STATE OF MICHIGAN

COURT OF APPEALS

SUSAN A. BERGHUIS, Petitioner-Appellee,	UNPUBLISHED January 22, 2013
v	No. 308344 Muskegon Circuit Court
JEFFERY JOE SHAW, Respondent-Appellant.	LC No. 11-250816-PH

Before: WHITBECK, P.J., and SAAD and SHAPIRO, JJ.

PER CURIAM.

Respondent Jeffery Shaw appeals as of right the trial court's order denying his motion to terminate petitioner Susan Berghuis's personal protection order. We affirm.

I. FACTS

A. BACKGROUND FACTS

In 1999, Berghuis testified as a witness in a criminal trial that she called 9-1-1 after she saw Shaw standing on a US-31 overpass and aiming a rifle at passing cars. In that case, the jury found Shaw guilty of three counts of assault with intent to do bodily harm less than murder, and three counts of felony firearm.

B. THE PROTECTION ORDER

On July 28, 2011, Berghuis filed a petition for an ex parte personal protection order. She requested that the trial court prevent Shaw from contacting her directly or through third parties.

Before the trial court sentenced Shaw in the 1999 case, Berghuis received a threatening letter that had Shaw's fingerprints on it. While incarcerated, Shaw sent Berghuis two letters that contained white powders and stated "Got ya." Berghuis attached police investigation reports to her petition. The reports indicated that the letters were "bogus 'anthrax' type letters," contained a harmless substance, and contained Shaw's name and his Michigan Department of Corrections identification number.

Berghuis also attached the report of Inspector Mark Christiansen. Christiansen interviewed Shaw after he wrote a note to another inmate that encouraged the inmate to write

letters to Berghuis's husband, Grant Berghuis. The note also stated that "I will destroy [Grant Berghuis] and his wife very soon—the punishments for false witnessing are severe."

In addition to the police reports, Berghuis also attached a letter that Shaw wrote to Mary Berghuis, an unrelated prison warden, which stated that

> [t]here is nothing you or anyone else can do for [Berghuis]. The movement has already begun and too many people have been alerted to watch for my well-being. You really should send me to another institution before you do something stupid. [Berghuis] is done.

Berghuis further alleged that she received "hundreds" of letters from other inmates, and that she frequently received telephone calls from Shaw's prison. Finally, Berghuis alleged that when Shaw was reviewed for parole, he listed her address as the address at which he would live if released. Berghuis stated that, because of these incidents, she "live[s] in terror daily[.]"

Opining that "this is the most compelling case for granting a personal protection order" it had considered, the trial court granted Berghuis's petition. The trial court's order prohibited Shaw from initiating any direct or third-party contact with Berghuis or disclosing information about her to third-parties.

C. SHAW'S CHALLENGE TO THE PROTECTION ORDER

On July 29, 2011, Shaw petitioned the trial court to terminate the protection order. He denied sending Berghuis letters and encouraging other prisoners to write or call her and her husband. Additionally, Shaw alleged that the petition was the product of a conspiracy to create false charges against him, and that Berghuis "is a false witness[.]"

At the September 2011 motion hearing, Berghuis testified that she has received "hundreds" of letters from inmates that she does not know, and that she has received the letters from "[e]very correctional facility [Shaw has] been at . . . . When he moves, they move." Shaw cross-examined Berghuis about the letters.

Shaw testified that he did not encourage other inmates to write the letters. He twice attempted to admit evidence, including an expert report on linguistics, that Berghuis perjured herself during the 1999 trial. The trial court excluded the evidence because it was not relevant and was not proper impeachment evidence. Shaw also argued that he did not receive adequate discovery. After informing Shaw that he should send discovery requests to Berghuis's attorney, the trial court adjourned the proceedings to afford Shaw the opportunity for adequate discovery.

At the November 2011 hearing, Shaw specifically requested the 9-1-1 telephone call evidence from his 1999 trial, and copies of the letters other inmates allegedly wrote Berghuis. The trial court again adjourned the proceedings for further discovery.

