COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

21-P-1022

E.K.

vs.

M.G.

MEMORANDUM AND ORDER PURSUANT TO RULE 23.0

The defendant appeals from an order dated August 12, 2020, that permanently enjoined him, pursuant to G. L. c. 258E, from abusing, harassing, or contacting the plaintiff, and ordered him to stay away from her residence. He raises two issues on appeal. First, he contends that there was insufficient evidence to support entry of the order. Second, he argues that his due process rights were violated because he did not receive notice of the hearing leading to the permanent order. Because the defendant has not provided a sufficient record to show that he is entitled to relief with respect to either of his two arguments, we affirm. However, our decision does not foreclose the defendant from seeking relief in the trial court, pursuant to G. L. c. 258E, § 3 (e), based on the alleged lack of notice.

Background. The plaintiff obtained an ex parte G. L. c. 258E harassment prevention order against the defendant on May 22, 2019. Although the defendant received notice that there would be a hearing on May 29, 2022 to determine whether to extend the ex parte order, the defendant did not appear. The plaintiff did, though, appear at that hearing, and the order was extended to May 29, 2020. The defendant did not appeal.

As a result of the COVID-19 pandemic, the May 29, 2020 hearing was rescheduled twice. A video conference virtual hearing[1] ultimately took place on August 12, 2020. Again, the plaintiff appeared; the defendant did not. At the conclusion of the hearing, the judge entered a permanent G. L. c. 258E order against the defendant. It is from this order that the defendant appeals.[2]

Discussion. The defendant argues that the evidence was insufficient to support the issuance of the permanent order, and that the permanent order was invalid because he did not receive notice of the August 12, 2020 hearing. We discuss each of these arguments in turn.

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[1] The defendant argues that the August 12, 2020 hearing was conducted telephonically, but the docket reflects that a video virtual hearing was conducted.

[2] On April 13, 2021, a single justice of this court allowed the defendant's motion for leave to file a late notice of appeal from the permanent order.

Sufficiency of the evidence. "We review a c. 258E order to determine whether a fact finder could conclude 'by a preponderance of the evidence, together with all permissible inferences, that the defendant had committed [three] or more acts of willful and malicious conduct aimed at a specific person committed with the intent to cause fear, intimidation, abuse or damage to property and that [did] in fact cause fear, intimidation, abuse or damage to property.'" R.S. v. A.P.B., 95 Mass. App. Ct. 372, 374 (2019), quoting Gassman v. Reason, 90 Mass. App. Ct. 1, 7 (2016). The hearing judge's factual findings will not be disturbed on appeal unless they are clearly erroneous. DeMayo v. Quinn, 87 Mass. App. Ct. 115, 117 (2015).

Here, although the defendant has included in his record appendix the plaintiff's complaint seeking a harassment prevention order, her affidavit supporting that complaint, and transcripts of the May 22, 2019 and May 29, 2019 hearings, he has not included a transcript of the August 12, 2020 hearing at which the permanent order issued. Without that transcript and any exhibits introduced at the hearing, the defendant's argument that the evidence was insufficient to support the permanent order is doomed from the start. See Mass. R. A. P. 18 (b) (4), as appearing in 481 Mass. 1637 (2019); Connolly v. Connolly, 400 Mass. 1002, 1003 (1987) ("In the absence of a transcript, as here, we assume that [the judge's] findings are adequately

supported."). We cannot accept the defendant's invitation to assume that the judge entered the permanent order on insufficient evidence.[3]

Although we recognize the defendant's arguments concerning weaknesses in the evidence supporting the ex parte order and the one-year extension order, neither of those orders is before us. The extension order was never appealed, and the ex parte order was not subject to separate appellate review. See R.S., 95 Mass. App. Ct. at 372 n.1; V.M. v. R.B., 94 Mass. App. Ct. 522, 524-525 (2018).

