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. 2021-035

JULY TERM, 2021

Mandy Hulett v. Daniel S. Banyai*	}	APPEALED FROM:
	}	
	}	Superior Court, Rutland Unit,
	}	Civil Division
	}	
	}	DOCKET NO. 20-ST-00311
		Trial Judge: Helen M. Toor

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

Defendant appeals from the trial court's issuance of an anti-stalking order to plaintiff. We affirm.

The parties are adjoining landowners. Defendant calls his property Slate Ridge. In December 2020, plaintiff sought an anti-stalking order against defendant under 12 V.S.A. § 5133. She alleged that between October 2020 and December 2020, defendant posted threatening messages about her family on the Slate Ridge Facebook page. Plaintiff stated that defendant's behavior caused her family great emotional distress and they feared imminent physical harm.

At the final hearing, plaintiff testified as follows. Defendant runs a business called Slate Ridge from his property; there is a shooting range on the property and defendant holds various gun-related classes there. Defendant owns the Slate Ridge Facebook page and he posted threatening messages about her family on the publicly available page. One post, admitted into evidence, called plaintiff's family "dirty racists" and "garbage" who "need to go to HELL!" and stated that "[w]e must eradicate these people." The post included the family's home address as well as the work addresses of plaintiff and her husband with the notation "midnight shift" by plaintiff's work address. Defendant also posted a video of a truck that had her family's business name handwritten on it; the name was bullet-ridden. Additionally, plaintiff described a challenge that defendant posted on the page offering free stickers of the family's last name in a red circle with a line drawn through it; prizes (such as firearms and ammunition) were awarded to those who posted the stickers in the best locations throughout the state. Plaintiff read this post as suggesting that defendant wanted to wipe out her family and eliminate them. Defendant also posted a follow-up message asking for more pictures of the stickers. In this post, he had the stickers lying on a bulletproof vest, which plaintiff considered a threat against her family.

Finally, plaintiff described a message posted the day before she was to testify at a court hearing adversely to defendant. In this post, defendant urged his followers to find a SUV of the same make, model, and color of the vehicle owned by plaintiff's minor daughter for the purpose of a "vehicle assault class" where the vehicle would be shot multiple times and then blown up.

Plaintiff expressed fear for her safety and the safety of her family given defendant's instability, the large number of firearms he possessed, and the type of classes he ran on his property. She described defendant's behavior as relentless and frightening.

Defendant also testified. He stated that he did not control the Slate Ridge Facebook page; he identified a friend who he said controlled the page and who posted the messages at issue without his approval or input. He denied any intent to harm plaintiff or her family. He indicated that his issue with plaintiff and her family was of a "political nature." Defendant denied that people unrelated to him came to his property to use firearms and he denied conducting classes on his property.

In a written decision, the court granted plaintiff's request for relief. It found that plaintiff proved by a preponderance of the evidence that on more than one occasion, defendant purposely threatened her and her children and she thus satisfied the requirements of 12 V.S.A. § 5133. It rejected as not credible defendant's testimony that he did not operate a shooting range on his property, that only his family used it, and that he had no authority over the operation of the shooting range or the Slate Ridge Facebook page. It found that defendant controlled the Facebook page. The court recounted the various posts testified to above. With respect to the stickers, the court recognized that a circle with a red line through it could be used innocuously to mean "no" as in "no parking," but it found no connection to such use here. In the context of defendant's other posts, the court found that a reasonable person would interpret the stickers as a threat to have people kill plaintiff and her family. The court found that defendant posted this message and the other messages on a public Facebook page that anyone could access. It concluded that a reasonable person would view them as threats of physical harm to plaintiff and her family, which defendant knew or should have known.

In reaching its conclusion, the court rejected defendant's assertion that he was engaged in political speech, finding that defendant provided no explanation why this would be so. It found the messages constituted "true threats" and that there was nothing political about them. The court also rejected defendant's assertion that unless the threats were made directly to plaintiff, they could not be the basis for a stalking finding. It ordered defendant to stay away from plaintiff and her minor children for two years. Defendant filed a pro se motion to reopen, which the court denied for multiple reasons, including that defendant was represented by counsel. This appeal followed.

