

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2138-20

T.R.,¹

Plaintiff-Respondent,

v.

L.A.H.,

Defendant-Appellant.

Submitted March 2, 2022 – Decided April 19, 2022

Before Judges Gooden Brown and Gummer.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Union County, Docket
No. FV-20-0929-21.

The BMB Law Firm, PC, attorneys for appellant
(Brooke M. Barnett, on the brief).

Respondent has not filed a brief.

PER CURIAM

¹ We use initials to protect the confidentiality of the victim. R. 1:38-3(d)(10).

In this one-sided appeal, defendant appeals from a March 16, 2021 final restraining order (FRO) entered against him in favor of plaintiff pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, based on the predicate act of harassment. We affirm.

Plaintiff and defendant are co-parents of a twelve-year-old daughter, D.H. The parties share joint legal custody, with plaintiff having primary residential custody of D.H. Previously, pursuant to court order, plaintiff relocated to Virginia with D.H. Since then, the parties have adhered to a parenting plan that allows defendant to have parenting time in New Jersey during D.H.'s summer break.

On January 28, 2021, plaintiff filed a domestic violence complaint under the PDVA alleging harassment and terroristic threats, and obtained a temporary restraining order (TRO) based on incidents that occurred on January 11 and 12, 2021. In the complaint, plaintiff alleged that at 9:00 p.m. on January 11, after receiving "a phone call from her sister" advising her that D.H. had disclosed being "sexually assaulted by defendant's nephew over the summer," plaintiff called defendant to inform him of the allegation and was subjected to "yelling" and "profanity." Plaintiff also alleged that defendant threatened "to have [her] clapped . . . when [his] brother [was] released."

The complaint continued that at 2:00 a.m. the following morning, defendant appeared unannounced at plaintiff's mother's house in Elizabeth, New Jersey, "with approximately [twenty] people," prompting plaintiff's mother to "call[] the police" to disperse the crowd. At approximately 3:30 p.m. later that day, while plaintiff accompanied D.H. to the prosecutor's office to give a statement, defendant allegedly again "appeared unannounced," "subjected . . . plaintiff to name calling," and "continued to stare at plaintiff to intimidate her." In the complaint, plaintiff reported a prior history of domestic violence based on defendant "refusing to return [D.H.] following his parenting time" and "call[ing] people to his home to intimidate plaintiff and prevent her from picking up [D.H.]."

On March 16, 2021, the Family Part judge conducted a one-day FRO hearing during which plaintiff was represented by counsel and defendant was self-represented. At the hearing, plaintiff testified that during the evening hours of January 11, 2021, while D.H. was visiting plaintiff's mother in New Jersey, plaintiff's sister called her in Virginia and told her that D.H. had just disclosed to her "that [defendant's] nephew molested her over the summer [of 2020] while

she was visiting [defendant]."² Plaintiff told her sister to "call the police" while she called defendant "to let him know what [was] going on and find out if he [knew] anything about what happened."

Immediately after talking to her sister, plaintiff called defendant and informed him of the allegations. Defendant retorted "that his nephew didn't do no shit like that," accused plaintiff of being a "fucking liar," and threatened "to get [plaintiff] fucking clapped." Plaintiff explained that "clapped" was "street terminology [for] getting shot at or killed." Plaintiff testified defendant added that "[b]ig brah's coming home soon from prison," and "[i]t's going down." Plaintiff stated that defendant had a brother who was "incarcerated for manslaughter" and was "supposed to get out" soon.

As defendant continued to berate her, plaintiff hung up the phone and purchased a train ticket to New Jersey leaving at 5:00 a.m. the following morning. After plaintiff arrived in New Jersey at approximately 1:00 p.m. on January 12, 2021, she accompanied D.H. to the prosecutor's office to give a statement. Although she had not told defendant they were going to the prosecutor's office, defendant "showed up" there with six family members, all

² The statement was admitted not for "the truth of the matter asserted" but to explain the actions plaintiff took after hearing the statement. N.J.R.E. 801(c).

of whom yelled and cursed at her. In addition, defendant "got in [her] face and called [her] a fucking liar." Although an officer made defendant's family members leave, defendant was "allowed . . . to stay, but . . . star[ed] at [her] the whole entire time trying to intimidate [her]." As a result, according to plaintiff, when she left the prosecutor's office, "[she] was escorted out."

