STATE OF MICHIGAN

COURT OF APPEALS

COREY WENDELL ANDERSON, Petitioner-Appellant,	UNPUBLISHED July 8, 2014
v	No. 311290 Wayne Circuit Court
RASHIDA JOHNSON, Respondent-Appellee.	LC No. 12-105410-PP

RASHIDA JOHNSON, Petitioner-Appellee,	
v	No. 311363 Wayne Circuit Court
COREY ANDERSON, Respondent-Appellant.	LC No. 12-104275-PP

Before: SAWYER, P.J., and METER and FORT HOOD, JJ.

PER CURIAM.

In Docket No. 311290, appellant appeals as of right from the trial court's order granting the motion to terminate a personal protection order (PPO) that he had obtained against Rashida Johnson. In Docket No. 311363, appellant appeals as of right from an order finding him in criminal contempt for violating a PPO held by Johnson against him. Appellant was sentenced to 30 days' jail time, all of which was suspended unless he violated the PPO again. We affirm both rulings.

I. FACTUAL BACKGROUND

Appellant and Johnson were a couple and lived together for several years before separating. During their relationship, they had two children together: a son, who was 17 years old at the time of these actions, and a daughter, who was 12 at the time of these actions. The parties shared responsibilities and finances throughout their relationship. Since their separation, there has been ongoing friction between them.

On April 9, 2012, Johnson obtained an ex parte PPO against appellant. He sought termination of the PPO. However, the trial court denied his motion to terminate, holding that the PPO remained in effect. On May 2, 2012, appellant obtained an ex parte PPO against Johnson. She sought termination of the PPO, and the trial court granted her motion to terminate. Johnson also alleged that appellant violated the PPO she held. After a hearing on the matter, the trial court ruled that appellant was in criminal contempt for sending a text message to Johnson in violation of the terms of the PPO.

II. MOTION TO TERMINATE PPO

A. ERROR IN TERMINATING THE PPO

Appellant, proceeding in propria persona, alleges that the trial court erred in terminating the ex parte PPO he held against Johnson and in failing to consider his supporting documentation. We disagree.

We review for an abuse of discretion a trial court's ruling regarding the issuance of a PPO. *Hayford v Hayford*, 279 Mich App 324, 325, 329; 760 NW2d 503 (2008). We also review for an abuse of discretion a trial court's evidentiary rulings. *Craig v Oakwood Hosp*, 471 Mich 67, 76; 684 NW2d 296 (2004). An abuse of discretion occurs when the decision resulted in an outcome falling beyond the range of principled outcomes. *Hayford*, 279 Mich App at 325. We review for clear error the trial court's findings of fact. *Id*. "The clear error standard provides that factual findings are clearly erroneous where there is no evidentiary support for them or where there is supporting evidence but the reviewing court is nevertheless left with a definite and firm conviction that the trial court made a mistake." *Hill v City of Warren*, 276 Mich App 299, 308; 740 NW2d 706 (2007). We give deference to the trial court's credibility determinations. MCR 2.613(C); *Pickering v Pickering*, 253 Mich App 694, 702; 659 NW2d 649 (2002).

Under MCL 600.2950(4), the trial court must issue a PPO if it finds that "there is reasonable cause to believe that the individual to be restrained or enjoined may commit 1 or more of the acts listed in subsection (1)." The relevant acts include "(i) Engaging in conduct that is prohibited under section 411h or 411i of the Michigan penal code[.]" MCL 750.411h and MCL 750.411i prohibit "stalking" and define the offense as "a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel terrorized, frightened, intimidated, threatened, harassed, or molested and that actually causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested."

"The petitioner bears the burden of establishing reasonable cause for issuance of a PPO . . . and of establishing a justification for the continuance of a PPO at a hearing on the respondent's motion to terminate the PPO[.]" *Hayford*, 279 Mich App at 326 (citation omitted). "The trial court must consider the testimony, documents, and other evidence proffered and whether the respondent had previously engaged in the listed acts." *Id*.

An ex parte PPO was issued against Johnson on May 2, 2012. Appellant argues that he provided sufficient documentation to support continuation of that PPO. Specifically, appellant

contends that Johnson and her boyfriend participated in a pattern of threatening and harassing conduct toward him and points to affidavits to support his assertion.