We begin with an overview of the relevant law and our standard of review. "Stalking" is defined in relevant part as "engag[ing] 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 . . . fear for [their] safety." 12 V.S.A. § 5131(6)(A). A "course of conduct" means "two or more acts over a period of time, however short, in which a person follows, monitors, surveils, threatens, or makes threats about another person, or interferes with another person's property." Id. § 5131(1)(A). The term "threaten" does not "require an express or overt threat." Id. § 5131(1)(B); see also State v. Noll, 2018 VT 106, ¶ 39, 208 Vt. 474 (similarly recognizing that "threatening speech need not be explicit or convey imminence").

On review, we will uphold the trial court's findings if supported by the evidence; we review its legal conclusions de novo. McCool v. Macura, 2019 VT 85, ¶ 6, 211 Vt. 263. It is the exclusive role of the trial court "to determine the credibility of the witnesses and weigh the persuasiveness of the evidence." Cabot v. Cabot, 166 Vt. 485, 497 (1997).

Defendant first asserts that the court erred in finding that he controlled the Slate Ridge Facebook page. According to defendant, plaintiff provided no information that tied him to the

postings beyond the fact that "Slate Ridge" posted the alleged threats. Defendant contends that the identity of the poster was left to assumption and conjecture.

Defendant fails to show that the court's finding is clearly erroneous. Plaintiff testified to her knowledge of the various activities conducted by defendant at Slate Ridge. She testified without objection that defendant owned the Facebook page and posted the messages at issue. While defendant testified that his friend controlled the page and posted the messages, the court rejected his testimony as not credible. Defendant did not argue below that plaintiff's testimony on this point lacked a proper foundation. He cannot raise that argument for the first time on appeal. See Lanphere v. Beede, 141 Vt. 126, 129 (1982) (explaining that "[c]ontentions not raised or fairly presented to the trial court are not preserved for appeal" and "[m]atters raised for the first time on appeal are not considered on appellate review"). Plaintiff's testimony supports the court's finding that defendant controlled the Facebook page.

Defendant next argues that the posts were protected speech under the First Amendment to the U.S. Constitution. He acknowledges that "true threats" are not protected speech but characterizes the messages here as political speech and argues that they did not call for violence or threaten harm. He offers his own interpretation of the evidence.

We find these arguments without merit. The trial court rejected defendant's characterization of the posts and its decision is consistent with our case law and supported by the evidence. As set forth above, the court found nothing political about asking others to "eradicate" plaintiff's family, to find a vehicle similar to her daughter's to shoot and blow up, to encourage followers to post stickers containing the family's name with a red line through it, or shooting up a truck bearing the name of plaintiff's family business. The "eradication" messages, moreover, had plaintiff's home and work address with the notation that she worked the midnight shift. While defendant provides his own characterization of each piece of evidence and argues that the language was "rough and edgy" rather than threatening, we leave it to the trial court to weigh the evidence. Cabot, 166 Vt. at 497. Based on the evidence, the court reasonably considered the messages "true threats." See Noll, 2018 VT 106, ¶ 37 (explaining that Court "evaluate[s] whether speech rises to the level of a true threat objectively—that is, whether an ordinary, reasonable person familiar with the context of the communication would interpret it as a threat of injury" (quotation omitted)). As in Noll, the court here could reasonably find, "in the context of defendant's overall course of conduct as well as the specific context," that these posts "would cause a reasonable person to fear unlawful violence." Id. ¶ 40. The court's findings are supported by the record and support the court's conclusion that plaintiff was entitled to relief under 12 V.S.A. § 5133.

Affirmed.

BY THE COURT:

_____

Paul L. Reiber, Chief Justice

_____

Harold E. Eaton, Jr., Associate Justice

_____

William D. Cohen, Associate Justice