STATE OF MICHIGAN

COURT OF APPEALS

BRIAN BLOCH, Petitioner-Appellee,	UNPUBLISHED May 23, 2013
v	No. 306862 Marquette Circuit Court
BRYAN ROBERT FRENCH , Respondent-Appellant.	LC No. 11-049684-PH

Before: RONAYNE KRAUSE, P.J., and GLEICHER and BOONSTRA, JJ.

PER CURIAM.

Once united by the attorney-client bond, respondent Bryan Robert French and petitioner Brian Bloch now detest each other. During an unplanned, "chance" encounter at the courthouse, both behaved childishly and churlishly, tossing profane insults back and forth. The next day, French drove by Bloch's home and made a threatening gesture. Bloch responded by applying for an ex parte personal protection order (PPO). The circuit court issued the PPO and refused to terminate it after a hearing.

At the hearing, Bloch admitted that he deliberately sat down next to French after French initiated the courthouse name-calling, and intentionally engaged in mutual verbal combat. A PPO may issue when the petitioner demonstrates a pattern of unconsented, uninvited contact. As Bloch consented to and willingly joined in the slur-fest, this event does not qualify as unconsented contact. Accordingly the circuit court erroneously continued the PPO, and we reverse its judgment.

I. FACTS AND PROCEEDINGS

Bloch represented French in a criminal matter tried in the 96th District Court. French was convicted. Through new counsel, attorney Thomas P. Casselman, French successfully moved for a *Ginther* hearing.[1] At the June 2011 *Ginther* hearing, Casselman accused Bloch of being "unethical" and "incompetent." At the same hearing, Bloch admitted that on more than one occasion, he had driven by French and "show[ed] him my middle finger." On September 6,

[1] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

2011, an Ann Arbor attorney sent Bloch a letter stating that French intended to sue Bloch for legal malpractice. On September 26, 2011, Bloch filed an ex parte petition for a PPO. The circuit court entered the PPO that day. French moved to set aside the PPO, and on October 7, 2011, the court conducted an evidentiary hearing.

Bloch testified that on September 19, 2011, he appeared in the 96th District Court for a landlord-tenant matter and observed French sitting outside the probation office. As he approached the counter to check-in, Bloch said, "hi Bryan" and continued walking. French then loudly announced, "you see that cocksucker there, he's the worst attorney in Marquette or something to that effect." Bloch "got angry" and elected to sit down next to French. Bloch explained:

> *A.* I didn't recall any other seats being av – open. But I didn't choose that seat because it was the only seat.
>
> *Q.* You chose that seat purposely?
>
> *A.* I did.
>
> *Q.* And you purposely chose to sit next to Mr. French?
>
> *A.* I did.
>
> *Q.* For some purpose?
>
> *A.* Yes.
>
> *Q.* What was that?
>
> *A.* To establish that I can take a deep breath and calm myself and regain control of the situation.

French did not share Bloch's tranquility goal. According to Bloch, French stated: "do you think you scare me? Do you think you intimidate me? Casselman's gonna have you disbarred, you're gonna lose your license." Bloch retorted, "[T]hat law firm in Ann Arbor that sent me the letter, are they the one who represented you in your rape trial?" Bloch admitted that he made this comment while feeling "agitated" and "highly emotional." He further conceded awareness that French had been acquitted of the rape charges after a trial, and that he asked the question because he was "[a]gitated enough not to keep my big mouth shut when I should have." In response, to Bloch's inquiry about the rape trial, French "turned beet red, balled up his fists, and was shaking[.]" Mariann Annala, a probation assistant in the 96th District Court, interceded.

Annala recalled that when she first became aware of the parties' presence, "[t]hey were bickering amongst themselves who had called who a piece of shit." She then heard French say "that if I didn't get Mr. Bloch out of the area, that he was going to knock his teeth, or his fucking teeth through the back of his throat." Annala allowed French to enter the probation department so that she could "quickly diffuse [sic] the situation."

Bloch testified that the next day, French drove by Bloch's family home and while "laughing insanely" made a "pistol-like gesture." Bloch was holding his three-year-old daughter at the time. Bloch interpreted the gesture as "mimicking . . . a drive-by shooting."

The circuit court allowed the PPO to remain in effect, reasoning as follows:

> Mr. French has testified that ah, Mr. Bloch's conduct before him was unprovoked and abusive. Um, my evaluation of the credibility of the witnesses, is that, in fact, ah, the burden on the confrontation here was on Mr. French and not Mr. Bloch ah, at the time the confrontation took place in the hallway at the District Court and I think his statement there was something that reasonably caused apprehension of serious and immediate harm. And ah, my resolution of the issue of the credibility about the threatening gesture with the thumb and finger is that Mr. Bloch's testimony is credible about that also. . . .

French now appeals this ruling.

II. STANDARD OF REVIEW

This Court reviews for an abuse of discretion a trial court's decision whether to issue or continue a PPO. *Pickering v Pickering*, 253 Mich App 694, 700-701; 659 NW2d 649 (2002). We review a trial court's underlying findings of fact for clear error. *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006). "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 must, however, defer to the trial court's credibility determinations. MCR 2.613(C); *Pickering*, 253 Mich App at 702. We apply de novo review to questions of statutory interpretation. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008).

