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. 2020-238

APRIL TERM, 2021

Lilly Sorrell v. Sergei Sonntag*	}	APPEALED FROM:
	}	
	}	Superior Court, Chittenden Unit,
	}	Family Division
	}	
	}	DOCKET NO. 257-6-20 Cnfa
		Trial Judge: Thomas Z. Carlson

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

Defendant appeals from the trial court's issuance of a relief-from-abuse (RFA) order against him. He argues that the evidence does not support the court's finding that there is a danger of further abuse. We affirm.

In July 2018, defendant was charged with sexually assaulting plaintiff, a minor, with an offense date of January 2017. Plaintiff was fourteen at the time of the alleged offense and defendant was nineteen. Defendant pled guilty to an amended charge of lewd and lascivious conduct in December 2019 pursuant to a plea agreement. The State agreed to dismiss additional charges against defendant and to argue for no more than eighteen-months-to-three-years to serve; defendant agreed to sex-offender treatment, domestic-violence counseling, and a five-year RFA order, and he could argue for any lawful sentence.[1]

In June 2020, while the criminal case was pending, plaintiff sought an RFA order against defendant. She alleged that defendant sexually assaulted her in 2017 and physically abused her while they were acquainted with one another, including grabbing her by the throat. She stated that defendant continued to interact with her despite conditions of release prohibiting such contact. Plaintiff explained that there had been lengthy delays in the criminal proceedings. She expressed fear of defendant and fear of further abuse.

The court granted a temporary RFA order and following a hearing at which plaintiff testified, it issued a final RFA order effective for five years. The court based its decision on evidence presented at the hearing; it did not rely on defendant's agreement to a five-year RFA order in his criminal case.

At the hearing, defendant acknowledged the criminal proceedings set forth above and agreed that he had abused plaintiff in the past. Because defendant agreed that he had abused

[1] At one point, defendant moved to withdraw his guilty plea, but he then withdrew his motion. Defendant was sentenced on March 24, 2021.

plaintiff, the only question for the court was whether "there [was] a danger of further abuse." 15 V.S.A. § 1103(c)(1)(A) (authorizing court to "make such orders as it deems necessary to protect the plaintiff" where it "finds that the defendant has abused the plaintiff" and "there is a danger of further abuse").

Plaintiff testified that defendant "put his hands on [her]" repeatedly during their relationship. She was fourteen at the time and very scared. She stated that she did not know how to defend herself against defendant who was much bigger and stronger than she was. Plaintiff testified that the abuse continued throughout their relationship.

After defendant was criminally charged and subject to a condition of release requiring that he have no contact with her, plaintiff saw him in public, including at her place of employment after the temporary RFA order had issued and just before the final hearing. Plaintiff stated that defendant came into the restaurant where she works and made eye contact with her. She had a panic attack and left the area. Defendant did not leave on his own and was asked to leave. Plaintiff testified that she was "so scared that [defendant] was even remotely close to [her]." She stated that every time she saw defendant, she had a panic attack and it brought back bad memories. Plaintiff answered "yes and no" when asked if she felt like she remained in danger, explaining that she believed the abuse could happen again if she saw defendant when she was alone rather than in a public place. Plaintiff then stated unequivocally that she felt she would be in danger if defendant was in contact with her. Plaintiff also described an incident that occurred several months before the hearing when she saw defendant at a Walmart. Defendant walked in while plaintiff was in the store and made eye contact with her. He came within five feet of her, looked at her, and kept walking. Plaintiff had to leave the store because she knew defendant was not allowed to be near her.

At the close of the evidence, the court found that plaintiff met her burden of proving by a preponderance that there was a danger of further abuse. In reaching its conclusion, the court noted that, in addition to a danger of further abuse, the statute also provided that an RFA should issue if a defendant was incarcerated and had been convicted of certain listed crimes, including lewd and lascivious conduct with a child. The court recognized that defendant was not incarcerated but observed that this provision provided some guidance as to what was relevant in assessing the danger of further abuse. See id. § 1103(c)(1)(B) (providing that court may issue RFA order where it "finds that the defendant has abused the plaintiff" and "the defendant is currently incarcerated and has been convicted of" a listed offense, including lewd or lascivious conduct with a child). The court was not reassured by defendant's assertion that his recent contact with plaintiff, which badly frightened her, was inadvertent. It explained that it did not need to find a recent event that was abusive or threatening to find a danger of further abuse. The court concluded that there was a danger of further abuse, which consisted of a threat to plaintiff of some further contact with an older male who had abused her in the past and who had pled guilty to a charge of lewd and lascivious conduct with her.

