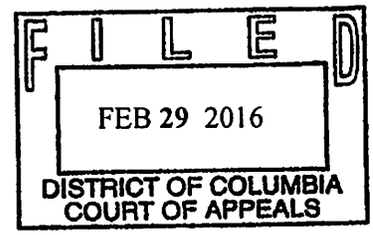
DISTRICT OF COLUMBIA COURT OF APPEALS



14-FM-0894

LAUREN MASHAUD, APPELLANT,

v.

CHRISTOPHER BOONE, APPELLEE.

Appeal from the Superior Court of the
District of Columbia
(2014-CPO-739)

(Hon. Fern Flanagan Saddler, Trial Judge)

(Argued January 20, 2016 Decided February 29, 2016)

Before BLACKBURNE-RIGSBY and MCLEESE, *Associate Judges*, and KING, *Senior Judge*.

MEMORANDUM OPINION AND JUDGMENT

PER CURIAM: Appellant Dr. Lauren Mashaud challenges the trial court's entry of a civil protection order ("CPO")[1] against him for stalking appellee Christopher Boone pursuant to the stalking statute, D.C. Code § 22-3133 (2012 Repl.). Dr. Mashaud argues that the trial court erred by relying on the elements of the old stalking statute, D.C. Code § 22-404 (e) (2008) (repealed), instead of the current stalking statute and that, alternatively, the CPO violated Dr. Mashaud's First Amendment right to free speech. We agree that the trial court erred in relying on the language from the old, repealed statute, and that there is at least some ambiguity as to whether the court would have issued the CPO had it relied on the

[1] *See* D.C. Code § 16-1003 (a) (2009) ("A petitioner . . . may file a petition for civil protection in the Domestic Violence Unit against a respondent who has allegedly committed or threatened to commit one or more criminal offenses against the petitioner . . . .").

language from the current statute. We reverse and remand for the trial court to make findings under the correct statute.[2]

I.

On May 8, 2013, Dr. Mashaud learned that his wife had an affair with her co-worker, Mr. Boone. In response, Dr. Mashaud first copied Mr. Boone on an email to three senior officials at Mr. Boone's place of employment informing them of the affair. Second, Dr. Mashaud paid Facebook to send Facebook messages to several of Mr. Boone's Facebook friends, whom Dr. Mashaud did not know, informing them of the affair. Third, Dr. Mashaud created an online blog entitled "The Power of Light and Truth," which discussed the affair, referred to Mr. Boone by name, and included links to information about Mr. Boone and his employer. Dr. Mashaud also included "tags" in the blog posts so that the blog was easily discoverable upon a Google search of Mr. Boone's name. Mr. Boone filed a petition for a CPO in Superior Court and testified at a hearing that he felt threatened and feared for his safety because Dr. Mashaud's behavior was escalating in nature and that he appeared unstable.[3]

Upon reviewing the evidence, the trial court issued a CPO against Dr. Mashaud, finding that Dr. Mashaud "harassed" Mr. Boone because he intended to make Mr. Boone feel, and should have known that his actions would make a reasonable person feel, "seriously alarmed, annoyed, frightened, or tormented." This quoted language, however, comes from a repealed portion of the old stalking statute, D.C. Code § 22-404 (e), which defined harassment as conduct that

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[2] We therefore need not reach Dr. Mashaud's First Amendment argument. Dr. Mashaud also argues that the trial court erred in *sua sponte* adding his wife to the CPO. Dr. Mashaud's wife could herself have raised that claim in this court, at a minimum by seeking to intervene in the trial court for purposes of appeal and then seeking review in this court. *See, e.g.*, *EMC Mortg. Corp. v. Patton*, 64 A.3d 182, 185 (D.C. 2013). Dr. Mashaud therefore does not have third party standing to make this challenge, and we decline to address it. *See Riverside Hosp. v. District of Columbia Dep't of Health*, 944 A.2d 1098, 1105 (D.C. 2008) (discussing third party standing requirements).

[3] Mr. Boone also learned that Dr. Mashaud had hired a private investigator who had already gathered information on Mr. Boone, which made him more fearful knowing that he was being followed.

"seriously alarms, annoys, frightens, or torments [a] person." D.C. Code § 22-404 (e).

II.

Because Dr. Mashaud did not object to the trial court's reliance on the repealed statutory language below, we review this issue for plain error. *See Fortune v. United States*, 59 A.3d 949, 954 (D.C. 2013) (requiring appellant to show 1) an error, 2) that is plain, 3) that affected his substantial rights, and 4) that seriously affected the fairness, integrity, or public reputation of the judicial proceedings).

