her and . . . that she was going to get him arrested and she was going to put him on child support and she was going to get him deported . . . .

Ms. Lazo recounted that Ms. Ventura showed her the bruise on her arm, and said she had told the police that Mr. Yanes had caused it, but that she stopped short of actually saying directly that he had hit her. Moreover, Ms. Lazo said, when Ms. Ventura reported what she had told the police, Ms. Ventura's five-year old daughter responded by saying, "No, no, that's not what happened." Ms. Lazo noted that when she asked Ms. Ventura directly if Mr. Yanes had hit her, "she just kept saying . . . , 'I just told the police that he hit me,'" which "gave [Ms. Lazo] the impression that he didn't hit her, that she just had told the police that he had done that to her to

get him arrested." Ms. Lazo further testified that she had never seen Mr. Yanes act physically aggressive toward anyone; that she had, however, seen Ms. Ventura push Mr. Yanes and throw things at him; that prior to the alleged assault Ms. Ventura had threatened to have Mr. Yanes locked up and deported with the result that he would never see his children again; that prior to the alleged assault she had seen Ms. Ventura holding hands and kissing another man as her children looked on; that Mr. Yanes was a "fabulous" father, while Ms. Ventura was abusive and neglectful toward her children; and that Ms. Ventura smoked marijuana and had parties where people used alcohol and drugs while her children were home.

Describing it as a "difficult case", the trial court began its findings of fact by noting that it "did not find Ms. Ventura a particularly compelling or credible witness." The court described her as "inarticulate" and "excitable." It commented that "the oath [does not] mean a lot to Ms. Ventura." Moreover, the court acknowledged that Ms. Ventura's testimony had "many inconsistencies." Nonetheless, the court explained, these deficiencies did not "necessarily make me disbelieve that an assault took place. It makes me believe that she's inarticulate, excitable . . . . but I don't believe she made up that she was assaulted on [January] 13 and I believe she was." The court also noted that the taped phone call that was introduced into evidence "reflects a contrived effort on [Mr. Yanes'] part to try to get her to say something and ultimately she agrees in a way that does not make me think that she is confessing to having made it up."

In reaching that conclusion, the court also found that Mr. Yanes "made a somewhat better witness," but that his version of events was "highly incredible, this notion that she injured herself." The court commented that it was "left with no sense of certainty as to what happened," but that "the question is, is it more likely than not that Mr. Yanes assaulted Ms. Ventura." The court found that it was "extraordinarily unlikely that she banged her arm into a chair. Possible, but unlikely." It also rejected Ms. Lazo's testimony that Ms. Ventura made up her testimony that she had been assaulted by Mr. Yanes.[2] The court recognized that "[m]any of the things that were mentioned reflect ill on Ms. Ventura but don't necessarily go directly to [whether Mr. Yanes assaulted Ms. Ventura]." It framed the question to be answered as whether it had "heard enough to think that it's more likely that . . . she made this all up to get back at Mr. Yanes?" In making that decision, it noted that Ms. Ventura's family members chased Mr. Yanes with knives because they had been told that he assaulted her, not because they had witnessed the assault. In the end, however, the court found that Ms. Venutura had not "made up that she was assaulted," and ruled that it was more likely than not that "Mr. Yanes . . . with many reasons good and bad, was upset with her and . . . assault[ed] her on the street." The court then passed the case to allow the parties

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[2] We note that it is a long-standing evidentiary principle that one witness cannot comment on the credibility of another witness. "Credibility determinations are the province of the [fact finder], not of witnesses asked to opine whether they believe another witness...." *Allen v. United States*, 837 A.2d 917, 920 (D.C. 2003).

to discuss temporary custody arrangements. When the court reconvened, it approved the parties' proposed joint custody arrangement and entered the previously-described Civil Protection Order.

II.

In challenging the court's ruling, Mr. Yanes argues that the court effectively required him to prove that Ms. Ventura was not entitled to a CPO, and that there was insufficient evidence to justify its issuance. Citing *Cruz-Foster v. Foster*, 597 A.2d 927 (D.C. 1991), appellant also faults the court for "granting a Civil Protection Order against Mr. Yanes based on evidence that he struck Ms. Ventura on one occasion, without considering the history of the parties' relationship or finding any risk of future harm."

