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ALABAMA COURT OF CIVIL APPEALS

SPECIAL TERM, 2020

2190284

M.R.E.

v.

M.J.E.

Appeal from Lauderdale Circuit Court
(DR-19-226)

PER CURIAM.

In August 2019, M.J.E. ("the daughter") filed a petition in the Lauderdale Circuit Court ("the trial court") seeking a protection-from-abuse ("PFA") order restraining her father, M.R.E. ("the father"), from having contact with her. In her petition, the daughter alleged that the father had sexually assaulted her in 2014, that he had told her in 2014 that "I

can see you naked whenever I want to," that he had emotionally abused her by "constant stalking," that he had yelled at her at her high-school graduation, and that he had sent her an e-mail message, "saying that 'I need to fix myself.'" She further alleged that, despite her telling him to leave her alone, he "will not stop" and that he had contacted the college she was entering as a freshman student "for info about me." The trial court entered an ex parte PFA order on the same day that the daughter filed her petition.

The father was served with the petition and the ex parte order on August 17, 2019. Although the matter was set for trial on August 22, 2019, the father requested and received a continuance. The trial court held the trial on November 7, 2019, after which, on November 22, 2019, the trial court entered a PFA order preventing the father from contacting the daughter and directed that he not be permitted to attend any events hosted at, or participated in by, the college the daughter attends. The PFA order expired by its terms on June 1, 2020.[1]

[1]We have considered whether the father's appeal of the PFA order is moot. "'The test for mootness is commonly stated as whether the court's action on the merits would affect the

The father filed a timely postjudgment motion directed to the November 22, 2019, PFA order. In that motion, he argued that the daughter had not presented evidence of an act of abuse that would support the entry of a PFA order against him. The father requested a hearing on his motion, but the trial court denied the motion on the same day it was filed, without holding a hearing. The father then timely appealed to this court. He raises two issues on appeal: whether the trial court erred in concluding that the conduct alleged by the daughter amounted to an act of abuse warranting the entry of a PFA order and whether the trial court erred in failing to hold a hearing on his postjudgment motion.

The testimony and exhibits presented at trial reveal the following. The daughter, who was 18 years old and a freshman

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rights of the parties.'" Chapman v. Gooden, 974 So. 2d 972, 983 (Ala. 2007) (quoting Crawford v. State, 153 S.W.3d 497, 501 (Tex. App. 2004)). The father contends that, because, once entered, a PFA order is recorded in, among other databases, the National Crime Information Center database, see Ala. Code 1975, § 30-5-8(c), he could suffer adverse consequences in his employment, which could require background checks for security clearances in the future. We therefore decline to dismiss the appeal as moot. See Rice v. Sinkfield, 732 So. 2d 993, 994 n.1 (Ala. 1998) (noting that an exception to the mootness doctrine exists when there exist "continuing collateral consequences to a party").

in college at the time of the trial, testified that she was living in a college dormitory and was a cheerleader. She said that, before attending college, she had lived with her mother and her stepfather because, she said, the father had molested her when she was in the seventh grade. She said that the father had continued to contact her through e-mail messages despite her asking him not to contact her. She also said that he had shown up at her high-school events although she had asked him not to attend those events. She explained that his presence "brings me a lot of anxiety." She expressed concern about how the father knew what dormitory she was living in, but she was presented a copy of an e-mail message sent to the father by her paternal grandmother that contained information, including the name of the daughter's dormitory; the daughter had sent the paternal grandmother an e-mail message containing that information because her paternal grandparents were paying a portion of her college expenses. The daughter stated that she did not want the father to know about her life or to be involved in her "college experience," stating that "I just want to be safe knowing that I can walk down the street without having to see him and freak out." At no point in the

daughter's testimony did she state that the father had spoken to her when he had attended events or that he had threatened her in any manner. She admitted that the father had not directed any violence toward her.

The record contains numerous e-mail messages between the father and the daughter.[2] By and large, most are innocuous messages from the father mentioning an activity he had engaged in or a memory of an activity involving the daughter or others; some messages have photos attached. Several messages involve the daughter's college plans.

