2018 IL App (2d) 160159-U
No. 2-16-0159
Order filed October 23, 2018

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. DONALD MUNZ, Defendant-Appellant.	))))))))))	Appeal from the Circuit Court of Winnebago County. No. 13-CF-1365 Honorable Randy Wilt, Judge, Presiding.

JUSTICE BIRKETT delivered the judgment of the court.
Justices Hutchinson and Jorgensen concurred in the judgment.

ORDER

¶ 1 *Held*: We upheld defendant's conviction for stalking on two constitutional portions of the stalking statute that our supreme court did not strike down in *People v. Releford*, 2017 IL 121094, specifically, that defendant both monitored and engaged in non-consensual contact with the victim when he knew or should have known that his conduct caused the victim emotional distress. Also, the trial court properly allowed in evidence of defendant's prior bad acts as relevant to show his motive in stalking his current victim. Finally, the defense counsel's decision to agree with the State to admit evidence of the victim's no-contact order against defendant was trial strategy and not error. Therefore, we did not need to address defendant's arguments of plain error or ineffective assistance of counsel. Accordingly, we affirmed the trial court.

¶ 2 After a jury trial, defendant, Donald Munz, was found guilty of stalking. 720 ILCS 5/12-

7.3(a)(2) (West 2012). He was sentenced to three years' imprisonment, which was later reduced to a two-and-a-half year term. On appeal, defendant argues: (1) his conviction should be vacated since our supreme court recently found that the section of the stalking statute he was convicted under was unconstitutional in *People v. Releford*, 2017 IL 121094; (2) the trial court erred in admitting evidence of his prior bad acts when the evidence was only offered to show that he had a propensity to commit stalking; and (3) the trial court erred in admitting evidence that the victim subsequently obtained a civil no-contact order against him where such evidence was not relevant to the elements of stalking. For the following reasons we affirm.

¶ 3 I. BACKGROUND

¶ 4 The record reflects that defendant was charged with two counts of stalking. Count one charged defendant with stalking pursuant to section 12-7.3(a)(2) of the Criminal Code of 2012 (Code):

> "in that the defendant knowingly engaged in a course of conduct directed at a specific person and knew or should have known that this course of conduct would cause a reasonable person to suffer other emotional distress, in that defendant left notes on the vehicle of Elizabeth Wassner and sent harassing emails and messages to Elizabeth Wassner***." 720 ILCS 5/12-7.3(a)(2) (West 2012).

¶ 5 In count two defendant was charged with stalking based upon the violation of a no-contact order in that he made indirect contact with Elizabeth Wassner after a no-contact order had been entered, in violation of section 21/125 of the Stalking NO Contact Order Act. 720 ILCS 21/125 (West 2012).

¶ 6 Prior to trial the State filed a motion *in limine* to present evidence of prior bad acts at defendant's trial. Specifically, the State wanted evidence of defendant's unwanted contact with

another woman, Laura Allman, admitted at trial. Over defendant's objection, the trial court granted the State's motion. Specifically, it found that the evidence of prior bad acts was highly relevant because it was showed that when defendant felt he had somehow been wronged, he did things to retaliate.

¶ 7 On the State's motion to *nolle pross*, the trial court dismissed the violation of the no-contact order charge. Based upon that dismissal, defendant initially moved to prevent the State from presenting evidence that a no-contact order was issued to Wassner. The State argued that the no-contact order was relevant: (1) to show the lengths that the victim went to in order to protect herself from defendant's conduct; and (2) because defendant violated the no-contact order after it was entered. Defense counsel later stated that he wanted to use the evidence of Wassner's no-contact order because he wanted to impeach the victim's testimony with her typewritten addendum that she filed in support of her request for an order of protection. For that reason, defense counsel agreed that the State could present such evidence as long as it was not referred to as a "no stalking order."

¶ 8 At trial, Elizabeth Wassner testified that in April 2013 both she and defendant were members of a running club at the Rockford YMCA. While running with the group, Wassner told defendant that she worked for the City of Rockford. However, she never gave him information regarding which building she worked in and she did not give him her phone number or email address.

¶ 9 While they were running defendant asked her out on a date. Wassner did not want to hurt defendant's feelings so she just changed the subject. On another occasion defendant approached Wassner and gave her his phone number while she was talking to a male friend. About a week later, defendant again asked her out for a date and she told him that she was seeing someone else.

Defendant responded by becoming very angry and said, "I think that's a bunch of bullshit." Wassner said to him, "[w]ell, I'm sorry you feel that way, but it's not." Defendant then said, "You're lying. I don't think you're telling the truth. You're not seeing anyone." Then instead of going running he just stormed off and left the YMCA. Later, Wassner found an internet article on her car entitled, "Being a Jerk is Contagious." About a week after that incident Wassner was with her 10-year-old daughter at the YMCA when defendant approached her and apologized.

¶ 10 Wassner testified that she subsequently found a letter on her car from defendant in which he asked her to give his contact information to any of her girlfriends who might be interested in dating him. He also left Wassner a packet of information about future races along with his name, phone number and email address. The packet was left on her car, which was parked at her place of employment at that time. Again, Wassner had never told defendant the exact location where she worked.