Plaintiff also recounted prior incidents between the parties. She testified that during defendant's parenting time with D.H. in June of 2020, defendant would not allow plaintiff to talk to D.H. and "sent [plaintiff] text messages saying that he [was] going to make [plaintiff] suffer." Believing defendant intended to hurt her or D.H., plaintiff "called the police to do a welfare check, and . . . filed for an emergent hearing." In August of 2020, when plaintiff attempted to pick up D.H. from defendant's house in New Jersey,³ defendant told plaintiff she was "not fucking leaving with [D.H.]" and about fifteen to twenty of defendant's family members threatened plaintiff's father who had accompanied her.

Plaintiff testified that although she lived in Virginia, she needed a restraining order because she visited her family in New Jersey every month and

³ Plaintiff explained that pursuant to their parenting plan, the party who had parenting time was responsible for picking up D.H.

was "afraid" that defendant was "going to shoot [her]" or "get [her] killed," and "retaliate" against her family.

During his testimony, defendant denied plaintiff's allegations. Specifically, defendant denied threatening to have plaintiff "clapped" or cursing at plaintiff during the January 11 phone conversation. Although defendant admitted that his brother was in prison for a homicide, he stated his brother was not coming home anytime soon. Regarding the January 12 encounter at the prosecutor's office, defendant acknowledged that he was not invited and claimed that he did not know that plaintiff would be there. Further, defendant admitted that he was accompanied by his mother, father, and two sisters. However, defendant explained that he only went to check on his daughter's welfare and denied cursing at plaintiff or that he or his family members tried to intimidate her.

Defendant also admitted that after learning of the molestation allegation, he went to plaintiff's mother's house with several family members in the early morning hours of January 12. However, he explained that his purpose was to do "[a] welfare check" on D.H. because he could not reach plaintiff's mother via telephone. Additionally, defendant denied threatening or cursing at plaintiff in

August of 2020 when she came to his house to pick up D.H. and denied that his family members threatened plaintiff's father.

Following summations, in an oral decision on the record, the judge determined the entry of an FRO was justified. The judge was satisfied that the evidence met both prongs of Silver v. Silver, 387 N.J. Super. 112, 125-26 (App. Div. 2006), which delineated the two-part test for granting an FRO under the PDVA. As a threshold matter, the judge found jurisdiction under the PDVA predicated on the parties having "a child in common." N.J.S.A. 2C:25-19(d). Next, the judge pointed out that given the divergent accounts, the entire case hinged on the credibility of one party over the other. After considering the testimony, the judge found plaintiff more credible than defendant and concluded plaintiff met the requisite burden of proof to establish defendant committed the predicate act of harassment, N.J.S.A. 2C:33-4.⁴ In support, the judge relied on defendant's threat to harm plaintiff and use of offensively coarse language during the January 11 telephone conversation, as well as his continuing course of alarming conduct during the January 12 encounter at the prosecutor's office.

In crediting plaintiff's version, the judge explained:

⁴ The judge did not find the predicate act of terroristic threats, N.J.S.A. 2C:12-3.

[Defendant] would have me believe that [plaintiff] totally fabricated all of those things, especially the part about big bro's coming home from prison. Things are going to go down.

How she would make that up is beyond me, but it's not credible that [defendant] say[s] that [he] didn't say it. I find [plaintiff] to be the more credible witness. I find that her testimony is truthful and that those things were said. And that those things were said in order to harass her, to stir her up, to scare her. To . . . if not alarm her, at least seriously annoy her. And so based upon that I believe . . . plaintiff has proved by a preponderance of the credible evidence that . . . defendant did commit an act of harassment against her.