III. ANALYSIS

French first contends that the circuit court erroneously imposed on him the burden of proof. At the hearing, the court inquired of Bloch's counsel, "what's your notion as to who has the burden of going forward here?" After both counsel offered responses the court declared, "Since the order's been issued and since [French] is asking that that is be set aside, I think that he has the burden of going forward . . . so if you want . . . to present testimony, this is your opportunity to do that." The circuit court's ruling comports with the rule that the party challenging a PPO bears the burden of producing evidence, *Pickering*, 253 Mich App at 699-700, while the petitioner bears the burden of justifying the continuance of a PPO. *Hayford*, 279 Mich App at 326. We find no indication in the record that the trial court imposed on French the ultimate burden of proof. Accordingly, this claimed error lacks merit.

French next asserts that as a matter of law, the facts found by the trial court were insufficient to justify continuation of the PPO. Under MCL 600.2950a(1), an individual may

seek a PPO "to restrain or enjoin an individual from engaging in conduct" prohibited under MCL 750.411h (stalking) or MCL 750.411i (aggravated stalking).[2] Stalking and aggravated stalking share a central theme: with a "continuity of purpose" on at least two separate occasions, the perpetrator must willfully initiate or continue unwanted contact with the victim. Because French neither planned nor intended the parties' initial encounter in the courthouse and (by his own admission) Bloch willingly engaged in the hostile repartee, the circuit court incorrectly considered this event as one of the two predicate stalking or aggravated stalking episodes necessary for continuing the PPO.

MCL 750.411h(1)(d) and MCL 750.411i(1)(e) define stalking 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." French's reaction to Bloch's final insult – balling up his fists and threatening to knock Bloch's teeth "through the back of [Bloch's] throat" indisputably would cause a reasonable person to feel frightened, as would the pointing of the mock-pistol. But to satisfy the statutory requirements, a PPO may issue only upon a showing of "a willful course of conduct involving repeated or continuing harassment of another individual." We must consider whether French's actions at the courthouse and subsequently constitute a "willful course of conduct" and "harassment" as those terms are defined in the statute.

The term "willful" simply means "intentional." It "involves design and purpose." *Jennings v Southwood*, 446 Mich 125, 139-140; 521 NW2d 230 (1994) (citations omitted). The stalking statutes provide several examples of willful conduct, including "[f]ollowing or appearing within the sight" of the victim, "[a]pproaching or confronting" an individual in a public place, entering on someone's property, or calling an unwilling listener on the phone. MCL 750.411h(1)(e); MCL 750.411i(1)(f). In addition to being "willful," the PPO-respondent's actions must manifest a "course of conduct." The Legislature defined this term as "a pattern of conduct composed of a series of 2 or more separate noncontinuous acts evidencing a continuity of purpose." MCL 750.411h(1)(a); MCL 750411i(1)(a). In other words, the perpetrator has repeatedly engaged in a calculated effort to disrupt the victim's life. Thus, proof of stalking or aggravated stalking requires evidence that the perpetrator purposefully designed and executed a plan of harassment.

> "Harassment" means conduct directed toward a victim that includes, but is not limited to, repeated or continuing unconsented contact that would cause a reasonable individual to suffer emotional distress and that actually causes the victim to suffer emotional distress. Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose. [MCL 750.411h(1)(c); MCL 750.411i(1)(d).]

[2] The elements of civil stalking are the same as those set forth in the criminal statutes. *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 721; 691 NW2d 1 (2005).

An "unconsented contact" is one "that is initiated or continued without that individual's consent or in disregard of that individual's expressed desire that the contact be avoided or discontinued." MCL 750.411h(1)(e); MCL 750.411i(1)(f). By including the term "unconsented contact" in the definition of "harassment," the Legislature signaled that a willing co-combatant is not a victim. "The contact must be initiated or continued without the victim's consent or in disregard of the victim's desire to discontinue the contact." *People v White*, 212 Mich App 298, 310; 536 NW2d 876 (1995). And to justify issuance or continuation of a PPO, the petitioner must prove two or more "acts of unconsented contact" that evidence "a continuity of purpose." MCL 750.411h(1)(a); MCL 750.411i(1)(a).[3]

The facts as Bloch describe them establish a mutually undertaken pattern of *consented* contact.[4] By displaying his middle finger when he encountered French on the street, Bloch exhibited his willingness to engage in petty behavior. Bloch voluntarily continued the conflict by sitting down next to French at the courthouse and lighting French's fuse with the rape-charge reference. This conduct is utterly inconsistent with that of an unwilling victim. Bloch not only acquiesced to contact with French; his question invited a response. While we do not condone French's conditional threat, it was not made to an unconsenting victim. Under these circumstances, the circuit court incorrectly interpreted and applied MCL 600.2950a, as the evidence did not support that French had repeatedly harassed Bloch.

Reversed. We do not retain jurisdiction.

/s/ Amy Ronayne Krause
/s/ Elizabeth L. Gleicher
/s/ Mark T. Boonstra

[3] This Court emphasizes that the distinction between consented and unconsented contact does not apply to domestic PPOs under MCL 600.2950.

[4] "A personal protection order shall not be made mutual." MCL 600.2950a(8).