¶ 11 On April 17, 2013, Wassner was at her office when she received an email from defendant that read, "[i]s this the same Liz that goes for group runs at the Y at 5:30? Didn't see you Tues night." Wassner was shocked that she had received an email from defendant at work because she had not given him her work email address. She responded to the email and said, "I don't appreciate you emailing me at work. I have told you that I'm not interested, and after receiving your notes on my car and now this email, I don't want to be friends either. Please leave me alone and do not talk to me in front of my child either."

¶ 12 The next day, defendant emailed her again and said that he would not talk to her if she did not talk to him and asked if that was a deal. Wassner responded and said it was a deal and that she never would have said yes to going out with him. Defendant replied and said, "[t]hat

comes from someone [who] had their house foreclosed on in 9/2012, right!" Wassner testified that she had a house that had been subject to foreclosure proceedings. She had never told defendant about the foreclosure and at that time none of her friends that she ran with at the YMCA knew about the foreclosure, either. Defendant left two voice messages around 6:00 a.m. the next morning at Wassner's work. In both voicemails he asked if Wassner if she had received his email.

¶ 13 A week or two after those email exchanges, Wassner's longtime neighbor and babysitter contacted Wassner because she found a piece of paper taped to a pole in Rockford that contained information about the foreclosure of Wassner's house. Wassner described the paper as something that was printed online and that had Wassner's name, the name of the bank that had foreclosed on her property and the foreclosure order on it. On the bottom of the paper Wassner's name was written in large letters in black marker. Later, her ex-husband received an envelope in his mailbox with her name and his address on the front of it. In the envelope was the same foreclosure information about Wassner's house. Wassner had never resided with her ex-husband at that house.

¶ 14 On May 1, 2013, Wassner sought and received a court order prohibiting defendant from having any contact with her. The next day, defendant was personally served with that order by Detective Mary Ogden. After the no-contact order was issued Wassner did not see any foreclosure fliers until she had to go back into court and extend the no-contact order. After the trial court extended that order, the mother of a girl in Wassner's daughter's class contacted Wassner one morning and said that there was a hot pink colored flier posted on a pole at Spring Creek and Spring Book Roads. The mother told Wassner that she was driving to school and her

daughter saw something that had Wassner's name on it. The mother dropped off her daughter at school and drove back and took it down.

¶ 15 Wassner subsequently found three other fliers on poles. A running friend found a couple more fliers and three hot pink fliers were found sitting on a table in the foyer of the YMCA. All the fliers had Wassner's foreclosure information on them. Wassner identified the fliers, which had "foreclosure" written at the top and her name at the bottom of the fliers. Her handwritten name and the word "foreclosure" were written much larger than the other printed information. Wassner said that she was shocked and humiliated by the foreclosure fliers that had been posted all around town. There was even one flier that was not collected because it was on the marathon route. People were running the marathon so they did not stop to take it down.

¶ 16 Wassner testified that her daughter was greatly affected by defendant's conduct toward her. She had seen her daughter cry over these incidents and it made her feel sad that her daughter was scared about the situation. Her daughter repeatedly asked her if defendant knew where they lived.

¶ 17 On cross-examination, Wassner testified that the communications defendant left on her car were more harassing than physically or mentally threatening. However, when she was talking to a male friend at the YMCA and defendant "butted in" and handed her his phone number she thought it was creepy.

¶ 18 Wassner had previously given sworn testimony about her interactions with defendant to a Winnebago County judge on May 1, 2013. At that time she was asked to be as inclusive as possible about everything that had happened with defendant and why she felt that she needed an order of protection. That information was reduced to a two-page addendum. However, Wassner admitted that she did not put anything in the addendum about how much defendant's conduct

had frightened her daughter. She also admitted that she did not mention the effect defendant's conduct had on her daughter when she signed a sworn statement and gave it to Detective Mary Odgen.

¶ 19 John "Gabe" Wassner, Elizabeth Wassner's ex-husband and a detective with the Rockford Police Department, testified that sometime in April 2013 one of those foreclosure printouts was placed in his mailbox. He testified that the envelope containing the printout was addressed to his ex-wife, Elizabeth. After he saw the flier he spoke to one of the other detectives at the police department and asked them to investigate it.

¶ 20 Sergeant Mary Ogden of the Rockford Police Department testified that in April 2013 Gabe Wassner gave her information about defendant's interactions with Elizabeth. Through the investigation she collected several items from Elizabeth including a letter. Ogden testified that a no-contact order was served on defendant on May 2, 2013.

¶ 21 Laura Allman testified that from 2009 to 2011 she and defendant both belonged to a running group in Rockford. Allman was assigned to a running team with defendant. Her first interaction with defendant was as part of a group email chain. Two of the people on her team sent out a group email generally saying hello, I'm on your team, good luck everyone and let's have a great series. Defendant responded and said that no one in the running group should email him again. He used profanity and threatened the group that if they did not stop emailing him he was going to make sure that they could not participate in the team series. All the members of the group agreed that they should avoid defendant.

¶ 22 On January 31, 2010, defendant came to her house and walked toward her front door. When Allman tried to speak to defendant he left. The next day, Allman found papers in her mailbox. The papers contained the county assessor's records of her property with notes written

on the back about her job, her daughter and ex-husband. During trail runs defendant would "flank her," meaning that he would stay too close behind her, which she found disturbing. Allman ultimately turned to defendant during one of the trail runs and asked him to stop what he was doing, to not contact her in any way, and to leave her alone. Defendant responded and said that he would leave Allman alone if she left him alone. She received no further communication from him.