In an e-mail exchange in mid-April 2019, the father mentioned that he had become aware that the daughter had received a prescription for birth-control pills from an insurance-benefits statement he had received. The father urged the daughter to discuss with her physician the possible long-term effects of birth-control pills on her health. The daughter responded with the following diatribe:

> "Let me tell you something. No one wants to be friends with the big bully who steals all the kids['] lunch money. Taking everything we have is just cruel. Whatever you do towards mom has an

[2]Some of the messages have an additional recipient who is not mentioned in the testimony.

> affect [sic] on the rest of us. So how in your right mind do you think taking us back to court is suppose to get us back? What is your motative [sic]? The only person that turns us against you is you. Hurting other people doesn't make anyone feel better not even you. And you know why I know that? Because you will always target mom and it will never be enough for you. You will never be happy and you will never get your way if you continue doing the actions you are doing. Maybe if you could care about something else and not try to take someone down just because you can't get your way you would be better off. You can try to knock someone down all day long but that will just push someone farther away. I don't need you to send me an argumentative email about how you are right and I'm wrong and how mom is isolating us from you. I have a car, I can do whatever I want and this is not seeing you. Maybe if you would have listened to us and had given us space and not send [sic] us to court you would be better off but something in your head won't let you do that. Sending me child support money does not make up for all the things you should have been help [sic] paying for during high school. So yes when I have asked for money from you it's because I think I deserve it. All the money you have wasted on this crap is WASTED. You didn't get us then and you won't get me now. I don't want to talk to you but I think you should hear just a piece of my mind. Here is a simple message about how I feel about this situation and hope you rethink the type of person you are."

(Capitalization in original.) In reply, the father thanks the daughter for speaking her mind and asks several questions, including "[h]ow am I taking everything you have" and "[w]hy am I taking you back to court." The record contains no further e-mail messages in response to the father's reply.

In one lengthy e-mail exchange between the father and the daughter on January 7 and 8, 2019, the father provides information about certain dental-assistant programs and suggests that the daughter, who was then considering the pursuit of a dental-assistant certificate, compare information about the different programs before choosing which to attend; he also states that it is respectable to work and to pay for one's own education. In what, based on the documentary evidence contained in the record, appears to be her final response to that series of e-mail messages, the daughter said:

> "This is why I'm not including you in anything I do because you won't support it. Talking to you is such a waste of time because you know paying for my own stuff is the best way to go because my 'father' won't spend a dime on it. That goes to show how much you care. The research doesn't matter, I'm not touring anymore places that is the one I am going to."

In his reply to the daughter's final message, the father stated that he did support her and that he desired a relationship with her "other than a text message when you need money." He explained that he supported her by attending her events and that he had looked up scholarship opportunities for her as well. He concluded his message by stating that "[t]he

problem is the only support you want from me is money and nothing else."

The record contains a third e-mail exchange between the father and the daughter that appears to have begun on July 25, 2019, with a message from the daughter stating: "I am almost certain you didn't even pay for your own education. When I asked you to pay for dental[-assistant] school you wouldn't even do that." The father answered the daughter's message on August 2, 2019, apologizing for the late reply because he had been out of town. In his response, he denies having refused to pay for the daughter's education. He also pointed out that the paternal grandparents had an account specifically intended to pay for, at least in part, the daughter's education.

The daughter immediately responded to the father's message by stating that "if you want to help pay, it would be nice to have money to pay [for] new clothes for school or have spending money for the year. ... You can always send a check to the house." The father replied to the daughter by offering to place money directly in her bank account or to meet her to go shopping; he stated clearly that he did not want to send a check to the house. The daughter responded that she did not

want to meet the father and that she did not "see a problem with sending a check to my house," to which the father replied: "What is the problem with transferring it from my account to your account?" Further exchanges regarding the manner of transferring the money continued; during one response, the daughter asked: "So why did you stop sending child support?" She later stated: "There is no reason you can't send me a check to my house. If you were willing to actually give me money and felt sincere about it you wouldn't have to argue about it. There is no difference in that and transferring it into my account." The father replied that there was a difference between the two options and that he was trying to find a solution, adding that he had offered four methods of transferring the money to her, including meeting in person at a store, meeting at his house, transferring money into her account, or mailing a check to her college address or a post office box.