Following the November 2011 hearing, Shaw requested 45 subpoenas from the Muskegon County Clerk, and filed a motion for an evidentiary hearing concerning the 1999 trial. The trial court ordered Shaw to list his expected witnesses and to provide a "one-sentence description of their expected testimony," so that it could determine how many of Shaw's

witnesses were necessary. Shaw filed a list of 41 witnesses, but did not describe their expected testimonies.

At the December 2011 hearing, Shaw continued to request an evidentiary hearing concerning the 1999 trial, asserting that Berghuis lied. The trial court denied Shaw's request to "have a retrial of [his] original case" and his request for the court to allow witnesses to testify about the 1999 trial. Shaw also argued that his 41 witnesses were necessary to rebut Berghuis's allegations that other inmates were writing her letters, because she produced only twelve of the letters. Berghuis withdrew her allegation that Shaw was encouraging other inmates to write her letters, and responded that she would rely on only the letters that were from Shaw. The trial court ruled that it would not consider the additional letters or allow Shaw to call the rebuttal witnesses, because those witnesses were now irrelevant.

Berghuis did not testify at the December 2011 hearing. Shaw testified that Berghuis lied during the 1999 trial and conspired with law enforcement, and that federal proceedings would prove that the 9-1-1 call was falsified. Shaw testified that he had "continually threatened to seek justice." When asked to explain the note to another prisoner, Shaw testified that he meant that he would "destroy" Berghuis and her husband "in court." Shaw also admitted that he wrote the letter to Mary Berghuis, but denied that he sent the fake anthrax letters.

The trial court denied Shaw's motion to terminate the protection order. It found that the letter to Mary Berghuis and the note to the other prisoner contained threats against Berghuis. On the basis of that finding, it determined that there was cause to believe that Shaw was stalking Berghuis. In January 2012, the trial court amended the protection order to remain effective until July 2016, and denied Shaw's motion for reconsideration.

II. EVIDENTIARY ISSUES

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's decision whether to admit or exclude evidence.[1] This Court also reviews for an abuse of discretion a trial court's decision concerning the mode and order of interrogating witnesses.[2]

B. LEGAL STANDARDS

MRE 611(a) gives the trial court discretion over presentation of witnesses and evidence:

> The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2)

[1] *Elezovic v Ford Motor Co*, 472 Mich 408, 419; 697 NW2d 851 (2005).

[2] *Linsell v Applied Handling, Inc*, 266 Mich App 1, 22; 697 NW2d 913 (2005).

avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.

Additionally, the trial court must exclude irrelevant evidence.[3] Evidence is relevant if it has "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."[4]

This Court will not predicate error on a ruling that excludes evidence unless that ruling affected the substantial rights of a party.[5] The trial court's error affects a party's substantial rights if the error prejudiced that party.[6]

C. BERGHUIS'S TESTIMONY

Shaw argues that the trial court did not allow him to call Berghuis as a witness to question her about the letters he wrote her. The party seeking reversal on appeal has the burden to provide this Court with a record that establishes the factual basis of his argument.[7] We reject Shaw's argument because the record indicates that Shaw did not attempt to call Berghuis after the first hearing.

Further, even had the trial court refused to allow Shaw to call Berghuis as a witness, Shaw has not shown that he was prejudiced. A trial court does not abuse its discretion when it allows a party to cross-examine the opposite party during her case in chief, instead of allowing that party to call the opposite party as a witness.[8] Shaw questioned Berghuis about the letters during his first cross-examination. Because Shaw was given the opportunity to question Berghuis about the letters, he has not demonstrated that he was prejudiced and cannot show that an error warrants reversal.

D. EXCLUSION OF SHAW'S REBUTTAL WITNESSES

Shaw argues that the trial court erred when it refused to allow him to call 41 inmates that Berghuis alleged wrote her "hundreds" of letters.

Shaw argued that the inmates would testify that Shaw did not encourage them to write letters to Berghuis and her husband. The trial court concluded that this evidence was not

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[3] MRE 402.

[4] MRE 401.

[5] MRE 103(a); *Detroit v Detroit Plaza Ltd Partnership*, 273 Mich App 260, 291-292; 730 NW2d 523 (2006).