The Superior Court is vested with statutory discretion to enter a civil protection order when it finds, after a hearing, "that there is good cause to believe the respondent has committed or is threatening an intrafamily offense." *See* D.C. Code § 16-1005 (c) (2001). The term "intrafamily offense" is defined as "an act punishable as a criminal offense committed by an offender upon a person . . . to whom the offender is related by . . . marriage, [or] having a child in common." *See* D.C. Code § 16-1001 (5) (A) (2001). An assault — the crime focused upon in these proceedings — is a criminal offense under the District of Columbia Code. *See* D.C. Code § 22-401 (2001). Unlike a criminal case, however, where the crime must be proven beyond a reasonable doubt, an intrafamily offense need only be proven by a preponderance of the evidence, or in other words, "that it is more likely so than not so." *See* D.C. Civil Jury Instruction § 2.08. *See also Cruz-Foster*, *supra*, 597 A.2d at 930, n.3. Since a CPO is essentially an injunction, we have stated that the petitioner must demonstrate the existence of "'some cognizable danger of recurrent violation, something more than the mere possibility which serves to keep the case alive. . . . To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations.'" *Id.* (quoting *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953)). In deciding whether the petitioner has met her burden, "the court must consider the entire history of her relationship with [the respondent], as reflected in the record . . . ." *Id.* at n.3. This court will reverse the Superior Court's decision to award or deny an order only upon a showing that it abused its discretion. *See McKnight v. Scott*, 665 A.2d 973, 977 (D.C. 1995) (citing *Maldonado v. Maldonado*, 631 A.2d 40, 42 (D.C. 1993)).

Appellant's first two arguments, which are somewhat inter-related, do not require extended analysis. His assertion that "the court's ruling in Ms. Ventura's favor was based entirely on its disbelief of Mr. Yanes' explanation for the bruising, thereby effectively placing on Mr. Yanes the burden of proof," is based on several flawed premises. First is appellant's focus on the trial court's professed lack of certainty about what occurred on the night in question and its acknowledgment that it "did not find Ms. Ventura a particularly compelling or credible witness." According to appellant, "[b]y granting the CPO in spite of the fact that evidence left it with 'no sense of certainty as to what happened,'" the trial court abused its discretion. Yet the court did not need to be "certain;" it only needed to be persuaded, as it was, that the alleged

assault more likely than not occurred. *See Haley v. United States*, 799 A.2d 1201, 1209 (D.C. 2002) ("The preponderance of the evidence standard requires proof that something more likely than not exists or occurred."). Second, the court did not have to believe every aspect of appellee's testimony in order to credit her basic, unyielding assertion that the appellant assaulted her. *See Barnes v. Sherman*, 758 A.2d 936, 942 (D.C. 2000) ("The trial court is free to believe all, part or none of the testimony of a witness even if such testimony is uncontroverted.") (internal quotation marks and citation omitted).

Once appellee had made out a *prima facie* case of an intra-family offense, that is, "there is good cause to believe the respondent has committed or is threatening an intrafamily offense,"*see* D.C. Code § 16-1005 (c), *supra,* the court, under the plain language of the statute, had adequate grounds for issuance of the CPO. Thus the burden shifted to appellant to produce contradictory evidence to rebut the *prima facie* showing, *see Nader v. De Toledano*, 408 A.2d 31, 48 (D.C. 1979), or to persuade the judge that notwithstanding the assault, a CPO is unwarranted under the circumstances of their past dealings and anticipated future relationship. Here, the record contains Ms. Ventura's testimony that she was assaulted by Mr. Yanes, plus police photographs of the injuries she asserts he inflicted. Thus, appellant cannot claim, as he must in order to overturn the court's ruling, that the record was "'without evidence'" to support the finding that the assault occurred. *See Mihas v. United States*, 618 A.2d.197, 200 (D.C. 1992) (quoting D.C. Code § 17-305 (a) (1989)). While Mr. Yanes rebutted Ms. Ventura's testimony through his own contrary testimony on this crucial point, the court credited Ms. Ventura, not Mr. Yanes. And in reviewing this decision, "this court cannot reexamine the credibility of witnesses where the trial court has had the opportunity to view and assess their demeanor." *In re De S.*, 894 A.2d 448, 452 (D.C. 2006). While we might all wish that witnesses would testify with unwavering precision, honesty, and consistency, such is rarely the case. The fact-finder must therefore unravel the truth as he or she can, and it is not this court's role to second-guess the considered judgment of those who had the benefit of hearing and observing the witnesses first hand. Mr. Yanes' claims of improper burden-shifting and insufficiency of evidence are accordingly without merit.

