COURT OF COMMON PLEAS
CLERMONT COUNTY, OHIO

LAUREN HESS	:	
Petitioner	:	**CASE NO. 2015 CVP 00382**
vs.	:	**Judge McBride**
NATHAN TILLEY	:	**DECISION/ENTRY**
Respondent	:	

Jason Fountain, attorney for petitioner, Lauren Hess, 215 East 9th Street, Suite 500, Cincinnati, Ohio 45202.

Nathan Tilley, *pro se* respondent, 4504 New Market Court, Batavia, Ohio 45103.

This cause came before the court for consideration of the objections filed by petitioner Lauren Hess, to the magistrate's decision rendered in this case on April 28, 2015. The court held a hearing on the objections on July 24, 2015. At the conclusion of the hearing, the court took the issues raised by the petitioner's objections under advisement.

Upon consideration of the objections, the record of the proceeding, the evidence presented for the court's consideration, the oral and written arguments of the parties, and the applicable law, the court renders this written decision.

FACTS OF THE CASE AND PROCEDURAL BACKGROUND

The petitioner Lauren Hess filed a petition for a civil stalking protection order against the respondent Nathan Tilley on March 26, 2015. Following an ex parte hearing on March 27th, the magistrate granted the protection order. The matter came before the magistrate for a full hearing on April 8, 2015. At the conclusion of the hearing, the magistrate dismissed the case and made the factual finding that the petitioner had not met her burden of proving that the respondent engaged in a pattern of conduct that rose to the level of menacing by stalking. This court adopted the magistrate's ruling.

The petitioner filed objections to the decision and requested oral argument on April 22nd. On June 11th, the petitioner filed supplemental objections. Specifically, the petitioner objected to (1) the court's holding that the petitioner did not present sufficient evidence to prove by a preponderance of the evidence that the respondent engaged in a pattern of conduct to knowingly cause her further physical harm and mental distress and (2) the court's finding that the respondent's actions and threats were not made in a threatening way.[1] The court held a hearing on these objections on July 24, 2015.

The petitioner and respondent dated for roughly two-and-a-half to three years.[2] The petitioner testified that the respondent was often angry.[3] Destiny Jones, witness for the petitioner, testified that approximately one to two years before the full hearing, which would have been in the time frame between March 2013 and March 2014, she witnessed the respondent pour a beer on the petitioner while the two were arguing at a

[1] Pet.'r. Mem. at pgs. 7, 9.
[2] Tr. 7:8-15.
[3] Tr. 35:8-25.

party. The petitioner testified that the prior summer, which would have been between June and August 2014, she had a violent fight with the respondent over his phone outside of a party.[4] During the fight the respondent threw her onto the ground, sat on top of her, and began to strangle her.[5] He stopped when the petitioner's ride arrived. A police report was filed regarding the incident. [6]

The petitioner testified that approximately one month before the respondent's most recent act of violence, which would have been on or about February 21, 2015, the respondent "jokingly" placed his hands around the petitioner's neck and told her that he could kill her right then and no one would know.[7]

Most recently, on March 21, 2015, the petitioner and respondent were involved in a violent altercation.[8] The fight started over relationship problems while the two were at a friend's home.[9] The respondent put his hands around the petitioner's throat and began to squeeze while telling her to shut up.[10] The respondent then asked the petitioner to leave, and he followed her out to her car.[11] The argument continued outside at the petitioner's car, where the respondent called the petitioner names such as "dirty slut" and "whore."[12] The respondent shoved the petitioner and took her car keys.[13]

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[4] Tr. 33:7-20, 24:9-35:3.
[5] Tr. 24:9-35:3.
[6] Tr. 34:18-20.
[7] Tr. 32:11-20.
[8] Tr. 8:12-15.
[9] Tr. 14:17-20.
[10] Tr. 13:22-15:3.
[11] Tr. 15:5-20.
[12] Tr. 16:4-13.
[13] Tr. 17:1-7, 17:18-21.