[6] *People v Grant*, 445 Mich 535, 549; 520 NW2d 123 (1994).

[7] *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000); *Detroit*, 273 Mich App at 291-292.

[8] *Linsell*, 266 Mich App at 26.

relevant. A fact is relevant if it has some consequence on the action.[9] After Berghuis withdrew her assertions about the letters, there was no longer any need for the trial court to hear from witness who would rebut those assertions. Thus, the letters—and the testimony of witnesses who would rebut them—no longer had any consequence on the action. We conclude that the trial court did not abuse its discretion when it declined to allow Shaw to call the inmates, because it correctly determined that the evidence was not relevant.

E. EXCLUSION OF SHAW'S EXPERT WITNESSES

Shaw argues that the trial court abused its discretion when it ruled that he could not call his proposed expert witnesses to testify that Berghuis lied during the 1999 trial.

A party may impeach a witness with evidence of the witness's character for truthfulness.[10] But generally, a party may not prove a witness's character for truthfulness with extrinsic evidence.[11] Here, Shaw attempted to offer extrinsic evidence—in this case, expert testimony—to prove that Berghuis was untruthful. This was evidence concerning a specific instance of conduct: Berghuis's testimony during his 1999 trial. We conclude that the trial court did not abuse its discretion when it excluded Shaw's proposed expert testimony that Berghuis lied during Shaw's 1999 criminal trial as improper impeachment evidence, because the evidence was extrinsic evidence of a specific instance of conduct.

III. THE PROTECTION ORDER

A. STANDARD OF REVIEW

This Court reviews for an abuse of discretion the trial court's determination whether to issue a protection order.[12] The trial court abuses its discretion when its decision results in an outcome that is outside the range of reasonable and principled outcomes.[13]

This Court reviews for clear error the trial court's factual findings in support of its decision to issue a protection order.[14] A finding is clearly erroneous if, although there is evidence to support it, this Court is definitely and firmly convinced that the trial court made a

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[9] *Morales v State Farm Mut Auto Ins Co*, 279 Mich App 720, 731; 761 NW2d 454 (2008).

[10] MRE 608(a).

[11] MRE 608(b); *People v Spanke*, 254 Mich App 642, 644-645; 658 NW2d 504 (2003).

[12] *Hayford v Hayford*, 279 Mich App 324, 325; 760 NW2d 503 (2008).

[13] *Id.*; *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

[14] *Hayford*, 279 Mich App at 325.

mistake.[15] We give regard to the trial court's opportunity to judge the credibility of the witnesses who appeared before it.[16]

B. LEGAL STANDARDS

The petitioner must establish a reasonable cause for the trial court to grant a protection order.[17] The trial court must issue a protection order if it finds that there is reasonable cause to believe that a person has engaged in stalking.[18] Stalking is

> a willful course of conduct involving repeated or continuing harassment of another individual that would cause a reasonable person to feel . . . harassed, or molested and that actually causes the victim to feel . . . harassed, or molested.[19]

Harassment includes

> 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.[20]

But "[h]arassment does not include constitutionally protected activity or conduct that serves a legitimate purpose."[21] Thus, conduct is not harassment if it "contributes to a valid purpose that would otherwise be within the law irrespective of the criminal stalking statute."[22]

C. APPLYING THE STANDARDS

Shaw argues that his statements in the letters served the legitimate purpose of encouraging Berghuis and Department of Corrections staff to stop harassing him, and that the trial court erroneously found that the statements were threats. We disagree.

Here, Shaw stated in one instance that Berghuis was "done" and that no one could protect her, and in another instance stated that he would "destroy" Berghuis and her husband. The trial court had the copies of the documents before it. Shaw argues that the trial court improperly interpreted his statements as threats because he was only threatening future legal action against

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[15] *In re JK*, 468 Mich 202, 209-210; 661 NW2d 216 (2003).

[16] MCR 2.613(C).

[17] MCL 600.2950(4); *Hayford*, 279 Mich App at 326.

[18] MCL 600.2950(4)(i).

