STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL J. MCKENZIE, Next Friend for BLAKE MICHAEL MCKENZIE,	UNPUBLISHED August 17, 2017
Petitioner-Appellee,	
v	No. 333581 Calhoun Circuit Court
JACOB TODD BLAKE,	LC No. 2016-000335-PH
Respondent-Appellant.	

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

PER CURIAM.

On February 4, 2016, appellee, Michael McKenzie (Michael) petitioned the trial court for an ex-parte personal protection order (PPO) as next friend for his son, Blake McKenzie (Blake), against Blake's uncle, respondent-appellant Jacob Blake (Jacob).[1] The trial court granted the petition and Jacob later moved to terminate the PPO. On June 6, 2016, after receiving limited evidence, the trial court denied Jacob's motion to terminate the PPO. Jacob now appeals that decision as of right. For the reasons stated below, we vacate the PPO.

I. BACKGROUND

For purposes of this action, this intra-family dispute began on Christmas Day 2014. On that day, Blake and his cousin, Jacob's son, were involved in some sort of physical altercation in the basement of Blake's grandparent's home. The adults were upstairs at the time of the incident and did not witness the altercation. Michael alleged that Jacob's son smashed Blake's head into the wall. Jacob, however, responded that the boys had gotten into a fist fight and that his son "got the worst of it" in that he was bleeding from the nose following the altercation. Michael testified that, once the adults reached the basement, Jacob began cursing and "lunged out" for Blake in an attempt to grab him. According to Michael, Blake began sobbing as a result. Jacob disputed this, claiming that he had "no interaction" with Blake "whatsoever." The trial court found that "there was some kind of altercation between the boys" but did not determine which

[1] Because of the multiple "McKenzies" and "Blakes" in this case, we will use first names to identify the parties.

boy instigated the altercation, and further, did not make a factual determination as to Jacob's conduct.

The trial court addressed the motion to terminate the PPO—which it characterized as a "stalking" order rather than a "domestic relations" order—by focusing on statements Jacob purportedly made to his ex-wife the day after the incident and later in November 2015. Jacob's ex-wife testified that he told her the day after the incident that "Blake is gonna get his ass kicked" and that he wanted their son to "kick Blake's ass." She also testified that, in November 2015, Jacob told her that he was "going to give Blake a reality check real soon" after Blake allegedly told another child at school that Jacob had a past conviction for driving under the influence. According to Jacob's ex-wife, she informed Michael of her ex-husband's statements in January 2016. Jacob categorically denied making those statements.

The trial court credited Jacob's ex-wife's testimony as truthful. Although the trial court noted that the PPO was probably aggravating, rather than helping, the family's strife and suspected that Jacob did not pose any serious risk to Blake, the trial court refused to "rely on the fact that [Jacob] may just be a blowhard." The trial court concluded that, although the boys' altercation was not enough, on its own, to keep the PPO in place, Jacob's statements following the incident were "just enough" to keep the order in place as evidence of a pattern of harassing behavior.

Jacob appealed. During the pendency of this appeal, the PPO expired by its own terms on February 4, 2017.

II. ANALYSIS

On appeal, Jacob argues that there was insufficient evidence to issue and maintain the PPO against him. We review for an abuse of discretion the trial court's decision to issue and maintain the PPO. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). The trial court abuses its discretion when its decision falls outside the range of principled outcomes. *Woodard v Custer*, 476 Mich 545, 557, 719 NW2d 842 (2006). We review the trial court's findings of fact for clear error, *Sweebe v Sweebe*, 474 Mich 151, 154; 712 NW2d 708 (2006), and any attendant questions of statutory interpretation de novo, *State Farm Fire & Cas Co v Corby Energy Services, Inc*, 271 Mich App 480, 483; 722 NW2d 906 (2006).

The Appeal Is Not Moot. Michael first responds that this appeal is moot because the PPO expired during the pendency of the appeal. We disagree. This Court has already determined that the validity of an expired PPO is not a moot issue where it can affect a person's employment. See *Hayford*, 279 Mich App at 325. Here, Jacob coaches sports at a high school and works for a pharmaceutical company. We note that PPOs are automatically entered in the Law Enforcement Information Network (LEIN), but not removed after their expiration date, unless vacated by the trial court. We agree with Jacob that the continued presence of this PPO in the LEIN presents the possibility of adverse effects on his current and future employment. The validity of the PPO is, therefore, not a moot question.

