

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2007-0789, Kristy Sparks v. Kara Larson, the court on August 13, 2008, issued the following order:

The defendant, Kara Larson, appeals an order of the district court finding that she stalked the plaintiff, Kristy Sparks. She argues that the trial court erred in: (1) relying upon an allegation not set forth in the stalking petition as one of two acts required to establish a course of conduct (notice issue), see RSA 633:3-a (2007); and (2) finding that graffiti in a public restaurant was an act sufficient to establish a course of conduct. The plaintiff argues that the defendant failed to preserve the notice issue for our review. We affirm.

We turn first to whether the defendant preserved the notice issue for our review. See State v. Brum, 155 N.H. 408, 417 (2007) (to be preserved for appellate review, issue must be raised with sufficient specificity to allow trial court to understand nature of challenge). The specific finding challenged by the defendant in her argument addressing the notice issue is that she wrote graffiti directed at the plaintiff on walls in a restaurant bathroom. She argues that the following language in her motion to reconsider was sufficient to apprise the trial court of the issue: "As the photographs were taken after the issuance of the stalking petition and were not relied upon in Petitioner's request for a stalking petition, the Court's reliance upon this particular document to grant the stalking petition was in error." A reading of the complete paragraph in which this excerpt is found indicates that the issue presented might be construed as sufficiency of the evidence or lack of foundation concerning the admission of two photographs; there is no reference in this paragraph, however, to a lack of notice issue. Accordingly, we conclude that this issue has not been preserved.

The defendant also asks that we review this issue under our plain error rule. See Sup. Ct. R. 16-A. We apply the plain error rule sparingly and only in those circumstances where a miscarriage of justice would otherwise result. State v. Lopez, 156 N.H. 416, 423 (2007). For us to find error under the rule: (1) there must be an error; (2) the error must be plain; (3) the error must affect substantial rights; and (4) the error must seriously affect the fairness, integrity or public reputation of judicial proceedings. Id. An error is plain "if it was or should have been obvious in the sense that the governing law was clearly settled to the contrary." Id. at 424 (quotations omitted). "Generally, when the law is not clear at the time of trial, and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error." Id. (quotation omitted).

In this case, the stalking petition was filed pursuant to RSA 633:3-a. It was consolidated without objection with a domestic violence petition filed against the defendant by the man with whom the plaintiff lived. The domestic violence petition cited several examples of harassment including the graffiti. Moreover, the plaintiff testified without objection concerning the graffiti.

The defendant argues that it was clear after our decision in In the Matter of Aldrich & Gauthier, 156 N.H. 33 (2007), that facts alleged against the defendant in a stalking petition must be supplied in advance of the hearing on the petition. Aldrich, however, addressed the notice requirements of a petition filed pursuant to RSA chapter 173-B. It was not until we decided Comer v. Tracy, 156 N.H. 241 (2007), that we determined that the same notice requirements applied to petitions filed under RSA 633:3-a. Comer was decided on September 25, 2007; the last hearing in this case was held on September 18, 2007. Because the law was unclear at the time of trial, we cannot say the error was plain.

The defendant also argues that the trial court erred in finding that “graffiti placed on a bathroom wall in a public restaurant with no particular connection to the targeted individual, was an act sufficient to establish a course of conduct.” She first contends that there was insufficient evidence to establish that she wrote the graffiti. The trial court observed photographs of the graffiti and handwriting of the defendant, and heard testimony, including that of the defendant, concerning the origin of the graffiti. The court was in the best position to evaluate the evidence, measure its persuasiveness and appraise the credibility of witnesses. Hoffman v. Hoffman, 143 N.H. 514, 519 (1999). Given the evidence presented, it was not necessary for a handwriting expert to testify to support the trial court’s finding that the graffiti was produced by the defendant.

In her final argument, the defendant contends that placing graffiti on a wall in a public restaurant does not qualify as an act necessary to establish a course of conduct required to grant a civil stalking petition. RSA 633:3-a, II(a) defines “course of conduct” as including but not limited to acts of threatening, following or appearing in close proximity to a person, as well as causing damage to a person’s property, placing an object on a person’s property, causing injury to a person’s pet, or any act of communication as defined in RSA 644:4, II. RSA 644:4, II (2007) defines “communicates” as “to impart a message by any method of transmission, including but not limited to telephoning or personally delivering or sending or having delivered any information or material by written or printed note or letter, package, mail courier service or electronic transmission, including electronic transmissions generated or communicated via a computer.”

In this case, the graffiti specifically named the plaintiff and accused her of certain acts. RSA 633:3-a, II(a) prefaces the enumerated acts with the phrase “may include but not be limited to.” This language indicates that the

list is nonexhaustive; accordingly, other acts that are similar may be considered. Fisher v. Minichiello, 155 N.H. 188, 192 (2007). RSA 644:4, II does not require that the act of communication take place directly between the defendant and the intended victim. *Id.* Even if we assume that imparting a message by writing graffiti on a restaurant wall is not a “method of transmission” as that term is used in RSA 644:4, II, we conclude that the defendant’s act is sufficiently similar to an act of communication as defined in RSA 644:4, II to be included as part of a “course of conduct” as defined in RSA 633:3-a, II(a). We conclude that the trial court did not err in considering it in determining whether the plaintiff met her burden.

To the extent that the defendant argues that the trial court’s application of RSA 633:3-a, II (a) rendered it void for vagueness, she did not raise this issue in the trial court. We therefore do not consider it on appeal. See State v. Blackmer, 149 N.H. 47, 48 (2003).

Affirmed.

DALIANIS, GALWAY and HICKS, JJ., concurred.

**Eileen Fox,
Clerk**

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