STATE OF MICHIGAN

COURT OF APPEALS

BG, Petitioner-Appellee,	UNPUBLISHED June 6, 2019
v	No. 344631
SL, Respondent-Appellant.	Macomb Circuit Court Family Division LC No. 2018-008091-PP

Before: SAWYER, P.J., and O'BRIEN and LETICA, JJ.

PER CURIAM.

Respondent appeals as of right an order denying his motion to terminate an ex parte personal protection order (PPO) that was issued under MCL 600.2950.[1] We affirm.

I. BACKGROUND

On May 7, 2018 petitioner filed a petition seeking an ex parte PPO against respondent. In the verified statement filed along with the petition, she explained that respondent was her ex-boyfriend and the father of her minor son. Petitioner alleged that respondent admitting to placing a GPS tracking device on her vehicle. When she discovered its location, she had it disabled by the Oakland County Sheriff's Department and eventually turned the device over to law enforcement to facilitate a criminal prosecution against respondent. Petitioner also alleged that respondent followed her in his vehicle, showed up at her workplace without consent, excessively called her and her mother, and followed her to her mother's house and second job. Petitioner requested that a PPO be issued ex parte, and the trial court issued the PPO the following day.

[1] MCL 600.2950 was amended by 2018 PA 146, effective August 8, 2018. All further references to MCL 600.2950 in this opinion refer to the statute as amended by 2016 PA 296, which was in effect throughout these proceedings.

After learning of the ex parte order, respondent timely moved to terminate the PPO, alleging that most of the allegations in the petition were untrue or embellished. Respondent conceded placing a tracking device in the vehicle petitioner drove, but reasoned that the vehicle actually belonged to his mother, who had given him permission to place the device. Respondent maintained that petitioner had known about the device since December 2017 and that he had only placed the device because he was concerned about where petitioner was taking their son. Respondent denied following petitioner or appearing at her workplace.

The trial court questioned both parties at a hearing on June 11, 2018, and then denied respondent's motion to terminate the PPO. Respondent filed a motion for reconsideration, which was likewise denied. This appeal followed.

II. MOTION TO TERMINATE THE PPO

We will first address respondent's contention that the trial court erred by (1) failing to articulate findings of fact and conclusions of law and (2) denying respondent's motion to terminate the PPO.

This Court reviews a trial court's issuance of a PPO for an abuse of discretion, which occurs when the trial court reaches a decision that falls outside the range of principled outcomes. *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008). The trial court's findings of fact are reviewed for clear error. *Id*. Under the clear-error standard of review, "the appellate court must defer to the trial court's view of the facts unless the appellate court is left with the definite and firm conviction that a mistake has been made by the trial court." *King v Oakland Co Prosecutor*, 303 Mich App 222, 225; 842 NW2d 403 (2013) (quotation marks and citation omitted). Issues involving interpretation or application of a statute or court rule are reviewed de novo. *Woodring v Phoenix Ins Co*, 325 Mich App 108, 113-114; 923 NW2d 607 (2018).

Respondent argues that the trial court erred by failing to comply with MCR 2.517(A)(1), which provides, "In actions tried on the facts without a jury or with an advisory jury, the court shall find the facts specially, state separately its conclusions of law, and direct entry of the appropriate judgment." Respondent fails to recognize that the subject hearing was not a trial, but rather a hearing on his motion to terminate the PPO. Under MCR 2.517(A)(4), "[f]indings of fact and conclusions of law are unnecessary in decisions on motions unless findings are required by a particular rule." Personal protection proceedings are governed by subchapter 3.700 of the court rules. MCR 3.701(A). In particular, MCR 3.707 governs motions to terminate a PPO and does not incorporate a requirement for explicit factual findings or legal conclusions.[2]

[2] In contrast, MCR 3.705(A)(2) directs the trial court to state the specific reasons for issuing an ex parte PPO if it is issued under MCL 600.2950a, and MCR 3.705(A)(5) directs the trial court to state its reasons for *denying* an ex parte PPO, without restricting the type of PPO by the statute under which it is authorized. Thus, it is evident that in promulgating the rules governing personal protection proceedings, the Supreme Court was fully aware that it could impose such a requirement, yet chose not to in the context of a motion seeking termination of a PPO.

Consequently, while "it is always preferable for purposes of appellate review that a trial court explain its reasoning and state its findings of fact," *People v Shields*, 200 Mich App 554, 558; 504 NW2d 711 (1993), the trial court was not obligated to make findings of fact or conclusions of law with respect to respondent's motion.

