

Circuit Court for Montgomery County
Case No. 171304 FL

UNREPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 1061

September Term, 2020

CODY N. LEISTER

v.

JORDAN L. LEISTER

Graeff,
Beachley,
Kenney, James A., III
(Senior Judge, Specially Assigned),

JJ.

Opinion by Beachley, J.

Filed: November 17, 2021

*This is an unreported opinion, and it may not be cited in any paper, brief, motion, or other document filed in this Court or any other Maryland Court as either precedent within the rule of stare decisis or as persuasive authority. Md. Rule 1-104.

At the conclusion of a hearing held in the Circuit Court for Montgomery County on September 28, 2020, the court granted appellee Jordan Leister’s petition for a protective order. Specifically, the court found that appellant Cody Leister abused appellee pursuant to Md. Code (2002, 2021 Repl. Vol.), § 3-809 of the Criminal Law Article (“CR”), also known as the “Revenge Porn” statute. Appellant timely appealed and presents five questions for our review, which we have consolidated and rephrased as follows: Did the circuit court err in granting appellee’s petition for a protective order by finding that appellant violated the Revenge Porn statute?¹

Because the circuit court expressly found that appellee did not intend to harm or harass appellee—a requisite element to prove a violation of the Revenge Porn statute—the court erred in finding that appellant violated the statute. Moreover, the court made no finding concerning the “reasonable expectation of privacy” element of the statute. Accordingly, we reverse.

¹ The first four questions presented in appellant’s brief all concern interpreting the Revenge Porn statute. Appellant’s fifth question presented is whether the Revenge Porn statute is constitutional pursuant to the First Amendment of the United States Constitution. At oral argument, however, appellant’s counsel conceded that he failed to preserve this constitutional argument for appellate review. Accordingly, we shall not review the constitutionality of the Revenge Porn statute. *See Vuitch v. State*, 10 Md. App. 389, 398 (1970) (“Of course, nothing is better settled than the rule that a question as to the constitutionality of a statute will not be considered on appeal when not properly raised and decided by the lower court.” (citing *Luthardt v. State*, 6 Md. App. 251, 257 (1969))).

FACTS AND PROCEEDINGS

This case began when the parties, who were married at the time,² filed opposing petitions for protective orders in the District Court of Maryland for Montgomery County. The two petitions were transferred to the circuit court on September 25, 2020. Relevant here, appellee’s petition for a protective order included an allegation that appellant had failed to delete explicit photos and videos of her from the internet despite her requests that he do so. Pursuant to Md. Code (1984, 2019 Repl. Vol., 2021 Supp.), § 4-501(b)(1)(vii) of the Family Law Article (“FL”), the statute which governs the issuance of protective orders, “abuse” can include a violation of the Revenge Porn statute codified at CR § 3-809.³

Throughout their marriage, and with both parties’ consent, appellant would take explicit photos and videos of and with appellee. In February 2020 appellant received appellee’s permission to post pictures and videos of her on appellant’s “Reddit” account, provided that her face was not displayed in any of the pictures. Unbeknownst to appellee, however, as early as 2016, appellant had posted photos of appellee to appellant’s “Tumblr” account. Unlike the content posted to Reddit in 2020, appellee never consented to

² At the September 28, 2020 hearing in the circuit court, appellant’s counsel confirmed that appellant had filed a complaint for divorce two weeks earlier.

³ We note that the circuit court’s protective order expired on September 28, 2021, a week before oral argument in this Court. Nevertheless, we conclude that the matter is not moot simply because the protective order has expired. *See Piper v. Layman*, 125 Md. App. 745, 753 (1999) (holding that the expiration of a protective order does not render the matter moot because a finding of abuse under the Domestic Violence Act—FL § 4-501 et seq.—carries collateral consequences and social stigmas).

appellant's posting of the Tumblr images. Nevertheless, appellee consented to the taking of those photos because she testified that she sent them to appellant. All of the photos and videos posted to the internet—either to Reddit or Tumblr—were anonymous in that appellant never posted a photo or video that showed appellee's face.

Appellee left the marital home on July 30, 2020, and sometime thereafter learned about the Tumblr posts. On August 20, 2020, appellee asked appellant to remove all of the pictures and videos of her from the internet. Despite this request, appellant failed to immediately remove the postings. Although appellant claimed that he made a concerted effort to remove the images, at the hearing he testified that “[he] couldn't remember the information to get on to do it, and [he] figured it out. It took a while.” According to appellee, however, appellant had still not removed the postings as of the day before the September 28, 2020 hearing. The circuit court declined to resolve whether the photos and videos were still accessible on the internet as of the date of the hearing, stating that it was “a little bit ambiguous.”

