VERMONT SUPREME COURT

109 State Street
Montpelier VT 05609-0801
802-828-4774
www.vermontjudiciary.org

Case Nos. 21-AP-268 &
21-AP 269

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

JUNE TERM, 2022

Lori Levering v. Mark Downer*	}	APPEALED FROM:
	}	
Thomas Doogan v. Mark Downer*	}	Superior Court, Windham Unit,
	}	Civil Division
	}	CASE NOS. 21-ST-00722 & 21-ST-00745
		Trial Judge: Katherine A. Hayes

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

Plaintiffs Lori Levering and Thomas Doogan, a married couple, each sought and obtained a final stalking order against their neighbor, defendant Mark Downer. In this consolidated appeal, defendant challenges both orders, arguing that the trial court misinterpreted the "reasonable person" standard in the stalking statute; that the court erred by excluding character evidence of plaintiff Levering; and that the course of conduct to which plaintiffs testified was insufficient to constitute stalking. We affirm.

At the merits hearing, plaintiffs testified, among other things, that defendant drove by them with a trailer and swerved near enough so that sticks and brush hanging out of the trailer struck plaintiffs; that defendant told plaintiffs he had inventoried their property and was around twenty-four hours a day, seven days a week; and that defendant set off loud fireworks to scare plaintiffs and their dogs when they were walking by defendant's home.

Defendant testified that he did not swerve toward plaintiffs with his trailer and instead plaintiff Levering ran across the road to cause a confrontation. He denied ever having suggested that he was keeping tabs on plaintiffs' property or surveilling them. Defendant also testified that he routinely sets off fireworks to ward away a nearby family of foxes from his chicken coop, and that he never intended to scare plaintiffs or their dogs.

Defendant's counsel sought to present as a witness the president of the neighborhood homeowner's association, who would have testified that plaintiff Levering "has been the source

of difficulties with many of the owners" and had filed an anonymous grievance against defendant complaining about defendant's chickens even though the association bylaws permit keeping chickens. Defendant's counsel argued that this evidence was critical to show plaintiff's character—specifically that she had antagonized defendant and other neighbors and was mentally unstable. Defendant's counsel also argued that this evidence had bearing on the reasonable-person standard. The court disallowed this testimony as inadmissible hearsay and because the witness seemingly lacked personal knowledge of whether plaintiff Levering had authored the anonymous grievance and of any problems she may have caused for other homeowners. The court additionally ruled that the proffered testimony was irrelevant because the stalking statute focuses on the perspective of the defendant, and a nonparty's perspective of plaintiff's character did not bear on whether defendant should have known that his conduct would cause a reasonable person to fear for their safety.

The court made findings orally on the record. It found plaintiffs' recitation of events largely credible and concluded that plaintiffs satisfied the statutory elements of stalking. It issued stalking orders protecting both plaintiffs until the end of January 2022. This appeal followed.[1]

Defendant first argues that the trial court misinterpreted the "reasonable person" standard in the stalking statute. In doing so, he contends that it was not credible that plaintiff Levering, as a retired police officer, would have felt afraid of firecrackers. To the extent defendant challenges the persuasiveness of evidence or the trial court's determinations of credibility, we reject those arguments. See Mullin v. Phelps, 162 Vt. 250, 261 (1994) ("[O]ur role in reviewing findings of fact is not to reweigh evidence or to make findings of credibility de novo."). He also asserts that plaintiff Levering made exaggerated and grandiose allegations in the affidavit submitted with her original complaint, which he presents as evidence of her "potential mental illness or personality disorder." It is unclear what bearing defendant believes plaintiff's mental condition should have on this case. However, the allegations in plaintiffs' complaints became irrelevant once they testified in open court at the merits hearing. Counsel for both parties had an opportunity to cross-examine all witnesses, and it was exclusively the trial court's prerogative to assess credibility.

