Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2003-290

JANUARY TERM, 2004

Julie Gaboriault	APPEALED FROM:
	Chittenden Family Court
v.	DOCKET NO. 344-5-03Cnfa
Philip Van Aelstyn	Trial Judge: Douglas P. Cohn

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

Defendant appeals from a final relief-from-abuse order issued by the Chittenden Family Court. Defendant contends the order is invalid because: (1) he did not receive proper notice of the hearing; (2) technical difficulties impeded his ability to participate meaningfully in the hearing; (3) the court=s findings are unsupported by the evidence; 4) the court was prejudiced, confused as to the burden of proof, and mismanaged the courtroom; and (5) the order improperly includes plaintiff= s children and boyfriend. We agree that the order could not apply to the complainant=s boyfriend, and direct that that portion of order be stricken. In all other respects, the order is affirmed.

Viewed in the light most favorable to the judgment, Coates v. Coates, 171 Vt. 519, 520 (2000) (mem.), the record evidence may be summarized as follows. Defendant and plaintiff ended a sexual relationship sometime in April 2002. On May 13, 2003, plaintiff applied for, and was granted, a temporary relief-from-abuse order against defendant. On May 22, the court held an evidentiary hearing. Defendant was living in California at the time and participated by telephone. Neither party was represented by counsel[1]. Plaintiff testified that since their break-up, defendant had been sending her threatening and abusive messages by e-mail and voice-mail. Several e-mails from defendant to plaintiff were admitted, and showed B among other things B that defendant was angry and upset about a relationship between plaintiff and another man. In addition to numerous obscene and insulting comments, the e-mails included such statements as follows: Athe hypothetical tramp should die, slowly and painfully@ (e-mail of June 6, 2002); A[i]f you can sleep at night, I would suggest keeping one eye open@ (e-mail of June 6, 2002); A[y]ou picked the wrong guy to [expletive deleted] with@ (e-mail of October 28, 2002); Ayou haven=t even begun to pay the price for it yet@ (e-mail of January 5, 2003); and A payback is a bitch@ (e-mail of May 13, 2003). The last e-mail message also contained a threat to post sexually graphic photographs of plaintiff on the web. In addition, plaintiff testified that defendant had left her a voice-mail on May 13, 2003, stating that, AI could [expletive deleted] you up.@ Plaintiff also indicated that defendant had the financial means to fly to Vermont whenever he wanted, that he had flown unannounced to Vermont in the past, and that she lived in constant fear that he would show up and cause her physical harm.

Defendant testified, denying that he had threatened plaintiff or that the e-mail and voice-mail statements represented threats of imminent physical harm. At the conclusion of the hearing, the court found that the parties had engaged in a sexual relationship and thus were Ahousehold members@ under 15 V.S.A. ' 1101(2), and that defendant=s e-mail and voice-mail statements could be viewed as threatening and entitled plaintiff to relief from abuse. Accordingly, the court issued a final relief-from-abuse order, prohibiting defendant from having any contact of any kind with plaintiff, and requiring that he stay 500 feet away from plaintiff, her two minor children, and plaintiff=s boyfriend. This appeal followed.

Defendant first contends that his due process rights were violated in several respects. First, although defendant was served on May 15 with a copy of the temporary order and notice of the hearing scheduled for May 22, he contends that copies of the complaint and supporting affidavit arrived less than 24 hours before the hearing, affording him inadequate time to prepare. Although defendant filed a form motion to dismiss the complaint, together with a supporting affidavit in which he claimed that he had not been served with a copy of the complaint and affidavit, it is undisputed that defendant was served with both prior to the hearing. Defendant=s specific claim that he was not afforded adequate time to prepare was not raised at the hearing, nor did defendant request a continuance on this basis. Accordingly, the claim was not preserved for review on appeal. LaMoria v. LaMoria, 171 Vt. 559, 562 (2000) (mem.). Defendant=s assertion that the rules do not authorize a continuance is unfounded. See V.R.F.P. 9(h).

