In the
Missouri Court of Appeals
Western District

L.M.D.,	)	
	)	
Respondent,	)	**WD83816**
	)	
v.	)	**OPINION FILED: April 6, 2021**
	)	
ROBERT W. GAUERT,	)	
	)	
Appellant.	)	

Appeal from the Circuit Court of Callaway County, Missouri
The Honorable J. Hasbrouck Jacobs, Judge

Before Division Three: Karen King Mitchell, Presiding Judge, Gary D. Witt, Judge and Anthony Rex Gabbert, Judge

Robert Gauert ("Gauert") appeals from the judgment of the Circuit Court of Callaway County entering a full order of protection in favor of L.M.D.[1] We reverse and vacate the judgment.

[1] Pursuant to section 595.226 RSMo (2016), we refer to the victim, the victim's husband, and the victim's hired hand by their initials because the circuit court found all three were victims of stalking. In addition to the Petition for an Order of Protection that L.M.D. filed against Gauert that is at issue in the appeal before us, Gauert filed a Petition for an Order of Protection against L.M.D. Gauert's Petition against L.M.D. was denied and that ruling has not been appealed. In addition, R.D., L.M.D.'s husband, and G.G., L.M.D.'s and R.D.'s hired hand, also filed separate Petitions for Orders of Protection against Gauert, which were granted, and the grant of relief to R.D. and G.G. have been separately appealed in case numbers WD83817 and WD83815. Further, due to the interrelated facts, all of these matters were tried together, but the cases were not consolidated. Facts that were adduced at the trial but are unrelated to L.M.D.'s claims against Gauert are omitted from this opinion so as not to confuse the issues relevant to this appeal with unrelated issues of the other causes of action.

Factual and Procedural Background[2]

L.M.D. is married to R.D., and they purchased their farm in 2008. Because their farm was landlocked, they obtained an easement across property owned by a third party, the "Saddle Club." L.M.D.'s and R.D.'s property adjoins Gauert's farm, which he purchased in 2010. There has been a longstanding dispute between L.M.D. and R.D. and Gauert, which started over Gauert's use of L.M.D.'s and R.D.'s easement across the Saddle Club property. The easement is located next to Gauert's property line.

In May of 2011, Gauert called L.M.D. a "bitch" and a "whore" when she was retrieving her mail. As R.D. was driving home, he saw the encounter, intervened by pulling L.M.D. away from Gauert, and approached Gauert. R.D. and Gauert postured as though they were going to fight, and L.M.D. pulled R.D. away from Gauert. No physical confrontation ensued.

Gauert and L.M.D. and R.D. had another argument later in 2011, regarding Gauert's use of the easement across the Saddle Club's property. The Saddle Club and R.D. agreed to install a fence along the easement to prohibit Gauert from using the easement to enter his property. While R.D. was installing the fence, Gauert cursed at R.D. and argued that the fence could not be installed in that location because it was on Gauert's property. Gauert called the Callaway County Sheriff's Department, and Deputy Alan Lebel ("Deputy Lebel") was dispatched. Deputy Lebel determined that R.D. was installing the fence on property where he had the right to do so, and that Gauert did not

[2] When reviewing a court-tried case, we view the facts and reasonable inferences in a light most favorable to the judgment. *Hanger v. Dawson*, 584 S.W.3d 798, 800 (Mo. App. W.D. 2019).

have a right to interfere. Gauert got in his vehicle and drove over L.M.D.'s and R.D.'s trash can as he went to his house. L.M.D. and R.D. were standing approximately twenty feet away from the trash can at the time. R.D. requested Deputy Lebel to arrest Gauert for property damage, and Deputy Lebel took Gauert into custody.

On one occasion in 2012 or 2013, L.M.D. approached Gauert in a hardware store and shook Gauert's hand. Gauert did not recognize L.M.D. at first because L.M.D. had recently changed her hairstyle. When L.M.D. identified herself, Gauert withdrew his hand and "started yelling, and [Gauert] made such a scene in the middle of [the hardware store]." L.M.D. testified that Gauert said:

> You need to stay away from me. You and your husband, stay away from me. Leave my people alone. I have filed . . . harassment charges of some sort with the local authorities.