The petitioner then got into her car and called a friend to come and pick her up.[14] The respondent threatened to "key," or scratch the surface, of the petitioner's car unless she got off the phone, and when she did not he began to key the car.[15] The petitioner became angry, got out of her vehicle, keyed the respondent's car, and then got back into her vehicle.[16] At that point the respondent reached in through her open car window, grabbed the petitioner by the hair, and began hitting her head against the car window.[17] When the respondent began to key the petitioner's car again, she got out of her car with the intention to key his car again as well.[18] Before she could reach his car, the respondent hit the petitioner twice in the back of the head, causing her to lose consciousness.[19] When she regained consciousness, the respondent was kicking her hard in the chest.[20]

The petitioner escaped, ran down the street, and called 9-1-1.[21] The petitioner had to be hospitalized and suffered multiple injuries, including broken ribs, a concussion, a black eye, and extensive bruising.[22] Upon discharge, the hospital referred her to a plastic surgeon for a possible face fracture.[23]

Beyond the four incidents described above, all of which were identified by a time frame, the petitioner also testified to other violent incidents with the respondent in which she did not specify a time frame. The petitioner testified that the respondent "jokingly"

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[14] Tr. 18:4-12.
[15] Tr. 18:10-19:5.
[16] Tr. 19:3-14.
[17] Tr. 20:13-24.
[18] Tr. 21:10-18.
[19] Tr. 21:19-22:15.
[20] Tr. 22:16-23:2.
[21] Tr. 23:14-24:1.
[22] Tr. 24:22-25:19, Petitioner's Exhibits 1-2.
[23] Tr. 27:10-13, Petitioner's Exhibit 2.

punched or hit her in the arm or shoulder every once in a while, but not hard enough to hurt.[24] The respondent often pushed or shoved the petitioner when he needed her to move.[25] On a couple occasions while driving, the respondent asked the petitioner to remove an item from his glove box and then slammed on his brakes so that her face hit the dashboard.[26] Lastly, the petitioner testified that, whenever the respondent saw her, he almost always placed his hands on the petitioner's neck.[27] She did not know why the respondent would put his hands around her neck.[28] When asked how she felt about this behavior, the petitioner answered that she "honestly didn't notice."[29] However, following the March 21st incident, the petitioner testified that she is now concerned for her safety because of what the respondent might do to harm her.[30]

Following the full hearing, the magistrate did not make any specific findings of fact other than that the petitioner failed to prove a pattern of conduct that rose to the level of menacing by stalking. At the close of the hearing the magistrate assumed "for the sake of argument" that the petitioner's testimony was entirely true.[31] Even so, the magistrate could not identify in the petitioner's testimony two acts involving menacing by stalking that were closely related in time.[32] The magistrate also stated that the petitioner had not perceived the respondent's statement that he could kill her in mid-February as a threat.[33] The magistrate stated that the other incidents of violence, the

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[24] Tr. 28:20-29-17.
[25] Tr. 29:24-30:4.
[26] Tr. 30:2-13.
[27] Tr. 30:14-22.
[28] Tr. 30:23-31:1.
[29] Tr. 32:5-7.
[30] Tr. 35:6-8.
[31] Tr. 62:17-18.
[32] Tr. 62:16-24.
[33] Tr. 63:1-5.

beer incident, and the earlier strangulation incident were not sufficiently closely related in time to the March 21, 2015 incident to satisfy R.C. 2903.211.[34]

STANDARD OF REVIEW

Civil protection orders "issued pursuant to R.C. 2903.214 are governed by Civ.R. 65.1."[35] After the "magistrate has issued its decision denying a civil protection order, such as the case here, a 'trial court may adopt the magistrate's decision after determining that there is no error of law or other defect evident on the face of the order.' "[36]