Even if explicit findings were required, a remand for factual findings would be unnecessary in this case. At the conclusion of the hearing, the trial court said: "All right. I've listened to the testimony. I've assessed the credibility. I'm going to deny the motion to terminate the PPO." While not detailed in any manner, we can infer from the trial court's statement that it found petitioner's allegations credible and sufficient to establish reasonable cause for continuing the PPO.

Under MCL 600.2950(4), a PPO must be issued "if the court determines 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)." Among other things, the acts listed in MCL 600.2950(1) include engaging in conduct that is prohibited under MCL 750.411h, which concerns stalking. MCL 600.2950(1)(i). " 'Stalking' means 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). The statute further defines a "course of conduct" 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). "Harassment" is defined as "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."[3] MCL 750.411h(1)(c).

The petition alleged that respondent went to petitioner's workplace with flowers on April 9, 2018, became "very upset" when she told him his presence was unwelcome, followed her to her second workplace thereafter, and from that location to an Oakland County Sheriff's Department substation after her shift ended. Petitioner further alleged that on April 16, 2018, respondent followed her to the mall after she picked their son up from school. Petitioner affirmed the accuracy of her allegations at the hearing. She also testified that, before the PPO was issued, respondent would call her workplace to find out when her shift ended and, after she removed the tracking device from her vehicle, respondent began following her in his vehicle and appearing at her workplace. In addition, respondent called her repeatedly before the PPO was issued. Petitioner agreed that she filed the PPO because she felt threatened by respondent and was unsure "what he's capable of and how far he'll go" in light of their recent break up.

The trial court could have determined from this evidence that petitioner established reasonable cause to believe that respondent engaged in stalking under MCL 750.411h and may

[3] "Harassment does not include constitutionally protected activity or conduct that serves a legitimate purpose." MCL 750.411h(1)(c).

continue stalking petitioner unless enjoined from doing so. Petitioner's description of respondent's behavior detailed two or more separate, noncontinuous acts involving unconsented contact[4] with petitioner that would cause a reasonable person, and did indeed cause petitioner, to suffer emotional distress and feel threatened, intimidated, or harassed. This evidence would also support a finding of reasonable cause to believe that respondent would interfere with petitioner at her place of employment, which is another act enumerated in MCL 600.2950(1). See MCL 600.2950(1)(g).

Moreover, MCL 600.2950(1)(k) permits a petitioner to seek a PPO enjoining "[a]ny other specific act or conduct that imposes upon or interferes with personal liberty or that causes a reasonable apprehension of violence." Petitioner testified about respondent's previous use of a tracking device to ascertain her whereabouts. While petitioner acknowledged that the device was disabled in December 2017, considering the totality of the circumstances, respondent's decision to resort to such covert measures could suggest that he would engage in other specific acts or conduct that would impose upon or interfere with petitioner's personal liberty. Because the evidence before the trial court would support the necessary findings for issuing a PPO, the trial court did not abuse its discretion by denying respondent's motion to terminate the PPO.

Respondent makes much of what he perceives as inconsistences among petitioner's written allegations and testimony, as well as his belief that the parties' living arrangements and communications in the period preceding the PPO rendered petitioner's allegations incredible. Respondent's position is unpersuasive. First, the petition admittedly referred to April 28, 2018, as the date of the incident involving the tracking device, while the evidence at the hearing established that the device was placed in petitioner's vehicle sometime in October 2017 and had been disabled since December 2017. However, petitioner explained at the hearing that she gave the device to law enforcement officials on April 28, 2018, in order to facilitate criminal prosecution against respondent. Thus, despite the ambiguity of the date identified in the petition, it was not wholly inaccurate or so damaging to petitioner's credibility that the trial court's credibility determination in her favor was clearly erroneous.

We also reject respondent's repeated reliance on the fact that petitioner resided with him during the events underlying the PPO. MCL 600.2950(1) permits a petitioner to request a PPO against "an individual residing or having resided in the same household as the petitioner . . . ." Therefore, the plain language of the statute clearly contemplates the possibility that a PPO may be appropriate even when the parties are, or were, residing together. The mere fact that petitioner apparently attempted to repair her relationship with respondent before deciding to

[4] "Unconsented contact" refers to contact with another individual without consent or in disregard of that individual's expressed desires and includes "[f]ollowing or appearing within the sight of that individual," MCL 750.411h(1)(e)(*i*), "[a]pproaching or confronting that individual in a public place or on private property," MCL 750.411h(1)(e)(*ii*), "[a]ppearing at that individual's workplace or residence," MCL 750.411h(1)(e)(*iii*), and "[c]ontacting that individual by telephone," MCL 750.411h(1)(e)(*v*).

remove herself from the relationship should not interfere with her ability to obtain a PPO upon demonstrating reasonable cause for its issuance.

