

CORRECTED
NOT DESIGNATED FOR PUBLICATION

No. 109,937

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

CECILIA TRENZADO,
Appellee,

v.

MILKO TRENZADO,
Appellant.

MEMORANDUM OPINION

Appeal from Ford District Court; DANIEL L. LOVE, judge. Opinion filed April 25, 2014.

Affirmed.

Michael J. Gardine, of Curtis E. Campbell, Chrt'd., of Cimarron, for appellant.

Sarah Doll Heeke, of Doll Law Firm, LLC, of Dodge City, for appellee.

Before MALONE, C.J., MCANANY, J., and JAMES L. BURGESS, District Judge Retired,
assigned.

Per Curiam: Milko Trenzado appeals the district court's judgment granting his ex-wife, Cecilia Trenzado, a protection from stalking order against him. Milko argues that the district court erroneously admitted and improperly considered certain evidence and that there was insufficient evidence to support the protection from stalking order. For the reasons set forth herein, we affirm the district court's judgment.

Cecilia and Milko Trenzado were married in 1994 and divorced in 2012. The divorce proceedings resulted in Milko having primary residential custody of their two

children, but the district court awarded Cecilia liberal visitation rights. During their marriage, they also owned and operated a tortilla business called Mi Tierra. The terms of the divorce required them to sell the business and apply the proceeds to the parties' debts.

On March 20, 2013, Cecilia filed a petition for a protection from stalking order in Ford County District Court. In the petition, Cecilia alleged the following incidents of stalking: (1) On March 2, 2013, Milko parked across the street from the tortilla shop and watched her with binoculars; (2) when Cecilia was at Coldwell Banker, her real estate agency, Milko was watching her; (3) on March 13, 2013, Milko called police and reported that Cecilia was stealing, after which he went to Cecilia's friend's house and looked with binoculars; (4) Milko had been driving past Cecilia's house to check if she or anyone else was there; (5) Milko told Cecilia when and where she could take their son and threatened to take him away from her if she took their son around people of whom Milko did not approve; (6) Milko threatened Cecilia's life and wanted to "put her on the street"; (7) Milko yelled at Cecilia and told her he had pictures of her and everyone around her; and (8) Milko physically and verbally abused Cecilia, inflicting such fear that she suffered physical symptoms. Milko filed an answer, denying Cecilia's allegations and asserting that she had failed to allege specific incidents of violence or a reasonable basis to be afraid for her safety.

At a hearing on April 29, 2013, Cecilia testified first. As Cecilia began testifying, Milko asked the district court to limit her testimony to the facts and allegations presented in her petition, but the district court refused to do so. Milko did not request a continuing objection to Cecilia's testimony about incidents not included in the petition.

Cecilia testified at length about her interactions with Milko. She testified that Milko's mother had once warned her that Milko had a gun and was looking for her, which caused her to hide in fear. She also testified that she saw Milko parked outside their business watching her with binoculars and that he called her after her appointment at

Coldwell Banker and demanded to know who she had been with, which scared her. She stated that during the divorce proceedings, Milko drove by her house many times and if he saw unfamiliar vehicles at her house, he would call her and ask who was there. Cecilia testified that Milko also called and told her not to take their children around certain people of whom Milko disapproved, and he said that she would end up by herself without the children.

Cecilia claimed the stress from the situation had caused her physical symptoms. She stated she was seeking treatment from a counselor and that she was always looking behind her to see if Milko was checking on her. On cross-examination, Cecilia admitted that she did not call the police to report many of these things, but she testified that she did not call the police because she was afraid of retribution from Milko.

Next, Susan Hansen, a friend of Cecilia's, testified that she was with Cecilia when Milko called Cecilia after her Coldwell Banker appointment. Hansen testified that she could not hear the phone call, but Cecilia became visibly nervous. Hansen further testified that Cecilia had previously told her Milko had abused her. Next, Derek Deines testified. He stated that he was the friend who told Cecilia that Milko had watched him with binoculars. Deines said that he had seen Milko near his house using binoculars or a camera to watch him unload items from a trailer in his garage. Deines also stated that whenever Milko's name was mentioned, Cecilia became nervous and panicked.