The judge also examined the "history between the parties," recounting defendant's attempt in June of 2020 to withhold D.H. from plaintiff and commenting that he was "going to make [plaintiff] suffer." Additionally, the judge cited the August of 2020 encounter during which defendant threatened that plaintiff was "not leaving with [D.H.]." The judge explained that the parties' history "help[ed] to establish the predicate offense [of harassment]" as well as determine whether an FRO was needed.

In that regard, the judge stated:

When the [c]ourt has to analyze whether or not a plaintiff is in some immediate danger to person or property, I look at the predicate offense, and I look at the history. So here the predicate offense is threatening in nature. . . .

And so I believe that [plaintiff] is in some immediate danger, if not from being harmed and being shot, but at least from having future acts of domestic violence committed against her like harassment. . . . And so this continuing conduct serves one purpose and one purpose only, to harass [plaintiff]. And it has to be stopped.

Thus, the judge entered an FRO "to protect [plaintiff] from future acts of domestic violence and to prevent any further abuse at the hands of . . . defendant." This appeal followed.

Our limited scope of review of a trial court's findings of fact is well established. "We accord substantial deference to Family Part judges, who routinely hear domestic violence cases and are 'specially trained to detect the difference between domestic violence and more ordinary differences that arise between couples.'" C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020) (quoting J.D. v. M.D.F., 207 N.J. 458, 482 (2011)). "[D]eference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" MacKinnon v. MacKinnon, 191 N.J. 240, 254 (2007) (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)).

Consequently, "findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015). To be sure, we will not disturb a trial court's factual findings

unless "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Cesare, 154 N.J. at 412 (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). We do not, however, accord such deference to the court's legal conclusions, which we review de novo. Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016).

As stated, the entry of an FRO under the PDVA requires the trial court to make certain findings pursuant to a two-step analysis delineated in Silver, 387 N.J. Super. at 125-27. Initially, the court "must determine whether the plaintiff has proven, by a preponderance of the credible evidence, that one or more of the predicate acts set forth in N.J.S.A. 2C:25-19(a) has occurred." Id. at 125 (citing N.J.S.A. 2C:25-29(a)). Harassment is one of the predicate acts included in N.J.S.A. 2C:25-19(a). See N.J.S.A. 2C:25-19(a)(13).

A person commits harassment "if, with purpose to harass another," he: (a) "[m]akes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;" (b) "[s]ubjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so;" or (c) "[e]ngages in any other course of alarming conduct or

of repeatedly committed acts with purpose to alarm or seriously annoy such other person." N.J.S.A. 2C:33-4(a) to (c).

If the court finds the defendant committed a predicate act of domestic violence, the court must then determine whether it "should enter a restraining order that provides protection for the victim." Silver, 387 N.J. Super. at 126. In those cases where "the risk of harm is so great," J.D., 207 N.J. at 488, the second inquiry "is most often perfunctory and self-evident," Silver, 387 N.J. Super. at 127. However, in all cases, "the guiding standard is whether a restraining order is necessary, upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29(a)(1) to . . . (6), to protect the victim from an immediate danger or to prevent further abuse." Ibid. Those factors include but are not limited to: "[t]he previous history of domestic violence between the [parties], including threats, harassment and physical abuse;" "[t]he existence of immediate danger to person or property;" and "[t]he best interests of the victim and any child." N.J.S.A. 2C:25-29(a)(1) to (2), (4).

Based on our review of the record, we are convinced there is sufficient credible evidence to support the judge's determination that defendant committed the predicate act of harassment to satisfy the first Silver prong. Admittedly, "[o]ur courts have struggled with the proofs needed to support a domestic

violence restraining order based on claims of harassment," and "[n]ot all offensive or bothersome behavior . . . constitutes harassment." J.D., 207 N.J. at 482-83. Because "direct proof of intent" is often absent, "purpose may and often must be inferred from what is said and done and the surrounding circumstances." State v. Castagna, 387 N.J. Super. 598, 606 (App. Div. 2006). Therefore, "[a] history of domestic violence may serve to give content to otherwise ambiguous behavior and support entry of a restraining order." J.D., 207 N.J. at 483.

