SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3038-20

C.B.,

Plaintiff-Appellant,

v.

S.C.K.,

Defendant-Respondent.

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Submitted March 28, 2022 – Decided May 6, 2022

Before Judges Sabatino, Mayer and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FV-15-1665-21.

John Rue & Associates, LLC, attorneys for appellant (Krista L. Haley and Frank Geier, on the briefs).

McGuckin Law, attorneys for the respondent (Jeff Thakker, of counsel; Stephen F. McGuckin, on the brief).

PER CURIAM

Plaintiff C.B.[1] appeals from a June 21, 2021 order denying her request for a final restraining order (FRO) and dismissing the temporary restraining order (TRO) pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. She claims that the evidence presented at the FRO trial was sufficient to support a finding that defendant, S.C.K., committed the predicate acts of assault and criminal sexual contact and that restraints were needed to protect her from future harm. We disagree and affirm.

Factual Background

We summarize the facts from our reading of the trial transcript. Both parties were represented by counsel. The evidence was based solely on plaintiff's testimony.[2] Defendant did not testify at the hearing.

Plaintiff met defendant online through OkCupid, a dating app, in March or April 2021 during the COVID-19 pandemic. Initially, the parties exchanged messages through the OkCupid app. At some point, plaintiff gave defendant her cell phone number and thereafter they exchanged text messages. Through text

[1] We use initials and pseudonyms to protect the identities of the parties and to preserve the confidentiality of the proceedings. R. 1:38-3(d)(9)-(10).

[2] The OkCupid app and text messages were not admitted into evidence; and therefore were not considered. However, the trial judge considered plaintiff's testimony about the text messages with defendant leading up to the May 3, 2021 first date.

messages, she told defendant that it would probably be several weeks before they could meet in person because she was assigned to manage a COVID-19 mega-vaccination center in Newark.

Several weeks later, defendant suggested that they meet at her apartment in Point Pleasant Borough on May 3, 2021. Because of the pandemic, plaintiff reluctantly agreed to defendant's suggestion. They agreed to meet, starting in the afternoon, have a few drinks, and end the "first date" at 9:30 p.m. According to plaintiff, they agreed to meet as friends and not engage in sex. Defendant purportedly understood that plaintiff was not interested in having sex on the first date, yet he made several "references to [them] having sex" and also stated "but no expectations."

Defendant also made several comments in his texts referring to getting "s***-faced and drinking to excess," which plaintiff explained was not part of her plan. On cross-examination, she admitted replying to defendant's message saying that she "need[ed] a day to get drunk and laugh." At the trial, she testified that she needed a day to relax.

On the afternoon of May 3, 2021, approximately one hour prior to defendant's arrival, plaintiff had one-and-a-half glasses of wine because she was nervous. Defendant arrived around 2:15 p.m. by Uber. They shared a bottle of

specialty beer she had bought, which was about the size of a wine bottle. Plaintiff later had another glass or glass-and-a-half of wine. She left her drink unattended on multiple occasions while defendant was in the apartment.[3]

Plaintiff did not feel any "chemistry" with defendant although there had been some consensual kissing. Around 3:54 p.m., plaintiff texted a photograph of defendant's identification to a friend. However, plaintiff never explained why she did so. This was plaintiff's last memory before she "lost consciousness" and did not call the friend as a trial witness.

At approximately 8:00 p.m., plaintiff testified that she regained consciousness and found herself naked in bed with defendant. Defendant then "tried to roll [her] over onto [her] back," touching her shoulder and knee in the process and she pushed him off. Plaintiff had "the worst headache [she] ever had in [her] life." When defendant attempted to move her body a second time, plaintiff stated she was in a haze, but "the haze cleared up for a moment." She again pushed him off, jumped out of bed and realized defendant was naked. Plaintiff demanded that he leave her apartment, then went to the bathroom to get her robe. When she returned to her bedroom, defendant was still there. Plaintiff

[3] As of the time of the trial, the lab results on a toxicology test of the drinking glass had not come back, nor had the results of a rape kit for DNA testing. Nevertheless, plaintiff did not request an adjournment to await the test results.

told the judge she repeatedly asked him to leave. Defendant first replied that he would call an Uber; then he said that he would leave in the morning. Plaintiff called 9-1-1 and defendant ran out of the apartment.

Plaintiff testified she did not recall removing her clothing. Plaintiff explained her leggings and underwear on the couch were completely turned inside out, as if "someone had taken it from [her] waist and just peeled [them] right off of [her]." In fact, her underwear was still coiled in the leggings "intact," suggesting both were removed at the same time. Plaintiff did not recall asking defendant to remove his clothing.

The police arrived at approximately 8:45 p.m. Plaintiff told the police that this was her first date with defendant, which did not go well. She also stated that defendant refused to leave until she called the police. However, plaintiff did not tell the police that she awoke naked in bed with defendant. The police remained in her apartment until they confirmed that defendant was no longer within the area.