Ultimately, after at least a dozen e-mail exchanges on August 1, 2019, and a few more on August 5 and 6, 2019, the father capitulated and agreed to mail the daughter a check for $1,000 to her house. However, the daughter then responded:

"If it is from child support I legally cannot except [sic] it. And if you send it I will return the check so never mind." The father replied to the daughter that she would be doing nothing wrong by accepting the money and that any amounts he chose to forward directly to her could be considered to be credits against his child-support obligation. On August 7, 2019, the father sent a message to the daughter indicating that he had mailed the check to her. The daughter commenced the PFA action the following day.

The father presented the testimony of Dr. Joan Kerr, a psychologist who had counseled both the daughter and the father. Dr. Kerr explained that the sexual-abuse allegations had arisen because the daughter had complained that the father's lying down beside her and stroking her hair during a visit had made the daughter uncomfortable; Dr. Kerr said that the mother had considered the father's actions to be sexual in nature but that the daughter had not considered the father's actions to be sexual in nature until the mother had told her they were. Dr. Kerr testified that, during her counseling sessions with the father, she had developed concerns that the mother was engaging in parental alienation. She also

commented that she had reviewed recordings of conversations between the father and the mother and that "statements by the mother ... led [her] to believe that some of the stuff was being orchestrated or coached" and that the mother had admitted to the father during those recorded conversations that she had lied. Although Dr. Kerr admitted that she was aware that the daughter had asked the father not to attend football games or other activities at which the daughter participated and that his persistence in doing so might make the daughter feel like she was being "stalked," as the term is used in the common vernacular, she testified that the father felt that it was his duty as a father to attend the daughter's activities and that he had also chosen to attend the daughter's activities because he had decided not to participate in the mother's alienation of him. According to Dr. Kerr, the father had not, to her knowledge, tried to make contact with the daughter at her activities and had simply attended her events and remained in the stands or the audience. Dr. Kerr stated that, in her opinion, the father was not a danger to the daughter.

Discussion

The Protection from Abuse Act, codified at Ala. Code 1975, § 30-5-1 et seq., has as one of its purposes to "create a flexible and speedy remedy to discourage violence and harassment against family members or others with whom the perpetrator has continuing contact." § 30-5-1(a)(2). In order to have been entitled to a PFA order, the daughter was required to prove by a preponderance of the evidence, see Ala. Code 1975, § 30-5-6(a), that the father had committed an act of abuse. The term "abuse," as used in the Protection from Abuse Act, is defined in § 30-5-2, which reads, in pertinent part:

> "(1) Abuse. An act committed against a victim, which is any of the following:
>
> > "a. Arson. Arson as defined under Sections 13A-7-40 to 13A-7-43, inclusive.
> >
> > "b. Assault. Assault as defined under Sections 13A-6-20 to 13A-6-22, inclusive.
> >
> > "c. Attempt. Attempt as defined under Section 13A-4-2.
> >
> > "d. Child Abuse. Torture or willful abuse of a child, aggravated child abuse, or chemical endangerment of a child as provided in Chapter 15, commencing with Section 26-15-1, of Title 26, known as the Alabama Child Abuse Act.

"e. Criminal Coercion. Criminal coercion as defined under Section 13A-6-25.

"f. Criminal Trespass. Criminal trespass as defined under Sections 13A-7-2 to 13A-7-4.1, inclusive.

"g. Harassment. Harassment as defined under Section 13A-11-8.

"h. Kidnapping. Kidnapping as defined under Sections 13A-6-43 and 13A-6-44.

"I. Menacing. Menacing as defined under Section 13A-6-23.

"j. Other Conduct. Any other conduct directed toward a plaintiff covered by this chapter that could be punished as a criminal act under the laws of this state.

"k. Reckless Endangerment. Reckless endangerment as defined under Section 13A-6-24.

"l. Sexual Abuse. Any sexual offenses included in Article 4, commencing with Section 13A-6-60, of Chapter 6 of Title 13A.