We are also unpersuaded by Mr. Yanes' argument that the trial court's focus in granting the CPO was impermissibly narrow. In rendering its decision, the court expressly mentioned the testimony of the parties; a transcript of a telephone call in which the parties discussed both their relationship and the events of January 13, 2006, that Mr. Yanes had recorded and entered into evidence; the testimony of Minerva Lazo; the behavior of Ms. Ventura's family toward Mr. Yanes; and the fact that the parties would have ongoing contact with respect to the children. While the court is indeed required to consider, under our jurisprudence, record evidence of the entire history of the parties' relationship, *Cruz-Foster*, *supra*, 597 A.2d at 930, the fact that it does not vocalize its entire process of weighing of the evidence does not require reversal.

The *Cruz-Foster* court specifically found that the trial judge in that case, in denying the CPO, "limited her consideration to an assessment of credibility with respect to the episodes as to which she heard testimony." *Cruz-Foster*, *supra*, 597 A.2d at 931. The judge "gave no consideration, at least explicitly, to the 'entire mosaic,'" which included record evidence of

respondent's history of physically abusing and threatening petitioner on other occasions; the entry of a prior protective order; respondent's violation of that order; the court's resultant finding of criminal contempt, for which respondent was incarcerated for ten months; and subsequent extensions and modifications of the CPO. *Id.* at 929, 931. This court found that unacceptable on the grounds that "a defendant's past conduct is important evidence – perhaps the most important – in predicting his future probable conduct. . . . especially . . . in the context of a marital or similar relationship." *Id.* at 930.

Cruz-Foster's "mosaic" language thus must be read in light of the emphasis that decision placed on the proposition that a person who reacts to marital discord with physical violence can be considered likely to do so again.[3] In this case, the court found appellant had crossed that line, and as we have already discussed, that finding was supported by the record. Ms. Ventura also testified that "[t]his is not the first time." The record, moreover, is replete with evidence of the rancor, discord, and volatility that existed within the parties' relationship. Indeed, as the court indicated with some understatement, much of appellant's own evidence "doesn't detract from the likelihood of [appellee's] story." The court also had before it the circumstance that even if the parties were content to end their own relationship, they would still come into regular contact with one another because of their children. Therefore, the trial court had reason to conclude that future violence was a very real possibility, and that a CPO was indicated as an additional deterrent.

The nature of appellate review is such that a court of last resort could almost always wish for more numerous and detailed findings by the trier of fact. While that may also be true here, we nevertheless conclude that the trial court adequately considered both the record evidence of the parties' past and existing relationship and the necessity of injunctive relief to deter reoccurrences of similar conduct.

The judgment of the trial court is therefore

Affirmed.

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[3] We do not, moreover, read *Tyree v. Evans*, 728 A.2d 101 (D.C. 1999) to the contrary, because that decision to reverse the trial court's order granting the petition for a CPO was based on the fact that the trial court explicitly and erroneously refused to allow the respondent any opportunity to cross-examine the petitioner, who was proceeding *pro se*. Appellant here has not alleged that any relevant evidence was excluded; rather, he simply disagrees with how the court resolved issues of weight and credibility.

06-FM-473

ENTERED BY THE DIRECTION OF THE COURT:

GARLAND PINKSTON, JR.
Clerk of the Court

Copies to:

Hon. Robert I. Richter

Clerk, Superior Court

Elizabeth G. Oyer, Esq.

Todd S. Kim, Esq.