When the police left, plaintiff went back to bed. She woke up at 4:30 a.m. to go to work. Plaintiff had a brief meeting with her team after she arrived at the work site. While at work, plaintiff began to process what happened the night before. She had a "banging headache" that she could not get rid of and had a

"feeling of being violated." She left work and went to the Point Pleasant Borough Police Station. After taking plaintiff's statement, the police directed her to the hospital to obtain a rape kit. At the hospital, she was interviewed by a detective from the Ocean County Prosecutor's Office. She gave written permission for the crime scene technicians to search her apartment.

Procedural History

On May 4, 2021,[4] plaintiff obtained a temporary protective order (TPO) against defendant under the Sexual Assault Survivors Protection Act (SASPA), N.J.S.A. 2C:14-13 to -21. On May 14, 2021, the judge converted the TPO to a TRO, but there is no explanation for the conversion. Plaintiff has not appealed from the judge's order converting the TPO to the TRO. Plaintiff alleged assault and criminal sexual contact in the domestic violence complaint.

At the conclusion of the testimony, the judge issued an oral opinion. She found the parties were in a dating relationship for purposes of jurisdiction under the PDVA.[5] The judge considered plaintiff's allegation of assault and further

[4] Plaintiff claims she obtained a TPO against defendant on May 4, the day she went to the police station. However, the TPO in the appendix is dated May 13, 2021.

[5] The judge referenced, although not by name, C.C. v. J.A.H., 463 N.J. Super. 419, 430-31 (App. Div. 2020), which held that a five-week exchange of

found that "at the outset [assault] doesn't apply to this case, the seriously bodily injury or []fear."

The judge next addressed the alleged act of criminal sexual contact. She did not find that defendant committed criminal sexual contact as that offense is defined by statute. The judge concluded:

> The court believes, would be that there was no physical force or coercion, and the plaintiff did not suffer severe personal injury. In this particular case, the plaintiff suffered only the injury that -- emotional injury that occurred as a result, and that there was no physical injury, and without physical force or coercion, means without the freely and affirmatively given consent of the victim. It would have probably [be] called by under aggravated criminal sexual contact as well as [N.J.S.A.] 2C:14-3a in that she indicates that she believes that she was under the influence of something which would affect her ability to consent.

The judge credited plaintiff's testimony finding "plaintiff to be candid. I don't think that she tried in any way to minimize the situation or tried to make the situation different than what it actually was." The judge further explained that she understood plaintiff's testimony that she was and was not awake. The judge reasoned that "[s]he wasn't completely awake, but she certainly was

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"proliferate and exceedingly intimate communications" between parties can constitute a "dating relationship" under the PDVA.

conscious at that point of what was going on." Plaintiff "believe[d] she was drugged by the defendant" however, "[s]he has no evidence of that."

The judge found no prior history of violence between the parties. Based on the testimony and evidence, the judge stated, "so I cannot make a finding that the plaintiff has met her burden of proof with regard to either an assault or criminal sexual contact regardless of the testimony." Plaintiff's request for a FRO was denied and the TRO was dismissed. This appeal ensued.

Standard of Review

On appeal, plaintiff contends that the trial court erred as a matter of law in dismissing the TRO. She also asserts she requires immediate protection from defendant. Further, she asks this court to issue an FRO without requiring a remand to the Family Part.

Our scope of review of the grant or denial of an FRO is limited. See Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). We accord substantial deference to family judges' findings of fact because of their special expertise in family matters. Id. at 413. That deference is particularly strong when the evidence is largely testimonial and rests on a judge's credibility findings. Gnall v. Gnall, 222 N.J. 414, 428 (2015). Deference is also particularly appropriate because the judge who observes the witness and hears the testimony has a perspective the

reviewing court does not enjoy. Pascale v. Pascale, 113 N.J. 20, 33 (1988) (citing Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)).

We will "not disturb the 'factual findings and legal conclusions of the trial judge unless [we are] convinced that 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)).

N.J.S.A. 2C:25-19 defines domestic violence under the PDVA as the infliction of one or more of the enumerated predicate acts upon a protected person. Assault, N.J.S.A. 2C:12-1, and criminal sexual contact, N.J.S.A. 2C:14-3, are among the predicate acts listed in N.J.S.A. 2C:25-19.

Before a FRO may be issued, the court must engage in a two-prong analysis and make specific factual findings and legal conclusions. Silver, 387 N.J. Super. at 125-27. First, the court must determine, "in light of the previous history of violence between the parties…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." Ibid.

After finding that a predicate act has been committed, the court must next determine "whether a restraining order is necessary to protect the plaintiff from

future acts or threats of violence, upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29(a)(1) to (a)(6), to protect the victim from an immediate danger or to prevent further abuse." J.D. v. M.D.F., 207 N.J. 458, 476 (2011). Simply stated, the court must resolve that "relief is necessary to prevent further abuse." Id.; see also Silver, 387 N.J. Super. at 127. This determination also "must be evaluated in light of the previous history of domestic violence between the plaintiff and defendant including, previous threats, harassment and physical abuse," as well as "whether immediate danger to the person is present." Silver, 387 N.J. Super. at 124 (quoting Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. 1995) (citing N.J.S.A. 2C:25-29(a)(1)-(2))). But the court need not incorporate all of these factors into its findings. Cesare, 154 N.J. at 401-02; McGowan v. O'Rourke, 391 N.J. Super. 502, 506 (App. Div. 2007).

