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

ENTRY ORDER

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

MAY 21 2010

SUPREME COURT DOCKET NO. 2009-358

MAY TERM, 2010

Kristin E. Juel	}	APPEALED FROM:
	}	
	}	
v.	}	Chittenden Superior Court
	}	
	}	
Kai Trevor Brost	}	DOCKET NO. S0059-09 Cnsa
		Trial Judge: Helen M. Toor

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

Defendant appeals pro se from the trial court's order prohibiting him from having any contact with plaintiff for five years. We affirm.

Plaintiff sought relief under the civil stalking statute, 12 V.S.A. § 5133, in August 2009. She alleged that defendant had been stalking her since 2003, both in Iowa and in Vermont. Plaintiff explained that defendant called her repeatedly, sent her packages, sent her email, and had even contacted her employer. The court issued a temporary ex parte order prohibiting defendant from contacting plaintiff and scheduled the matter for a final hearing.

Both parties appeared pro se at the final hearing; defendant appeared by telephone. Plaintiff testified that she met defendant in passing approximately six years earlier, while she was teaching at a college in Iowa that defendant attended. During the next two years, defendant sent her violent threatening email messages, he watched plaintiff at her home and office, and plaintiff feared that he may also have been inside her house. Plaintiff took a new job in Vermont, in large part to escape from defendant. Defendant continued to contact plaintiff, however, calling her regularly at work and telling her how angry he was that she had left Iowa and that he wanted to be with her. He referenced suicide and death in his messages and threatened to harm any police officers sent to his home. Defendant also mailed packages to plaintiff, and pretended to be a lawyer and tried to convince her to lift a no-contact provision in effect in Iowa. In the few months before the hearing, plaintiff testified that defendant called her incessantly, generally in the middle of the night. As noted above, defendant also called plaintiff's employer and asked if any students had committed suicide for plaintiff. He told the employer that plaintiff ruined people's lives and that she was going to kill a student. Plaintiff stated that she was afraid that defendant would snap and that he would come to Vermont and try to rape or kill her. Defendant did not deny contacting plaintiff as described above. He argued instead that his conduct did not constitute stalking.

The court concluded that plaintiff met her burden of proof. See 12 V.S.A. § 5133(b) (plaintiff must prove by preponderance of evidence that defendant stalked her). It found that defendant had engaged in a repeated pattern of conduct over a period of time that involved threatening behavior that served no legitimate purpose and would cause a reasonable person to fear for her safety and to suffer substantial emotional distress. See id. § 5131(6) (defining stalking). This included telephone and written communications where it was very clear, based on the history, that plaintiff had no interest in any contact from defendant and that she did not welcome such contact. The court found that plaintiff was seriously and truly in fear of defendant, noting that she was visibly upset and trembling during the hearing. The court issued an order prohibiting defendant from having any contact with plaintiff for five years. Defendant appealed.

Defendant argues that the court erred in finding that he stalked plaintiff. He states that he did not engage in any threatening conduct toward plaintiff. He suggests that his conduct is more akin to harassment than stalking. He also complains that: plaintiff did not file a complaint for a final order; the court did not rule on a motion to dismiss that he filed; and his answers during the hearing were "cut off," apparently by the trial court.

We find no error. The record amply supports the court's finding that defendant engaged in threatening behavior and that he stalked plaintiff. See Mullin v. Phelps, 162 Vt. 250, 260 (1994) (on review, Supreme Court will uphold trial court's findings unless there is no credible evidence to support them). The term "stalk" is defined as engaging "in a course of conduct which consists of . . . threatening behavior directed at a specific person . . . , and [the conduct] (A) serves no legitimate purpose; and (B) would cause a reasonable person to fear for his or her safety or would cause a reasonable person substantial emotional distress." 12 V.S.A. § 5131(6). "Threatening behavior means acts which would cause a reasonable person to fear unlawful sexual conduct, unlawful restraint, bodily injury, or death, including verbal threats, written, telephonic, or other electronically communicated threats, vandalism, or physical contact without consent." Id. § 5131(8).

As the State notes, we have not yet addressed the meaning of the words "threatening behavior" in connection with the civil stalking statute, but we have addressed similar language in the context of criminal stalking under 13 V.S.A. § 1062. The criminal statute defines stalking in part as a course of conduct that consists of following, lying in wait, or harassing, see 13 V.S.A. § 1061(1), and the definition of "harassing" is almost identical to the definition of "threatening behavior" in the civil stalking statute. Compare id. § 1061(4) (defining "harassing" as "actions directed at a specific person . . . which would cause a reasonable person to fear unlawful sexual conduct, unlawful restraint, bodily injury, or death, including but not limited to verbal threats, written, telephonic, or other electronically communicated threats, vandalism, or physical contract without consent") with 12 V.S.A. § 5131(8).