Milko called Officer Guillermo Gutierrez with the Dodge City Police Department, who responded to Milko's call when he reported property taken from his business. Gutierrez testified Milko had taken him to Deines' house, where Gutierrez saw some items in a garage, but Gutierrez did not know if they came from Milko's business.

Finally, Milko testified. He denied parking outside the business and watching Cecilia. He likewise denied watching her when she was at Coldwell Banker; he testified

that he had an 11 a.m. appointment at Coldwell Banker for which he arrived approximately 5 minutes early and he only found out later that Cecilia had been there for a 10 a.m. appointment. Regarding the March 13, 2013, incident with the property from the business, Milko testified that he had been informed that someone took property from the business and he had tracked the property to Deines' house. Milko categorically denied driving by Cecilia's house or ever threatening her life.

After hearing the evidence, the district judge stated that he was convinced Milko had caused Cecilia fear. Specifically, the judge noted her testimony that Milko had watched her while she was at the business, Milko had watched her while she was at Coldwell Banker, Milko had been at their son's school when Cecilia picked up their son, and that Milko had on another occasion forced her off a street with his vehicle. Finding that Cecilia had met her burden of proof, the district court granted Cecilia's petition and issued a final order of protection from stalking, valid until April 29, 2015. Milko timely appealed the district court's judgment.

DID THE DISTRICT COURT ERR IN ADMITTING CERTAIN EVIDENCE?

Milko first argues that the district court erroneously admitted certain evidence. Specifically, Milko points to Cecilia's testimony that (1) Milko parked behind Cecilia when she picked up their child at school, (2) Milko forced her off a street in his car, and (3) she had received numerous unwanted text messages and telephone calls from Milko. Milko asserts only that the testimony was unduly prejudicial because the evidence supported allegations that were not in Cecilia's petition and therefore he had no opportunity to prepare to defend himself against these claims. Cecilia responds by asserting that the district court properly considered the testimony because it was highly probative and not unduly prejudicial.

In *State v. Shadden*, 290 Kan. 803, 817-18, 235 P.3d 436 (2010), our Supreme Court clearly laid out the multistep analysis used to review evidentiary rulings, explaining which standard of review applies to each step. The first question is relevance, or whether the evidence is probative and material; the district court's conclusion as to whether the evidence is probative is reviewed for an abuse of discretion, while its conclusion as to materiality is reviewed de novo. 290 Kan. at 817. In the second step, an appellate court reviews de novo the district court's determination of which rules of evidence or other legal principles apply. 290 Kan. at 817. The third step is review of the district court's application of the appropriate rule or principle, and the standard of review depends upon which rule or principle is applied. 290 Kan. at 817.

K.S.A. 60-404 generally precludes an appellate court from reviewing an evidentiary challenge "unless there appears of record objection to the evidence timely interposed and so stated as to make clear the specific ground of objection." *State v. Holman*, 295 Kan. 116, 126, 284 P.3d 251 (2012); see *State v. King*, 288 Kan. 333, 342, 204 P.3d 585 (2009) (explaining purpose behind contemporaneous-objection rule of K.S.A. 60-404). As we will explain, we conclude that Milko has failed to properly preserve his evidentiary challenges for appeal.

Cecilia's testimony about the interaction with Milko at the school

First, Milko complains that the district court allowed Cecilia to testify about a phone call between Milko and their son that occurred when Cecilia picked up their son from school. Specifically, Cecilia testified as follows:

"[Cecilia's counsel:] Now, we've talked a lot of past incidents. Have there been any current incidents between the two of you?