Lastly, respondent focuses on petitioner's contact with respondent on two occasions after filing the police report, but before seeking the PPO. According to respondent, these voluntary contacts negate the notion that petitioner felt threatened. First and foremost, MCL 600.2950(4) does not condition the issuance of a PPO on a finding that the petitioner feels threatened by the conduct to be enjoined. Rather, a trial court "shall issue a personal protection order under this section if the court determines 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)." MCL 600.2950(4). And, as already noted, subsection (1)(g) includes interfering with the petitioner at his or her place of employment as an act that can be enjoined. Thus, whether petitioner felt threatened by respondent's behavior is irrelevant to at least one of the bases for issuing the PPO. Second, to the extent that the trial court found reasonable cause to believe that respondent may engage in stalking under MCL 750.411h—which requires conduct that causes the victim to feel terrorized, frightened, intimidated, threatened, harassed, or molested, MCL 750.411h(1)(d)—the trial court did not clearly err by finding that respondent's behavior caused petitioner to feel threatened or harassed. Petitioner unambiguously testified that she sought the PPO because she felt threatened by respondent, and explained that she met with him twice in May 2018 so respondent could see his son and to arrange a parenting time schedule for the future. Petitioner offered a rational explanation for her actions, and the trial court did not clearly err by crediting her testimony.

III. EX PARTE ORDERS UNDER MCL 600.2950(12)

Respondent also argues on appeal that the trial court erred by issuing the PPO without notice or a hearing because the petition did not clearly show immediate and irreparable injury, loss, or damage that would result from the delay required to effectuate notice or that notice would precipitate adverse action. However, respondent did not take issue with the trial court's ex parte procedure below until he filed his motion for reconsideration. "Where an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj v Farm Bureau Gen Ins Co of Mich*, 284 Mich App 513, 519; 773 NW2d 758 (2009). We review unpreserved issues for plain error. *Demski v Petlick*, 309 Mich App 404, 426-427; 873 NW2d 596 (2015). "To avoid forfeiture under the plain error rule, three requirements must be met: 1) the error must have occurred, 2) the error was plain, i.e., clear or obvious, 3) and the plain error affected substantial rights." *Id*. at 427 (quotation marks and citation omitted).

Even assuming that the allegations in the petition were insufficient to justify the issuance of an ex parte PPO under MCL 600.2950(12), respondent cannot establish that the procedure employed by the trial court affected his substantial rights. For the reasons already set forth, the trial court did not abuse its discretion by denying respondent's motion to terminate the PPO. In other words, a PPO was properly issued, even if we agreed with respondent that it should not have been issued ex parte. Consequently, respondent cannot establish entitlement to relief.

IV. DUE PROCESS

Next, respondent argues that he was not prepared to conduct an evidentiary hearing at the trial court's June 11, 2018 motion call and the rushed hearing held on that date did not satisfy the requirements of due process. Respondent did not request a separate evidentiary hearing or otherwise object to the procedure employed by the trial court on due process grounds. Therefore, this issue is unpreserved for appellate review. See *Brown v Loveman*, 260 Mich App 576, 599; 680 NW2d 432 (2004) (holding that the plaintiff's failure to object to "conference style hearing" left appellate challenge to that procedure unpreserved). Unpreserved claims of constitutional error are reviewed for plain error. *In re VanDalen*, 293 Mich App 120, 135; 809 NW2d 412 (2011).

Procedural due process minimally requires "notice of the proceedings and an opportunity to be heard in a meaningful time and manner." *IME v DBS*, 306 Mich App 426, 434; 857 NW2d 667 (2014). Respondent contends that he was deprived due process when the trial court ruled on his motion to terminate the PPO during the trial court's regular motion call, rather than scheduling an evidentiary hearing for another date. In making this argument, respondent implies that MCL 600.2950 requires the trial court to hold a hearing outside of its regular motion call and that failure to do so violates due process principles. We disagree.

Subject to an exception not applicable to this case, MCL 600.2950(14) provides that "the court shall schedule a hearing on a motion to modify or rescind the ex parte personal protection order within 14 days after the filing of the motion to modify or rescind." Respondent filed his motion to terminate the PPO on May 31, 2018, and the trial court heard respondent's motion less than 14 days later on June 11, 2018. Respondent suggests that the June 11, 2018 hearing was intended as "argument on the motion for the hearing," but nothing in the statutory language requires the trial court to entertain the motion on two separate occasions. Furthermore, respondent's own filings do not support his position. Respondent filed a motion to terminate the PPO, accompanied by a notice of hearing stating that "a hearing has been scheduled to modify, extend, or terminate the personal protection order," and identifying the hearing date as June 11, 2018. Simply put, respondent did not move for a separate evidentiary hearing in his written motion, nor did he make that request orally at the June 11, 2018 hearing.

