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

SUPREME COURT DOCKET NO. 2017-380

MAY TERM, 2018

Brian K. Bannister v. David Graves*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 96-9-17 Frsa
		Trial Judge: A. Gregory Rainville

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

Defendant appeals an order against stalking. On appeal, defendant's main arguments are that (1) the evidence does not support the court's findings; (2) the court erred in admitting a recording of defendant; (3) defendant was not allowed to present his entire defense; and (4) defendant had insufficient time to prepare his case. We affirm.

In September 2017, plaintiff filed a complaint for a civil order against stalking alleging that defendant owned land adjacent to his and had followed him, made threats, and interfered with his property, causing him to fear for his safety. The court held a hearing on the petition in October 2017. Plaintiff was represented by counsel at the hearing. Plaintiff testified concerning defendant's behavior. He stated that in September defendant had driven by and yelled obscenities at him. Plaintiff testified that after defendant arrived at the adjoining property, he heard twelve to fifteen gunshots. Plaintiff stated that a few weeks prior to that he drove past defendant at the mailbox and defendant yelled obscenities at plaintiff. Plaintiff stated that defendant drove past his house four or five times a week. Plaintiff has security cameras and he stated that on one occasion defendant sat in front of the house for fifteen to twenty minutes. Plaintiff offered a recording to demonstrate defendant's threatening behavior. Plaintiff stated that it was taken a year and half prior to the hearing. The court admitted the recording over defendant's objection that the recording was not relevant. On the recording, which is laced with profanity, defendants calls plaintiff several derogatory names, and states he "will never stop," and "burn your house." Plaintiff stated that he feels threatened by defendant's behavior.

Defendant was present and represented himself. The court permitted him to cross-examine plaintiff. After asking a few questions, defendant inquired why plaintiff was using the old tape rather than something more recent. Plaintiff answered that it showed defendant's language and wording, and further stated: "Every day you're up there giving me a hard time, threatening and giving me a problem." Defendant then stated "Shut up. I didn't want to ask you that." At that point, the court directed defendant to sit down and ended the cross-examination, explaining that that type of attitude was not permitted. Defendant presented testimony from two witnesses and testified on his own behalf. The court made oral findings. The court found that the parties have an ongoing dispute and that defendant, when upset, had loudly yelled at plaintiff and had repeated

that behavior several times over the prior year or two. The court found that defendant's behavior would cause reasonable people to be upset and fear for their safety. The court granted the order against stalking, finding that defendant had threatened plaintiff and interfered with plaintiff's property and knew or should have known this would cause a reasonable person to fear for his or her safety or to suffer emotional distress.

Defendant first argues that the court's order was not supported by the evidence. The court had authority to issue the no-stalking order if it found "by a preponderance of evidence that the defendant has stalked . . . the plaintiff." 12 V.S.A. § 5133(d). The law defines "stalk" as engaging "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 . . . . fear for his or her safety" or "suffer substantial emotional distress." 12 V.S.A. § 5131(6)(A)-(B). Here, plaintiff's testimony was that defendant had routinely passed by plaintiff's house, defendant on at least one occasion stayed in front of plaintiff's house for at least fifteen minutes, defendant yelled obscenities directed at plaintiff and threatened plaintiff, on one occasion defendant threatened plaintiff with a shovel, and firearms were discharged adjacent to plaintiff's property soon after defendant had yelled at plaintiff. On the recording plaintiff offered, defendant is yelling obscenities and states "he will never stop" and "burn your house." Defendant denies that some incidents occurred and provides alternate explanations for some of his behavior, but it is not this Court's role to reevaluate the evidence. It was up to the trial court judge the credibility of the witnesses. Whippie v. O'Connor, 2011 VT 97, ¶ 6, 190 Vt. 600 (mem.). As long as there is evidence in the record to support the court's findings, which there is in this case, they will be affirmed. Here, the evidence supports the court's findings that defendant stalked plaintiff by making threats and interfering with plaintiff's property and that that behavior would cause a reasonable person fear or to suffer emotional distress.

Defendant next contends that the court erred in admitting the recording of defendant yelling at plaintiff because it was not taken recently. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." V.R.E. 401. The trial court has discretion to determine whether to admit evidence. State v. Larose, 150 Vt. 363, 371 (1988) (explaining that court has discretion to decide what evidence is admissible and decision "will not be overturned on appeal absent a showing of an abuse of that discretion" (quotation omitted)). Here, the court acted within its discretion in admitting the recording. The recording was relevant to demonstrating whether defendant's behavior was threatening and specific to plaintiff, and whether it would cause a reasonable people to fear for their safety or to have emotional distress. That the recording was over a year and a half old may have affected the weight the court would apply to the evidence, something within the court's purview. Johnson Bldg. Specialists v. Brennan, 145 Vt. 337, 339 (1985) (explaining that "the weight of the evidence, and its persuasive effect are questions for the trier of fact"). But it does not make the tape irrelevant.

Defendant also argues that he was not notified of the final hearing date of October 17, 2017 until October 13, 2017 and had an inadequate opportunity to prepare. Generally, issues that are not presented to the trial court cannot be raised on appeal. O'Rourke v. Lunde, 2014 VT 88, ¶ 17, 197 Vt. 360. At no time did defendant seek more time or ask to continue the hearing. Having failed to raise this argument in the trial court defendant has not preserved it for appeal.

Defendant asserts that he received an inadequate opportunity to present his defense at the hearing, citing the court's action in cutting off his cross-examination of plaintiff. We conclude that the court acted within its discretion in directing defendant to stop cross-examination after defendant told plaintiff to "shut up." State v. Settle, 141 Vt. 58, 63 (1982) ("Control of cross and redirect examination lies within the sound discretion of the trial court."). Defendant does not

specify other ways in which the proceeding denied him a right to defend himself. In fact, the record demonstrates that the court gave defendant a chance to present his case by testifying himself and presenting testimony from two witnesses. Therefore, we conclude that defendant was not denied an opportunity to present a defense.

Defendant's additional assertions do not provide grounds to invalidate the no-stalking order. Defendant claims that he did not violate a previous no-stalking order, but this is not relevant to the current order, which did not rest on a finding that defendant violated a prior order. Defendant also states that that he was more than 500 feet away from plaintiff when plaintiff heard him yelling; but, the court's decision here did not rest on defendant's distance from plaintiff. Finally, defendant claims that plaintiff is using the no-stalking order to gain an advantage in a different legal matter. The motive for filing a request for a no-stalking order is not relevant under the statutory scheme. See 12 V.S.A. § 5133(d) (requiring court to "order the defendant to stay away from the plaintiff" if it finds that defendant has stalked plaintiff and not requiring finding concerning plaintiff's motive).

Affirmed.

BY THE COURT:

_____
Paul L. Reiber, Chief Justice

_____
Beth Robinson, Associate Justice

_____
Harold E. Eaton, Jr., Associate Justice