

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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JM,

Petitioner-Appellant,

v

JS,

Respondent-Appellee.

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UNPUBLISHED  
October 15, 2020

No. 349991  
Otsego Circuit Court  
Family Division  
LC No. 19-017659-PH

PM,

Petitioner-Appellant,

v

JS,

Respondent-Appellee.

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No. 349992  
Otsego Circuit Court  
Family Division  
LC No. 19-017658-PH

Before: LETICA, P.J., and K. F. KELLY and REDFORD, JJ.

PER CURIAM.

In these consolidated appeals, petitioners, JM and PM, a married couple, appeal as of right the trial court's orders terminating the ex parte personal protection orders (PPOs) that had been entered against respondent, JS. We affirm.

**I. BACKGROUND FACTS**

Respondent and petitioners are adjacent neighbors who previously litigated over a boundary dispute and competing nuisance claims. Petitioners each sought and obtained ex parte PPOs against respondent related to his serious, un-neighborly conduct. At the evidentiary hearing on respondent's motion to terminate the ex parte PPOs, the trial court excluded evidence concerning incidents that occurred before the conclusion of the previous litigation. Petitioners

testified concerning several incidents of alleged harassment that occurred after the completion of the previous litigation, including incidents in which respondent ran JM off the road with a plow truck, damaged petitioners' fence, shined a spotlight on petitioners' house, and trespassed on petitioners' property. The trial court concluded that petitioners failed to meet their burden to justify the continuation of the PPOs and ordered their termination on July 15, 2019. These appeals followed.

## II. STANDARDS OF REVIEW

We “review for an abuse of discretion a trial court’s determination whether to issue a PPO because it is an injunctive order.” *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008) (citation omitted). “An abuse of discretion occurs when the decision resulted in an outcome falling outside the range of principled outcomes.” *Id.* (citation omitted). We “review a trial court’s findings of fact for clear error.” *Id.* (citation omitted); see also *Brandt v Brandt*, 250 Mich App 68, 72; 645 NW2d 327 (2002). “Clear error exists when some evidence supports a finding, but a review of the entire record leaves the reviewing court with the definite and firm conviction that the lower court made a mistake.” *In re Dearmon*, 303 Mich App 684, 700; 847 NW2d 514 (2014). “[A]n appellate court may not weigh the evidence or the credibility of witnesses.” *Brandt*, 250 Mich App at 74.

We review de novo as a question of law whether evidence is admissible under a rule or statute, and review for an abuse of discretion the trial court’s ultimate decision whether to admit the evidence. *People v Denson*, 500 Mich 385, 396; 902 NW2d 306 (2017). “An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes.” *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010) (citation omitted). The proponent of evidence has the burden of establishing that it is relevant and admissible. *Id.* An evidentiary error is grounds for reversal only if the error was more likely than not outcome-determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999).

## III. ANALYSIS

MCL 600.2950a(1)<sup>1</sup> provides, in relevant part:

[A]n individual may petition the family division of circuit court to enter a personal protection order to restrain or enjoin an individual from engaging in conduct that is prohibited under section 411h, 411i, or 411s of the Michigan penal code, 1931 PA 328, MCL 750.411h [(stalking)], 750.411i [(aggravated stalking)], and 750.411s [(cyberstalking)]. A court shall not grant relief under this subsection unless the petition alleges facts that constitute stalking as defined in section 411h or 411i, or conduct that is prohibited under section 411s . . . . Relief may be sought and granted under this subsection whether or not the individual to be restrained or

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<sup>1</sup> Petitioners cite MCL 600.2950 as the relevant authority; however, “MCL 60.2950a(1) addresses the issuance of PPOs for nondomestic matters.” *Lamkin v Engram*, 295 Mich App 701, 706; 815 NW2d 793 (2012).

enjoined has been charged or convicted under section 411h, 411i, or 411s of the Michigan penal code . . . for the alleged violation.

The court's issuance of a nondomestic PPO under MCL 600.2950a(1) restrains the respondent from engaging in activities defined under the stalking, aggravated stalking, and cyberstalking statutes above. "Stalking" is "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). " '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).

"[T]he burden of justifying continuation of a PPO granted ex parte is on the applicant for the restraining order." *Pickering v Pickering*, 253 Mich App 694, 699; 659 NW2d 649 (2002). "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 (citations omitted).