A party may then choose to object to the "court's adoption, modification, or rejection of a magistrate's denial or granting of a protection order after a full hearing, or any terms of such an order, within fourteen days of the court's filing of the order."[37] The objecting party bears the "burden of showing that an error of law or other defect is evident on the face of the order, or that the credible evidence of record is insufficient to support the granting or denial of the protection order."[38]

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[34] Tr. 63:9-17.
[35] *Wulf v. Opp*, 12th Dist. Clermont No. CA2014-10-074, 2015-Ohio-3285, ¶ 16, citing *Croone v. Arif*, 8th Dist. Cuyahoga No. 101103, 2014–Ohio–5546, ¶ 12; Civ.R. 65.1.
[36] *Wulf* at ¶ 17, citing *B.C. v. A .S.*, 9th Dist. Medina No. 13CA0020–M, 2014–Ohio–1326, ¶ 5.
[37] Civ.R. 65.1(F)(3)(d)(i).
[38] Civ. R. 65.1(F)(3)(d)(iii).

LEGAL ANALYSIS

(A) PETITIONER'S FIRST ASSIGNMENT OF ERROR

In the case at bar, the petitioner first objects to the finding that she presented insufficient evidence to prove the respondent engaged in a pattern of conduct to knowingly cause her further physical harm and mental distress.[39]

A petitioner is entitled to a civil protection order under R.C. 2903.214 when the petitioner proves that the respondent engaged in conduct constituting menacing by stalking.[40] Revised Code 2903.211(A)(1) provides: "No 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." Phrased differently, the elements for menacing by stalking under R.C. 2903.211 are: (1) "engaging in a pattern of conduct, (2) to knowingly, (3) cause another to believe that the offender will cause physical harm * * * or cause mental distress to the other person."[41]

The decision whether to grant a civil protection order lies within the sound discretion of the trial court.[42] The petitioner must prove the menacing by stalking elements by a preponderance of the evidence.[43] "'Preponderance of the evidence'

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[39] Pet.'r. Mem. at pg 1.
[40] *Wulf* at ¶ 7 citing *Lane v. Brewster*, 12th Dist. Clermont No. CA 2011-08-060, 2012-Ohio-1290, ¶ 18.
[41] *State v. Dario*, 106 App.3d 232, 238, 665 N.E.2d 758 (1st Dist. 1995).
[42] *Parrish v. Parrish*, 95 Ohio St.3d 1201, 1204, 765 N.E.2d 359 (2002), citing *Deacon v. Landers*, 68 Ohio App.3d 26, 587 N.E.2d 395 (1990).
[43] *Henry v. Coogan*, 12th Dist. Clermont No. CA2002–05–042, 2002–Ohio–6519, ¶ 15.

means the greater weight of the evidence, or evidence that leads the trier of fact to find that the existence of the contested fact is more probable than its nonexistence."[44]

For the first element, a pattern of conduct is defined as "two or more actions or incidents closely related in time.[45] For the second element, knowingly means that "regardless of purpose * * * the person is aware that the person's conduct will probably cause a certain result or will probably be of a certain nature."[46] For the final element, mental distress means "[a]ny mental illness or condition that involves some temporary substantial incapacity" or "[a]ny mental illness or condition that would normally require psychiatric treatment, psychological treatment, or other mental health services."[47]

The petitioner's first objection concerns the magistrate's decision to dismiss the case due to her finding the petitioner had not proved the respondent engaged in a pattern of conduct rising to the level of menacing by stalking. The petitioner argues the respondent did exhibit a recognizable "pattern of conduct."[48] As discussed, to reach the petitioner's conclusion, the respondent must have knowingly engaged in "two or more actions or incidents closely related in time" that caused the petitioner to believe she would suffer physical harm or mental distress.[49]

Because "closely related in time" is undefined by statute, "[w]hether the incidents are 'closely related in time' should be resolved by the trier of fact considering the