"m. Stalking. Stalking as defined under Sections 13A-6-90 to 13A-6-94, inclusive.

"n. Theft. Theft as defined under Sections 13A-8-1 to 13A-8-5, inclusive.

"o. Unlawful Imprisonment. Unlawful imprisonment as defined under Sections 13A-6-41 and 13A-6-42."

As noted above, the father argues on appeal that the daughter did not prove that he committed any act of abuse warranting the entry of a PFA order against him. He specifically challenged the sufficiency of the evidence in his postjudgment motion. He also contends that the trial court erred by failing to hold a hearing on his postjudgment motion.

> "'Rule 59(g)[, Ala. R. Civ. P.,] provides that posttrial motions "remain pending until ruled upon by the court (subject to the provisions of Rule 59.1), but shall not be ruled upon until the parties have had opportunity to be heard thereon." The failure to hold a hearing on a posttrial motion is not always reversible error, however. Our supreme court has stated:
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> > "'"'[I]f a party requests a hearing on its motion for a new trial, the court must grant the request.' Ex parte Evans, 875 So. 2d 297, 299-300 (Ala. 2003) (citing Rule 59(g), Ala. R. Civ. P., and Walls v. Bank of Prattville, 554 So. 2d 381, 382 (Ala. 1989)). Although it is error for the trial court not to grant such a hearing, this error is not necessarily reversible error. 'This Court has established, however, that the denial of a postjudgment motion without a hearing thereon is harmless error, where (1) there is ... no probable merit in the grounds asserted in the motion, or (2) the appellate court

> resolves the issues presented therein, as a matter of law, adversely to the movant, by application of the same objective standard of review as that applied in the trial court.' Historic Blakely Auth. v. Williams, 675 So. 2d 350, 352 (Ala. 1995) (citing Greene v. Thompson, 554 So. 2d 376 (Ala. 1989))."'"

Frazier v. Curry, 119 So. 3d 1195, 1197-98 (Ala. Civ. App. 2013) (quoting Cunningham v. Edwards, 25 So. 3d 475, 477 (Ala. Civ. App. 2009), quoting in turn Chism v. Jefferson Cty., 954 So. 2d 1058, 1086 (Ala. 2006)). Thus, we must determine whether there was probable merit in the father's postjudgment motion or whether we may, as a matter of law, resolve the issues he raises on appeal adversely to him.

The allegations in the daughter's petition included alleged acts of sexual abuse by the father that allegedly occurred in 2014, "emotional abuse," and "constant stalking." She made no allegations in her petition and presented no evidence indicating that the father's conduct included any acts that could be construed as arson, assault, criminal coercion, criminal trespass, kidnapping, menacing, reckless endangerment, theft, or unlawful imprisonment. Thus, we will

confine our discussion to those acts of abuse that the daughter alleged.

The daughter alleged in her petition that the father stalked her; specifically, she complained in her testimony that the father attended her extracurricular events despite her asking him not to do so. A person is guilty of stalking in the first degree if he or she "intentionally and repeatedly follows or harasses another person and ... makes a threat, either expressed or implied, with the intent to place that person in reasonable fear of death or serious bodily harm." Ala. Code 1975, § 13A-6-90(a) (emphasis added). In order to be guilty of stalking in the second degree,

> "[a] person ... acting with an improper purpose[] [must] intentionally and repeatedly follow[], harass[], telephone[], or initiate[] communication, verbally, electronically, or otherwise, with another person, any member of the other person's immediate family, or any third party with whom the other person is acquainted, and cause[] material harm to the mental or emotional health of the other person, or cause[] such person to reasonably fear that his or her employment, business, or career is threatened ...."

Ala. Code 1975, § 13A-6-90.1(a). However, in order to be guilty of stalking in the second degree, "the perpetrator [has

to have been] previously informed to cease [the offending] conduct." Id.