The old stalking statute, D.C. Code § 22-404 (b), made it unlawful for a person to "willfully, maliciously, and repeatedly follow[] or harass[] [a] person," and subsection (e) defined harassment as "engaging in a course of conduct . . . which seriously alarms, annoys, frightens, or torments the person." Under the new stalking statute, D.C. Code § 22-3133, a person's behavior constitutes stalking if he either 1) purposefully intended to make the victim feel "seriously alarmed, disturbed, or frightened"; 2) knowingly made the victim feel "seriously alarmed, disturbed, or frightened"; or 3) should have known that his actions would make a reasonable person feel "seriously alarmed, disturbed, or frightened." Notably, the new statute removed the words "annoys" and "torments" from the list of effects on the victim and added "disturbed."

While these words may appear, at first glance, to have similar meaning, the legislative intent for the new statute articulates two important reasons for this material language change. *See Whitfield v. United States*, 99 A.3d 650, 656 (D.C. 2014) (stating that we may look beyond the plain language of a statute "in order to effectuate the legislative purpose as determined by a reading of the legislative history or by an examination of the statute as a whole" (quoting *Peoples Drug Stores, Inc. v. District of Columbia*, 470 A.2d 751, 754 (D.C. 1983))). First, the Council of the District of Columbia's Committee on Public Safety and the Judiciary proposed the new statute to "enable law enforcement to intercept behaviors that potentially lead to violence, a loss in the quality of life, or even death." D.C. Council, Report on Bill 18-151 at 33 (June 26, 2009); *see also* D.C. Code § 22-3131 (a), (b) (codifying the legislative intent of the statute). The report on the bill includes attachments that reflect criticism of the term "annoy" as being "less serious than the other possible feelings" listed in the statute. District of Columbia Public Defender Service, June 2, 2009 letter to Councilmember Phil Mendelson at 3, attachment to D.C. Council, Report on Bill 18-151. Accordingly,

the Council adopted recommendations to replace "annoy" with "disturb" because "it conveys a more serious effect than mere 'annoyance' does." *Id.*

Second, the Committee aimed to more clearly communicate to District of Columbia citizens what constitutes stalking and to ensure that the definition only included illegal behavior. The report attachments also reflect concerns regarding the term "annoys" because it is "vague," *id.*, and similar concerns regarding the word "torment" because it "has no easily understood definition," "Final" Statement of The District of Columbia Association of Criminal Defense Lawyers, at 3, attachment to D.C. Council, Report on Bill 18-151. The new statutory language, therefore, better targets behavior that "escalates into violence — yet avoid[s] inadvertent criminalization of legal behaviors." D.C. Council, Report on Bill 18-151 at 32-33.

Here, the trial court quoted the old stalking statute, which listed "seriously alarmed, annoyed, frightened, or tormented" in the disjunctive, meaning that the trial court could issue a CPO if any one of those conditions was met. The trial court did not specify which one of the triggering actions applied to this case, and it is not clear that the court's findings apply to all four actions because it listed them in the disjunctive. As stated in the trial court's findings, it is possible that the trial court intended to issue the CPO solely because Dr. Mashaud "annoyed" or "tormented" Mr. Boone, which does not constitute stalking according to the new statute. Therefore, the court erred in relying on the old statutory language, resulting in ambiguity in its conclusions.

Dr. Mashaud's substantial rights and the fairness of the proceeding are affected if the trial court issued the CPO for conduct that no longer constitutes stalking. *See Ruffin v. United States*, 76 A.3d 845, 852 (D.C. 2013) ("[I]t would be both an obvious error and a miscarriage of justice for a defendant to stand convicted of an offense which the law does not make a crime." (quoting *Mitchell v. District of Columbia,* 741 A.2d 1049, 1052–53 (D.C. 1999))). Moreover, it is not clear that the outcome of the hearing would have been the same had the trial court relied on the correct statutory language. *Cf. Atkinson v. United States*, 121 A.3d 780, 785–86 (D.C. 2015) (finding no reversible plain error for an incorrect jury instruction because the jury would have reached the same conclusion if given the correct instruction). If the trial court truly relied solely on the "annoyed" or "tormented" language from the old statute to conclude that Dr. Mashaud committed stalking—as a reasonable reading of the oral ruling might suggest—the court may very well have reached a different conclusion had it relied on the current statutory language, which does not include those words. Given that there is more

than one possible outcome, we must remand. *See District of Columbia v. American Fed'n of State, Cty., & Mun. Emps., Dist. Council 20*, 81 A.3d 299, 301–02 (D.C. 2013) (Schwelb, J. concurring) ("We will 'eschew a remand as unnecessary . . . if . . . the record before us [is] conclusive [,]" such that only one disposition is possible as a matter of law, and 'we [can] state with complete assurance that further development of the record could not conceivably alter [the] result.'" (quoting *Andrews v. District of Columbia Police & Firefighters Ret. & Relief Bd.*, 991 A.2d 763, 776 (D.C. 2010))).

Accordingly, the order on appeal is reversed and the case is remanded.

ENTERED BY DIRECTION OF THE COURT:

JULIO A. CASTILLO
Clerk of the Court

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