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[44] *Wulf*, 2015-Ohio-3285, at ¶ 8.
[45] R.C. 2903.211(D)(1); See, also, *Ensley v. Glover*, 6th Dist. Lucas No. L-11-1026, 2012-Ohio-4487, ¶ 15 (holding that one incident alone is insufficient to form a pattern of conduct under R.C. 2903.211).
[46] R.C. 2901.22(B).
[47] R.C. 2903.211(D)(2).
[48] Pet.'r. Mem. at pg. 7.
[49] R.C. 2903.211(D)(1); See, also, *Glover* at ¶ 15 (holding that one incident alone is insufficient to form a pattern of conduct under R.C. 2903.211).

evidence in the context of the circumstances of the case."[50] When "determining what constitutes a pattern of conduct for the purposes of R.C. 2903.211(D)(1) * * * courts must take everything into consideration even if * * * some of the person's acts may not, in isolation, seem particularly threatening."[51] A pattern of conduct "may arise out of two or more events occurring the same day * * * or it may consist of intermittent incidents occurring over a period of years."[52] Hence, whether the incidents are sufficiently closely related in time is determined on a case-by-case basis.[53]

In the course of determining whether incidents are closely related enough in time, the court must necessarily determine which of the respondent's actions caused the petitioner to believe the respondent would cause her physical harm or mental distress. The Twelfth District Court of Appeals has expressly rejected the argument that courts should use the reasonable person standard to "determine whether a reasonable person in the 'same of similar circumstances' would suffer mental distress or physical harm'" due to the respondent's actions.[54] Rather, the court must determine "the respondent's effect" on the specific petitioner involved.[55]

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[50] *Middletown v. Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E. 2d 1003, ¶ 10 (2nd Dist.), quoting *State v. Honeycutt*, 2nd Dist. Montgomery, 2002-Ohio-3490, ¶ 26. Accord *State v. Dario*,106 App.3d 232 at 238, 665 N.E.2d 759 (holding same).

[51] *Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E. 2d 1003 at ¶ 10, quoting *Guthrie v. Long*, 10th Dist. Franklin No. 04AP-913, 2005-Ohio-1541 at ¶ 12.

[52] (Citation omitted.) *Ellet v. Falk*, 6th Dist. Lucas No. L-09-1313, 2010-Ohio-6219, ¶ 25.

[53] *Bloom v. Macbeth*, 5th Dist. Ashland No. 2007-COA-050, 2008-Ohio-4564, ¶ 10, citing *Dario*. 106 App.3d 232 at 238, 665 N.E.2d 758.

[54] *Brewster*, 2012-Ohio-1290 at ¶ 19.

[55] Id. at ¶ 20; R.C. 2903.211(A)(1). See *Tuuri v. Snyder*, 11th Dist. Geauga No. 2000-G-2325, 2002 WL 818427, *3, 2002-Ohio-2107 ("[T]he trial court needs to view the actions with their respect to the effect on the petitioner."); *Miller v. Francisco*, 11th Dist. Lake, 2003-Ohio-1978, ¶ 11, overruled in part on other grounds, *Davis v. Dinunzio*, 11th Dist. Lake No. 2004-L-106, 2005-Ohio- 2883 (holding same). *But see State v. Woodgeard*, 5th Dist. Fairfield No. 45-CA-SEP-1993, 1994 WL 167928, *1 (April 29, 1994) (finding proper the trial court's instruction limiting the jury's consideration of the past incidents or acts to the issue of whether a reasonable person might suffer mental distress under the circumstances).

In the case at bar, the most recent incident that caused the petitioner to believe the respondent would cause her physical harm or mental distress is the March 21, 2015 incident. As described in the petitioner's testimony and supported by her exhibits, during the March 2015 incident the respondent hit the petitioner to the point of losing consciousness, and then he broke her ribs from kicking her in the chest. The petitioner testified that following the incident she now fears physical harm from the respondent. Accordingly, the March 2015 incident is a recent incident that could qualify as part of a pattern of conduct for R.C. 2903.211 purposes. The issue becomes identifying a second, qualifying incident that is closely related in time to the March 2015 incident.