At the motion hearing, appellant testified about several instances in support of the claim of harassing or threatening behavior, including an instance where Johnson's boyfriend pulled up beside appellant and some of his friends as they left a club. The back door of the boyfriend's vehicle opened, and someone pointed a long, black object at appellant. Appellant also alleged that Johnson's uncle told him about a telephone call he received from Johnson warning him not to ride with appellant because her boyfriend was going to harm appellant. There were other instances where Johnson's boyfriend came to her house when appellant was there dropping off their daughter.

In response, Johnson testified that appellant constantly harassed and threatened her. The trial court asked Johnson if she ever encouraged her boyfriend or anyone else to harm appellant. She responded in the negative. She also stated that she was not riding with her boyfriend during the incident outside the club.

The trial court listened to the evidence and held it insufficient to maintain the PPO against Johnson. Specifically, the trial court found that appellant failed to establish Johnson's connection to the alleged threatening or harassing behavior of her boyfriend. The trial court noted that Johnson was not in the vehicle during the incident outside of the club. It further noted that there was no evidence that she was directing her boyfriend to hurt appellant.

We have no definite and firm conviction that the trial court was mistaken regarding these findings. *Hill*, 276 Mich App at 308. The record shows that appellant's allegations overwhelmingly describe the boyfriend's conduct. Appellant's assertions that Johnson told the boyfriend where he lived and knew about the incident at the club are insufficient to show that she harassed or threatened him. Without connecting Johnson to the unauthorized conduct, appellant could not satisfy his burden of proof. Accordingly, the trial court did not abuse its discretion when it granted Johnson's motion to terminate the PPO issued against her.

Regarding appellant's related argument that the trial court failed to consider his supporting documentation, we find that the record indicates otherwise. The affidavits at issue are part of the lower-court record that was before the trial court at the motion hearing. Moreover, appellant asserted the facts of the incidents averred to in those affidavits at the motion hearing.

B. EXCLUSION OF WITNESSES

Second, appellant argues that the trial court erred when it excluded testimony of witnesses to the incidents allegedly warranting maintenance of the PPO issued against Johnson. We disagree.

As noted earlier, we review for an abuse of discretion a trial court's evidentiary decisions. See *Waknin v Chamberlain*, 467 Mich 329, 332; 653 NW2d 176 (2002). "In civil cases, evidentiary error is considered harmless unless declining to grant a new trial, set aside a verdict, or vacate, modify, or otherwise disturb a judgment or order appears to the court inconsistent with substantial justice." *Guerrero v Smith*, 280 Mich App 647, 655; 761 NW2d 723 (2008) (internal quotation marks and citations omitted).

MRE 402 states that "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of Michigan, these rules, or other rules adopted by the Supreme Court." Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The decision to permit or exclude witnesses is within the trial court's discretion. See *Duray Dev, LLC v Perrin*, 288 Mich App 143, 162; 792 NW2d 749 (2010).

The trial court did not deny appellant the opportunity to present witnesses. Rather, the record shows that it asked appellant multiple times to present witnesses to support his claim. Appellant never presented any witnesses. After the trial court ruled on the motion, appellant contended that he was not given the opportunity to present his witnesses. Because appellant was afforded the opportunity to present witnesses during the hearing, the trial court did not err in denying his untimely request to present them after its ruling on the motion.

Further, the purported evidence of the witnesses was not relevant to a material fact of the case. The substance of the affidavits on which the testimony was based did not establish that Johnson directed any harm toward appellant.

C. DUE PROCESS

Third, appellant contends that the delay of the hearing to determine the status of the PPO he held against Johnson was a deprivation of his right to due process and resulted in prejudice to him. We disagree.

"Whether proceedings complied with a party's right to due process presents a question of constitutional law that we review de novo." *In re Rood*, 483 Mich 73, 91; 763 NW2d 587 (2009). "Generally, [procedural] due process in civil cases requires notice of the nature of the proceedings and an opportunity to be heard in a meaningful time and manner by an impartial decisionmaker." *By Lo Oil Co v Dep't of Treasury*, 267 Mich App 19, 29; 703 NW2d 822 (2005) (internal quotation marks and citations omitted).

