VERMONT SUPREME COURT
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Case No. 23-AP-373

Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

JUNE TERM, 2024

Richard Hill v. David Andrus*

} APPEALED FROM:
} Superior Court, Grand Isle Unit,
} Civil Division
} CASE NO. 23-ST-01205
Trial Judge: Samuel Hoar, Jr.

In the above-entitled cause, the Clerk will enter:

Defendant appeals a final order against stalking requiring him to stay away from plaintiff, his neighbor. We affirm.

In October 2023, plaintiff filed a complaint seeking an anti-stalking order under 12 V.S.A. § 5133. In a supporting affidavit, he alleged that defendant threatened him in connection with an ongoing boundary dispute. The civil division issued a temporary protective order and set the matter for a final hearing.

Both parties were represented by counsel at the November 2023 hearing. The court heard testimony from plaintiff, defendant, and plaintiff's ex-wife, E.H.

E.H. testified to the following. She lives across the road from plaintiff and defendant, who are next-door neighbors. By May 2023, the once-friendly relationship between the parties had soured because defendant was challenging the location of the boundary between their respective properties. On September 25 of that year, E.H. was visiting plaintiff when defendant asked plaintiff to walk over to his property with him. After instructing E.H. to stay where she was, plaintiff accompanied defendant to defendant's property. E.H. subsequently heard defendant screaming at plaintiff and saw defendant's wife standing between the two men, pushing defendant back. Defendant yelled at plaintiff to get off his property and stated, "if you don't move, I will move you myself."

Plaintiff also testified about the events of September 25. He explained that defendant invited him to his property and then "threatened . . . gun violence," indicating "that things were getting so bad for him that guns would be involved." He further stated that defendant threatened him with bodily harm during this encounter by warning that he would physically remove plaintiff from his property.

Plaintiff explained that defendant had threatened to "put his hands on [him]" on more than one occasion, describing "constant" threats of "physical violence" prior to September 25. Plaintiff could not recall the dates on which these incidents occurred or provide further detail about the threats. He indicated that defendant is tall and, when angry, would take advantage of his height by standing in close proximity to intimidate plaintiff.

Plaintiff testified that he is seventy-five, lives alone, and has several medical problems; he took defendant's threats seriously and is "very nervous about him now."

For his part, defendant conceded that he had "a couple" conversations with plaintiff about the boundary issue that became "heated on both sides." He characterized the September 25 exchange on his property as "very heated," and explained that, in an effort to calm himself and bring levity to the situation, he told plaintiff: "Well, I guess it's time for lawyers, guns, and money,"—referencing a lyric from the Warren Zevon song of the same name. See Warren Zevon, Lawyers, Guns and Money, on Excitable Boy (Asylum Records 1978). Defendant denied ever threatening plaintiff with a gun. He recalled asking plaintiff to leave and plaintiff refusing to do so, but did not remember threatening plaintiff with physical removal. He testified that the encounter ended when he walked away.

When asked, plaintiff did not recall defendant saying, "I guess it's time for lawyers, guns, and money," and indicated he was unaware of any song including such lyrics. He did describe defendant saying "three things" to him: "The physical harm. I have plenty of money; I'm going to ruin you financially. Better get your lawyers." He also recalled later telling law enforcement that defendant had warned him, "this will be handled either with guns or lawyers." Plaintiff agreed that defendant never actually approached him with a gun.

The trial court, constituted of one superior court judge and two assistant judges, weighed this evidence. See 4 V.S.A. § 36(a), (b) (providing that unless otherwise specified by law, civil division of superior court shall consist of one presiding superior judge and two assistant judges, if available). The presiding superior judge then announced a split decision from the bench, indicating that two out of three judges found the following facts by a preponderance of the evidence:

> On a number of occasions, most recently on September 25 of this year, [defendant] did physically threaten [plaintiff]; that his actions were intended to and did, in fact, convey threats. They were calculated to, and did, put a reasonable person in reasonable fear of bodily harm. And so [defendant] did engage in a course of conduct that rises to the level of stalking, as defined by statute.

The court indicated it would issue a final order against stalking. Defendant's counsel objected, arguing that the testimony did not support a finding of two or more specific instances of conduct as required under 12 V.S.A. § 5131(1)(A). The court did not reconsider its conclusion and issued the final order.[1] This appeal followed.