"A[.] Yes. He already has—I believe he has a restraining order right now, and last Friday, he just cannot hold himself. That was my time with my son and I was at the Northwest School on Sixth Avenue and he parked behind me and my son came on the truck and told me, why is my dad behind you if it's [your] day with me? And I said, I

don't know. He told me, let me borrow the phone. So I let him borrow the phone and he asked him, why are you here? And he—I could hear him—

"[Defense counsel]: I'm gonna [*sic*] object, Your Honor. This is hearsay.

"A[.] I could hear him telling my son—

"THE COURT: Okay. You could hear him—

"THE WITNESS: Telling my son over the phone that—

"THE COURT: Okay. Overruled as to what she heard Mr. Trenzado say.

"[Cecilia's counsel:] Could you hear the telephone conversation at the time?

"A[.] Yes, because I was—my son was sitting down next to me.

"Q[.] Okay. What did you hear?

"A[.] I heard him telling him, I came because I missed you a lot and I want to see you and I want you to tell your mom to roll the window down so—"

On appeal, Milko argues that the district court erred in allowing the testimony because it "is unduly prejudicial in that it was not included in the Petition for Protection from Stalking." Yet when the testimony was introduced at the hearing, Milko did not object on the ground that the evidence would be unduly prejudicial; he objected on hearsay grounds. Although the district court had denied Milko's request at the beginning of the hearing to limit Cecilia's testimony to the facts and allegations presented in her petition, Milko did not request a continuing objection on this ground and he did not renew his objection on this ground when Cecilia testified about the incident at school.

Our Supreme Court has clearly stated: "A defendant may not object to the admission of evidence on one ground at trial and then assert a different ground for objection on appeal. [Citation omitted.]" *State v. Huffmier*, 297 Kan. 306, 319, 301 P.3d 669 (2013); see also K.S.A. 60-404. Therefore, Milko may not now argue a different ground for objection—namely, that the evidence was unduly prejudicial—that he did not assert at trial. See *State v. Richmond*, 289 Kan. 419, 430, 212 P.3d 165 (2009) (declining to consider defendant's K.S.A. 60-445 argument because he had not asserted it at trial).

Cecilia's testimony that Milko forced her off the road

Next, Milko challenges Cecilia's testimony that Milko once forced her off the road while they were both driving. The challenged testimony, which occurred during cross-examination, was as follows:

"Q[.] [W]hat specifically has Mr. Trenzado said to threaten your life?

"A[.] Like—Like October 8, 2010, when he was abusing me verbally and he got the gun, his mother told me to hide because he followed me. There's another time also that I haven't mentioned when he was—he got a ticket for reckless driving because he was pushing me out of the way. I was driving and he was—With his truck, he was getting really close to me and pushing me out of the way, so I was driving on the other side of the street where the cars are coming on the opposite way."

Milko argues that this testimony, which the district court noted in granting the protection from stalking order, was unduly prejudicial. Once again, however, we need not address the merits of Milko's argument. First, Milko made no contemporaneous and specific objection to the testimony at the hearing. See K.S.A. 60-404 (requiring a timely and specific objection to preserve an evidentiary challenge for appellate review); *State v. Randolph*, 297 Kan. 320, 335, 301 P.3d 300 (2013) (same). Second, Milko's counsel elicited the testimony of which he now complains; this precludes him from challenging the evidence on appeal. See *State v. Wilson*, 281 Kan. 277, 283-84, 130 P.3d 48 (2006) (citing prior Kansas caselaw and concluding that a defendant cannot complain about admission of testimony when he did not object to the testimony at trial and his counsel elicited the testimony); *State v. Anthony*, 282 Kan. 201, 215, 145 P.3d 1 (2006) (same).

Cecilia's testimony about text messages from Milko

Finally, Milko asserts that the district court improperly admitted and considered testimony of unwanted telephone calls and text messages Milko made to Cecilia. The

exchange to which he cites in his brief occurred during Cecilia's direct examination and consists of the following:

"Q[.] Okay. How about any times before that? Have the two of you had any interactions?

"A[.] Yes.

"Q[.] Do you have any specific dates on those?