[19] MCL 750.411h(1)(d).

[20] MCL 750.411h(1)(c).

[21] *Id*.

[22] *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 723; 691 NW2d 1 (2005).

Berghuis. Berghuis testified that the letters were threats that Shaw would retaliate against her for her testimony during the 1999 trial. The trial court believed Berghuis's explanation over Shaw's. We defer to the trial court's credibility assessment of which witness to believe.[23] Given the strong language that Shaw employed in the letters and the more typical meanings of such phrases, we conclude that the trial court's determination that the statements contained in the letters were threats was not clearly erroneous.

Further, Berghuis alleged and testified that these letters made her feel terrified. Thus, the letters fitted the definition of harassment under the stalking statute. We conclude that the trial court did not abuse its discretion when it granted Berghuis's request for a protection order, because its outcome was within the reasonable range of principled outcomes.

IV. JUDICIAL BIAS

A. STANDARD OF REVIEW AND ISSUE PRESERVATION

To preserve an issue of judicial bias, a party must raise the claim before the trial court.[24] Here, Shaw did not raise this claim before the trial court. Where the party has not done so, we review the issue for plain error affecting the party's substantial rights.[25]

B. LEGAL STANDARDS

A judge must be disqualified when he or she cannot hear a case impartially, including when a judge is personally biased or prejudiced against a party.[26] The party who alleges that a judge is biased must overcome the heavy presumption in favor of judicial impartiality.[27]

C. APPLYING THE STANDARDS

Shaw argues that the trial court's evidentiary rulings indicate that the trial court judge was personally biased against him. We disagree. Generally, this Court will not find bias simply because the trial court ruled against a party, even when its rulings are erroneous.[28] The party

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[23] MCR 2.613(C); *H J Tucker & Assoc, Inc v Allied Chucker & Engineering Co*, 234 Mich App 550, 563; 595 NW2d 176 (1999).

[24] *People v Jackson*, 292 Mich App 583, 597; 808 NW2d 541 (2011); MCR 2.003(D).

[25] *Id*.; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[26] MRE 2.003(B), (C); *Cain v Dep't of Corrections*, 451 Mich 470, 494-495; 548 NW2d 210 (1996).

[27] *Id*. at 497.

[28] *Bayati v Bayati*, 264 Mich App 595, 603; 691 NW2d 812 (2004); *Mahlen Land Corp v Kurtz*, 355 Mich 340, 350; 94 NW2d 888 (1959).

must demonstrate that the judge is unable to make fair rulings, or has a hostility or deep-seated antagonism toward the party.[29]

Here, Shaw has not demonstrated that the trial court did make erroneous rulings, much less that those rulings were the product of antagonism or personal bias. We reject Shaw's argument, and conclude that Shaw has not overcome the presumption in favor of judicial partiality or shown that a plain error of judicial bias affected his substantial rights.

V. CONCLUSION

We do not consider Shaw's remaining argument, that the trial court denied Shaw his right to confrontation under the Sixth Amendment, because we conclude that he has abandoned it. A party must provide authority for its assertions on appeal.[30] A party abandons its assertions when it fails to include the issue in his or her statement of questions presented and fails to provide any authority to support its assertions.[31] Shaw did not raise this issue before the trial court, did not state it in his statement of issues presented, and has failed to provide sufficient authority for his assertion that Sixth Amendment rights extend to a civil context, such as a protective order.[32] Thus, we consider these assertions abandoned.

We affirm.

/s/ William C. Whitbeck
/s/ Henry William Saad
/s/ Douglas B. Shapiro

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[29] *Jackson*, 292 Mich App at 598; *Cain*, 451 Mich App at 495 n 29.

[30] *People v Matuszak*, 263 Mich App 42, 59; 687 NW2d 342 (2004).

[31] *Caldwell v Chapman*, 240 Mich App 124, 132; 610 NW2d 264 (2000).

[32] See *In re Brock*, 442 Mich 101, 108; 499 NW2d 752 (1993) ("[B]ecause the present case is not a criminal case, we conclude that the Sixth Amendment right of confrontation does not apply.")