The court emphasized that plaintiff's burden was a preponderance of the evidence and that the purpose of the RFA statute was to protect individuals from abuse. See Raynes v. Rogers, 2008 VT 52, ¶ 8, 183 Vt. 513 (recognizing that Vermont's Abuse Prevention Act "addresses the pattern of controlling behavior that distinguishes intimate abuse from other forms of violence by providing a unique legal remedy, injunctive in nature, aimed at ending the cycle of domestic violence before it escalates"). The court was convinced that there was a danger of further abuse given defendant's

prior conduct toward plaintiff, even if the abuse occurred three years earlier. It thus issued an order prohibiting defendant from contacting or threatening plaintiff, or coming within 300 feet of her, for five years. This appeal followed.

Before turning to defendant's arguments, we emphasize that his criminal case is not on appeal and the court's RFA decision was not based on the terms of defendant's plea agreement. We thus do not address any of defendant's arguments regarding the terms of his plea agreement with the State, his allegations about his plea colloquy, or his allegation that he complied with his conditions of release.

Because these are separate cases, we also deny plaintiff's request to dismiss defendant's appeal as moot. Plaintiff argues that defendant lacks a legally cognizable interest in the outcome of this appeal because he has separately agreed to the issuance of a five-year RFA order in the criminal case. This requirement was apparently not imposed as part of the disposition in the criminal case. We note that, in her initial request for an RFA order, plaintiff complained that the "no contact" condition of defendant's release was not affording her sufficient protection; the order on appeal here is separate and apart from the conditions of release and the order of probation and it provides more specific protection to plaintiff. We cannot say with certainty that our decision here "will no longer have a practical effect on the rights of the parties," as plaintiff asserts. State v. Nguyen, 445 P.3d 390, 391 (Or. Ct. App. 2019) (per curiam) ("An appeal is moot when a court decision will no longer have a practical effect on the rights of the parties." (quotation omitted)). We reach the same conclusion with respect to defendant's request to dismiss this appeal as moot. Defendant argues that the RFA order is void ab initio because the State did not include his agreement to a five-year RFA order in his probation order. As previously stated, defendant's criminal case and this RFA proceeding are distinct, and the disposition of the criminal case did not render the RFA order—based on evidence presented at a contested evidentiary hearing—moot.

We thus turn to the merits. Defendant contends that the court should have determined that there was no danger of further abuse because: the incidents at issue are too far in the past; the parties have not been together for four years; plaintiff did not testify to recent episodes of violent or threatening behavior; and the parties have "moved on and away from each other." Defendant questions why plaintiff did not seek a RFA order earlier and suggests that she should have presented a RFA at his plea hearing or sought to enforce his plea agreement with the State. Defendant cites other evidence that he believes supports his position, such as plaintiff's testimony on cross-examination that she gave him a hug in 2017. Defendant characterizes his public interactions with plaintiff as inadvertent and generally sets forth his version of events. He argues that plaintiff sought the RFA "as a contract-enforcement action," not because she feared him.[2]

We review the court's decision to issue an RFA order "only for an abuse of discretion, upholding its findings if supported by the evidence and its conclusions if supported by the findings." Raynes, 2008 VT 52, ¶ 9. The trial court is solely responsible for determining the credibility of witnesses and the weight of the evidence. See Cabot v. Cabot, 166 Vt. 485, 497 (1997) ("As the trier of fact, it [is] the province of the trial court to determine the credibility of the witnesses and weigh the persuasiveness of the evidence."). Its findings will stand unless they are clearly erroneous, meaning that there is no evidence to support them. Benson v. Muscari, 172 Vt.

[2] Defendant also appears to take issue with the court's finding that he abused plaintiff. As defendant stipulated to abusing plaintiff below, we do not address this argument.