The petitioner posits that the respondent's February 2015 statement that he could kill her forms a pattern of conduct when coupled with the March 2015 incident. While closely related in time to the March 2015 incident, the February 2015 incident did not cause the petitioner to believe the respondent would cause her physical harm or mental distress, and therefore it does not qualify as part of a pattern of conduct.[56]

During the February 2015 incident, the respondent placed his hands around the petitioner's neck and said he could kill her without anyone knowing. However, this incident is not part of a larger pattern of conduct because the petitioner testified that she believed the respondent's comment was a joke, not a threat.

The petitioner now counters that the respondent's statement was threatening regardless of how the petitioner interpreted it.[57] Regardless, although the respondent's comment may be threatening from the perspective of a reasonable person in the petitioner's circumstances, the reasonable person standard is inapplicable. Rather, the

[58] R.C. 2903.211(A)(1).
[57] Pet.'r. Mem. at pg. 9.

court must look to the effect the respondent's words and actions had on this specific petitioner.[58] This specific petitioner testified that the comment was made "jokingly," not threateningly.

The petitioner also argues that the court should view the facts and circumstances of her case from her perspective at the time she filed for the protective order in March 2015. Under this framework, it would be immaterial that at the time of the February 2015 incident the petitioner viewed the respondent's threat to kill her as a joke. Under her theory, when coupled with the March 2015 assault, the February 2015 threat forms a pattern of conduct because the petitioner currently views the February 2015 threat as an actual threat on her life.

In support of this theory, the petitioner during oral argument cited *Guthrie v. Long*, 10th Dist. Franklin No. 04AP-913, 2005-Ohio-1541, for the proposition that the court must contextualize the petitioner's circumstances rather than view the incidents in a vacuum. The importance of contextualization is illustrated by *Smith v. Wunsch*, 162 Ohio App.3d 21, 2005-Ohio-3498, 832 N.E.2d 757 (4th Dist.), where the appellee sought a protection order from her former boss.[59] One of the incidents that formed the pattern of conduct was a visit from the appellant at the appellee's work.[60] The appellant was the appellee's former boss, and she had been his clerk.[61]

Viewed in isolation, the office visit seems innocent and normal. However, because the appellant had previously made a habit of following the appellee to and from her job and around town, called her numerous times, e-mailed her numerous times, hid

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[58] *Brewster*, 2012-Ohio-1290 at ¶ 19.
[59] Id. at ¶ 3.
[60] Id. at ¶ 4.
[61] Id. at ¶¶ 3-4.

in bushes outside her office, etc., the office visit from the appellant was clearly one part of a larger pattern of conduct used to cause the petitioner to believe that the respondent would cause her physical harm or mental distress.[62] Although contextualizing a series of incidents is important to the court's analysis, the petitioner in the case at bar has not identified a case holding that the respondent's actions must be viewed from the perspective of the petitioner at the time the she sought the protective order instead of at the time the action occurred. None of the cases that the court has reviewed employ the petitioner's reasoning. As such, the court declines to adopt the petitioner's position and finds the February 2015 threat cannot qualify as part of a pattern of conduct.

Similar problems plague the petitioner's argument that the respondent's past incidents of hitting her and placing his hands on her throat are part of a larger pattern of abusive conduct.[63] Prior to the March 2015 incident, the respondent hit the petitioner "jokingly." The hitting only occurred once in a while, and it was not hard enough to hurt her. As to the defendant placing his hands on her neck, while such behavior may be considered threatening under a reasonable person standard, the petitioner herself testified she did not notice when he did this. The petitioner did not testify that these incidents caused her to believe that the respondent may cause her mental distress or physical harm. Accordingly, instances of the respondent jokingly hitting the petitioner or placing his hands on her neck are not part of a pattern of conduct for the purposes of R.C. 2903.211.