¶ 23 Also admitted into evidence were State's exhibits 12 and 12A, which were emails between Allman and the other members of the running group. In one of the emails another member of the running group told Allman that she searched defendant's name on the sex offender registry as well as the Winnebago County court website. In that email the runner said that defendant's name appeared "a lot," but as often as a plaintiff as a defendant. The runner also said that a criminal felony charge against defendant had been dismissed. Several other emails contained opinions by Allman and other members of the group that defendant was "creepy," and in another email a runner told Allman that defendant's conduct was "on the verge of stalking." The trial court gave the jury an instruction that the evidence of other bad conduct was limited to show defendant's motive in committing the instant offense.

¶ 24 During deliberations, the jury sent a note to the court asking "[w]as Lisa issued a civil no stalking order? We would like to know the difference between a: (1) no stalking order; (2) restraining order; (3) no-contact order? What was she issued?" Over defendant's objection the court responded: "[t]he terms 'no stalking order,' 'restraining order,' and 'no-contact order' were used by the attorneys as if they were synonymous terms. For purposes of deliberation you should consider them as having the same meaning." The court also instructed the jury that, as to

whether such an order was issued, they should rely on their own memory. The jury subsequently found defendant guilty of stalking.

¶ 25 Defendant filed a motion for a new trial and alleged, among other things, that the trial court erred in allowing the State to present prior bad acts related to Laura Allman, and that the court's response to the jury question regarding the no-contact order was incorrect. After the motion was filed, defendant's counsel withdrew from the case and the public defender's office was appointed to represent him. An assistant public defender filed a supplemental motion for a new trial and added an allegation that the trial court erred in instructing the jury as to the elements of the stalking charge. The trial court ultimately denied defendant's motion for a new trial.

¶ 26 Defendant was sentenced to three years' imprisonment, which was later reduced to two and a half years' imprisonment. Defendant appeals.

¶ 27 II. ANALYSIS

¶ 28 On appeal, defendant argues: (1) his conviction should be vacated since our supreme court recently found that the section of the stalking statute he was convicted under was unconstitutional in *People v. Releford*, 2017 IL 121094; (2) the trial court erred in admitting evidence of his prior bad acts when the evidence was only offered to show that he had a propensity to commit stalking; and (3) the trial court erred in admitting evidence that Wassner subsequently obtained a civil no-contact order against him where such evidence was not relevant to the elements of stalking.

¶ 29 A. Application of *People v. Releford*

¶ 30 First, defendant argues that because his conviction for stalking was based upon the portion of the stalking statute found unconstitutional in *Releford*, and because his conviction

cannot be sustained on any of the remaining constitutional portions of the statute, his conviction and sentence must be vacated.

¶ 31 In response, the State argues that our supreme court's decision in *Releford* does not affect defendant's conviction for stalking. Specifically, it contends that the *Releford* decision only struck a portion of the stalking statute—the "communicates to or about" portion of the "course of conduct" definition, leaving several other applicable activities as unlawful. See 720 ILCS 5/2-12.7.3(c)(1) (West 2012). Therefore, it argues, even after the *Releford* decision, the phrase "course of conduct" can include, but is not limited to, actions in which a defendant directly, indirectly, or through third parties, by any action, method or device, or means, follows, monitors, observes, surveils, or threatens a person, engages in other non-consensual contact with or damages a person's property or pet. It also points out that a course of conduct may include contact via electronic communication. See 720 ILCS 5/12-7.3(c)(1) (West 2012).

¶ 32 The offense of stalking is contained in the Criminal Code of 2012, and provides as follows, in pertinent part:

> "(a) A person commits stalking when he or she knowingly engages in a course of conduct directed at a specific person, and he or she knows or should know that this course of conduct would cause a reasonable person to:
>
> (1) fear for his or her safety or the safety of a third person; or
>
> (2) suffer other emotional distress." 720 ILCS 5/12-7.3(a)(2) (West 2012).

¶ 33 As the State points out, pursuant to Illinois' stalking statute, "course of conduct" means two or more "acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, engages in other non-consensual

contact, or interferes with or damages a person's property or pet. A course of conduct may include contact via electronic communications." 720 ILCS 5/12-7.3(c)(1) (West 2012).

¶ 34 The application of the *Releford* decision to the instant case is an issue of law, and therefore it will be reviewed *de novo*. *In re Beverly B.*, 2017 IL App (2d) 160327, ¶ 23 (where a question on appeal involves the application of law to essentially undisputed facts, it is therefore a question of law and subject to *de novo* review).

¶ 35 We initially note that after the briefs were filed in this case, the State filed a motion to supplement authority with a recent case from this court, *People v. Gauger*, 2018 IL App (2d) 150488. We granted the motion. In *Gauger*, the defendant was convicted of violating an order of protection (720 ILCS 5/12-3.4(a) (West 2012)), stalking (*id*. § 12-7.3(a)(2)), and aggravated stalking (*id*. § 12-7.4(a)(3)). The trial court merged the lesser convictions and sentenced the defendant to five years' imprisonment for aggravated stalking. *Gauger*, 2018 IL App (2d) 150488, ¶ 1. On appeal, similarly to the instant case, the defendant argued that because his conviction was based upon a portion of the stalking statute found unconstitutional in *Releford*, and because his aggravated stalking conviction could not be sustained on any of the remaining constitutional portions of the statute, his conviction and sentence must be vacated. *Id*.

