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. 2020-292

MAY TERM, 2021

Jessica M. Rivera v. James Rivera Martinez*	}	APPEALED FROM:
	}	
	}	Superior Court, Franklin Unit,
	}	Family Division
	}	
	}	DOCKET NO. 225-9-20 Frfa
		Trial Judge: Scot L. Kline

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. We affirm.

Stepmother sought an RFA order against defendant, her stepson, in September 2020, alleging that he had repeatedly sent her threatening messages. The court issued a temporary RFA order and provided notice regarding the date of the final hearing. The hearing was continued several times due to lack of service and it was finally held via WebEx on October 5, 2020 after defendant was served. Defendant did not appear at the final hearing.

At the hearing, stepmother testified to the following. In July 2020, defendant sent her a message essentially telling her that he hated her and stating, "I don't attack anything that I don't intend to kill." He contacted her again in September 2020, asking her to resend him his July message. He called her derogatory names and told her he thought his July message was hilarious. Defendant subsequently posted something on Facebook that stepmother commented on. He wrote back to her, stating in part, "I meant what I said. If you ever get in my effing face again, I will effing destroy you." She perceived his message as a threat. When she told him to take care of himself, he called her names and told her, "if you can last the night, I will destroy you. You can try it. I'm bigger than you." She testified that after she filed for an RFA order, defendant began sending messages to his father (her husband), threatening them both. Stepmother expressed concern that defendant knew where they lived.

The court granted stepmother's request for relief. It credited her testimony regarding the events described above. It found that defendant sent stepmother messages making threats of serious physical violence, including threating to kill or destroy her. It found that these threats placed stepmother in fear of imminent serious physical harm and there was a danger of further abuse.

Several days later, defendant moved for reconsideration. He stated that he had received notice of the hearing date and knew he should have contacted the court, but he had a workplace physical/drug screening on the morning of the hearing that he could not miss. Defendant

acknowledged having confrontational exchanges with stepmother, including telling her that if she ever touched him again, he would destroy her. He asserted that he was not threatening her with imminent harm but letting her know that he would not tolerate any further abuse from her. He asserted that stepmother had abused him since 2010. Defendant also noted that he lived far away from stepmother and he did not have a car and thus he contended that there was no risk of imminent serious physical harm and no danger of further harm.

The court denied the motion, finding that defendant provided insufficient grounds to reopen the proceeding. It found that defendant had notice of the hearing and, while he may have had another appointment, he made no effort to raise or resolve the scheduling issue before the hearing. He simply failed to appear. Defendant did not dispute making the statements testified to by stepmother, moreover, and the court noted that a "true threat" could be conditional, citing State v. Noll, 2018 VT 106, ¶ 39, 208 Vt. 474 (stating that "threatening speech need not be explicit or convey imminence"). As to placing stepmother in fear of imminent serious bodily injury, the court reiterated its conclusion that the intent and nature of the threats provided sufficient grounds to support the RFA order. This appeal followed.

Defendant argues that the court's order is not supported by the evidence. Relying on his post-decision affidavit, he asserts that his behavior was justified because he believed stepmother was abusive toward him as a child. He also takes issue with stepmother's testimony, arguing that she should have testified that his threat to her was conditional, as laid out in her affidavit, and he questions why she did not testify to an event many years before when she allegedly "slapped him in the back of the head," as referenced in her affidavit. He suggests that the trial court should have addressed or clarified her testimony and elicited additional details from stepmother. He contends that his conditional threats did not suffice to create an objectively reasonable fear of imminent serious bodily injury and that there was no danger of further abuse. Finally, defendant suggests that the court relied on his absence from the hearing in concluding that stepmother met her burden of proof. He asserts that his decision to pursue a job opportunity rather than attend the hearing was excusable.

Pursuant to 15 V.S.A. § 1103(c)(1)(A), the court may "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." As relevant here, "abuse" includes "[p]lacing another in fear of imminent serious physical harm." Id. § 1101(1)(B). The question before the court is not whether a defendant's behavior toward a plaintiff is somehow justified, but rather whether a plaintiff shows she is entitled to relief by a preponderance of the evidence. See Raynes v. Rogers, 2008 VT 52, ¶ 11, 183 Vt. 513 (explaining that, even if trial court believed defendant's assertion that he attacked plaintiff in response to her provocations, it "was required to order appropriate protections for plaintiff if it found both that plaintiff was abused and in danger of future abuse").

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." Id. ¶ 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. 1, 5 (2001). We view the findings "in the light most favorable to the prevailing party below, disregarding the effect of any modifying evidence." Stickney v. Stickney, 170 Vt. 547, 548 (1999) (mem.).

Defendant fails to show an abuse of discretion here. In reviewing the court's decision, we look to the evidence presented at the hearing, not to stepmother's affidavit or to allegations made by defendant after the court issued its decision. Stepmother testified that defendant threatened to destroy or kill her and that he continued to send threatening messages after she filed for an RFA. She felt threatened by the messages particularly because defendant knew where she lived. The court credited stepmother's testimony and it recognized the conditional nature of the threats in its findings. It concluded, based on stepmother's testimony, that she met her burden of proof; it had no obligation to seek out additional information from stepmother or ask her questions related to her affidavit. The court did not rely on defendant's absence from the hearing in reaching its decision, as defendant suggests. Its conclusion that defendant "abused" stepmother and that there was a danger of further abuse is supported by the evidence. To the extent that defendant challenges the trial court's assessment of stepmother's credibility and its assessment of the weight of the evidence, those arguments are unavailing. We do not reweigh the evidence on appeal. See Cabot, 166 Vt. at 497. We also reject defendant's assertion that no reasonable person would "fear . . . imminent serious physical harm," 15 V.S.A. § 1101(1)(B), based on the threats here.

Defendant does not directly challenge the court's decision on his motion for reconsideration and he fails to show any abuse of discretion. See Rubin v. Sterling Enters., Inc., 164 Vt. 582, 588 (1996) ("Disposition of a [Vermont] Rule [of Civil Procedure] 59 motion is committed to the court's sound discretion."). As the court explained, defendant had notice of the hearing and it was his obligation, in the event of a conflict, to contact the court prior to the hearing. We note that defendant offered only modifying evidence in support of his request, suggesting that his behavior was justified. See Raynes, 2008 VT 52, ¶ 11 (explaining that, notwithstanding defendant's assertion that his behavior was justified, question for trial court was whether plaintiff was abused and there was danger of further abuse). Defendant acknowledged making the statements at issue and the court did not err in observing that a "true threat" could be conditional, citing Noll, 2018 VT 106, ¶ 39. We did not in Noll, a criminal stalking case, adopt the standard enunciated by the Court of Appeals for the Tenth Circuit in United States v. Dillard, as defendant asserts. See 795 F.3d 1191, 1200 (10th Cir. 2015) (stating that "[a] threat of violence does not need to be imminent so long as it conveys a gravity of purpose and likelihood of execution." (quotation and alteration omitted)). We merely cited Dillard, and other cases, as support for the proposition that "threatening speech need not be explicit or convey imminence." Noll, 2018 VT 106, ¶ 39. The court's decision is consistent with the proposition here.

Affirmed.

BY THE COURT:

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Paul L. Reiber, Chief Justice

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Beth Robinson, Associate Justice

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William D. Cohen, Associate Justice