The petitioner and Destiny Jones testified to two additional incidents of abuse that could be identified by rough time frames. One to two years before the full hearing,

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[62] Id. at ¶¶3-4.
[63] Pet.'r. Mem. at pg. 5.

between March 2013 and March 2014, the respondent poured a beer on the petitioner while the two were arguing at a party. The next incident was the summer before the full hearing, which would have been between June and August 2014. The petitioner and the respondent fought outside of a party, during which time the respondent threw her onto the ground, sat on top of her, and strangled her. For the latter incident, the petitioner filed a police report. At minimum, the strangling incident was 8 months before the March 2015 incident, and at maximum the strangling incident was 10 months before the March 2015 incident.

The longest time period the court has identified separating two incidents that form a pattern of conduct, where there was no harassment or abuse in between, was 10 months. In *State v. Honeycutt*, 2nd Dist. Montgomery No. 19004, 2002 WL 1438648, *5. 2002-Ohio-3490, the court held that a 10-11 month period in between the appellant's two incident's involving the appellee were "closely related in time." There, the two most recent incidents were in October 1999 and September 2000.[64] During those months the appellant had been confined in a psychiatric unit and did not have the means to contact or harass the appellee.[65] In contradistinction to this case, "because Honeycutt was confined in the Twin Valley Psychiatric Unit during those months, the incidents can be considered closely related in time."[66]

Longer time spans than 10 months have been deemed "closely related in time," but only when the respondent continually harassed the petitioner in between the two incidents. For instance, in *Noah v. Brillhart*, 9th Dist. Wayne No. 02CA0050, 2003-Ohio-2421, ¶ 14, the Ninth District Court of Appeals held that a two year time period

[64] *State v. Honeycutt*, 2nd Dist. Montgomery No. 19004, 2002 WL 1438648, *5. 2002-Ohio-3490.
[65] Id.
[66] Id.

was considered "closely related in time" because the appellee had endured harassment by the appellant throughout those the two years.[67] As another example, in *Retterer v. Little*, 3rd Dist. Marion No. 9-11-23, 2012-Ohio-131, ¶ 33, the Third District Court of Appeals found that a five year span constituted a "pattern of conduct." The court explained that just because "each of the specific incidents occurred over a period of five years, that fact alone does not prohibit a finding that the [respondent] engaged in a pattern of conduct."[68] Rather, "during the periods of time in between each incident [the respondent] verbally abused [the petitioners] whenever he saw them."[69] Hence, when a respondent continues to harass a petitioner in between incidents, a time span of months or years may form a "pattern of conduct" to satisfy the menacing by stalking standard.[70]

Unlike the cases above, the petitioner in this case did not testify that the respondent harassed or abused her between the summer of 2014 strangulation incident and the March 2015 assault. She testified that the respondent has pushed or shoved her, but she did not identify when or how near these incidents were to the March 2015 incident. In addition, a couple times while driving he asked her to get something from

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[67] *See Snyder*, 2002 WL 818427 at *3-4 (holding that a two year time span between breaking and entering on two occasions were sufficiently "close in time" because there was also continual thinly veiled threats and telephone harassment); *Macbeth*, 2008-Ohio-4564 at ¶¶ 6, 12 (finding that a two year time span before the hearing was sufficient where the appellant engaged in nine incidents, with two taking place within the last month of the hearing).

[68] *Retterer v. Little*, 3rd Dist. Marion No. 9-11-23, 2012-Ohio-131, ¶ 33.

[69] Id.