"A[.] I don't remember dates. He texts me and tells me all the time—I have a text saying that—

"[Defense counsel]: I'd object to the texts as well, Your Honor, under the Best Evidence Rule. If there are texts that she has, those can be documented and presented to the Court as an exhibit.

"THE COURT: I consider that to be communications and it's admissible.

Overruled.

"[Cecilia's counsel:] Now, explain your texts.

"A[.] What I was doing and he wanted to call me and talk to me.

"Q[.] Asking you what you were doing? I'm sorry.

"A[.] Yes, what I was doing and—I don't remember. I have my texts right there. I don't exactly remember."

Once again, Milko asserts that this testimony was unduly prejudicial in that it contained an allegation not included in the petition and, due to lack of notice, he was unable to adequately defend against the allegation. As with Milko's previous evidentiary challenges, however, he did not assert prejudice or a lack of notice through the required specific and contemporaneous objection to this testimony. Instead, he objected on the basis of the best-evidence rule, set out by statute in Kansas in K.S.A. 60-467. Because Milko failed to object in the district court on the only ground he now attempts to raise on appeal, we need not address the merits of this argument. See *Huffmier*, 297 Kan. at 319 (defendant may not object to the admission of evidence on one ground at trial and then assert a different ground for objection on appeal); *Richmond*, 289 Kan. at 430 (declining to consider defendant's K.S.A. 60-445 argument because he had not asserted it at trial).

WAS THERE SUBSTANTIAL COMPETENT EVIDENCE TO SUPPORT THE PROTECTION
FROM STALKING ORDER?

Next, Milko argues there was insufficient evidence to support the district court's decision to issue the protection from stalking order. Specifically, he asserts the evidence presented at the hearing did not support the district court's finding that he harassed Cecilia and that such harassment would cause another reasonable person to fear for his or her safety. Cecilia argues that there was sufficient evidence to support the district court's conclusions and issuance of the order.

"When a verdict is challenged as being contrary to the evidence, an appellate court does not reweigh the evidence or pass on the credibility of the witnesses. If the evidence, when considered in the light most favorable to the prevailing party, supports the verdict, the appellate court should not intervene. [Citation omitted.]" *Unruh v. Purina Mills*, 289 Kan. 1185, 1195, 221 P.3d 1130 (2009). In the context of a challenge to the sufficiency of the evidence in an appeal from a protection from stalking order, our function is to determine whether the trial court's findings of fact are supported by substantial competent evidence and whether the findings are sufficient to support the trial court's conclusions of law. *Wentland v. Uhlarik*, 37 Kan. App. 2d 734, 736, 159 P.3d 1035 (2007).

The Protection from Stalking Act, K.S.A. 60-31a01 *et seq.*, "shall be liberally construed to protect victims of stalking and to facilitate access to judicial protection for stalking victims." K.S.A. 60-31a01(b). K.S.A. 2013 Supp. 60-31a05(a) provides that "the plaintiff must prove the allegation of stalking by a preponderance of the evidence."

At the conclusion of the hearing, the district judge made the following findings:

"I'm convinced that there have been actions by the Defendant that have caused fear with the Plaintiff. The testimony . . . testimony that I'm finding to be convincing is that there have been occasions where the Defendant has parked across the street to watch the

Plaintiff in the—at their business. I'm finding he was outside the Coldwell Banker's. I think there's testimony that supports that he was, that he called her afterwards and these communications were not wanted. He knows that they are not desired-type of communications. She reacts to them which has been testified to by other persons. The testimony indicates he has watched her and others along Comanche Boulevard. There's testimony that he followed—or was behind her at the school when she was picking up a child here just very recently. There's testimony that he forced her off a street in his vehicle. It's clear that there's lots of issues here, but it's also clear that there doesn't need to be any more contact than is absolutely necessary or else there's issues here, and I feel that the testimony that's been presented by the Plaintiff indicates there's been harassment, there's been unwanted telephone or text contact. This has occurred numerous times. It affects her. Others have testified to that and I'm finding that she has met the burden of proof to grant the protection-from-stalking order. I'm going to grant that order and I'll sign it."