On June 5, 2012, appellant was arraigned on his violation of the PPO held by Johnson. The related motion to terminate the ex parte PPO held by appellant was also before the trial court. Appellant asserted that he was in court to argue for the continuation of the PPO and had not been served with notice of the contempt matter. The show-cause hearing regarding contempt was scheduled for June 21, 2012. The prosecutor requested that the motion to terminate also be adjourned to that date. Appellant objected to the delay, stating that he had witnesses at court who were ready to testify and might not be able to return on the later date. The prosecutor warned that there might be testimony from the termination matter that would relate to the violation hearing as well. The trial court agreed with the prosecutor and adjourned both matters to the later date.

The delay of the hearing on the motion to terminate did not deprive appellant of the opportunity to be heard by an impartial decisionmaker. Matters of trial scheduling are left to the discretion of the trial court. *People v Lown*, 488 Mich 242, 281; 794 NW2d 9 (2011). A trial court has broad power to control the manner in which a proceeding is conducted. *Hartland Twp*

v Kucykowicz, 189 Mich App 591, 595; 474 NW2d 306 (1991). Because the cases had the same parties and related issues, it was not unreasonable for the trial court to hold the hearings together. Giving deference to the trial court's scheduling authority, we find no error in the delay.

Furthermore, the delay did not change the outcome of the proceeding. Appellant was not prevented from presenting witnesses. As previously noted, the trial court asked him to present witnesses to support his claims. Appellant had at least one of his witnesses at the subsequent hearing, yet he did not present witnesses. Even if the delay prevented appellant's witnesses from appearing, the trial court found that their purported testimony would not establish Johnson's connection to the unauthorized conduct. There was no prejudice, and the adjournment to a later date was not a due-process violation.

D. PROSECUTORIAL MISCONDUCT

Fourth, Appellant argues that the prosecutor engaged in multiple instances of misconduct. We disagree.

"This Court reviews preserved claims of prosecutorial misconduct case by case, examining the remarks in context to determine whether the defendant received a fair and impartial trial." *People v McLaughlin*, 258 Mich App 635, 644; 672 NW2d 860 (2003). However, regarding appellant's unpreserved errors, we review for plain error affecting appellant's substantial rights. *Pfaffle*, 246 Mich App at 288. "Reversal is warranted only when plain error resulted in the conviction of an actually innocent defendant or seriously affected the fairness, integrity, or public reputation of judicial proceedings." *People v Callon*, 256 Mich App 312, 329; 662 NW2d 501 (2003).

For most of his claims of misconduct, appellant makes general assertions of error without citing the record below or adequately developing his arguments; thus, we find no basis for reversal. *McLaughlin*, 258 Mich App at 644.

We further conclude that appellant's remaining claims of prosecutorial misconduct fail. Appellant contends that the prosecutor obstructed justice by arguing for a delay of the hearing on Johnson's motion to terminate the PPO issued against her and that the delay resulted in prejudice to him. To support a claim of obstruction of justice, a party must demonstrate how the prosecutor interfered with the orderly administration of justice. *People v Meissner*, 294 Mich App 438, 454; 812 NW2d 37 (2011). A common example of obstruction is coercion of a witness. *Id.*

Here, the prosecutor requested to adjourn the hearing on the motion to terminate to the same date as the contempt hearing because of the related evidence in the two matters. A request to adjourn does not constitute obstruction of justice by the prosecutor. This is particularly true because the prosecutor does not exert control over the scheduling of proceedings. *Lown*, 488 Mich at 281. That duty is left solely to the discretion of the trial court. *Id.* Because the trial court has discretion to delay a proceeding, there was no misconduct with regard to the prosecutor's request to adjourn to a later date.

Further, appellant asserts that the prosecutor engaged in gender discrimination when she unfairly "singled out" appellant for prosecution. We need not address appellant's argument

because it is not contained in the statement of the questions presented. *Mich Farm Bureau v Dep't of Environmental Quality*, 292 Mich App 106, 146; 807 NW2d 866 (2011). We also note that it was not asserted before the trial court. *Callon*, 256 Mich App at 329.[1]

II. CONTEMPT FOR PPO VIOLATION

A. SUFFICIENCY OF THE EVIDENCE

Appellant argues that the evidence was insufficient to support the trial court's finding of criminal contempt. We disagree.