[1] Though the court's oral findings reflected a split decision, its written decision—signed by all three judges—does not denote the apparent disagreement of one judge with the majority's factual findings. A judge's signature on an order, without further qualification, indicates endorsement of the factual findings therein. Cf. Velardo v. Ovitt, 2007 VT 69, ¶ 8, 182 Vt. 180 (noting that assistant judge's signature on court's order "represent[s] approval of the factual

Whether the civil division correctly interpreted the anti-stalking statute is a question of law that we review de novo. Morton v. Young, 2023 VT 29, ¶ 10, __ Vt. __. However, we will not disturb the court's factual findings unless they are "clearly erroneous when viewed in the light most favorable to the prevailing party," Swett v. Gates, 2023 VT 26, ¶ 20, __ Vt. __ (quotation omitted), and will uphold its conclusions if supported by the findings, Haupt v. Langlois, 2024 VT 3, ¶ 9, __ Vt. __.

Under 12 V.S.A. § 5133(d), the court is required to issue an anti-stalking order if it finds by a preponderance of the evidence that the defendant stalked the plaintiff. "Stalk" means "to engage purposefully in a course of conduct directed at a specific person that the person engaging in the conduct knows or should know would cause a reasonable person" to either fear for their safety or the safety of a family member or suffer substantial emotional distress. Id. § 5131(6). The statute defines "course of conduct," in relevant part, as "two or more acts over a period of time, however short, in which a person . . . threatens, or makes threats about another person." Id. § 5131(1)(A). Because a course of conduct cannot include constitutionally protected activity, see id., the threats at issue must be "true threats"—those that "communicate[] intent to inflict physical harm on another person." Hinkson v. Stevens, 2020 VT 69, ¶¶ 43-46, 213 Vt. 32 ("The civil stalking statute implicitly prohibits only true threats, because it excludes constitutionally protected activity from the definition of 'course of conduct.' "). However, they need not be "express or overt." 12 V.S.A. § 5131(1)(B).

On appeal, defendant argues that the evidence was insufficient under these standards to support an anti-stalking order. He contends that neither the reference to guns nor the statement about removing plaintiff from his property constitute true threats and, even if so construed, cannot comprise a "course of conduct" because they were part of a single, continuous incident on September 25. Finally, he asserts that plaintiff's testimony that defendant threatened him with bodily harm on other occasions lacked sufficient detail to be evaluated: because plaintiff did not specify defendant's statements, the court could not determine whether they were true threats, and because plaintiff did not recall when the statements were made, it was impossible to conclude that they occurred on more than one occasion such that they constituted a course of conduct. Plaintiff did not file a brief.

Defendant raised no argument pertaining to true threats in the civil division. Because the trial court did not have a fair opportunity to consider and rule on the arguments he now presents, they are not preserved for our review. See Hinkson, 2020 VT 69, ¶¶ 35-36 (explaining that issue is not preserved for appeal where not presented below); see also Garilli v. Town of Waitsfield, 2008 VT 91, ¶ 7, 184 Vt. 594 (explaining that preservation rule "is no different for constitutional claims"). However, defendant's objection adequately preserved his contentions that the evidence cannot support a finding that he engaged in a course of conduct under § 5131(1)(A).

As noted above, the court determined that defendant physically threatened plaintiff "[o]n a number of occasions, most recently on September 25." In considering whether defendant engaged in "two or more acts" amounting to a "course of conduct" under 12 V.S.A.

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findings"). Moreover, "where inconsistencies exist between oral and written findings, the written findings must prevail." Hanson-Metayer v. Hanson-Metayer, 2013 VT 29, ¶ 46, 193 Vt. 490. Thus, while it does not impact the result here, we note that that the correct practice would have been for the judge who did not join the majority's findings to sign the order subject to language indicating this disagreement, such that the written order was consistent with the positions set forth in the oral decision.

§ 5131(1)(A), courts must weigh factors similar to those set forth in State v. Fuller, 168 Vt. 396, 400 (1998). Beatty v. Keough, 2022 VT 41, ¶ 19, 217 Vt. 134. These include "the elapsed time between successive parts of the defendant's conduct; whether the defendant's conduct occurred in more than one geographic location; whether an intervening event occurred between successive parts of the defendant's conduct;" and "whether there was sufficient time for reflection between . . . acts for the defendant to again commit himself." Fuller, 168 Vt. at 400.