¶ 36 In the aggravated stalking charge, the State alleged that the defendant engaged in a course of conduct directed at a Crystal Carswell that the defendant knew would cause a reasonable person emotional distress while Carswell had an order of protection against the defendant, her ex-husband. *Id*. § 2. At trial, evidence was presented that the defendant used an old Facebook account of Carswell's and attempted to "friend" some of her high school friends in order to find out more information about her. Defendant also set up a fake Facebook page using the name of a male friend of Carswell's and then sent Carswell two messages, one for a date and one wishing

her a happy birthday. *Id*. ¶¶ 3,4. The police obtained a search warrant for the defendant's residence. In the search they found a three-ring binder with a page labeled "Facebook" containing four or five fictitious Facebook pages, passwords and emails. Another document was found that included Carswell's name, date of birth, and social security number. Another document appeared to be from someone logged on to a website called classmates.com, using Carswell's name and asking, "How do you remember [Carswell]?" The police also found mail addressed to Carswell in the defendant's residence. *Id*. ¶ 12.

¶ 37 A forensic search of the defendant's computer revealed a number of photos and emails pertaining to Carswell and her family, as well as photos associated with the defendant's fictitious Facebook account. The computer also contained a copy of photos that Carswell had posted onto her Facebook account. Defendant admitted to "accessing" Carswell's Facebook page, but he denied ever sending her any messages. *Id*. ¶ 11.

¶ 38 In finding the defendant guilty on all three charges, the trial court found that the defendant "knowingly engaged in a course of conduct directed at Crystal Carswell and knew or should have known that this course of conduct would cause a reasonable person to suffer other emotional distress." The court also found that the evidence "overwhelmingly establishes that the defendant directly or indirectly through third parties monitored and communicated to or about Ms. Carswell through his internet activities." ¶ 13.

¶ 39 While on appeal, the supreme court granted leave to appeal in *Releford* and this court held the *Gauger* appeal in abeyance pending the decision in *Releford*. The *Releford* court held that Illinois' stalking statute was unconstitutional *to the extent that it prohibited communicating "'to or about'" someone*. *People v. Releford*, 2017 IL 121094, ¶ 28. The court held that the "to or about" phrase was overbroad and therefore it impermissibly infringed on speech protected by

the first amendment. *Releford*, 2017 IL 121094, ¶ 78. The court then vacated the defendant's convictions because it found that they could not be sustained under any other portion of the statute. *Id*. ¶¶ 65-69.

¶ 40 In *Gauger*, the defendant argued that because his conviction was based upon his Facebook messages to Carswell, it was therefore based upon his having communicated "to or about" Carswell and thus, under *Releford*, his conviction could not stand. *Gauger*, 2018 IL App (2d) 150488, ¶ 16. In response, the State contended that the trial court also found that the defendant "monitored" Carswell and that this portion of the statute was unaffected by *Releford*. *Id*. ¶ 17; see 720 ILCS 5/12-7.3(c)(1) (West 2012). As support for its position, the State pointed to the circumstantial evidence that the defendant used fake Facebook accounts to contact Carswell's friends and to download pictures and information about her that was not available to the general public. *Id.* This court agreed with the State. We found that, unlike in *Releford*, the defendant's conviction could be sustained on the constitutional ground that the defendant "monitored" Carswell by creating at least one fictitious Facebook account in the name of Carswell's male friend, and he apparently also possessed mail addressed to Carswell. *Id*. ¶ 18. We found that this course of conduct satisfied the definition of "monitor" and that the trial court could have reasonably found that the defendant "knew or should have known that this course of conduct would cause a reasonable person to suffer other emotional distress." *Id*. ¶ 19.

¶ 41 Here, defendant argues it is clear that his conduct was only "communication to or about" Wassner, which cannot be validly prohibited pursuant to *Releford*. He also claims that his conduct of sending emails and leaving a note on Wassner's windshield did not violate any of the remaining validly prohibited courses of conduct in the stalking statute. See 720 ILCS 5/121-7.3(c)(1) (West 2012). With regard to the fliers with Wassner's foreclosure information posted

around town, defendant argues: (1) there was not sufficient evidence presented at trial to conclude that the defendant posted the printouts, so evidence that the printouts existed is insufficient to sustain defendant's conviction for stalking; and (2) even if we assume that defendant posted the printouts, the printouts are also "communication to or about" Wassner that cannot be prohibited under *Releford*.

¶ 42 We are not persuaded. Defendant cites no authority for the proposition that since his notes and emails were "communications" they cannot then be considered anything else under the stalking statute. Simply because something may be construed as a "communication" does not also mean that it cannot fit into another, narrower category. In fact, the *Releford* court specifically noted that the provisions in Illinois' stalking statute were severable and that after striking the phrase "communicates to or about" as unconstitutionally overbroad, it still had to determine whether the defendant's conviction could be upheld based upon another course of conduct prohibited by that statute. *Releford*, 2017 IL 121094, ¶ 65.