L.M.D. immediately found her husband several aisles away and left the store without further incident.

While there was testimony as to other events in 2015, when L.M.D. and R.D. were out of state on a business trip, L.M.D. acknowledged she speculated and had no proof that Gauert committed any of these other acts, as she was 2,000 miles away at the time and there were no witnesses to the acts.

On June 29, 2019, Gauert had a bonfire on his property. As L.M.D. and R.D. were leaving for dinner at approximately 9:00 p.m., they saw the bonfire and could not tell whether it was on their property or another neighbor's property. L.M.D. and R.D. used an ATV to investigate and reported the fire to the local fire department. After determining the fire was not on their own property, they crossed Gauert's property in the ATV to

investigate if the fire was on another neighbor's property. While they were on Gauert's property, Gauert drove his truck towards L.M.D. and R.D. to chase them off of his property coming within three feet of their ATV. Gauert stopped his vehicle at the edge of his property and did not pursue L.M.D. and R.D. once they left his property. L.M.D. and R.D. contacted the Callaway County Sheriff's Department to report the alleged assault, but no arrests were made. The local fire department did not engage in any firefighting activity and no citations were issued to Gauert, but the fire department requested that Gauert report any future fires on his property so the department would know how to respond to calls.

On July 22, 2019, R.D. was working along the fence line, and Gauert began to taunt R.D. L.M.D. was behind some trees and recorded the encounter on a cell phone. At the end of the encounter, Gauert told R.D., "[Y]ou're a coward, you need to defend yourself and defend your wife." When asked whether she felt threatened by that statement, L.M.D. testified, "Absolutely."

On August 14, 2019, L.M.D. and G.G., L.M.D.'s and R.D.'s hired hand, were bathing a horse in L.M.D.'s and R.D.'s pasture approximately twenty-five yards from the property line to Gauert's property. G.G. had her dog with her, which was off-leash and wandered onto Gauert's property. L.M.D. heard a gunshot from a small caliber firearm, but she did not think anything of it because it is not unusual to hear gunshots in the rural area where they live. G.G. noticed her dog was missing and looked through trees that lined the fence-line between Gauert's property and the pasture she was in and saw her dog lying dead on Gauert's property. Neither L.M.D. nor G.G. saw the shooting or the events

leading up to it. Immediately, L.M.D. and G.G. went to the property line and telephoned the Callaway County Sheriff's Department. While waiting for law enforcement to arrive, Gauert moved the dog's body away from the middle of his yard so it was closer to his porch and removed the dog's collar. Gauert testified G.G.'s dog was being aggressive towards Gauert's cats, and Gauert retrieved a .22 caliber rifle. Gauert testified that after he returned with the rifle, G.G.'s dog showed his teeth to Gauert, and Gauert shot the dog for his own protection. Gauert did not threaten L.M.D. or leave his property during the killing of G.G.'s dog or afterwards.

Two weeks later on September 4, 2019, L.M.D. filed a petition seeking an order of protection based on an allegation of stalking. The circuit court conducted a bench trial on January 23, 2020, and entered its judgment granting L.M.D. a full order of protection against Gauert ("Judgment") on that date. The Judgment prohibited Gauert from coming within fifty feet of L.M.D.; communicating with L.M.D. in any fashion; harassing, stalking, or threatening L.M.D.; and using, attempting to use, or threatening to use physical force against L.M.D. The Judgment further ordered Gauert not to possess firearms while the Judgment is in effect. The circuit court also found that it was in the parties' best interests that the Judgment automatically renew after one year; thus, the Judgment is effective until January 22, 2022. After various post-trial motions were filed, heard, and ruled on, the Judgment became final on May 20, 2020. This timely appeal followed.[3]

[3] L.M.D. did not file a brief or participate in this appeal in any fashion.