In rendering its findings, the court found that appellant did not post the content with an intent to harm or harass appellee. Additionally, the court failed to expressly resolve whether appellee had a reasonable expectation that the images would remain private. Nevertheless, the court concluded that appellant violated the Revenge Porn statute and granted appellee's request for a protective order. As noted above, appellant timely appealed that decision.

STANDARD OF REVIEW

When reviewing a court’s issuance of a protective order, “we accept the facts as found by the hearing court unless it is shown that its findings are clearly erroneous. As to the ultimate conclusion, however, we must make our own independent appraisal by reviewing the law and applying it to the facts of the case.” *Piper v. Layman*, 125 Md. App. 745, 754 (1999) (citations omitted).

DISCUSSION

Appellant challenges several aspects of the circuit court’s decision that he violated the Revenge Porn statute. He first argues that the statute was “never intended to include protection for individuals that are unidentifiable to the public[,]” and because appellee’s face is not visible in any of the postings, she is not subject to public scrutiny and ridicule. Second, appellant argues that he “posted the images *before* the marriage broke down while the relationship was still loving and amicable[,]” and therefore lacked the intent to harm or harass appellee. Third, appellant challenges the notion that he posted the content with either knowing or reckless disregard as to appellee’s consent. Finally, appellant argues that appellee had no reasonable expectation that the photos and videos would remain private.

We agree with appellant on two counts: the circuit court expressly found that he did not possess the requisite intent to harm or harass appellee, and the court failed to make an express finding regarding appellee’s reasonable expectation of privacy.

The Revenge Porn statute, codified at CR § 3-809⁴ provides, in relevant part, that

(c) A person may not knowingly distribute a visual representation of another identifiable person that displays the other person with his or her intimate parts exposed or while engaged in an act of sexual activity:

- (1) with the intent to harm, harass, intimidate, threaten, or coerce the other person;
- (2) (i) under circumstances in which the person knew that the other person did not consent to the distribution; or
(ii) with reckless disregard as to whether the person consented to the distribution; and
- (3) under circumstances in which the other person had a reasonable expectation that the image would remain private.

The Revenge Porn statute makes clear that a party must possess the requisite intent to harm or harass in order to violate the statute. CR § 3-809(c)(1). Because a person's intent is usually difficult to prove, courts frequently look to circumstantial evidence to infer criminal intent. *Jones v. State*, 213 Md. App. 208, 218 (2013) (quoting *Smallwood v. State*, 343 Md. 97, 104 (1996)). Here, however, the circuit court expressly found that appellant *did not* possess this requisite intent. In rendering its oral decision, the circuit court stated, “number one, with the intent to harm, harass, intimidate, threaten, or coerce. I don't find that, because I think he posted it several years ago when he had no reason to be angry with her and harass her.” That this finding is clearly erroneous. Indeed, the court recognized the undisputed evidence in the record that appellant posted the content to both Tumblr and Reddit while the parties were still together, and when appellant had no reason to harm or

⁴ We note that CR § 3-809 was amended on October 1, 2020, a mere three days after the circuit court ruled on the petition for a protective order. The amendments to CR § 3-809, however, simply removed language not relevant to our analysis here.

harass her. Accordingly, appellee failed to prove, and the circuit court failed to find, a requisite element of the Revenge Porn statute.

The circuit court also erred in that it failed to make any findings regarding whether appellee had a reasonable expectation of privacy in the images pursuant to CR § 3-809(c)(3). We acknowledge appellee's testimony that the images she sent to appellant in 2016 were "personal from me to him." But appellant testified that he obtained appellee's approval before he posted the content in 2020 to Reddit. In light of the contradictory evidence regarding appellee's expectations of privacy, the court was required to resolve this factual issue. We note, however, that even had the court found that appellee possessed a reasonable expectation of privacy, we would still reverse because the court found that appellant lacked the intent to harm or harass appellee pursuant to CR § 3-809(c)(1).

**JUDGMENT OF THE CIRCUIT COURT FOR
MONTGOMERY COUNTY REVERSED.
COSTS TO BE PAID BY APPELLEE.**