¶ 43 The record reflects that when Wassner emailed defendant and specifically told him that she did not want him to contact her again, he responded and said, "[t]hat comes from someone [who] had their house foreclosed on in 9/2012, right!" We find that the content of that email was both non-consensual contact as envisioned by the Illinois stalking statute *and* it was proof that defendant was monitoring Wassner. "Non-consensual contact," as defined by the statute, "means *any contact* with the victim that is initiated or continued *without the victim's consent*, including *but not limited to* being in the physical presence of the victim; appearing within the sight of the victim; approaching or confronting the victim in a public place or on private property; appearing at the workplace or residence of the victim; entering onto or remaining on property owned, leased, or occupied by the victim; or placing an object on, or delivering an

object to, property owned, leased, or occupied by the victim." (Emphasis added.) 720 ILCS 5/12-7.3(c)(6). Here, defendant's email to Wassner was sent after Wassner had specifically told him to not contact her again. The statute provides that a course of conduct may include conduct via electronic communications. *Id*. § 12-7.3(c)(1). Therefore, defendant's email to Wassner about her foreclosure was "non-consensual contact" sent via electronic communication that is prohibited by the stalking statute.

¶ 44 As we noted in *Gauger*, the stalking statute does not define "monitoring," but a dictionary definition of the word "monitor" is "to watch, keep track of, or check usu. for a special purpose." *Gauger*, 2018 IL App (2d) 150488, ¶ 19 (quoting Merriam-Webster's Collegiate Dictionary 750 (10th ed. 2001)). By researching Wassner's property and determining that she had been subject to a foreclosure, it is obvious that defendant was monitoring Wassner. However, since the stalking statute requires two or more acts, we need to determine whether defendant engaged in at least one more act in addition to this particular email to Wassner.

¶ 45 We also find that defendant's conduct in placing a packet of information about future races along with his name, phone number and email address on Wassner's car constituted "monitoring." At the time defendant put that information on Wassner's car, her car was parked at her place of employment. However, Wassner testified that she never told defendant the exact location where she worked. Clearly, the only reasonable inference is that defendant was "keeping track of" Wassner's whereabouts or he would not have been able to put that information on her car when she was at work. Accordingly, this course of conduct also constituted "monitoring" under the stalking statute.

¶ 46 We will next address defendant's argument that there was not sufficient evidence presented at trial to conclude that he posted the numerous fliers around town with Wassner's

foreclosure information on them, therefore evidence that the fliers existed is insufficient to sustain defendant's conviction for stalking.

¶ 47 We find defendant's argument to be without merit. Although there was no direct evidence that defendant created those fliers and disseminated them around town, there is ample circumstantial evidence that he did so. First, Wassner testified that she told very few people about the foreclosure on her home, and no one on her running team. Second, after defendant repeatedly put items on her windshield, asked her out on a date, and then emailed her at work (when Wassner did not give defendant her work email address), Wassner emailed him and told him to not contact her again. In response, defendant ignored Wassner's request and sent her another email, this time referencing the foreclosure of her home. A few weeks later, many fliers with Wassner's foreclosure information along with her name and the word "foreclosure" written on them in large letters were found around town. Circumstantial evidence does not require each link in the chain of circumstances be proven beyond a reasonable doubt; it is sufficient if all the evidence, considered collectively, satisfies the trier of fact beyond a reasonable doubt that the defendant is guilty. *People v. Hall*, 194 Ill. 2d 305, 330 (2000). A conviction may be sustained on circumstantial evidence alone. *People v. Murphy*, 2017 IL App (1st) 142092, ¶ 10. We find that these pieces of evidence, taken together, were sufficient for the jury to find that defendant was responsible for posting those fliers around town.

¶ 48 We next consider defendant's argument that even if we assume that he posted the printouts, those printouts were also "communication to or about" Wassner that cannot be prohibited under *Releford*. As we have previously found, simply because the fliers could be considered "communication to or about" Wassner does not preclude the possibility that the fliers also fall into a narrower category that is prohibited under the stalking statute. Indeed, we find

that those fliers are also evidence that defendant monitored Wassner. It is reasonable to infer that defendant checked on the status of Wassner's home for a special purpose, that is, to use that information against her when she thwarted his attempts at romance. Also, those fliers are separate "acts" from defendant's email to her where he referenced the foreclosure of her home.

¶ 49 Within this argument defendant also contends that since the fliers did not contain any threats and simply contained publicly available court information they cannot be considered anything other than "communication to or about" Wassner. We disagree. A plain reading of Illinois' stalking statute makes it clear that threatening a victim is simply one form of a "course of conduct" that constitutes stalking. 720 ILCS 5/12-7.3(c)(1)(West 2012) ("course of conduct" means two or more "acts, including but not limited to acts in which a defendant directly, indirectly, or through third parties, by any action, method, device, or means follows, monitors, observes, surveils, threatens, or communicates to or about, a person, engages in other non-consensual contact, or interferes with or damages a person's property or pet. A course of conduct may include contact via electronic communications."). Accordingly, we reject this argument.

¶ 50 For all these reasons, the record reflects that defendant engaged in two or more acts directed at Wassner that he knew or should have known would cause a reasonable person to suffer emotional distress. 720 ILCS 5/12-7.3(a)(1), (a)(2) (West 2012). Accordingly, the jury properly found defendant guilty beyond a reasonable doubt of stalking. 720 ILCS 5/12-7.3(a)(2) (West 2012).