The due process requirement of an opportunity to be heard does not equate to a "full trial-like proceeding" in all cases; rather, due process requires a hearing that affords the parties "the chance to know and respond to the evidence." *Cummings v Wayne Co*, 210 Mich App 249, 253; 533 NW2d 13 (1995). The trial court questioned the parties at the hearing and permitted respondent's attorney to elicit further testimony from the parties as well. Respondent's attorney was also permitted to impeach petitioner with a copy of a text message she sent to respondent. Because the hearing afforded respondent an opportunity to know and respond to the evidence, he has not established plain error.

And, again, even if this Court were to agree that the hearing failed to satisfy the requirements of due process, respondent cannot demonstrate that the manner in which the hearing was conducted affected his substantial rights. Respondent argues that he was denied the opportunity to present other witnesses—the parties' pastor and respondent's mother—who would have impeached petitioner's allegations and testimony. But the evidence respondent contends

these witnesses would have offered does not have significant impeachment value because petitioner conceded the relevant facts at the hearing. Moreover, respondent's witnesses executed affidavits concerning their proposed testimony on May 29, 2018, well before the June 11, 2018 hearing. Given the cumulative nature of this evidence, and respondent's decision not to present the affidavits despite their availability, respondent cannot demonstrate that his inability to elicit testimony from these witnesses affected his substantial rights.

V. BURDEN OF PROOF

Lastly, respondent alleges that the trial court improperly placed the burden of proof on him with respect to the motion to terminate the PPO. Because respondent failed to raise this issue below,[5] it is unpreserved, and our review is limited to plain error affecting substantial rights. *Demski*, 309 Mich App at 426-427.

As respondent correctly, observes, "[t]he burden of establishing reasonable cause to issue a PPO is on the petitioner, who also bears the burden of justifying its continuance at a hearing on a motion to terminate the PPO." *Brown v Rudy*, 324 Mich App 277, 290; 922 NW2d 915 (2018). In *Demski*, 309 Mich App at 426, the defendants similarly argued on appeal that the trial court "failed to assign the burden of persuasion to plaintiff." This Court rejected the defendants' claim of error, reasoning as follows:

> In presenting this argument, defendants blend and thus confuse two distinct issues: (1) whether the trial court properly assigned the burden of persuasion, and (2) whether the trial court applied the correct legal standard in determining whether that burden had been satisfied. Regarding the former, defendants identify no evidence or statement of the trial court supporting their assertion that the trial court failed to assign the burden of persuasion to plaintiff. Although the record reflects that the trial court did not specifically indicate which party bore the burden of persuasion, the plaintiff in a civil case bears the burden of persuasion throughout the course of a case. "A trial judge is presumed to know the law." We therefore presume, given the dearth of evidence to the contrary, that the trial court assigned the burden of persuasion to plaintiff. Defendants' argument in that respect accordingly fails. [*Id*. at 427 (citations omitted).]

Respondent likewise attempts to use his assertion that petitioner failed to satisfy her burden of proof as evidence that the trial court wrongfully placed the burden of proof on respondent. However, as the *Demski* Court made clear, whether the burden of proof was properly applied and whether it was properly assigned are two distinct issues. With respect to

[5] In his motion for reconsideration, respondent asserted that plaintiff had the burden of proof concerning continuance of the PPO and failed to meet that burden, but did not argue that the trial court improperly imposed a burden of proof on respondent. At any rate, "[w]here an issue is first presented in a motion for reconsideration, it is not properly preserved." *Vushaj*, 284 Mich App at 519.

the latter issue, respondent asks this Court to infer that the trial court misallocated the burden of proof because, after the trial court questioned petitioner, it bypassed petitioner's own attorney and instead allowed respondent's attorney to examine her. Respondent's position is unavailing because the trial court had already elicited testimony from petitioner concerning the events described in her petition, and there is no indication that further questioning by her attorney was necessary. Apart from this innocuous procedure, respondent acknowledges that "there is nothing in the record to reflect where the trial court was placing the burden of proof." Therefore, given the lack of evidence to the contrary, we reject respondent's claim of error because respondent has not overcome the presumption that trial judges know the law. *Id*.

Affirmed.

/s/ David H. Sawyer
/s/ Colleen A. O'Brien
/s/ Anica Letica