



**In the
Missouri Court of Appeals
Western District**

G.E.G.,	)	
	)	
Respondent,	)	WD83815
	)	
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 G.E.G.¹ We reverse and vacate the judgment.

¹ Pursuant to section 595.226 RSMo (2016), we refer to the victim, and the victim's employers 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 G.E.G. filed against Gauert that is at issue in the appeal before us, R.D. and L.D., G.E.G.'s employers, also filed separate Petitions for Orders of Protection against Gauert, which were granted, and the grant of relief to R.D. and L.D. have been separately appealed in case numbers WD83816 and WD83817. 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 G.E.G.'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.

Procedural and Factual Background²

G.E.G. works as a hired hand for R.D. and L.D. on their farm and lives in an apartment on the farm. R.D.'s and L.D.'s farm adjoins Gauert's farm. There have been longstanding disputes between R.D. and L.D. and Gauert. On August 14, 2019, G.E.G. and L.D. were bathing a horse in R.D.'s and L.D.'s pasture approximately twenty-five yards from the property line to Gauert's property. G.E.G. had her dog with her, which was off-leash and wandered onto Gauert's property. G.E.G. 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.E.G. noticed her dog was missing and looked through trees that lined the fence-line between Gauert's property and the pasture and saw her dog lying dead on Gauert's property.

Immediately, G.E.G. and L.D. 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.E.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.E.G.'s dog showed his teeth to Gauert, and Gauert shot the dog for his own protection.

Gauert offered to let G.E.G. come onto his property and retrieve her dog's body, but G.E.G. refused because she "wasn't go [sic] onto his property and give him an excuse

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).

to shoot me." After the Callaway County Sheriff's deputy arrived, the deputy returned the dog's body to G.E.G. Prior to this incident, G.E.G. and Gauert had not had any interaction between them of any kind, either positive or negative.

Several days later, as G.E.G. was leaving the property, she saw another car leaving Gauert's driveway. Gauert's girlfriend was driving the other car with Gauert in the passenger seat. After both vehicles turned onto the highway, Gauert's girlfriend moved to the passing lane and slowed down until her vehicle was parallel to G.E.G.'s vehicle, and Gauert began taking photographs of G.E.G. through the window of the car.

Two weeks later on September 3, 2019, G.E.G. 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 G.E.G. a full order of protection against Gauert ("Judgment") on that date. The Judgment prohibited Gauert from coming within fifty feet of G.E.G.; communicating with G.E.G. in any fashion; harassing, stalking, or threatening G.E.G.; and using, attempting to use, or threatening to use physical force against G.E.G. 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 G.E.G. 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 in that G.E.G. 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 may not possess firearms 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 G.E.G. 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 G.E.G. 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

The facts adduced at trial established only two acts: (1) the shooting of the dog and (2) the incident on the highway. Because we hold that these two incidents when

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).

considered together would not cause a reasonable person to fear a danger of physical harm, we address only that portion of Gauert's argument.

In *E.M.B. v. A.L.*, 462 S.W.3d 450, 451 (Mo. App. E.D. 2015), E.M.B. and A.L. were coworkers at a restaurant, and E.M.B. filed a complaint against A.L. accusing A.L. of sexual harassment. A.L. was subsequently terminated, and sent a series of text messages to E.M.B., which demonstrated A.L. was upset with E.M.B. *Id.* at 453. A.L. also ordered food to be delivered from the restaurant and expected E.M.B. to be the delivery person at that time. *Id.* Later, A.L. videotaped E.M.B. at the restaurant when she returned from a delivery, and when E.M.B. confronted him, A.L. did not respond but kept videotaping. *Id.* The court held that this conduct along with the previous interactions was insufficient to cause the requisite reasonable fear to E.M.B. *Id.*

In contrast, the Southern District of this Court affirmed a judgment entering a full order of protection where a stalker had taken photographs of a victim in *Skovira v. Talley*, 369 S.W.3d 780 (2012). Talley and Skovira were soldiers, who worked together in a warehouse at Fort Leonard Wood. *Id.* at 782. Talley made numerous telephone calls and sent multiple text messages to Skovira inviting Skovira to go on dates with him. *Id.* When Skovira refused, Talley would "constantly beg," and eventually a platoon sergeant counseled Talley to stop calling and texting. *Id.* Instead, Talley continued to call and send text messages and began to drive by Skovira's barracks. *Id.* The platoon sergeant "issued a negative counseling" for this continued behavior. *Id.*

Even after the platoon sergeant issued his order, Talley would talk to Skovira whenever possible, stare at her, eye her up and down, lick his lips, groan, and make

sexual comments while working with Skovira. *Id.* The company commander issued a no-contact order, prohibiting communication with Skovira and requiring that he stay at least 100 feet away from her. *Id.* at 783. In violation of this order, Talley took additional photographs of Skovira, which made her uncomfortable. *Id.* Talley divorced his wife, and moved into the barracks right next to Skovira's barracks in violation of the no-contact order. *Id.* Because Talley's conduct was escalating and he had repeatedly violated his orders, the military placed a "watch" on Talley, escorted him wherever he went, took his car away from him, and ordered him to sleep in a location where he could be watched all night long. *Id.* The court noted the continuing, unpredictable, and escalating nature of Talley's conduct in finding that the conduct did in fact cause Skovira to fear physical harm and that fear was reasonable. *Id.* at 786.

In the instant case, regarding the incident on the highway, G.E.G. testified that she saw a car leaving Gauert's driveway as she was pulling out of her driveway, and that car was in front of her. She followed it at a safe distance. After both cars turned onto the highway the other car moved to the passing lane and slowed down so the passenger side of that car was next to her car and Gauert, who was in the passenger's seat began taking pictures of her through the window. As to her fear, G.E.G. testified:

Again, I was fearing for my life. I knew that something was wrong, that people -- normal people do not do that, normal people do not behave like that, and obviously something was wrong. I'm only 18 years old. I don't have a way to protect myself, and I was making sure that if something would have happened to me, that the police would have been notified and, yes.

G.E.G. also testified she called the police "[s]o that they could protect me if anything happened to me in the future."

Courts examine whether the taking of unwanted photographs reasonably causes a fear of physical harm on a case by case basis. Just as in *E.M.B.*, there was evidence that G.E.G. subjectively feared danger of physical harm, however, we find her fear was not reasonable under the totality of the circumstances. Gauert did not make any threats towards G.E.G., and the vehicle Gauert was traveling in did not make any threatening maneuvers or drive erratically on the highway. In fact, Gauert was in the passenger seat, and G.E.G. testified she was not afraid of the driver, who would have had a better opportunity to maneuver the vehicle in an intimidating manner. In *Skovira*, Skovira reasonably feared danger of physical harm when Talley had taken her photograph after Talley engaged in a litany of disturbing and unwanted behavior and repeatedly refused to follow military orders that he stay away from her. G.E.G.'s fear in the instant case is unreasonable given that she had only one previous encounter with Gauert, which while extremely upsetting, there was no evidence that it was directed at G.E.G., as she and Gauert both testified they did not even know each other prior to the incident where her dog was shot.

G.E.G.'s fear of physical harm as it relates to a single incident of being photographed in a public place while driving was not reasonable. We do not find that Gauert's conduct would cause a reasonable person to fear physical harm, and therefore G.E.G. has failed to meet her burden of adducing sufficient evidence to support the Judgment.

Conclusion

The Judgment is reversed and vacated in its entirety.⁶



Gary D. Witt, Judge

All concur

⁶ The fact that the law requires reversal in this case should not be read to indicate we condone Gauert's reprehensible behavior.