The daughter admitted that the father had not made any threat toward her. As noted above, many of the e-mail messages between the father and daughter were brief and contained comments about activities the father had enjoyed or memories of activities that he had enjoyed with the daughter, like fishing; a few involved reporting happenings within the daughter's extended family, like informing the daughter about the health of a relative or the death of the paternal grandfather's cat. The more lengthy and frequent exchanges involved the daughter's postsecondary-education plans and her need for money to pay her educational or associated expenses. The daughter's perception notwithstanding, the father's attendance at sporting events where the daughter cheered, at recitals, at competitions, or at the daughter's graduation from high school appear, at least without the daughter's having presented any contravening evidence, to be lawful actions by a father. Thus, we are unable to conclude that the father's argument that the daughter did not establish that the father was guilty of stalking lacks merit.

We are similarly unable to conclude that the father's argument that the evidence presented by the daughter failed to establish that the father had committed the offense of harassing communications by continuing to contact her through e-mail messages is without merit. Although the father repeatedly communicated with the daughter through electronic means, in order to be entitled to a PFA order, the daughter was required to present evidence indicating that the father's communications were performed "in a manner likely to harass or cause alarm." Ala. Code 1975, § 13A-11-8(b)(1)a. As stated, the majority of the e-mail messages contained in the record on appeal could be considered innocuous. The tone of some of the daughter's e-mail messages could be construed as more strident than any sent by the father.

Finally, we also cannot conclude that the father's challenge to the evidentiary support for the PFA order insofar as it was based on the daughter's statement that the father had molested her when she was in the seventh grade lacks merit such that the denial of his requested postjudgment hearing was harmless error. The father admitted that he had been accused of molesting the daughter, that he had been criminally

investigated, that the district attorney had chosen to abandon the prosecution of those charges, and that he had been awarded unsupervised visitation with the daughter by a court after those allegations had been litigated. Dr. Kerr testified that the father was not a danger to the child and indicated that the sexual-abuse allegations were likely coached.

Because we are unable to conclude that the issues raised in the father's postjudgment motion lacked merit and because we cannot, as a matter of law, decide the issues the father raises on appeal adversely to him, we cannot determine that the trial court's denial of the father's requested hearing on his postjudgment motion was harmless error. Accordingly, we reverse the trial court's order denying the father's postjudgment motion, and we instruct the trial court to hold a hearing on the father's postjudgment motion. Based on our resolution of this issue, we pretermit discussion of the other issue raised by the father in this appeal.

REVERSED AND REMANDED WITH INSTRUCTIONS.

Moore, Donaldson, and Hanson, JJ., concur.

Thompson, P.J., concurs in the result, without writing.

Edwards, J., dissents, with writing.

EDWARDS, Judge, dissenting.

Although I would agree with the main opinion's conclusion that the postjudgment motion filed by M.R.E. ("the father") has probable merit and, thus, that the Lauderdale Circuit Court ("the trial court") erred in failing to hold a hearing on that motion, because I have concluded that the evidence presented to the trial court by M.J.E. ("the daughter") is entirely insufficient to support the protection-from-abuse ("PFA") order entered by the trial court, an issue that the main opinion declines to address, I would reverse the trial court's PFA order. I, therefore, would pretermit addressing the father's argument relating to the failure of the trial court to hold the postjudgment hearing as moot. See Sullivan & Wills Real Estate, L.L.C. v. Cruce, 75 So. 3d 117, 121 (Ala. Civ. App. 2010).

A PFA order is necessary to protect those who have been or may be victimized by those in close relationship to them. See Ala. Code 1975, § 30-5-2(7) (defining "victim"). However, a person has the right to seek a PFA order only if he or she is a victim of abuse or "has reasonable cause to believe he or she is in imminent danger of becoming the victim of any act of

abuse." Ala. Code 1975, § 30-5-5(a)(1). PFA orders are recorded in national databases, including the National Crime Information Center database, see Ala. Code 1975, § 30-5-8(c), and can be enforced in certain of our sister states. See Ala. Code 1975, § 30-5B-1 et seq. (the Alabama Uniform Interstate Enforcement of Domestic Violence Protection Orders Act). The reasons for, and the consequences of, a PFA order are of the utmost seriousness. Thus, a party seeking a PFA order must prove his or her allegations by a preponderance of the evidence, see Ala. Code 1975, § 30-5-6, and mere conclusory allegations, generalized anxiety, or a desire to avoid annoyance should not be sufficient to entitle a party to such an order.