¶ 51 B. Defendant's Prior Bad Acts

¶ 52 Next, defendant argues in the alternative that the trial court erred in admitting evidence of his prior conduct with Laura Allman because that evidence was offered only for the improper purpose of showing to the jury that he had a propensity to commit this type of offense.

Specifically, he contends that Allman's testimony regarding her interactions with him when they were in a running club, which included him leaving paperwork in her mailbox, was not relevant for any valid purpose. Also, he claims, the trial court erred in allowing Allman to testify about emails that contained highly prejudicial hearsay statements of Allman and other members of the running club. The inclusion of this improper evidence, defendant argues, so prejudiced him that his conviction must be reversed and this cause remanded for a new trial.

¶ 53 Other-crimes evidence is admissible to prove any material fact relevant to the case, but it is inadmissible if it is relevant only to demonstrate the defendant's propensity to engage in criminal activity. *People v. Johnson*, 2013 IL App (2d) 110535, ¶ 61. "Such evidence may be admissible when it is relevant to show, among other things, motive, intent, identity, absence of mistake or accident, modus operandi, or the existence of a common plan or design." *Id*.; see Ill. R. Evid. 404(b) (eff. Jan. 1, 2011). "However, relevant other-crimes evidence may yet be excluded if its prejudicial effect substantially outweighs its probative value." *Johnson*, 2013 IL App (2d) 110535, ¶ 61. "The admissibility of other-crimes evidence is committed to the sound discretion of the trial court, and its decision will not be disturbed absent a clear abuse of discretion." *People v. Gregory*, 2016 IL App (2d) 140294, ¶ 24 (quoting *People v. Null*, 2013 IL App (2d) 110189, ¶ 43). "An abuse of discretion occurs when the trial court's ruling is arbitrary, fanciful, or unreasonable, or where no reasonable person would take the view adopted by the trial court." *Null*, 2013 IL App (2d) 110189, ¶ 43.

¶ 54 Defendant argues that the trial court erred when it found that evidence of his prior conduct toward Allman was admissible to show his motive and the way he retaliates when he feels slighted. He claims that Allman's testimony did not establish his motive to allegedly stalk Wassner two years later, and the trial court's statement that Allman's testimony was used to

show how he retaliates when he feels slighted makes it clear that the evidence was only admitted to show his propensity to commit this type of offense.

¶ 55 As support for his argument that Allman's testimony did not establish that he had a motive to allegedly stalk Wassner, defendant cites to *People v. Thingvold*, 191 Ill. 2d 144 (1989) (*affirmed*, 145 Ill. 2d 441 (1991)). In *Thingvold*, defendant was charged with soliciting a man named Nolan to murder his wife, Barbara. At trial, a man named Atkinson testified that defendant had solicited him to kill defendant's first wife, Diane. Two other men also testified that defendant had solicited them to kill Barbara. On appeal, we held that all three men's testimony was admissible. *Thingvold*, 191 Ill. App. 3d at 148-49. However, we reversed defendant's conviction and remanded the cause to for a new trial on a different ground. *Id*. at 151-52.

¶ 56 Our supreme court affirmed this court's decision to reverse the defendant's conviction and remand for a new trial. *People v. Thingvold*, 145 Ill. 2d 441, 456-59 (1991). It also found that the two men's testimony that they were solicited to kill defendant's second wife Barbara was properly admitted to show motive. Specifically, it found "both witnesses stated that the collection of insurance proceeds was the primary reason defendant wanted Barbara murdered. This was the common motive behind defendant's solicitation of these men. Consequently, the fact that defendant solicited two other men to kill Barbara for the purpose of obtaining insurance proceeds tends to prove that defendant solicited Nalan to kill Barbara for the purpose of obtaining insurance proceeds." *Id*.

¶ 57 However, the supreme court also found that Atkinson's testimony that the defendant had solicited him to kill his first wife Diane was not admissible to show motive, and Atkinson's testimony merely established the defendant's propensity to commit crime. *Thingvold*, 145 Ill. 2d

at 454. The court disagreed with the State's contentions that the record revealed a "ten-year odyssey to get rich off the murder of his wife," noting that the State did not even specify to which it was referring. Instead, the court found that the only evidence showing that defendant's first wife, Diane, was covered by insurance was a $5,000 to $10,000 employment-related group insurance plan, and that there was no evidence that defendant was the beneficiary of that plan. It also found that five years had elapsed between the time when defendant allegedly solicited someone to kill Diane to the time that he spoke with another man about having his second wife, Barbara, killed. The court found, "[g]iven these facts and the fact that defendant divorced Diane in 1978 and subsequently married Barbara, we are skeptical of the State's claim that Atkinson's testimony reveals a 10–year scheme to get rich off the murder of his wife." *Id.*

¶ 58 Defendant argues that just as in *Thingvold*, evidence of his interaction with Allman did not provide a motive for the alleged stalking of Wassner, but merely established his propensity to commit the crime of stalking. Specifically, he claims that the two incidents were unrelated and distinct in their characteristics because his conduct toward Allman and Wassner occurred two years apart, and Allman did not testify that defendant asked her on any dates prior to coming to her home. He claims that there was no relationship between defendant's interactions with Allman and his interactions with Wassner. Finally, defendant argues that it is clear that Allman's testimony was only used for propensity purposes when, in closing argument, the State said, "[h]is motive for how he acted with Liz Wassner is explained by how he has acted before."

