THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case Nos. 2012-0112 and 2012-0113, Nicholas Paul Tello v. John Thomas Tello; Sarah Elizabeth Tello v. John Thomas Tello, the court on July 13, 2012, issued the following order:

The defendant's motion for leave to file or to supplement record on appeal, to which no objection was filed, is granted. Having considered the brief, memorandum of law, and record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We affirm.

The defendant, John Tello, appeals the trial court's domestic violence final protective orders issued in favor of the plaintiffs, Nicholas Tello and Sarah Tello. See RSA 173-B:5 (Supp. 2011). In thirty-five separate questions on appeal, he argues that: (1) the matters were barred by res judicata and collateral estoppel; (2) the facts do not support the issuance of protective orders; (3) the trial court lacked personal and subject matter jurisdiction; (4) he was not afforded adequate notice or a meaningful opportunity to be heard; (5) the court erred in denying his requests for sanctions; and (6) the judge was biased against him.

We first address whether the trial court was precluded from addressing these matters by the doctrines of res judicata and collateral estoppel. The defendant claims that the issues in this case were decided in prior domestic violence proceedings initiated by plaintiff Nicholas Tello and his mother. Collateral estoppel bars a party to a prior action, or a person in privity with such a party, from relitigating any issue or fact actually litigated and determined in a prior action. McNair v. McNair, 151 N.H. 343, 352 (2004). Res judicata, or claim preclusion, is a broader remedy and bars relitigation of any issue that was, or might have been, raised in respect to the subject matter of the prior litigation. Id. at 352-53. Both doctrines are affirmative defenses, and the defendant bears the burden of proving that they apply. Id. at 354.

In Nicholas' prior case, he alleged that the defendant would soon be released from prison. The trial court denied his petition based in part upon its finding that there was "[n]o immediacy." In this case, Nicholas alleged that the defendant has been released from prison, that he fears for his life, that despite his desire to have "no form of contact with this man," the defendant has commenced attempts to communicate with Nicholas, and that the defendant has indicated that he "will communicate with [him] as is his right." (Emphasis added.) Plaintiff Sarah Tello similarly alleges that she fears for her life now that the defendant has been released from prison, and that despite her desire

to have no contact with him, he has attempted to contact her. We conclude that the defendant has failed to meet his burden to prove that these factual issues were actually litigated or could have been litigated in the prior domestic violence proceedings. See id. at 354. Accordingly, we reject the defendant's argument that the trial court was precluded from addressing these matters by the doctrines of res judicata and collateral estoppel.

We construe the defendant's next argument as a challenge to the trial court's conclusion that the evidence supported the issuance of protective orders. Any person may seek relief pursuant to RSA 173-B:5 by filing a petition alleging abuse by the defendant. See RSA 173-B:3, I (2002). "Abuse," as defined in RSA chapter 173-B, means "the commission or attempted commission" of certain enumerated acts, such as assault, criminal threatening or harassment, by a family or household member where such conduct constitutes a credible threat to the plaintiff's safety. See In the Matter of Sawyer & Sawyer, 161 N.H. 11, 15 (2010); RSA 173-B:1, I (Supp. 2011). The term "family or household member" includes parents and other persons related by consanguinity or affinity, other than minor children who reside with the defendant. See RSA 173-B:1, X (2002). Among the enumerated crimes that may constitute abuse is harassment, which criminalizes several forms of communication under certain circumstances. RSA 173-B:1, I(g); RSA 644:4 (2007).

The defendant does not deny that he is the plaintiffs' biological father. The plaintiffs alleged that the defendant had attempted to communicate with them following his release from prison, and the trial court found, based upon the evidence at trial, that the defendant's conduct constituted "harassment" under RSA 644:4 for purposes of RSA 173-B:1. The trial court further found that the defendant had been convicted of sexually-related felony offenses against Nicholas and another, that he engaged in an extreme level of violence with both minor victims of his crime, and that he is "obsessed with contacting both Sarah [and] Nicholas in a controlling [and] demanding manner, and the level of his past violence supports a finding of [a] credible threat" to the plaintiffs' safety. We conclude that these findings are sufficient to support the issuance of the protective orders.

To the extent that the defendant argues that the evidence was insufficient to support the court's findings, it is his burden as the appealing party to provide this court with a record sufficient to decide his issues on appeal. See Bean v. Red Oak Prop. Mgmt., 151 N.H. 248, 250-51 (2004); see also Sup. Ct. R. 13; In the Matter of Birmingham & Birmingham, 154 N.H. 51, 56 (2006) (pro se litigants are bound by the same procedural rules that govern parties represented by counsel). The defendant did not provide a transcript of the final hearing as part of the record on appeal. Absent a transcript, we must assume that the evidence was sufficient to support the trial court's findings. See In the Matter of Lynn & Lynn, 158 N.H. 615, 618 (2009). Here, we assume

the evidence submitted at the final hearing supports the trial court's findings that the defendant's communications constituted harassment or attempted harassment under RSA 644:4, and that it constituted a credible threat to the plaintiffs' safety.