"This Court reviews de novo a challenge to the sufficiency of the evidence in a bench trial." *In re Contempt of Henry*, 282 Mich App 656, 677; 765 NW2d 44 (2009) (internal quotation marks and citation omitted). In evaluating the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution. *Id.*

If a PPO is violated, a petitioner is permitted to file a motion to have the respondent found in contempt of court. MCR 3.708(B)(1). At a criminal contempt hearing, the petitioner "has the burden of proving the respondent's guilt of criminal contempt beyond a reasonable doubt . . . ." MCR 3.708(H)(3). We "may not weigh the evidence or the credibility of the witnesses in determining whether there is competent evidence to support the [trial court's] findings [of fact]." *Henry*, 282 Mich App at 668.

As an initial matter, appellant argues that he was not properly arraigned on the contempt charge because he was not served with notice of the show-cause hearing. At his arraignment, the trial court scheduled the show-cause hearing for a later date, and the prosecutor provided appellant with notice. Accordingly, appellant received proper notice before the contempt hearing, and no prejudice resulted.

Next, appellant challenges the trial court's finding of a violation based on the language of the statute defining "stalking." A PPO restrains a person from doing the acts specified in the order. The language of the PPO prohibits appellant from "stalking," which, it provides, includes "contacting petitioner by telephone except regarding minor children." At the motion hearing, Johnson testified that she obtained the PPO against appellant on April 9, 2012. On May 13, 2012, Johnson received a text message from her son's telephone stating, "Not [son's name] and you need read between the lines cause you and that guy is going to jail." Johnson testified that she believed the message was from appellant. She explained that she and appellant were having an ongoing controversy, and he was the only person bothered by the man she was dating. She further testified that, on May 14, 2012, the day after she received the text message, she was served with the ex parte PPO appellant held.

The trial court determined that the evidence was sufficient to establish that appellant sent the text message. The trial court found that the beginning of the text indicated that it was not

[1] At any rate, we find no evidence of gender discrimination.

sent from Johnson's son. It further noted that the text stated that Johnson and her boyfriend were going to jail. It found Johnson's testimony to be credible. Because the text was unauthorized contact, the trial court ruled that appellant violated the PPO held by Johnson. Viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence to support the trial court's finding of a violation of the PPO.

In a related matter, appellant claims that the contempt hearing should have taken place before one of the judges who issued PPOs in this matter. It appears that the contempt case was transferred to a different judge based on the criminal charge, and, because the two cases were related, they were consolidated before the same judge for hearing. In light of the circumstances, we find no error in the assignment of the cases.

B. RIGHT NOT TO TESTIFY

Next, appellant claims that the trial court erred in using his Fifth Amendment right to remain silent against him. We disagree.

We review unpreserved claims of constitutional error for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999). A plain error affected a defendant's substantial rights if the error affected the outcome of the proceedings. *People v Vaughn*, 491 Mich 642, 665; 821 NW2d 288 (2012).

"When a contempt proceeding is criminal, it requires some, but not all, of the due process safeguards of an ordinary criminal trial." *DeGeorge v Warheit*, 276 Mich App 587, 592; 741 NW2d 384 (2007) (internal quotation marks and citation omitted). The defendant has a Fifth Amendment right against self-incrimination. *Id*. Additionally, the burden of proof in a criminal proceeding cannot be shifted by reference to a defendant's silence. See *People v Abraham*, 256 Mich App 265, 277; 662 NW2d 836 (2003) (the prosecution cannot shift the burden of proof by asserting that a defendant must prove he is not guilty).

At the contempt hearing, Johnson testified regarding the text message at issue. Appellant chose not to testify. After hearing the evidence, the trial court found Johnson to be a credible witness and stated:

> I think it's credible. So, I do find that she's — in light of your failure to testify, Mr. Appellant, I do find that — I mean, I'm not using that against you that you didn't testify, but I have no conflicting evidence to counteract her version of the story and I think she was credible.
>
> So, I find that she met her burden of proof beyond a reasonable doubt that he violated the personal protection order by sending the text message which is prohibited by the language of sending mail or other communications to petitioner.

It is clear from the statement at issue that the trial court did not rely on appellant's refusal to testify in ruling. Instead, the trial court stated multiple times that it found Johnson's testimony to be credible. It noted that she met the burden of proof beyond a reasonable doubt. The trial court merely indicated that the evidence presented was uncontroverted. There was no error depriving appellant of his constitutional right against self-incrimination.

C. RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

In a related argument, appellant claims that his trial counsel was ineffective for failing to object to the trial court's erroneous statement regarding his decision not to testify. The record does not contain a motion for a new trial or an evidentiary hearing; therefore, our review of appellant's claim of ineffective assistance of counsel is limited to mistakes apparent on the record. *People v Jordan*, 275 Mich App 659, 667; 739 NW2d 706 (2007). When challenging the effectiveness of trial counsel, "a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's deficient performance, there is a reasonable probability that the outcome would have been different." *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012).

Because appellant's constitutional right against self-incrimination was not violated by the trial court's statement, we conclude that counsel's objection would have been futile. Trial counsel is not ineffective for failing to make futile motions. *People v Sabin*, 242 Mich App 656, 660; 620 NW2d 19 (2000).

Appellant seemingly argues that his trial counsel should have objected to testimony regarding his son as inadmissible hearsay. "'Hearsay' is a statement, other than the one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." MRE 801(c). "Hearsay is inadmissible unless a recognized exception applies." *People v Mesik*, 285 Mich App 535, 538; 775 NW2d 857 (2009). Appellant fails to cite the specific testimony at issue. Moreover, such an argument is contrary to the record. Defense counsel objected to portions of the text messages as hearsay, and the trial court did not admit the hearsay portions of the text messages at the hearing. Accordingly, there is no evidence that counsel's representation fell below an objective standard of reasonableness. *Trakhtenberg*, 493 Mich at 51.

Finally, appellant contends that his constitutional right to counsel was denied because his counsel's performance was so deficient as to render counsel constructively absent. The specific objectionable conduct he asserts has been deemed proper. Moreover, the record indicates that his counsel was present during the entire hearing and argued on appellant's behalf. This claim lacks merit.

D. IMMUNITY FROM PROSECUTION

Next, appellant claims that he is immune from prosecution under the "Child Protection Act." We hold that appellant abandoned this issue. Appellant fails to clarify his contention and to cite any section of such an act to support his claim. "An appellant may not merely announce his position and leave it to this Court to discover and rationalize the basis for his claims, nor may he give only cursory treatment [of an issue] with little or no citation of supporting authority." *People v Schumacher*, 276 Mich App 165, 178; 740 NW2d 534 (2007) (internal quotation marks and citations omitted).

E. DOUBLE JEOPARDY

Appellant next argues that the trial court violated double-jeopardy protections when it found him in criminal contempt. We disagree.

Generally, "[a] constitutional double jeopardy challenge presents a question of law that we review de novo." *People v Lett*, 466 Mich 206, 212-213; 644 NW2d 743 (2002). However, as with other unpreserved, constitutional claims, our review is for plain error affecting the defendant's substantial rights. *People v Matuszak*, 263 Mich App 42, 47; 687 NW2d 342 (2004).

Under both the Double Jeopardy Clause of the Michigan Constitution, Const 1963, art 1, § 15, and its federal counterpart, US Const, Am V, an accused may not be "twice put in jeopardy" for the same offense. "The double jeopardy guarantee protects against multiple punishments, or successive prosecutions, for the same offense." *People v Rodriguez*, 251 Mich App 10, 16-17; 650 NW2d 96 (2002).

Appellant asserts that double-jeopardy protections apply because an ex parte PPO was issued against him, in part, based on an allegation of stalking Johnson. Subsequently, the trial court found that he violated the PPO by stalking Johnson. Appellant contends that he has twice been "charged" with the same offense.

Double-jeopardy protections were not violated in this case. A PPO is an injunctive order issued by the circuit court. MCL 600.2950(30)(c). Thus, a PPO proceeding is civil in nature. However, the contempt proceeding for violation of the PPO was criminal, not civil. Appellant was not being prosecuted when the ex parte PPO was issued and maintained against him. It was not until the June 21, 2012, hearing that he was prosecuted and found to be in criminal contempt for violation of the PPO. No double-jeopardy violation occurred.

Appellant has abandoned review of his related argument for reversal, in which he contends that other constitutional protections for criminal defendants apply in criminal contempt proceedings. As previously stated, "[w]hen a contempt proceeding is criminal, it requires some, but not all, of the due process safeguards of an ordinary criminal trial." *DeGeorge*, 276 Mich App at 592 (internal quotation marks and citation omitted). Nevertheless, appellant does not assert any further, specific violations. We refuse to ascertain and rationalize the basis for appellant's blanket statement of error. *Schumacher*, 276 Mich App at 178.

Affirmed.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Karen M. Fort Hood