MISSOURI COURT OF APPEALS
WESTERN DISTRICT

R.J.D.

RESPONDENT,

v.

ROBERT W. GAUERT

APPELLANT.

DOCKET NUMBER WD83817

DATE: April 6, 2021

Appeal From:

Callaway County Circuit Court
The Honorable J. Hasbrouck Jacobs, Judge

Appellate Judges:

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

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Attorneys:

Ryan P. Waters, Jefferson City, MO, for respondent.

Joshua J. Sieg, Columbia, MO, for appellant.

MISSOURI APPELLATE COURT OPINION SUMMARY

MISSOURI COURT OF APPEALS
WESTERN DISTRICT

R.J.D., RESPONDENT,
v.
ROBERT W. GAUERT, APPELLANT.

WD83817 Callaway County

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

Appellant Robert Gauert appeals from the judgment of the Circuit Court of Callaway County entering a full order of protection in favor of R.D.

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

In May of 2011, Gauert called L.D. a "bitch" and a "whore" when retrieving her mail. As R.D. was driving home, he saw the encounter and approached Gauert and told Gauert not to talk to L.D. that way. Gauert opened the door to his vehicle, stood up, and confronted R.D. L.D. pulled R.D. away from Gauert, and no physical confrontation ensued.

Later in 2011, Gauert and L.D. and R.D. had another argument regarding Gauert's use of the easement. R.D. was installing a fence across the easement, which would prohibit Gauert from using the easement to enter his property. Gauert cursed at R.D. and argued the fence could not be installed in that location because it was on Gauert's property. Gauert called the Sheriff's Department. A deputy was dispatched, and the deputy determined that R.D. was installing the fence on property where had the right to do so. Gauert got in his vehicle, drove over R.D.'s and L.D.'s trash can, and went to his house. R.D. requested that Gauert be arrested for property damage, and the deputy took Gauert into custody.

On June 29, 2019, Gauert had a bonfire on his own property. As R.D. and L.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. They used an ATV to investigate and reported the fire to the local fire department. After determining the fire was not on their property, R.D. and L.D. went across Gauert's property to investigate whether the fire was on a neighbor's property. While they were on Gauert's property, Gauert drove his truck toward R.D. and L.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 R.D. and L.D. once they were

off of his property. R.D. and L.D. called the Sheriff's Department to report the alleged assault. The Sheriff's Department did not issue any citations or make any arrests. The local fire department did not engage in any firefighting activity but asked that Gauert report any future fires on his property.

On July 22, 2019, R.D. was working along the fence line trimming trees, and Gauert taunted R.D. R.D. testified that, "[T]he main thrust of the whole conversation was that I was a coward and that I needed to figure out how to defend myself and my wife." L.D. was behind some trees and recorded the encounter on a cell phone.

On August 14, 2019, R.D. was working near the entrance to his property. L.D. and a hired hand were bathing a horse in a nearby pasture. The hired hand had her dog with her, which was off-leash and wandered onto Gauert's property. R.D. heard a gunshot from a small caliber firearm, but he did not think anything of it. Later the hired hand noticed her dog was missing, and R.D. walked through the field toward Gauert's property and saw the hired hand's dog lying dead on Gauert's property. L.D. called the Sheriff's Department, and 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 offered to allow R.D. or L.D. or their hired hand to retrieve the dog's body, but they refused. R.D. testified that he felt threatened during the encounter "[b]ecause we caught him killing a dog. We knew he had a gun. He was extremely upset that we called the sheriff."

Two weeks later, R.D. filed a petition seeking an order of protection on the basis of stalking. The circuit court conducted a bench trial and entered its judgment granting R.D. a full order of protection against Gauert, which prohibited Gauert from coming within fifty feet of R.D.; communicating with R.D.; using, attempting to use, or threatening to use physical force against R.D., and possessing firearms.

REVERSED AND VACATED.

Division Three holds:

The circuit court erred in entering a full order of protection on the basis of stalking because R.D. failed to establish that Gauert committed two acts that did not serve a legitimate purpose causing R.D. to objectively and subjectively fear the danger of physical harm in that:

> (1) following R.D. and L.D. while they were on trespassing on Gauert's property served a legitimate purpose of using reasonable means to protect his property from trespass;
>
> (2) R.D. did not subjectively fear the danger of physical harm when Gauert ran over R.D.'s and L.D.'s trashcan while he was driving away and they were standing next to a Sherriff's Deputy or when Gauert taunted R.D. with derogatory names at the fence line;
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> (3) R.D. was the aggressor when he approached Gauert after Gauert called L.D. a "bitch" and thus the contact was not unwanted;

(4) the single incident of shooting the hired hand's dog, on its own, is insufficient to support an allegation of stalking under the Adult Abuse Act.

Opinion by: Gary D. Witt, Judge April 6, 2021

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