[70] In oral argument the petitioner cited to *Jones v. Middletown* for the proposition that a series of conduct over years can constitute a pattern of conduct. *Jones*, 167 Ohio App.3d 679, 2006-Ohio-3465, 856 N.E. 2d 1003. While that proposition generally is correct, that case is factually distinguishable from the case at bar. In *Jones* the appellant argued that the incidents were not closely related in time because the first incident was in 2001 and the incident leading to his arrest was in 2004. Id. at ¶ 9. Although the time period spanned years, the *Jones* Court held that the incidents were closely related in time. Id. at ¶ 10. Unlike the instant case, there were "numerous" incidents throughout that entire time period and the two most recent incidents had occurred in the same month. Id. at ¶ 11. Therefore, when contextualized, the appellant's actions formed a pattern of conduct. Id.

the glovebox for him, and then he slammed on the brakes so that she would hit her face on the dashboard. Without any testimony suggesting that these incidents of abuse occurred between summer 2014 and March 2015, they do not form a pattern of conduct.[71]

Even after assuming that the entirety of the petitioner's testimony was credible, she still has not met her burden of demonstrating menacing by stalking by a preponderance of the evidence. A pattern of conduct cannot not be formed because all incidents with the respondent had one of the following deficiencies: (1) the respondent's actions did not cause the plaintiff to subjectively believe he may cause her mental distress or physical harm, (2) the respondent's actions, although serious, were too remote in time to the March 2015 incident, or (3) the petitioner's testimony describing abusive conduct did not reference any time frame or otherwise indicate if the incidents occurred near the time of the March 2015 incident. The facts and circumstances of this case do not meet the legal standard for issuing a civil protection order for menacing by stalking. Accordingly, the court finds that the credible evidence of record sufficiently supports the denial of the protection order.

[71] *See Dupal v. Sommer* 5th Dist. Stark No. 2009CA00032, 2009-Ohio-5791, ¶ 15 (excluding testimony that supported harassing conduct because there was "no time frame as to when he observed these events. His testimony was therefore immaterial."); *Dinunzio*, 2005-Ohio- 2883 at ¶ 39 (finding the a lack of specific dates identifying when stalking incidents occurred was permissible because the petitioner described how far apart the incidents were).

(B) PETITIONER'S SECOND ASSIGNMENT OF ERROR

The petitioner's second objection is that the magistrate erred in concluding that the respondent's actions were not made in a "threatening way."[72] The petitioner argues that the respondent's comments in February 2015 that he could kill the petitioner were a threat, irrespective of whether he said it with "a scowl or smile."[73] As discussed, the respondent's comment could be threatening from the perspective of a reasonable person in the petitioner's circumstances, but the court must look to the effect the respondent's words and actions had on this specific petitioner.[74] The petitioner testified that the comment was made "jokingly," not threateningly, as she sees it today.

Under R.C. 2903.211 the petitioner must prove that the defendant's statement was made to knowingly to cause her to believe that the respondent will cause physical harm or mental distress.[75] Even if the court assumes the respondent had "clear intent to make Ms. Hess believe he would cause her further harm," the petitioner still has not met her burden of proof.[76] She would have shown that the respondent's comment was made "knowingly," thus satisfying the second element for menacing by stalking. However, his intent does not change the fact that, for the purposes of the third element, he did not cause the petitioner to believe that the he would cause her physical harm or mental distress in making the comment. Therefore the petitioner's second objection is overruled.

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[72] Pet.'r. Mem. at pg. 9.
[73] Id.
[74] *Brewster*, 2012-Ohio-1290 at ¶ 19.
[75] *State v. Dario*, 106 App.3d 232 at 238, 665 N.E.2d 758.
[76] Pet.'r. Mem. at pg. 9.

CONCLUSION

The facts of the instant case do not support a finding that "a pattern of conduct" existed, as it has been defined by statute and applied in case law, to knowingly cause the petitioner physical harm or mental distress.[77]

For the foregoing reasons, the petitioner's objections to the magistrate's decision are not well taken. The court overrules the objections and adopts the magistrate's decision.

IT IS SO ORDERED.

DATED: 9-22-2015

Judge Jerry R. McBride

[77] R.C. 2903.214.