Reviewing a PFA order is made more difficult because the "findings" of the trial court are merely check marks on a preprinted form that indicate that the plaintiff proved "abuse" and that the defendant represents a credible threat to the safety of the plaintiff (or, in certain cases, to the plaintiff's children or other household member). I am well aware that I am constrained by the ore tenus rule to presume that the factual findings of the trial court are correct, Wu

v. Wu, 37 So. 3d 792, 794 (Ala. Civ. App. 2009), and that I must not substitute my judgment regarding those factual findings for that of the trial court. See Ex parte R.E.C., 899 So. 2d 272, 279 (Ala. 2004). However, the presumption in favor of the trial court's findings may be overcome if the record lacks sufficient evidence to support those findings. See Fadalla v. Fadalla, 929 So. 2d 429, 433 (Ala. 2005). Furthermore, the ore tenus presumption does not prevent me from considering whether the trial court properly applied the law to the facts. Fadalla, 929 So. 2d at 433. As I explain below, in my opinion, the evidence contained in the record does not rise to the level sufficient to support the trial court's finding that the father committed an act of "abuse" as that term is defined in Ala. Code 1975, § 30-5-2(1).

As the main opinion suggests, the daughter's evidence was insufficient to establish the daughter's allegations that the father stalked her or that, by continuing to contact her through e-mail, he had engaged in harassing communications. The daughter's testimony did not support any possible finding that the father had made any threat toward the daughter, that he had acted with an improper purpose, or that he had acted in

any way that would amount to harassment or would cause alarm when he contacted her through e-mail. See Ala. Code 1975, § 13A-6-90(a) (defining "stalking in the first degree"); Ala. Code 1975, § 13A-6-90.1(a) (defining "stalking in the second degree"); and Ala. Code 1975, § 13A-11-8(b) (defining "harassing communications"). Thus, the evidence presented to the trial court regarding those allegations was insufficient to support a conclusion that the daughter "had proved the allegations of abuse by a preponderance of the evidence" as the trial court indicated in its PFA order.

The daughter's evidence relating to the alleged sexual abuse is, in my opinion, similarly insufficient. The daughter alleged in her petition that the father had "rubbed himself and his parts on me" and that he had told her that he could "see her naked whenever he wants." The daughter did not testify about either allegation. She made the conclusory statement that the father had molested her, but she produced no evidence relating to the actions of the father that would have amounted to such conduct. The only evidence relating to the actions that might have formed the basis of the daughter's molestation allegations came from the testimony of Dr. Joan

Kerr, who indicated that the allegations had arisen from an incident when the father had laid down beside the daughter and stroked her hair.

"Abuse," as defined in § 30-5-2(1), includes "sexual abuse," which is defined as those "sexual offenses included in Article 4, commencing with Section 13A-6-60, of Chapter 6 of Title 13A[, Ala. Code 1975." § 30-5-2(1)(l) The offenses set out in Ala. Code 1975, § 13A-6-60 et seq., require "sexual contact," which was, at the time the alleged abuse supposedly occurred in 2014 and at the time the daughter filed her PFA petition in August 2019, defined in former § 13A-6-60(3) as "[a]ny touching of the sexual or other intimate parts of a person not married to the actor done for the purpose of gratifying the sexual desire of either party."[3] The daughter presented no evidence indicating that the father had touched any of her "sexual or other intimate parts." Thus, in my opinion, the daughter, by testifying solely that her father had "molested" her, did not present any, much less sufficient,

[3]Section 13A-6-60 was amended effective September 1, 2019. The 2019 amendment removed the phrase "not married to the actor" from the definition of "sexual contact."

evidence to establish that the father had "molested" her or that he had committed an act of sexual abuse.

Because my review of the record has convinced me that the daughter failed to present sufficient evidence to establish that the father committed any of the acts of abuse she alleged in her PFA petition, I would reverse the PFA order against the father.