In his form motion to dismiss, defendant also claimed that he had received Aimproper service of process@ and Alack of proper service of complaint,@ but again the motion and affidavit provided no specific argument in support of the claim, which was not asserted at the hearing. Accordingly, defendant=s various assertions on appeal that service was invalid were not properly preserved for review. See LaMoria, 171 Vt. at 562. Defendant also claims that the temporary order was invalid because it was dated May 13, while the affidavit and complaint were date May 14. Defendant has cited no authority in support of his claim that the discrepancy invalidates the order, and we discern none.

Defendant also contends that he had difficulty hearing the proceedings through the speaker-phone that had been set up in the courtroom, and that the trial court failed to adequately respond to the problem, resulting in a denial of the opportunity to participate meaningfully in the process. Although the videotape reveals a number of instances in which defendant indicated that he had not heard certain statements by the court or plaintiff and asked that they be repeated, it does not support defendant= s claim that he was unable to participate meaningfully in the process; he responded to questions, asked his own, engaged in several colloquies with the court, and evinced an overall awareness of what was transpiring. Accordingly, we discern no error. Moreover, defendant had requested to participate by telephone, as permitted by V.R.F.P. 4(g)(1)(B), and raised no objection at the hearing to the adequacy of the procedure. Accordingly, any claim of error was waived. LaMoria, 171 Vt. at 562.

Defendant next contends the relief-from-abuse order is unsupported by the evidence and the findings in a number of respects. We review the court=s findings in the light most favorable to the judgment, disregarding the effect of modifying evidence, and we will not set aside the findings unless they are clearly erroneous. Coates, 171 Vt. at 520. Findings must be upheld if supported by credible evidence, and the court=s conclusions will be affirmed if reasonably supported by the findings. Id. Defendant first contends the court failed to make specific oral findings at the conclusion of the hearing that defendant had placed plaintiff in fear of imminent physical harm. See 15 V.S.A. ' 1101(1)(B) (abuse means Aplacing another in fear of imminent serious physical harm@). The court made a finding to this effect in the final relief-from-abuse order, however, and this was adequate to support the judgment. Benson v. Muscari, 172 Vt. 1, 6 (2001). Defendant also appears to suggest that the court was limited to the e-mail of May 13, 2003, in finding abuse because plaintiff had cited that date on the form-complaint for relief from abuse. The affidavit in support of the complaint, however, mentioned a series of e-mails and voice-mails, not merely the e-mail of May 13, 2003, which had precipitated the filing of the complaint. Accordingly, there was no error.

Defendant also argues that none of the e-mail statements could be construed as threatening Aphysical harm@ to plaintiff. Defendant claims that he was merely threatening to reveal certain incriminating information about plaintiff relating to her filing of a bankruptcy petition. The interpretation, weight and persuasiveness of the evidence, and the credibility of the witnesses, is the province of the family court to determine. LaMoria, 171 Vt. at 561. Here the court=s finding that defendant= s e-mail and voice-mail statements B described earlier -- represented credible threats of physical harm to plaintiff is reasonably supported by the evidence, and therefore cannot be disturbed by this Court on appeal. Coates, 171 Vt. at 520. Defendant further contends that there was no evidence to support a finding that plaintiff was in fear of Aimminent@ harm because defendant lives in California. Close physical proximity, however, is not a requirement to such a finding where B as here B there was testimony that defendant was capable, as he had in the past, of appearing whenever he wished and without warning in Vermont.

Defendant next contends the court committed prejudicial error in several respects. First, he argues the court Aconfused@ the burden of proof. He cites a statement toward the beginning of the hearing, when the court inquired whether defendant wished to avert a contested hearing by agreeing not to contact plaintiff. When defendant refused, the

court explained that it was Atrying to give you an out here.@ Contrary to defendant= s claim, the statement does not indicate that the court had improperly placed the burden of proof on defendant, but merely B as the court explained B that it was seeking to settle the matter. We thus discern no impropriety. Defendant also cites the court=s statement, after plaintiff=s testimony, AYou have a few minutes sir; you can try and rebut the plaintiff.@ Although defendant argues that the statement indicates the court=s mind was made up, we discern nothing in the statement indicating a lack of impartiality.

