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

ENTRY ORDER

SUPREME COURT DOCKET NO. 2010-160

OCTOBER TERM, 2010

Marcia J. Nichols OBO Erin Nichols	}	APPEALED FROM:
	}	
v.	}	Lamoille Superior Court
	}	
Marc Newton	}	DOCKET NO. 14-4-10 Lesa
		Trial Judge: Dennis R. Pearson

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

Defendant appeals from the court's issuance of a civil anti-stalking order under 12 V.S.A. § 5133. He argues that plaintiff failed to prove that he engaged in threatening behavior as defined by statute. We affirm.

Plaintiff sought relief on behalf of her daughter, a seventeen-year-old high school student who received numerous inappropriate text messages from defendant. Defendant was a coach for both men's and women's sports teams at the student's high school, and he also assisted injured athletes, including the student here. Among other things, defendant worked with the student as an assistant coach and trainer, including wrapping the student's legs with tape before each of her games. The court granted temporary ex parte relief to plaintiff in early April 2010. Following a hearing, the court issued a final order that required defendant to stay away from the student for one year.

At the final hearing, the student testified that defendant began sending her text messages in December 2009. At first, the messages were friendly and casual, and defendant would inquire about certain sports-related injuries that she had. The student had not given defendant her cell phone number, but apparently, such numbers were made available to coaches. By the end of March 2010, the messages had become sexually oriented. The student deleted some of the messages because she found them so disturbing. Defendant asked the student if she wanted him to take her virginity. Defendant also advised, referring to having sex with the student, that "if u decide for real that u want that to happen u just need to let me know." In a related message, he told the student that "u don't want to know some of the thoughts that went through my head sometimes" while he was wrapping her legs as treatment for a sports injury.

The student testified that she did not respond to the message about taking her virginity because it "freaked [her] out." She tried to ignore the situation at first, but then responded, telling defendant that his behavior was inappropriate, that she was a minor, and that he had crossed the line. She sent between four and six messages to this effect to defendant, as he continued to respond with messages that he "had a pretty rough night," and that he "would like to talk (not text) with u please," asking for "the opportunity to apologize and really talk about this," and that he was "still the same person who talked with u all through bball season and I want you to know that . . . if u allow it, I believe we could work this out . . . please let me know." The student testified that these messages made her uncomfortable. Defendant then told her that he wanted to try to talk to her via text messages, but the

student told him no. The student also recounted that defendant had shown up at her soccer banquet in New Hampshire. She was visibly uncomfortable at the banquet and did not look at defendant. During the banquet, defendant sent her a text message that said she "needed to lighten up because [she] looked like [she] was about to burst."

The student stated that she was "kind of" afraid that something might happen or that defendant might follow up on his messages. She testified that she "just didn't want to see him." When asked if she was concerned about defendant trying to make contact with her in the future, the student reiterated that she just did not want to see him, talk to him, or have anything to do with him.

Defendant also testified. He acknowledged that he sent text messages about his willingness to take the student's virginity as well as the other messages described by the student. He admitted that he continued to send her text messages despite the fact that she had indicated that she was uncomfortable with the messages he had been sending. He agreed that he had "crossed a line" and that his messages were inappropriate. Defendant indicated that he continued to contact the student because he hoped the situation was something they could talk about, and that he wanted to try to continue their friendship. He stated that when he received a message that essentially said "stop contacting me," he replied with a message that he was sorry that she felt that way and that he had hoped to have a conversation with her.

The court made findings on the record at the close of the hearing, concluding that plaintiff established the right to relief under 12 V.S.A. § 5133. It found that defendant engaged in "threatening behavior" by committing acts that would cause a reasonable person to fear unlawful sexual conduct. It also found, as required by the statute, that defendant engaged in a course of conduct of two or more instances that included such threatening behavior, that it served no legitimate purpose, and that it was conduct that would cause a reasonable person to suffer substantial emotional distress. In reaching its conclusion, the court considered the totality of the circumstances including the coach-student relationship and the obvious power disparity between the two.

The court also found by a preponderance of the evidence that the student had made clear to defendant that she wanted him to stop contacting her, and defendant failed to do so. It stated that a reasonable person in the student's circumstances would have a basis to fear unlawful sexual conduct, which could be as little as some further attempt to follow through on "any of the implications contained in any of those text messages." The court added that it did not construe the statutory language to require any actual acts of sexual conduct, but there could be as little as an attempt to pursue any further activity that could be defined as unlawful sexual conduct. More specifically, the court held the reasonable fear under these circumstances "could [result from] as little as an attempted commission of a lewd act." The court thus concluded that plaintiff had established her right to relief by a preponderance of the evidence. Defendant appealed from the court's decision.

Defendant argues that plaintiff failed to prove by a preponderance that he engaged in "threatening behavior" under 12 V.S.A. § 5131(8). As suggested above, 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." Id. § 5131(6)(A), (B). " '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).

We conclude that the evidence supports the court's finding that defendant engaged in stalking by "threatening behavior" as defined and required by § 5131. See Mullin v. Phelps, 162 Vt. 250, 260 (1994) (on review, this Court will uphold trial court's findings unless there is no credible evidence to support them). In reaching our conclusion, we look not to the definition of an attempted lewd act, as did the trial court, but to the crime of sexual exploitation of a minor. See 13 V.S.A. § 3258. Section 3258 provides that no person shall engage in a sexual act with a minor if the actor is four years older than the minor and the actor is "in a position of power, authority, or supervision over the minor by virtue of the actor's undertaking the responsibility, professionally or voluntarily, to provide for the health or welfare of minors, or guidance, leadership, instruction, or organized recreational activities for minors." Id. § 3258(a)(1), (2). It is undisputed that defendant, through his texting to the student, attempted to engage her in a sexual relationship prohibited by § 3258.[*] This course of conduct was sufficient to cause the student to reasonably fear such "unlawful sexual conduct"—i.e. to fear defendant's attempt to sexually exploit her—so as to constitute "threatening behavior" defined at 12 V.S.A. § 5131(8). As found by the trial court, the conduct served no legitimate purpose and would cause a reasonable person in the student's position substantial emotional distress. Accordingly, defendant's behavior qualified as "stalking" as concluded by the trial court and defined at 12 V.S.A. § 5131(6)(A) and (B).

The court's conclusion and order will be upheld when supported by the record below. Where the trial court "finds by a preponderance of the evidence that the defendant has stalked" the plaintiff, the court "shall order the defendant to stay away from the plaintiff . . . and may make any other such order it deems necessary to protect the plaintiff . . . ." Id. § 5133(d)(1) (emphasis added). The evidence supports the court's finding that defendant stalked the student here, and so did not err in ordering defendant to stay away from her for a specific period of time.

Affirmed.

BY THE COURT:

_____
John A. Dooley, Associate Justice

_____
Denise R. Johnson, Associate Justice

_____
Brian L. Burgess, Associate Justice

[*] While the trial court did not cite this criminal statute in its analysis, violation of same falls squarely within the "implications" of defendant's solicitations mentioned by the court as a source of the student's reasonable fear of unlawful sexual conduct required for the element of threatening behavior necessary for stalking.