Petitioners first argue that the trial court abused its discretion by excluding evidence of respondent's acts that occurred before the conclusion of previous litigation between the parties. "A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion." *Edry* 486 Mich at 639 (citation omitted). Relevant evidence is generally admissible. See MRE 402; *People v Starr*, 457 Mich 490, 497; 577 NW2d 673 (1998). Irrelevant evidence is not admissible. MRE 402; *Woodard v Custer*, 476 Mich 545, 569-570; 719 NW2d 842 (2006). " 'Relevant evidence' means evidence having 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. "Relevance involves two elements, materiality and probative value." *People v Henry*, 315 Mich App 130, 144; 889 NW2d 1 (2016). "Materiality refers to whether the fact was truly at issue." *Id.* (citation omitted). "Materiality looks to the relation between the propositions that the evidence is offered to prove and the issues in the case. If the evidence is offered to help prove a proposition that is not a matter in issue, the evidence is immaterial." *Hardrick v Auto Club Ins Ass'n*, 294 Mich App 651, 667; 819 NW2d 28 (2011), quoting 1 McCormick, *Evidence* (6th ed), § 185, p 729 (quotation marks omitted). Further, MRE 403 allows relevant evidence to be excluded on the basis of "considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

Petitioners assert that evidence of actions taken by respondent before completion of the civil litigation, including the use of obscenities, rock throwing, and property destruction, remained material for the trial court's determination of the need for the continuation of the PPOs. Petitioners also assert that the trial court excluded these acts on the basis of the passage of time. The record, however, reflects that the trial court explained: "I'm aware of a lot of things," and "I don't think it's particularly relevant because I feel like based on the parties['] dismissal of all those show causes at the end of the bench trial that at that point you're starting with a clean slate." The trial court's explanation indicated that it did not base the exclusion of such evidence strictly on the

passage of time, but after considering it determined that this evidence was immaterial to the issue before it, i.e., whether evidence justified continuation of the PPOs.

Moreover, “[a]n error in the admission or the exclusion of evidence, an error in a ruling or order, or an error or defect in anything done or omitted by the court or by the parties is not ground for granting a new trial, for setting aside a verdict, or for vacating, modifying, or otherwise disturbing a judgment or order, unless refusal to take this action appears to the court inconsistent with substantial justice.” MCR 2.613(A). As noted above, an evidentiary error is grounds for reversal only if the error more likely than not determined the outcome. *Lukity*, 460 Mich at 495-496. Petitioners have not demonstrated how the trial court’s exclusion of the proffered evidence was outcome-determinative or how our failure to take action would be inconsistent with substantial justice.

The trial court properly observed that a number of the incidents petitioners cited to justify continuation of the PPOs occurred before the conclusion of the litigation of the parties’ property line dispute. The trial court cannot be said to have erred by finding that the resolution of the parties’ conflict at the end of the bench trial rendered previous conduct immaterial to the issues presented for its determination. By excluding evidence of previous conduct the trial court appropriately focused its attention on current events to determine whether respondent’s present conduct justified continuation of the PPOs. The record indicates that the trial court considered the evidence relevant to the alleged snowplow incident, spotlight incident, fence damage incident, and photograph of a person on petitioners’ property. The record reflects that conflicting evidence existed respecting all of these alleged incidents.

The record reflects that the alleged snowplow incident in which JM claimed to have been forced into a snowbank by respondent’s approaching snowplow truck lacked support by the video evidence presented to and reviewed by the trial court. Petitioners also claimed that a spotlight had been shined directly and deliberately into their bedroom. Respondent, however, testified that the motion-detection lights on his house were not aimed at petitioners’ house. Petitioners claimed that a photograph established extensive and deliberate damage to a brand-new fence, but respondent argued that only a small mark was shown in the photograph, and if he actually hit it with the plow, it would have been completely destroyed. Further, petitioners’ security camera provided a photograph of a person trespassing on their property that they concluded was respondent. Respondent testified, however, that it was not him and the photograph did not reveal the subject’s face.

Ultimately, the trial court made its decision to terminate the PPOs based upon weighing the relevant and material evidence presented and its determination of the witnesses’ credibility. Appellate courts may not weigh evidence or the credibility of witnesses. *Brandt*, 250 Mich App at 74. Petitioners failed to meet their burden of justifying continuation of the PPOs. The trial

court's factual findings were not clearly erroneous, it did not abuse its discretion regarding its evidentiary decisions, and we conclude that it did not abuse its discretion by terminating the PPOs.

Affirmed.

/s/ Anica Leticia

/s/ Kirsten Frank Kelly

/s/ James Robert Redford