The Record Is Devoid of Evidence of "Stalking." The trial court issued the PPO under MCL 600.2950a, which provides, as relevant to this appeal, that a PPO shall not be entered

unless a petitioner proves "stalking" as defined in MCL 750.411h and MCL 750.411i. These provisions define "stalking" identically to mean "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." MCL 750.411h(1)(d); MCL 750.411i(1)(e). For its part, "harassment" is defined to mean "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." MCL 750.411h(1)(c); MCL 750.441i(1)(d). A stalking victim is defined as the "target" of the harassment. MCL 750.411h(1)(f); MCL 750.411i(1)(g).

Course of Conduct. Under our abuse-of-discretion review, we accept the trial court's credibility determinations. See *Drew v Cass Co*, 299 Mich App 495, 501-502; 830 NW2d 832 (2013). Yet, even given this acceptance, and although we find the described conduct troubling, we are unable to find that appellant "stalked" Blake within the statutory definition of that term. For a court to conclude that a respondent "stalked" a target, the trial court must find a willful course of conduct directed toward the target that actually, and reasonably, causes the target to suffer emotional distress. A course of conduct is comprised necessarily of more than one incident. See MCL 750.411h(1)(a); MCL 750.411i(1)(a). In this case, we have neither a course of conduct directed toward Blake, nor any evidence demonstrating that Blake suffered emotional distress as a result.

At most, the trial court was presented with evidence of one incident of conduct directed toward Blake when Michael testified that, on Christmas Day 2014, Jacob lunged at Blake and attempted to grab him. Jacob's son's conduct on that day is irrelevant to the question of stalking as Michael did not seek a PPO against Jacob's son. We further note that there is no clear evidence that Jacob's son initiated the altercation, and no evidence, whatsoever, that he did so at Jacob's direction.

Beyond the Christmas Day 2014 incident, the trial court heard about two statements Jacob purportedly made regarding Blake. Even if made, these purported statements were directed to Jacob's ex-wife, and there is no indication in the record that Jacob intended that those statements be relayed to anyone else, let alone to Blake.

MCL 750.411h(e) and MCL 750.411i(1)(f) provide further support for the conclusion that Jacob's statements do not amount to "stalking" in this case. These provisions provide a nonexhaustive list of conduct that may amount to unconsented contact within the definitions of MCL 750.411h(1)(e) and MCL 750.411i(1)(d), including:

> (i) Following or appearing within the sight of that individual.
>
> (ii) Approaching or confronting that individual in a public place or on private property.
>
> (iii) Appearing at that individual's workplace or residence.
>
> (iv) Entering onto or remaining on property owned, leased, or occupied by that individual.
>
> (v) Contacting that individual by telephone.

(vi) Sending mail or electronic communications to that individual.

(vii) Placing an object on, or delivering an object to, property owned, leased, or occupied by that individual. [MCL 750.411h(1)(e); MCL 750.411i(1)(f).]

Each of the activities listed above involves direct contact with the target individual, and this supports our conclusion that Jacob's statements directed toward his ex-wife cannot constitute harassment against Blake when there is no indication that the statements were intended to reach or otherwise did, in fact, reach Blake.

Accordingly, being presented with, at most, one incident of harassing conduct directed toward Blake, we find the evidence insufficient to establish the pattern of harassing behavior necessary to sustain a stalking PPO. See *Pobursky v Gee*, 249 Mich App 44, 48; 640 NW2d 597 (2001) (concluding that a trial court erred by maintaining a PPO upon only a single incident of harassment).

Evidence of Mental State. The failure to show a course of harassing conduct is fatal to the stalking PPO, but we recognize a second, similarly fatal problem with respect to Blake's actual mental state. We can reasonably assume that a child, upon hearing that an adult is going to "kick his ass" or direct another person to do so, may justifiably suffer emotional distress as a result. Nonetheless, in this case the trial court was presented with no evidence regarding Blake's *actual* mental state as required by the definitions of "stalking" and "harassment." See MCL 750.411h(1)(c),(d); MCL 750.411i(1)(d),(e). Blake did not testify at trial, and no other witness provided any testimony regarding Blake's mental state. In fact, there is no evidence in the record that Blake was even aware of the threatening statements. Therefore, we find the evidence insufficient to sustain the PPO in that the evidence fails to establish that Jacob's actions actually caused Blake to suffer emotional distress. MCL 750.411h(1)(c),(d); MCL 750.411i(1)(d),(e).

III. CONCLUSION

The trial court did not have an evidentiary record sufficient to issue the PPO. Absent such record, the trial court clearly erred in issuing it. As the PPO has since expired, we vacate the PPO and remand this matter to the trial court to enter a new order to update and remove any reference to the PPO from the LEIN.

/s/ Mark T. Boonstra
/s/ Amy Ronayne Krause
/s/ Brock A. Swartzle