Discussion

Gauert raises two claims of error. First, he asserts that the circuit court erred in granting the Judgment because the record lacks substantial evidence to support it, in that L.M.D. failed to prove all of the elements required to establish stalking under the Adult Abuse Act ("Act").[4] Second, he argues the circuit court erred in ordering that Gauert not possess firearms during the pendency of the Judgment because the circuit court exceeded its jurisdiction in that the Act does not provide for a remedy of prohibiting the possession of firearms except when the parties are "intimate partners." Because Gauert's first point on appeal is dispositive, we do not address his second point.

Standard of Review

We review orders of protection under the Act "the same as in any other court-tried case; we will uphold the trial court's judgment as long as it is supported by substantial evidence, is not against the weight of the evidence, and does not erroneously declare or apply the law." *M.N.M. v. S.R.B.*, 499 S.W.3d 383, 384 (Mo. App. E.D. 2016). "Substantial evidence is evidence that, if believed, has some probative force on each fact that is necessary to sustain the circuit court's judgment." *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. banc 2014). We defer to the circuit court's credibility determinations and consider the evidence in the light most favorable to the circuit court's judgment. *Id*. at 200.

[4] Section 455.005, *et seq.* All statutory references are to the Revised Statutes of Missouri 2016 as currently supplemented, unless otherwise indicated.

Analysis

The Act provides that a person who has been subject to domestic violence or has been the victim of stalking or sexual assault may seek an order of protection. Section 455.020.1. Because it is undisputed that L.M.D. and Gauert are not related and are not members of the same household as defined by the Act, the Judgment could only be entered if L.M.D. sufficiently demonstrated she was a victim of stalking by Gauert.

The Act defines "[s]talking" as "when any person purposely engages in an unwanted course of conduct that causes alarm to another person . . . when it is reasonable in that person's situation to have been alarmed by the conduct." Section 455.010(14). "'Course of conduct'" means a pattern of conduct composed of two or more acts over a period of time, however short, that serves no legitimate purpose." Section 455.010(14)(b). "'Alarm' means to cause fear of danger of physical harm[.]" Section 455.010(14)(a). Therefore, to obtain relief under the Act, a petitioner must demonstrate by a preponderance of the evidence: (1) that the respondent engaged in a pattern of conduct of at least two or more acts, (2) which served no legitimate purpose, (3) causing the petitioner to fear danger of physical harm, and (4) that the petitioner's fear was reasonable. *Binggeli v. Hammond*, 300 S.W.3d 621, 624 (Mo. App. W.D. 2010) (applying section 455.010(10)(a)-(c) RSMo 2000).[5]

"[T]he stalking provision of the [Act] was not meant to be a panacea for the minor arguments that frequently occur between neighbors." *N.L.P. v. C.G.W.*, 415 S.W.3d 800,

[5] Since *Binggeli* was decided, section 455.010 has been amended several times, but the definitions of "stalking," "course of conduct," and "alarm" are substantially the same and are now contained within section 455.010(14)(a)-(c) RSMo. (2016).

804 (Mo. App. E.D. 2013) (quoting *C.H. v. Wolfe*, 302 S.W.3d 702, 707 (Mo. App. W.D. 2009)).

> The potential for abuse of the stalking provision of the [Act] is great. And, the harm that can result is both real and significant, not the least of which will be the stigma that attaches by virtue of a person having found to be a stalker. Moreover, such a finding could lead to criminal prosecution for violation of the criminal stalking statute, [section] 565.225. Thus, it is incumbent that trial courts exercise great vigilance to prevent abuse of the stalking provisions in the [Act] and in making sure that sufficient credible evidence exists to support all elements of the statute before entering a protective order.

Wallace v. Van Pelt, 969 S.W.2d 380, 387 (Mo. App. W.D. 1998).

L.M.D. alleged that Gauert engaged in the following acts:[6] (1) calling L.M.D. vulgar names near the mailbox, (2) driving over L.M.D.'s and R.D.'s trash can, (3) the incident at the hardware store, (4) threatening L.M.D. while taunting R.D. at the fence line, (5) following L.M.D. and R.D. in their ATV after the fire on Gauert's property, and (6) shooting G.G.'s dog. We address the sufficiency of these incidents to determine if they satisfy the four elements necessary to warrant the entry of full order of protection.

L.M.D. failed to establish that Gauert committed some of the alleged acts.