1, 5 (2001). We view the findings "in the light most favorable to the prevailing party below, disregarding the effect of any modifying evidence." Coates v. Coates, 171 Vt. 519, 520 (2000) (mem.) (quotation omitted).

The court's findings are supported by the evidence and they support its conclusion that there is a danger of further abuse. Defendant relies on modifying evidence and presents a version of events that the court found unpersuasive. The court recognized that the abuse had occurred three years earlier and nonetheless concluded that there was a danger of further abuse. We have never held, as a matter of law, that abuse must have occurred within a certain timeframe before it can support the issuance of an RFA order. This is a discretionary decision for the trial court. Nor does the statute require evidence of "a pattern or recency of abuse" to show a present danger of abuse, as defendant asserts.

The cases cited by defendant in support of this assertion are unpersuasive. Most are nonprecedential decisions that, in any event, recognize that the trial court has discretion in evaluating the evidence and that each case must be decided on its own facts. See, e.g., Washburn v. Fowlkes, No. 2015-089, 2015 WL 4771613, at *2 (Vt. Aug. 12, 2015) (unpub. mem.), https://www.vermontjudiciary.org/sites/default/files/documents/eo15-089.pdf [https://perma.cc/W2EQ-VGCB] (recognizing that "[a] danger of future abuse can, and often is, reasonably inferred on the basis of the parties' relationship and a single instance of abuse" and "[f]uture danger may be inferred on a variety of grounds"). Defendant's reliance on McCool v. Macura, 2019 VT 85, ¶ 5, is also misplaced. In that case, we considered whether a defendant had "abused" the plaintiff "by placing her in fear of imminent serious physical harm," a provision of the statute that is not at issue here. See id. ¶ 13 (finding "insufficient evidence in the record, as a matter of law, to support a conclusion that defendant's conduct in entering [plaintiff's] residence to retrieve his personal belongings placed plaintiff, from an objectively reasonable standpoint, in fear of imminent serious physical harm"). We did not consider if the evidence supported "a danger of further abuse" in McCool. Finally, defendant cites out-of-state case law that involves different statutory language and that has been overruled. See Thompson v. Schrimsher, 906 N.W.2d 495, 499-500 (Minn. 2018) (holding that appeals court erred in concluding, "as a matter of law, that a finding of past domestic abuse alone is insufficient to support the issuance of [a protective order] without a showing of a present intent to cause or inflict fear of imminent physical harm" and overruling Kass v. Kass, 355 N.W.2d 335 (Minn. Ct. App. 1984), the source of this erroneous rule (quotation omitted)).

We reject defendant's arguments concerning the timing of plaintiff's filing and his allegation about her motivation for seeking a RFA order. Plaintiff's motive for filing a request for a RFA is irrelevant; the questions for the court were whether she suffered abuse and proved by a preponderance of the evidence that there was a danger of further abuse. In reaching its conclusion, the court was cognizant of the amount of time that had elapsed since the abuse. Additionally, the court did not err, as defendant asserts, in observing that 15 V.S.A. § 1103(c)(1)(B) offered guidance about what constituted a danger of further abuse. The court did not rely on this provision in reaching its conclusion; it recognized that, at the time of its decision, defendant was not incarcerated for lewd and lascivious conduct.

As reflected above, plaintiff testified to the prior abuse that defendant inflicted upon her and she stated that she feared further abuse should she encounter defendant while she was alone. Defendant did not remove himself from her presence in earlier encounters, even where a temporary

RFA and conditions of release were in place prohibiting such contact, and his behavior greatly frightened her. Based on the evidence presented at the hearing, the court did not err in concluding, by a preponderance of the evidence, that in light of the past abuse, there was a danger that plaintiff would be subject to further abuse from defendant and that she was entitled to an order protecting her against this threat. While defendant disagrees with the court's conclusion, he fails to show an abuse of discretion. See, e.g., Meyncke v. Meyncke, 2009 VT 84, ¶ 15, 186 Vt. 571 (mem.) (explaining that arguments which amount to nothing more than disagreement with court's reasoning and conclusion do not make out a case for abuse of discretion).

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Beth Robinson, Associate Justice

Karen R. Carroll, Associate Justice