¶ 59 Defendant's argument has no merit. We disagree with defendant's claim that just as in *Thingvold*, evidence of his interaction with Allman did not provide a motive for the alleged stalking of Wassner, but merely established his propensity to commit the crime of stalking. In *Thingvold*, our supreme court found that the State failed to prove the defendant's motive to

solicit someone to kill his first and second wives was the same (to get the wives' insurance money) when the first wife had very little life insurance, there was no evidence that defendant was the beneficiary of that plan, and defendant had instead divorced his first wife and married his second wife. *Thingvold*, 145 Ill. 2d at 454.

¶ 60 If we look at the definition of motive, "that which incites or stimulates a person to do an act" (*Thingvold*, 191 Ill. App. 3d 144, 149 (1989) (*affirmed*, 145 Ill. 2d 441 (1991)), it is clear from the evidence presented in this case that when defendant meets a woman who, for whatever reason, angers him in some way, his anger then incites him to engage in the same type of inappropriate conduct with that woman repeatedly.

¶ 61 Defendant's interactions with Allman and Wassner are startlingly similar. Defendant met both women as part of a running group. After he got angry at them, whether in a group (Allman as a recipient of a group email that angered defendant for no apparent reason) or personally (Wassner in response to her telling him that she was seeing someone else when he asked her out), defendant repeatedly harassed his victims. After he sent Allman and the other members of the running group a profane email, defendant drove to Allman's house and approached her home with papers in his hand. When he saw Allman he left, but the next day Allman found a paper in her mailbox that was a printout of information from the county assessor's records regarding property that Allman owned. After Wassner angered him by rejecting his request to go out on a date, defendant sent her an email about the foreclosure of her home in 2012, information that Wassner had not told defendant about. He then put a copy of her foreclosure records in Wassner's ex-husband's mailbox, and then posted that document all over town. When Allman told defendant to stop running behind her closely and to not contact her in any way, he said that he would leave her alone if she left him alone. He used the same response with Wassner when

she asked him to stop contacting her. Based upon this evidence, we find that the State properly contended in closing argument that defendant's motive for how he acted toward Wassner was explained by how he acted in the past. *People v. Nicholas*, 218 Ill. 2d 104, 121 (2006) (a prosecutor may comment on the evidence presented at trial, as well as any fair, reasonable inferences therefrom, even if such inferences reflect negatively on the defendant).

¶ 62 Defendant next argues that the trial court erred in allowing the State to introduce the State's exhibits 12 and 12A, which were emails with highly prejudicial hearsay statements of Laura Allman and other members of the running group regarding their impressions of him. In one of the emails another member of the running group told Allman that she searched defendant's name on the sex offender registry as well as the Winnebago County court website. In that email the runner goes on to say that defendant's name appeared "a lot," but as often as a plaintiff as a defendant. The runner also said that a criminal felony charge against defendant had been dismissed. Several other emails contained opinions by Allman and other members of the group that defendant was "creepy," and in another email a runner told Allman that defendant's conduct was "on the verge of stalking." Defendant claims that the admissions of these exhibits were highly prejudicial and not admissible for any proper purpose. Since this error was properly preserved, defendant contends, the State must prove the admission of these emails was harmless beyond a reasonable doubt.

¶ 63 We initially note that although defendant has preserved the issue of whether the trial court erred in allowing Allman to testify as evidence of his prior bad acts, defendant does not point to anywhere in the record where his counsel made an objection on hearsay grounds. Also, neither private counsel nor the public defender, who was appointed to represent defendant after private counsel withdrew, alleged any error on hearsay grounds in their motions for a new trial.

Even more important, although the State admitted exhibits 12 and 12A into evidence, it was *defense counsel* who read the contents of those emails to Allman on cross-examination. When the State finally interrupted counsel and the court asked counsel what he was doing, counsel said that he was asking Allman to confirm the content of the emails in order to prove her bias. Nevertheless, we agree with defendant that the content of the emails constituted impermissible hearsay. See Ill. R. Evid. 801(c) (eff. Oct. 15, 2015) ("Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.") "To determine whether an ordinary trial error, such as the improper admission of hearsay evidence, was harmless, we must ask whether the verdict would have been different if the evidence had not been admitted." *People v. McWhite*, 399 Ill. App. 3d 637, 643 (2010). Here, between Wassner's testimony and the proper portion of Allman's testimony that pertained to defendant's prior bad acts, there was overwhelming evidence of defendant's guilt. Accordingly, we find that the admission of these hearsay statement were harmless.

¶ 64 For all these reasons, we find that Allman's testimony and the State's exhibits were highly relevant to show defendant's motive to commit the instant offense and their admission was more probative than prejudicial. Therefore, the trial court did abuse its discretion in admitting this evidence.

¶ 65 C. Admission of Wassner's Civil No-Contact Order

¶ 66 Finally, defendant argues that the trial court erred in admitting evidence that Wassner obtained a civil no-contact order against defendant because that evidence was not relevant to the elements of the offense of stalking. He acknowledges that defense counsel agreed to the inclusion of this evidence. However, defendant claims that the admission of such evidence was

either plain error or ineffective assistance of counsel. In response, the State argues that no error occurred by the admission of the evidence of the no-contact order.