L.M.D. acknowledged she was merely speculating that Gauert committed the 2015 acts, while she was out of town "2,000 miles away"; she testified that these additional acts had occurred, but those acts could not be attributed to Gauert. No witnesses saw these acts committed and no evidence tied Gauert to these acts. Therefore, this testimony

[6] The Judgment did not make any findings of fact pertaining to any of the alleged acts, and the Judgment did not specify which events formed the pattern of conduct necessary to enter a full order of protection.

is too vague and indefinite to support a conclusion that Gauert engaged in this conduct; thus, we cannot consider these events as part of Gauert's "pattern of conduct."

Following L.M.D. and R.D. while they were on Gauert's property served a legitimate purpose.

"An activity with a legitimate purpose is one that is sanctioned by law or custom or is lawful or is allowed." *C.B. v. Buchheit*, 254 S.W.3d 210, 212 (Mo. App. E.D. 2008) (citing *Overstreet v. Kixmiller*, 120 S.W.3d 257, 258 (Mo. App. E.D. 2003)). In Missouri, trespass "is the unauthorized entry by a person upon another's land, regardless of the degree of force used, and regardless of any damage done." *Philips v. Citimortgage, Inc.*, 430 S.W.3d 324, 330 (Mo. App. E.D. 2014). Landowners may protect their property and use force to prevent stealing, property damage, or tampering. Section 563.041.1. *See Hartman v. Hoernle*, 201 S.W. 911, 912 (Mo. App. 1918) ("there can be no doubt that while defendant was entitled to resist the trespass upon his land[,] . . . he was not warranted in using more force than was necessary to eject the trespassers or to protect his property . . . ."). In the instant case, L.M.D. and R.D. unlawfully entered Gauert's property on an ATV, and Gauert was within his rights to use reasonable force to eject them from his land. The testimony only supports that Gauert followed L.M.D. and R.D. in his truck until they left his property and that he stopped at the property line. Therefore, this incident served a legitimate purpose and cannot form the basis of an order of full protection.

L.M.D. failed to establish she subjectively feared physical danger during some of the events.

In *Schwalm v. Schwalm*, 217 S.W.3d 335, 337 (Mo. App. E.D. 2007), the court held that "a plaintiff is required to do more than simply assert a bare answer of 'yes' when asked if [he or she] was alarmed." A husband and wife were litigating a dissolution of marriage action. *Id*. at 336. Husband had filed a petition for an order of protection against Wife, which alleged that Wife had knocked on his door, followed him in her car, and "hung around" his work. *Id*. Wife peaceably left when Husband refused to answer the door, and she moved her car when asked by Husband. *Id*. at 337. Wife had never threatened Husband. *Id*. Husband did not provide any proof of the reasonable fear of physical harm and "failed to testify that he was afraid of Wife and, specifically, afraid of physical harm." *Id*. at 337.

Furthermore, in *C.L. v. Hartl*, 495 S.W.3d 241, 244 (Mo. App. W.D. 2016), we held that when C.L. testified she "felt safe" during one encounter with her stalker, her actions demonstrated she subjectively feared physical danger. Her stalker knocked on her door for thirty minutes while talking loudly to her through her door, called her twice leaving voicemails, and parked his car blocking her driveway preventing C.L. from leaving in her car. *Id.* at 242. During this incident, C.L. had set her alarm and brought her dog next to her. *Id*. at 244. We concluded these precautionary measures were sufficient to prove by a preponderance of the evidence that C.L. feared physical danger in that instance.

Just as in *Schwalm*, L.M.D. did not testify that she feared a danger of physical harm during the incident where Gauert shot G.G.'s dog. L.M.D. did not see him shoot the dog and thought nothing of the small caliber gun shot because gun shots are commonly heard in their rural area. Additionally, unlike in *C.L.*, L.M.D. did not take any precautionary measures. L.M.D. ran toward what would have been the danger rather than moving away from it, and L.M.D. remained standing along the fence line while waiting for the Callaway County Sheriff's Office to respond, which indicates L.M.D. did not fear a danger of physical harm in that particular instance.