Though the trial court's findings could have been more explicit, they clearly reflect a determination that defendant threatened plaintiff at least once on September 25 and at least once on a distinct, earlier occasion.[2] See Smith v. Wright, 2013 VT 68, ¶ 16, 194 Vt. 326 ("Extensive findings are not generally required in civil abuse proceedings, which are aimed at providing relief to the putative victim rather than punishing the alleged perpetrator."); see also Haupt, 2024 VT 3, ¶ 19 (explaining that cases interpreting civil relief-from-abuse statute are relevant to interpretation of civil stalking statute because former incorporates latter by reference and their statutory purposes are aligned). This finding is not clearly erroneous. In addition to the evidence about the events of September 25 adduced through plaintiff and E.H., it is supported by plaintiff's testimony that defendant threatened to "put his hands on [him]" on "more than one" occasion, and his description of defendant's threats of "physical violence" as "constant." See Swett, 2023 VT 26, ¶ 20. It was for the trial court, not this Court, to "assess the credibility of witnesses and weigh the evidence." Beatty, 2022 VT 41, ¶¶ 6, 41 ("As a general matter, the question of whether there are 'two or more acts' presents a question of fact for the trial court to resolve, considering all of the circumstances.").

Defendant contends that "[s]uch flimsy evidence could not support a criminal charge, and it accordingly cannot support a no-stalking order." This argument misapprehends the connection between the civil stalking statute and Vermont's criminal stalking statute, 13 V.S.A. § 1061. We explained in Hinkson that "[b]ecause the Legislature has applied both civil and criminal sanctions to the same definition of stalking, we interpret [the] civil statute as if it were a criminal statute." 2020 VT 69, ¶ 30. This means that we construe the relevant definitions "together and in harmony if possible." Hinkson, 2020 VT 69, ¶ 30 (quotation omitted). It does not mean that both definitions are subject to the same standard of proof. Though the State must prove the elements of criminal stalking beyond a reasonable doubt, see State v. Messier, 145 Vt. 622, 625 (1985), the Legislature required that the plaintiff in a civil stalking case establish his allegations only by a preponderance of the evidence. 12 V.S.A. § 5133(d); see In re M.L., 2010 VT 5, ¶ 25, 187 Vt. 291 (explaining that preponderance standard satisfied "[w]hen the equilibrium of proof is destroyed, and the beam inclines toward him who has the burden, however slightly . . . . A bare

[2] Defendant argues that although plaintiff may not have recognized the Warren Zevon lyric he allegedly quoted on September 25, plaintiff "recalled enough of the words of the communication to make it clear that this was indeed [defendant's] reference." As a result, defendant asserts, this evidence cannot support a conclusion that he purposefully engaged in conduct he knew or should have known would cause a reasonable person to fear for his safety or suffer substantial emotional distress. See 12 V.S.A. § 5131(6). However, the trial court did not find that defendant mentioned guns only in quoting a song. Nor does the evidence, viewed in the light most favorable to plaintiff, compel this conclusion. See Swett, 2023 VT 26, ¶ 20. Though plaintiff testified that defendant variously referenced lawyers, guns, and money, he never linked these three concepts in that precise sequence, and he indicated that he interpreted defendant's statement as a serious threat of gun violence. This evidence, as well as the testimony about defendant's warning that he would remove plaintiff from his property, could support the court's finding that defendant purposefully physically threatened plaintiff on September 25.

preponderance is sufficient, though the scales drop but a feather's weight" (quotation omitted) (alteration in original)). Under this standard, the trial court's conclusions were "reasonably drawn from the evidence presented." Swett, 2023 VT 26, ¶ 20 (quotation omitted).

Because the evidence was sufficient to support the court's conclusion that defendant threatened plaintiff on September 25 and at least one other occasion, we need not consider whether it supports a determination that "two or more acts" constituting a course of conduct also occurred on September 25.

Affirmed.

BY THE COURT:

Harold E. Eaton, Jr., Associate Justice

Karen R. Carroll, Associate Justice

Nancy J. Waples, Associate Justice