We next address the defendant's argument that the trial court lacked personal jurisdiction over him. We conclude that the defendant waived this issue by filing responsive pleadings in the trial court contesting the issues on their merits and requesting sanctions. See Barton v. Hayes, 141 N.H. 118, 120 (1996) (general appearance and motion to strike default judgment deemed waiver of personal jurisdiction argument); Lachapelle v. Town of Goffstown, 134 N.H. 478, 480 (1991) (motions for late entry of appearance and to strike default constitute voluntary submission to jurisdiction); Mauzy v. Mauzy, 97 N.H. 514, 515 (1952) (request for continuance constitutes general appearance).

We note that even if the defendant had not waived the issue, we would find that the court had personal jurisdiction over him. We have held that the State's long-arm statute, RSA 510:4, I (2010), authorizes jurisdiction over a non-resident defendant who directs threats to a plaintiff in this State, and that such contacts are sufficient to exercise jurisdiction over the defendant. See McNair v. McNair, 151 N.H. at 349-52 (2004). Here, the trial court credited the plaintiffs' allegations that the defendant directed communications toward them constituting harassment or attempted harassment.

The defendant next argues that he was not afforded adequate notice and a meaningful opportunity to be heard. Parties whose rights are to be affected are entitled to be heard, and to enjoy that right, they must first be notified. Petition of Kilton, 156 N.H. 632, 638 (2007). Due process, however, does not require perfect notice, but only notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Id. at 638-39. Our inquiry focuses upon whether notice was fair and reasonable under the facts and circumstances of the case. Id. We construe the defendant's brief as raising only a federal constitutional due process claim.

In his January 18, 2012 letters to the trial court, the defendant acknowledged having received notice on that date of the final hearing scheduled for January 26, 2012. Although he argues that he was not provided with an adequate opportunity to prepare for the hearing, the record shows that in Nicholas's case, he filed a forty-six page motion to dismiss, a seventeen page motion for sanctions, and a third-party claim. He filed similar pleadings in Sarah's case, all of which were denied on the date of the final hearing. The record does not show that the defendant requested a continuance of the final hearing or how he was otherwise prejudiced by the allegedly defective notice. See In the Matter of Sawyer & Sawyer, 161 N.H. at 17 (party will not prevail on his due process claim absent a showing of actual prejudice); cf. McIntire v.

Woodall, 140 N.H. 228, 230 (1995) (party's failure to present evidence at hearing, object to opponent's introduction of evidence, or request a continuance precluded a finding of actual prejudice); State v. Crooker, 139 N.H. 226, 228 (1994) (defendant failed to establish prejudice for purposes of due process challenge to adequacy of notice of amendment to bill of particulars where he did not request continuance). Moreover, while he asserts that it was "impossible, realistically, to expect his personal presence and participation" in a New Hampshire court, there is nothing in the record to show that he requested to participate by telephone. Cf. Leone v. Leone, 161 N.H. 566, 569 (2011) (trial court unsustainably exercised its discretion in denying out-of-state respondent's request to testify telephonically at hearing on petitioner's domestic violence petition). Under these circumstances, the defendant has not established that the trial court unconstitutionally deprived him of notice reasonably calculated to apprise him of the pendency of the action and an opportunity to present his objections.

We next address the defendant's argument that the trial court erred in denying his requests for sanctions. Assuming, without deciding, that the trial court had the authority to grant the relief sought by the defendant, but see RSA 173-B:5, I(b)(10) (2002) (authorizing the court to order the defendant to pay reasonable attorney's fees), he has failed to demonstrate that the court's order was clearly untenable or unreasonable to the prejudice of his case. See In the Matter of Martel & Martel, 157 N.H. 53, 64 (2008) (appellant must demonstrate that the court's order was clearly untenable or unreasonable to the prejudice of his case). In granting the plaintiffs' requests for protective orders, the trial court credited their assertions that the defendant's harassment constituted a credible threat to their safety. As previously noted, absent a transcript, we must assume the evidence was sufficient to support the trial court's findings. See In the Matter of Lynn & Lynn, 158 N.H. at 618.

We next address the defendant's argument that the trial judge was biased against him. Based upon our review of the record, we conclude that no reasonable person would have questioned the judge's impartiality and that no factors were present that would have per se disqualified her from participating in this case. See State v. Bader, 148 N.H. 265, 268-71 (2002) (adverse rulings do not render the judge biased).

In the defendant's appeal of the protective order issued to Tamara, we addressed his challenge to the jurisdiction of the district division (then the district court) over domestic violence proceedings. See Tamara Ann Tello v. John Thomas Tello, No. 2011-0648 (N.H. May 4, 2012); see also RSA chapter 490-F (Supp. 2011) (establishing the circuit court system, including district divisions with the jurisdiction of the former district courts). To the extent that he is raising the same issues here, we reject his arguments for the same reasons.

We have reviewed the defendant's remaining arguments, including his remaining challenges to the court's subject matter jurisdiction, and conclude that they are insufficiently developed to warrant judicial review, see Douglas v. Douglas, 143 N.H. 419, 429 (1999) (mere laundry list of complaints regarding adverse rulings by trial court, without developed legal argument, is insufficient to warrant review), and warrant no extended consideration, see Vogel v. Vogel, 137 N.H. 321, 322 (1993).

The defendant's requests for sanctions on appeal are denied.

Affirmed.

Dalianis, C.J., and Hicks, Conboy and Lynn, JJ., concurred.

Eileen Fox,
Clerk

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