Similarly, during the incident at the fence line where Gauert taunted R.D., L.M.D. testified that she "absolutely" felt threatened during the incident. However, just an in *Schwalm*, this bare assertion that she felt threatened is insufficient, and L.M.D. did not take any precautionary measures that demonstrates she feared a danger of physical harm because she remained in the situation for several minutes and recorded the entire conversation between R.D. and Gauert.

Furthermore, L.M.D. did not testify in regard to the incident where Gauert drove over L.M.D.'s and R.D.'s trash can, and there was no evidence that she was subjectively afraid in this situation. There was no evidence of how she responded in the situation, which occurred in the presence of Deputy Lebel. Therefore, L.M.D. failed to demonstrate she subjectively feared physical harm during the encounter, and even if she was afraid, that fear would have been unreasonable because the incident occurred in the presence of Deputy Lebel and because Gauert was driving away from L.M.D.

During the incident at the hardware store, the testimony only established that L.M.D. approached Gauert and shook his hand before Gauert recognized her and yelled:

> You need to stay away from me. You and your husband, stay away from me. Leave my people alone. I have filed . . . harassment charges of some sort with the local authorities.

The incident in the hardware store does not constitute a threat and was in fact a demand by Gauert that L.M.D. stay away from him and leave him alone.

Furthermore, L.M.D. initiated the conversation with Gauert in the hardware store. In *Fowler v. Minehart*, 412 S.W.3d 917, 918 (Mo. App. S.D. 2013), Fowler petitioned for a full order of protection against Minehart. Fowler worked with Minehart's wife at a school, and Fowler made a disciplinary complaint against Minehart's wife. *Id*. Minehart made a threatening phone call to Fowler stating, "I'm going to come get you. I'm going to get even with you. I'll catch you off school campus and I'll take care of you." *Id*. at 919. Later that same day, Fowler requested to speak to Minehart and the two had a "'heated conversation,' during which Minehart said, '[y]ou wait till you leave the school property' and pointed his finger at Fowler." *Id*. The Court held that because Fowler wanted to speak with Minehart during the second conversation, that conversation could not qualify as an "unwanted communication" or "unwanted contact" as required by the Act. *Id*. at 922. Similarly, the conversation between Gauert and L.M.D. in the hardware store was not "unwanted" because L.M.D. sought out Gauert and initiated the interaction and Gauert's response to the interaction was not threatening.

Therefore, because L.M.D. did not establish she subjectively feared a danger of physical harm during these events, these events cannot be considered to determine if Gauert's pattern of conduct met the requirements of the Act.

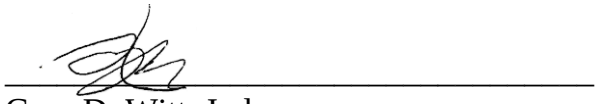
A reasonable person would not have feared a danger of physical harm during the remaining incident.

Only one incident remains that could be used to establish a reasonable fear of Gauert's actions was when Gauert threatened L.M.D. and called her vulgar names near the mailbox. This incident occurred in May of 2011, more than nine years before this action was filed, Gauert confronted L.M.D., calling her a "bitch" and a "whore" as she was retrieving her mail. R.D. intervened by pulling L.M.D. away from Gauert and approached Gauert. R.D. and Gauert postured as though they were going to fight, and L.M.D. pulled R.D. away from Gauert. No physical confrontation ensued. During this one incident, Gauert was offensive and used incredibly inappropriate language, but he did not threaten L.M.D. Further the extensive length of time that passed between this incident and the filing of the petition establishes that this incident, without more, did not cause her to fear physical harm.

Even if we were to find that this remaining incident where Gauert made derogatory comments to L.M.D. at the mailbox was sufficiently threatening to cause L.M.D. to fear physical harm and would have caused a reasonable person to fear physical harm, one incident alone is insufficient to prove stalking under the Act. *Fowler*, 412 S.W.3d at 922.

Conclusion

The Judgment is reversed and vacated in its entirety.[7]



Gary D. Witt, Judge

All concur

[7] The fact that the law requires reversal in this case should not be read to indicate we condone Gauert's reprehensible behavior.