Here, the totality of the circumstances demonstrated that defendant's communications, which included offensively coarse language, his threats of harm involving his brother, and his course of alarming conduct, particularly the intimidation at the prosecutor's office, were engaged in with the purpose to harass plaintiff. See State v. Hoffman, 149 N.J. 564, 577, 585 (1997) (explaining that in determining whether a defendant's conduct constitutes harassment, a judge may use "[c]ommon sense and experience," and "[t]he incidents under scrutiny must be examined in light of the totality of the circumstances"); C.M.F. v. R.G.F., 418 N.J. Super. 396, 404 (App. Div. 2011) (noting "the very nature of the verbal attack, the manner of its delivery and the attendant circumstances" may "strongly suggest a purpose to harass"); Pazienza v. Camarata, 381 N.J. Super. 173, 183-84 (App. Div. 2005) (explaining text

messages sent from defendant to plaintiff "when viewed in the context of defendant's prior conduct towards plaintiff, was likely to cause plaintiff annoyance," and the "purpose to harass on defendant's part [was] easily inferred").

Additionally, the evidence clearly established that an FRO was required to protect plaintiff and prevent further acts of domestic violence, satisfying the second Silver prong. Critically, the judge believed an FRO was warranted because plaintiff was in "immediate danger" of "being harmed" or "shot" at defendant's behest and at risk of "having future acts of domestic violence committed against her."

Defendant essentially disputes the judge's credibility findings – adopting plaintiff's narrative of the events over that of defendant's – and argues that the judge relied on insufficient proofs to support his findings. However, "[b]ecause the entire case was premised on disputed testimony and the credibility of witnesses," we are bound to defer to the judge's findings as they are based on sufficient, credible evidence in the record. Cesare, 154 N.J. at 416.

Defendant also asserts he was denied a fair opportunity to be heard and defend himself against plaintiff's claims of domestic violence because the judge did not advise defendant "of his right to cross[-]examine . . . plaintiff" and

"precluded him from presenting evidence." Like all civil proceedings, litigants in domestic violence proceedings are entitled "to a full and fair hearing" imbued with the protections of due process. J.D., 207 N.J. at 481. The due process guarantee includes the opportunity to be heard and requires "procedural safeguards including the right to cross-examine adverse witnesses and the right to call witnesses in his own defense." Peterson v. Peterson, 374 N.J. Super. 116, 124 (App. Div. 2005).

Nonetheless,

[w]e do not suggest that our trial courts are without means to control testimony or to require that parties present testimony and evidence relevant to the issues in dispute. Nor do we mean to make our trial courts prisoners of the whims of litigants locked in domestic warfare. But their obligation is to see to it that justice is accomplished and to conduct and control proceedings in a manner that will best serve that goal.

[J.D., 207 N.J. at 482.]

Here, we are satisfied defendant was afforded a full and fair hearing before the FRO was entered. Although the judge did not explain defendant's right to cross-examine plaintiff, it is unclear from the record that defendant was unaware of his right to do so, and the judge certainly did not prevent defendant from cross-examining plaintiff. The judge told defendant that the burden was on plaintiff to prove her case and allowed defendant to respond to the allegations

and present relevant evidence to support his defense.⁵ The judge questioned defendant to elicit his version of events, and, after being questioned, defendant indicated he had no additional evidence or witnesses to present. The judge also permitted defendant to give a summation after painstakingly explaining to defendant that

[a] summation is an opportunity to characterize the evidence that has been presented to the [c]ourt in an effort to persuade the [c]ourt in terms of the outcome you are seeking. In your case the outcome you're seeking is a dismissal of the restraining order. And you're going to comment on the evidence as insufficient proof to [establish] the predicate offense[] of either harassment or terroristic threats.

Thus, we discern no procedural, factual, or legal basis to intervene.

Affirmed.

I hereby certify that the foregoing
is a true copy of the original on
file in my office.



CLERK OF THE APPELLATE DIVISION

⁵ The judge precluded defendant from introducing a business card he had obtained from the prosecutor's office because it was "not going to be relevant." Likewise, the judge precluded plaintiff's mother from testifying on plaintiff's behalf after plaintiff's attorney provided a proffer of the testimony. We discern no error in either of those rulings.