Sufficient evidence

First, Milko challenges the district court's finding that Milko had parked across the street to watch Cecilia at their tortilla shop. Milko argues that even considered in the light most favorable to Cecilia, the hearing testimony did not overcome Milko's denial that this incident occurred.

Cecilia testified that once, while she and Deines were working at the shop, they went outside and saw Milko sitting in his truck on the sidewalk across the street from the shop looking at them. On cross-examination, Cecilia further elaborated that she saw Milko watching them with binoculars. Milko testified that this was "completely a false accusation." The district court found Cecilia's testimony more credible, and on appeal this court does not pass on the credibility of the witnesses. See *Unruh*, 289 Kan. at 1195. This factual finding was supported by substantial competent evidence and should not be disturbed on appeal. See *Wentland*, 37 Kan. App. 2d at 736.

We may similarly dispose of Milko's challenge to the district court's reference to the incident at their child's school, Milko making multiple phone calls and sending multiple text messages to Cecilia, and Milko's attempt to run Cecilia off the road. Milko complains that the only support for these findings was Cecilia's testimony. In fact, Milko testified explicitly that Cecilia's statement that Milko saw her at their son's school and yelled at her was untrue. Yet the district court found Cecilia's testimony more credible, and this court does not pass on the credibility of witnesses. See *Unruh*, 289 Kan. at 1195.

Legitimate purpose and reasonable fear for safety

Next, Milko argues that certain acts the district court cited in its ruling—the events of March 13, 2013, involving the property allegedly taken from the tortilla shop and the incident at Coldwell Banker—could not have properly been the basis for granting a protection from stalking order. Milko argues that these acts could not have supported the district court's order because (a) they were acts Milko undertook for a legitimate purpose and (b) they would not put a reasonable person in fear for his or her safety.

Initially, we note that even if Milko's actions on March 13 and the incident at Coldwell Banker are discarded, there is still sufficient evidence to support the district court's issuing a protection from stalking order. Cecilia had to prove her allegation of stalking by a preponderance of the evidence. See K.S.A. 2013 Supp. 60-31a05(a). "Stalking" is "an intentional harassment of another person that places the other person in reasonable fear for that person's safety," K.S.A. 60-31a02(a). "Harassment" is "a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose," while "course of conduct" is "conduct consisting of two or more separate acts over a period of time, however short, evidencing a continuity of purpose which would cause a reasonable person to suffer substantial emotional distress." K.S.A. 60-31a02(b)-(c).

When these statutory definitions are read together, Cecilia needed to prove by a preponderance of the evidence that Milko undertook a knowing and intentional course of conduct directed at Cecilia that seriously alarmed, annoyed, tormented, or terrorized her, that served no legitimate purpose, and that placed her in reasonable fear for her safety. In finding that Cecilia met this burden, the district judge did not only depend upon the March 13 and Coldwell Banker events. The district court also referred to Milko's watching Cecilia while she was at their business, Milko's encounter with Cecilia at their son's school, and Milko's forcing Cecilia off the road. Milko does not challenge that this additional conduct would cause a reasonable and objective fear for one's safety, nor does he assert that it was undertaken for a legitimate purpose.

Thus, even if the district court erred in considering Milko's actions on March 13 and the incident at Coldwell Banker in granting the protection from stalking order, there would still be sufficient evidence in the record to support the district court's decision. *Cf. Sauls v. McKune*, 45 Kan. App. 2d 915, 918-19, 260 P.3d 95 (2011) (failure to address alternative basis for district court's ruling is sufficient reason to deny appeal). Nevertheless, we will examine Milko's arguments that his actions were undertaken for a legitimate purpose and would not have put a reasonable person in fear for his or her safety.

Did Milko's acts have a legitimate purpose?