We have emphasized in the criminal context that a defendant need not make actual threats of violence against the victim to be guilty of stalking. See State v. Ellis, 2009 VT 74, ¶ 24, 979 A.2d 1023 (elements of crime of stalking do not require that defendant have actually threatened violent behavior or unlawful restraint in past, or that victim feared for her safety or that she would be restrained); see also State v. Hinchliffe, 2009 VT 111, ¶ 21, ___ Vt. ___ (absence of specific threat of violence is not determinative of whether there is sufficient evidence

to support stalking charge). In Ellis, we concluded that a high school student's obsessive behavior toward another student did not constitute stalking under 13 V.S.A. § 1062. 2009 VT 74, ¶ 32. We acknowledged that obsessive behavior, without threats or attempted acts of violence, could cause a reasonable person to fear unlawful restraint, but concluded that in that case, the defendant's actions did not rise to a level that would cause a reasonable person to have such fear. Id. ¶ 26. We noted that almost all of the interaction between the defendant and the victim occurred either at school in public areas or at school-related public activities. We also observed that when the victim told the defendant to stop calling her, the defendant complied, and that the victim had not clearly indicated that she wanted no further contact with the defendant until shortly before he was arrested. We were particularly mindful of the fact that the parties were in high school and that the behavior of the defendant, while inappropriate, was more awkward than deliberate.

We reached a different conclusion in Hinchliffe. In that case, the defendant repeatedly phoned and sent text messages to his ex-wife. The calls were negative, and the defendant was often angry. The defendant also stopped by the victim's house unexpectedly and angrily confronted the victim. The victim testified that she was frightened by the defendant's behavior, particularly given that he had assaulted another woman in the past. We affirmed the defendant's conviction and rejected his argument that he could not be convicted of stalking because he had not made any threats to the victim or her family, emphasizing that the lack of a specific threat was not determinative and that the State did not need to prove that the defendant threatened the victim or that the victim actually feared bodily harm. Hinchliffe, 2009 VT 111, ¶ 21.

The instant case shares similarities with Hinchliffe, but it is even more akin to the circumstances presented in State v. Simone, 887 A.2d 135 (N.H. 2005), a case we discussed in Ellis. In Simone, the defendant became obsessed with a census worker following a brief interaction. The defendant called the victim incessantly against her wishes, expressing his romantic interest in her. He told the victim he had "serious personal problems" and felt suicidal and out of control. Id. at 136. The defendant threatened to ruin the victim's marriage and sabotage her employment. The defendant continued to contact the victim by telephone and mail, despite a warning from a police officer and the issuance of a protective order. The defendant was convicted of stalking, and he appealed, arguing that his conduct would not cause a reasonable person to fear physical violence, as he had never assaulted the victim or explicitly threatened her with violence. The court rejected this argument. "Even in the absence of an explicit verbal threat of physical violence," the court explained, "a reasonable person could view the defendant's unrelenting telephone calls and gifts to [the victim], especially in light of the defendant's articulated history of emotional instability, as evidence that the defendant was obsessed with [the victim] and posed a threat of physical violence to her." Id. at 139.

We reach a similar conclusion here. In this case, defendant has repeatedly contacted plaintiff over a six-year period by email, regular mail, and telephone, against her express wishes. He talked about sexual matters and threatened to kill himself. He has called plaintiff at work, and at home during the middle of the night. He called plaintiff's employer on several occasions, talking about death and suicide. As plaintiff testified, defendant appeared to seek a romantic relationship with her. Indeed, defendant indicated as much during his testimony at the hearing, stating that he called her in the middle of the night "so that there could be a romantic situation, a romantic call back." This course of conduct could, and did, cause plaintiff to fear unlawful

sexual conduct, unlawful restraint, bodily injury and death. Plaintiff so testified, and such fear is certainly reasonable under the circumstances. The court did not err in finding that plaintiff met her burden of proof.

We find defendant's remaining claims of error equally without merit. Plaintiff was not required to file two complaints in this case—one for temporary relief and one for final relief—as defendant suggests. An ex parte temporary order may be converted to a final order following a final hearing. See 12 V.S.A. § 5134(a), (b).

As to defendant's motion to dismiss, the record shows that it was received by the court in the middle of the final hearing. It is a fourteen-page handwritten document that generally states factual allegations that defendant believed supported his defense. Because of the factual allegations contained therein, it was not properly a motion to dismiss. The court found the document very difficult to understand, and asked defendant to explain his arguments to the court. The court informed defendant that it would not decide the case based on the filings, but rather on the evidence presented at the final hearing. As previously discussed, defendant's position was that his conduct did not constitute stalking, and the court rejected this argument. The court's decision necessarily rejects the motion to dismiss.

Finally, the record does not support defendant's suggestion that his answers were improperly "cut off." The court conducted the hearing appropriately and consistently with the requirements of due process and the rules of evidence. See V.R.E. 611 (court authorized to control mode and order of interrogation of witnesses and presentation of evidence). We find no grounds to disturb the court's opinion.

Affirmed.

BY THE COURT:

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John A. Dooley, Associate Justice

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Denise R. Johnson, Associate Justice

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Marilyn S. Skoglund, Associate Justice