Due process and notice. The defendant next argues that the permanent order was issued in violation of his due process rights because he did not receive sufficient notice of the hearing at which the order issued.[4] Basic due process

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[3] At oral argument, the defendant's counsel represented that no recording was made of the hearing on August 12, 2020. Accepting this to be the case, the defendant should have sought to reconstruct the record in the District Court, pursuant to Mass. R. A. P. 8 (c), as appearing in 481 Mass. 1611 (2019). Although the judge who issued the permanent order has retired, there are mechanisms by which record reconstruction could still be obtained. See Commonwealth v. Delacruz, 99 Mass. App. Ct. 189, 192-193 (2021) (where trial judge had retired, First Justice of Lynn District Court could have, on appellant's motion, settled record). See also Mass. R. A. P. 8 (d), as appearing in 481 Mass. 1611 (2019).

[4] The defendant also raises a due process challenge to the one-year extension order, because it was issued following a hearing at which he was not present. But, as discussed supra, this challenge is not properly before us because the defendant never appealed from the one-year extension order. Furthermore, the

considerations apply in the context of proceedings under G. L. c. 258E. R.S., 95 Mass. App. Ct. at 373 n.4, citing Frizado v. Frizado, 420 Mass. 592, 596-598 (1995). "[A] defendant in any case has a right to notice and an opportunity to be heard." M.M. v. Doucette, 92 Mass. App. Ct. 32, 34 (2017). Every harassment protection order "shall, on its face, state the time and date the order is to expire and shall include the date and time that the matter will again be heard." G. L. c. 258E, § 3 (d).

Here, the record reflects that the one-year extension order was served in hand on the defendant. That order notified the defendant that the next hearing would be held on May 29, 2020. However, due to the COVID-19 pandemic, the May 29 hearing did not occur as scheduled; instead, the docket shows that the hearing date was twice extended: first to June 18, 2020, and then to August 12, 2020. Although the record includes a return of service dated June 19, 2020, indicating that notice of the second extension was served in hand on the defendant's father at the defendant's last and usual place of abode, neither the docket nor the order reflects that the defendant received notice

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mere fact that the defendant did not appear for the hearing does not mean that he did not receive notice of it, and the defendant has not otherwise shown or claimed lack of notice. See G. L. c. 258E, § 5 (where defendant does not appear at hearing after notice, "the temporary orders shall continue in effect without further order of the court").

that the hearing would be conducted by video conference. Instead, the June 17, 2020 order states that the August 12, 2020 hearing would be held in courtroom 2 of the Cambridge District Court. Nonetheless, it is undisputed that the plaintiff appeared at the August 12, 2020 video hearing, which leads to the natural inference that she received notice that the hearing would occur in that format. But nothing in the trial court's records directly indicates how the plaintiff was informed that the hearing would be conducted by video conference, let alone that the defendant received the same notice.

It is not the role of an appellate court to reconcile the potential factual conflict between the written notice stating that the parties were to appear in courtroom 2 and the inference to be drawn from the fact that the plaintiff knew to appear for a video conference instead. The trial court is in the best position to resolve factual issues such as this, once the defendant makes a motion and provides a factual record (for example, by way of affidavit) to support it. The defendant may do so any time by filing a motion in the District Court to modify the permanent order, see G. L. c. 258E, § 3 (e), on the ground that it was void due to lack of notice. See Mass. R. Civ. P. 60 (b) (4), 365 Mass. 828 (1974). This would allow a District Court judge to make factual findings as to whether the defendant received notice of the video conference at which the

permanent order issued. Since the defendant had so far not sought such relief in the District Court, we must affirm the issuance of the permanent c. 258E order on the record before us. See Commonwealth v. Laskowski, 40 Mass. App. Ct. 480, 482-483 (1996).

The c. 258E order issued on August 12, 2020, is affirmed. Nothing in this decision affects the defendant's right, pursuant to G. L. c. 258E, § 3 (e), to move the District Court to modify the permanent order at any time.

So ordered.

By the Court (Green, C.J., Wolohojian & Neyman, JJ.[5]),

Joseph F. Stanton

Clerk

Entered: September 2, 2022.

[5] The panelists are listed in order of seniority.