Milko challenges the district court's consideration of the events of March 13, 2013, and its characterization that Milko "watched [Cecilia] and others along Comanche Boulevard." Milko contends he had a legitimate purpose for his acts: he was trying to keep track of property that had been taken from the shop. If Milko had a legitimate purpose for the acts, they were not harassment and could not support a finding of stalking. See K.S.A. 60-31a02.

Regarding these events, Cecilia alleged in her petition that "Milko drove by the shop to see what was going on and he called the police saying I was stealing. Then Milko drove by my friends' house with binoculars looking to see everything." At the hearing, on direct examination, Cecilia testified that she talked to the police on that date, was never charged with theft, and remembered being very afraid. On cross-examination, Cecilia stated that the property in question was property she had sold to a man named Ernest Fernandez in 2011.

Milko testified that in March 2013, he believed that he was still a co-owner of the tortilla shop. On the day in question, he received a phone call telling him some equipment was missing; Milko testified that the equipment included a baking mixer, two ovens, a tortilla mixer, stainless-steel tables, and a proofing cabinet. The caller told him the equipment was in four pickup trucks and told him which way the trucks were headed, so Milko drove down Comanche Street looking for the trucks. In one driveway, he found three or four trucks full of equipment. Milko took some pictures of the trucks and then drove to a parking lot and called the police. The photographs were submitted into evidence.

The question here is whether the district court believed that Milko drove down Comanche Street, took pictures of Deines' garage, and called the police to report his property stolen for the legitimate purpose of keeping track of his property. In his hearing testimony, Milko characterized the events of March 13 in such a manner. During closing argument, he specifically argued that any contact between him and Cecilia "served a legitimate purpose." Obviously, the district court did not believe that argument and did not give credibility to Milko's statements about the purpose of his behavior. On appeal, this court does not reweigh the evidence or pass on the credibility of the witnesses. *Unruh*, 289 Kan. at 1195.

The same analysis applies to Milko's remaining argument that he had a legitimate purpose for being at Coldwell Banker and communicating with Cecilia afterward. At the hearing, Milko testified briefly that he went to Coldwell Banker for his own appointment and did not know that Cecilia had been there until later. Although, as Milko asserts, this version of events is "perfectly reasonable," the district court gave more credibility to Cecilia's version, and this court does not revisit the credibility of witnesses. See *Unruh*, 289 Kan. at 1195. Thus, the district court's implicit finding that Milko did not undertake these actions for a legitimate purpose was supported by substantial competent evidence.

Cecilia's fear for her safety

Finally, Milko argues that even if the district court correctly found that he had no legitimate purpose for engaging in these activities, there was insufficient evidence to show that Cecilia had an objectively reasonable fear for her safety. Cecilia testified at the hearing that Milko's actions caused her to fear for her safety, but Milko asserts that Cecilia's alleged fear for her safety is not objectively reasonable.

The Protection from Stalking Act does not require that each individual event in and of itself be sufficient to create a reasonable fear for the victim's safety. Rather, the district court could consider whether all of the evidence, taken in context, would cause a reasonable person to experience the requisite fear. See *Wentland*, 37 Kan. App. 2d at 740. Here, considering the totality of the evidence and the tumultuous history between Cecilia and Milko, the district court did not err in finding that Milko's harassment placed Cecilia in reasonable fear for her safety. Accordingly, there was sufficient evidence to support the district court's decision to issue the protection from stalking order.

Affirmed.



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May 5, 2014

Re: Cecilia Trenzado v. Milko Trenzado
Appellate Case No. 109,937

Enclosed please find a corrected opinion in the above matter replacing the unpublished opinion filed April 25, 2014.

The corrections may be found in the opinion on the following page:

Page seven; the subheading at the top of the page was not in the correct format in the original opinion.

Please feel free to contact me if you have any questions.

Sincerely,

Handwritten signature of N. Musquiz, consisting of the letters "nm" in a cursive style.

N. Musquiz
Deputy Clerk

encl.