Defendant relatedly argues that the trial court erroneously disallowed evidence that "was offered to show the court that Ms. Levering was a bully and had a skewed perspective of the world." "In matters of trial conduct and evidentiary rulings the trial court has wide discretion. We accordingly apply a deferential standard of review to the trial court's evidentiary rulings and will reverse its decision only when there has been an abuse of discretion that resulted in prejudice." Kneebinding, Inc.v. Howell, 2020 VT 99, ¶ 56 (quotations omitted).

Although defendant made an oral and written offer of proof to allow testimony by defendant's wife and two other neighbors, these potential witnesses were unable to attend the

[1] Although the stalking orders expired during the pendency of this appeal, the case is not moot because "defendant has an ongoing interest in avoiding the reputational harms of a stalking order." Hinkson v. Stevens, 2020 VT 69, ¶ 22, 213 Vt. 32 (applying collateral-consequences exception to mootness).

hearing. Defendant did not seek to postpone the hearing or make other arrangements for these witnesses to testify. The trial court did not even make a ruling regarding these witnesses because defendant's counsel simply stated that they were no longer available. Their testimony, whatever it may have been, is now a moot point.

The only witness that was available and that defendant attempted to have testify was the president of the homeowners' association where the parties lived. The court disallowed the proffered testimony of the homeowners' association president for three reasons: (1) it was inadmissible hearsay; (2) it was irrelevant to the statutory stalking elements; and (3) the witness lacked personal knowledge. When the trial court prompted defendant's counsel to explain how the proffered testimony would comply with the rules regarding hearsay and personal knowledge, defendant's counsel provided no answer. Defendant again fails to address these issues on appeal. Thus, even if we agreed that the evidence was relevant, we would have no basis to disturb the trial court's ruling disallowing it because defendant has effectively conceded that it was inadmissible.[2]

Defendant also argues that the course of conduct to which plaintiffs testified did not rise to the level of stalking; that the events were merely "unpleasant" or at most a "nuisance." So long as the trial court applied the statute correctly, we will affirm its legal conclusions if supported by its factual findings. Stannard v. Stannard Co., Inc., 2003 VT 52, ¶ 8, 175 Vt. 549 (mem.). We will uphold the court's findings if supported by any credible evidence. Id. As relevant here, stalking "means to engage 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: (A) fear for his or her safety or the safety of a family member, or (B) suffer substantial emotional distress." 12 V.S.A. § 5131(6). 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). Although a threat need not be "express or overt," it must convey an "intent to inflict physical harm on another person." Hinkson v. Stevens, 2020 VT 69, ¶¶ 41, 46, 213 Vt. 32 (quotation omitted).

Plaintiffs' testimony, which the trial court deemed credible, established three separate acts by defendant that together satisfied the plain language of the statute. Defendant's statement that he was inventorying plaintiffs' property and was always around straightforwardly qualified as monitoring or surveilling under the statute. Scheffler v. Harrington, 2020 VT 93, ¶ 12 (defining surveillance under stalking statute to include "close watching or careful observation"). The trial court reasonably concluded that defendant intended to alarm and frighten plaintiffs and their dogs by setting off fireworks near them, and it also noted the physical dangers that fireworks can pose to people. It was also reasonable to construe the act of swerving a vehicle toward plaintiffs as conveying an "intent to inflict physical harm" on them, especially given that

[2] In his offer of proof for this testimony, defendant's counsel also cited the rule of lenity, arguing that any ambiguity in the term "reasonable person" must be interpreted in defendant's favor, and that the proffered evidence was necessary to show how plaintiff Levering was not reasonable. On appeal, defendant argues that the trial court erred in failing to apply the rule of lenity. Because the evidence he sought to introduce was inadmissible, we reject this argument as well.

defendant swerved close enough to make physical contact. Hinkson, 2020 VT 69, ¶ 46. While defendant disagrees with the result, he fails to show that any of the court's findings are clearly erroneous.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Harold E. Eaton, Jr., Associate Justice

William D. Cohen, Associate Justice