¶ 67 Plain error would allow this court to review an issue not preserved below if this court finds: "(1) a clear or obvious error occurred and the evidence is so closely balanced that the error alone threatened to tip the scales of justice against the defendant, regardless of the seriousness of the error, or (2) a clear or obvious error occurred and that error is so serious that it affected the fairness of the defendant's trial and challenged the integrity of the judicial process, regardless of the closeness of the evidence." *People v. Walker*, 2012 IL App (2d) 110288, ¶ 16. However, in order for something that occurred at trial to be plain error, we must first find that it was error. *Walker*, 2012 IL App (2d) 110288, ¶ 17.

¶ 68 We review a trial court's evidentiary rulings regarding admissibility for an abuse of discretion. *People v. Peach*, 2017 IL App (5th) 160264, ¶ 13. A trial court abuses its discretion when it acts arbitrarily or when no reasonable person would take the view adopted by the trial court. *People v. Chambers*, 2016 IL 117911, ¶ 68

¶ 69 At trial, when offering the evidence of the no-contact order, the State said that it was relevant: (1) to show the lengths that Wassner went to in order to protect herself from defendant's conduct; and (2) because the hot pink fliers with Wassner's name and foreclosure information on them were discovered after the order was served on May 2, 2013. Defense counsel stated that he wanted to use the evidence of Wassner's no-contact order because he wanted to impeach her with her typewritten addendum that she filed in support of her request for an order. It is clear from the record that counsel successfully impeached Wassner with the fact that although she testified that her daughter was very upset and cried over defendant's conduct toward her mother, she did not mention anything about her daughter in the addendum.

¶ 70 Here, Wassner obtained a no-contact order on May 1, 2013. Detective Mary Ogden testified that she personally served defendant with the order on May 2, 2013. After the order was entered, several more hot pink fliers were found around town with Wassner's foreclosure information written on them, along with her name and "foreclosure" written in large letters on the fliers. Evidence of the no-contact order was relevant to show defendant's continuing and escalating conduct, even after he was served with a no-contact order. It was also relevant to prove one of the elements of stalking, *i.e.*, that defendant's conduct caused Wassner emotional distress. See 720 ILCS 5/12-7.3(a)(2) (West 2012). Clearly, a victim is not going to attempt to obtain an order of protection against another unless that person is emotionally distressed by that other person's conduct. See *People v. Tassone*, 41 Ill. 2d 7 (1968) (courts will take judicial notice of that which everyone knows to be true).

¶ 71 Additionally, defense counsel's decision to agree with the State about allowing the reference to the no-contact order was one of trial strategy. Counsel wanted to be able to cross-examine Wassner on her testimony that her daughter was very upset and had cried over defendant's conduct by impeaching that testimony and showing that Wassner never mentioned the effect on her daughter's emotional state in the addendum to the order of protection or in the sworn statement that she gave to Detective Odgen. Although ultimately counsel's strategy did not prove to be successful, that does not mean that any error occurred here. *People v. Medrano*, 271 Ill. App. 3d 87, 101 (1995) (the fact that a given trial strategy proved ultimately unsuccessful does not constitute proof of ineffective assistance). Since we find that defense counsel did not err in agreeing to allow evidence of the no-contact order into evidence, we need not reach the issues of plain error or ineffective assistance.

¶ 72 Within this argument defendant also claims that because the State was able to present

evidence of the no-contact order, the jury was unnecessarily given the suggestion of additional charges for which defendant was not being prosecuted. We disagree. The jury instructions were clear that defendant was being tried on a charge of stalking, along with the elements of that offense, and no other offense. We also disagree with defendant's claim that the jury's confusion was evidenced by its questions regarding the difference between a no stalking order, a restraining order, and a no-contact order. During the trial, the order was referred to as a "no-contact order" and "an order of protection." It was never referred to in front of the jury as a "stalking no-contact order." The trial court properly answered the jury's question by telling them that for purposes of deliberation they should use all these phrases it listed as synonymous. Those questions by no means showed that the jury thought defendant was being convicted of violating a no-contact order; it simply was confused because both the State and the defense used some terms interchangeably.

¶ 73 III. CONCLUSION

¶ 74 In sum, defendant's conviction for stalking did not need to be vacated in light of *People v. Releford*, 2017 IL 121094, because his conviction was sustained on other constitutional portions of the statute, *i.e.*, that defendant both monitored and engaged in non-consensual contact with Wassner when he knew or should have known that his conduct caused Wassner emotional distress. 720 ILCS 5/12-7.3(c)(1) (West 2012). Also, defendant's prior bad acts toward Allman were properly admitted into evidence as proof of his motive to stalk Wassner when defendant's conduct in both cases were very similar and showed how defendant acted after he was angered. Finally, defense counsel's decision to agree with the State and allow evidence of Wassner's no-contact order to be admitted was simply trial strategy and not error. Since we found no error, we did not need to address defendant's arguments regarding plain error or ineffective assistance of

counsel. For all these reasons, the judgment of the circuit court of Winnebago County is affirmed.

¶ 75 Affirmed.