Defendant also claims that he was denied an opportunity to cross-examine plaintiff. Although defendant observed in the middle of plaintiff=s testimony that he wanted to Aconfront@ his Aaccuser,@ he made no attempt at the end of plaintiff=s testimony to cross-examine her, and raised no objection at any point during the hearing that he had been denied such an opportunity. Accordingly, any claim of error in this regard was waived. LaMoria, 171 Vt. at 562. Defendant further claims that plaintiff was not properly sworn before her testimony, but the videotape reveals otherwise. Defendant also claims that the court improperly admitted copies of the e-mails to plaintiff, asserting that they were not A relevant, authenticated or offered into evidence by the Plaintiff.@ Defendant= s sole objection at trial, however, was to the relevance of a statement containing an alleged threat against plaintiff= s boyfriend. Accordingly, any claim of error concerning the relevance or authenticity of the balance of the e-mails was not preserved for review. Id.

Defendant raises the additional claim in his reply brief that the court erred in failing to inform him that a police detective and a friend of plaintiff were in the courtroom during the hearing. Having failed to raise the issues in his opening brief, defendant has waived the claim on appeal. Secretary v. Earth Constr., Inc., 165 Vt. 160, 165 (1996).

Defendant finally contends the evidence was insufficient to support the inclusion of plaintiff= s children and boyfriend in the provision of the order requiring that defendant maintain a distance of 500 feet. We discern no infirmity in the provision relating to plaintiff=s children. As we explained in Benson, A[t]he statute clearly authorizes the court to include plaintiff=s child in the abuse-prevention order,@ and specific evidence of abuse of the child is unnecessary for location restrictions since Aan order that provides a zone of protection for plaintiff= s child . . . also provides a zone of protection for plaintiff.@ 172 Vt. at 7. As to plaintiff= s boyfriend, the statute B as plaintiff concedes B extends only to household or family members, 15 V.S.A. ' 1101(2) & (6), and there was no evidence here that the boyfriend met the statutory definitions. See Embree v. Balfanz, 817 A.2d 6, 9 (2002) (mem.) (reversing relief-from-abuse order in favor of individual who was neither household nor family member). Accordingly, this portion of the order must be stricken.

That portion of the final relief-from-abuse order requiring that defendant stay 500 feet away from plaintiff= s boyfriend is stricken. In all other respects, the order is affirmed.[2]

BY THE COURT:

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Jeffrey L. Amestoy, Chief Justice

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John A. Dooley, Associate Justice

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Paul L. Reiber, Associate Justice

Footnotes

1. Although he represented himself at the hearing, and has appealed pro se, defendant testified that he is an attorney, admitted in Vermont, and had been working for a law firm in California.

2. While this appeal was pending, the parties filed a series of motions, several of which were disposed of before oral argument, and others reserved for disposition in conjunction with our decision on the merits. All of the unresolved motions are now denied. Plaintiff's motion to strike portions of defendant's printed case, appendix, and brief and subsequent motion to strike all of defendant's brief on the ground that they contain matters outside the record are denied as moot, as we have not considered or relied on any statements or materials not part of the record evidence. Defendant's motions to strike certain e-mails from the record and exclude certain evidence, and to reverse the holding of the family court and vacate the final relief-from-abuse order on the ground that taking testimony by telephone was improper are denied, as they raise issues that should have been addressed in appellant's brief. Additionally, we note that defendant's reliance on Simpson v. Rood, 2003 VT 39, 830 A.2d 4 (2003), is misplaced, as that case concerned the taking of a witness's testimony by telephone over objection in a superior court proceeding in violation of V.R.C.P. 43(a), not – as here – telephonic testimony at the request of the party, under a specific rule allowing such testimony in a family court proceeding. V.R.F.P. 4(g)(1). Defendant's motion to set aside the judgment for lack of subject matter jurisdiction is also denied, as there is no merit to the claim that assistant judges were disqualified from sitting on this matter. The parties' respective requests for costs and attorney's fees incurred in connection with the motions are denied.