Assault

The evidence does not support the argument advanced by plaintiff that an assault occurred. The predicate act of assault is committed when a person "[a]ttempts to cause or purposely, knowingly or recklessly causes bodily injury to another[.]" N.J.S.A. 2C:12-1(a)(1). "Bodily injury" is "physical pain, illness or any impairment of physical condition[.]" N.J.S.A. 2C:11-1(a). See also State v. Stull, 403 N.J. Super. 501, 505 (App. Div. 2008).

Here, the record supports the judge's finding that defendant did not commit an assault. The judge considered plaintiff's testimony that defendant twice tried to roll her over onto her back by touching her right shoulder and knee. The judge correctly determined that plaintiff did not suffer any physical injury or fear of bodily injury based on her testimony. Plaintiff did not have any bruises and she felt no pain other than a headache. She also noted that there was no prior history of violence between the parties. Hence, plaintiff's arguments are meritless since she failed to present by a preponderance of the evidence sufficient proof of an assault within the meaning of the statute.

Criminal Sexual Contact

N.J.S.A. 2C:14-3(b) provides that "[a]n actor is guilty of criminal sexual contact if he commits an act of sexual contact with the victim under any of the circumstances set forth in section 2C:14-2(c) (1) through (5)." "Sexual contact" is defined as "an intentional touching by the . . . actor, either directly or through clothing, of the victim's . . . intimate parts for the purpose of degrading or humiliating the victim or sexually arousing or sexually gratifying the actor." N.J.S.A. 2C:14-1(d). Although the statute does not specify the mental state that must be demonstrated to prove the defendant's criminal intent, N.J.S.A. 2C:2-2(c)(3) establishes the principle that criminal statutes that do not designate a

specific culpability requirement should be construed as requiring knowing conduct. N.J.S.A. 2C:2-2(b)(2) provides that "[a] person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist[.]"

Plaintiff's criminal sexual contact argument is fundamentally flawed. There is no competent credible proof in the record that defendant forcibly touched plaintiff's intimate body parts and that he did so for his own sexual gratification. With nothing more than plaintiff's testimony that defendant attempted to roll her over on her back by touching her shoulder and knee, she did not establish by a preponderance of the evidence that a criminal sexual touching occurred.

Plaintiff also argues that the judge should have drawn an adverse inference against defendant since he declined to testify at the trial. Plaintiff has not provided any persuasive reasoning in support of her argument, except for referring to an unpublished case, which has no precedential value.[6] Defendant did not testify, provide a certification, or offer any other documentary evidence;

[6] Rule 1:36-3 provides, in relevant part, "No unpublished opinion shall constitute precedent or be binding upon any court." In addition, except for certain situations not applicable here, "no unpublished opinions shall be cited by any court." Ibid.

therefore, the record is barren of any additional evidence to support an adverse finding. State, Dep't of Law & Pub. Safety., Div. of Gaming Enf't v. Merlino, 216 N.J. Super. 579, 587 (App. Div. 1987). As such, it is within the discretion of the trial judge to draw an adverse inference. Ibid. Here, we find no abuse of discretion by the judge declining to draw an adverse inference in this domestic violence proceeding.

We defer to the trial judge's finding, based upon an assessment of the plaintiff's credibility and the lack of competent evidence, that defendant did not commit acts of domestic violence on May 3, 2021.

Final Restraining Order

Plaintiff argues that the court erred in finding the entry of an FRO was unnecessary to protect plaintiff from immediate danger or further acts of domestic violence. We reject plaintiff's contention.

A history of domestic violence is one of the six non-exhaustive factors the judge must consider when evaluating whether an FRO is necessary for a plaintiff's protection. See N.J.S.A. 2C:25-29(a); Silver, 387 N.J. Super. at 125-27. The judge is "not obligated to find a past history of abuse before determining that an act of domestic violence has been committed." Cesare, 154 N.J. at 402.

Applying these standards to our review of the arguments raised by plaintiff, we discern no basis for disturbing the judge's decision to deny entry of a FRO. The judge determined that there was no history of violence or abuse between the parties. Plaintiff did not testify that there was any additional contact with defendant after the "first date" and therefore there was no evidence of an "immediate danger or a need to prevent further acts of domestic violence." Silver, 387 N.J. Super. at 127. Thus, plaintiff did not satisfy the second prong of Silver. We are satisfied that the record supports the judge's determination that plaintiff failed to establish that a FRO was necessary.

We find insufficient merit in plaintiff's argument for the exercise of original jurisdiction under Rule 2:10-5 to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

SABATINO, P.J.A.D., concurring.

I join in the result and in the soundly reasoned opinion of the court. I write to point out a concern that may warrant future legislative attention.

When plaintiff applied for restraints under SASPA, she included as charged predicate acts, among others, "attempted sexual contact" and "attempted sexual penetration." However, when her complaint was converted to a pleading under the PDVA, those attempt-based offenses were omitted. That is presumably because, with the exception of simple assault, the Legislature did not include attempt crimes on the list of eligible predicate acts under the PDVA, as enumerated in N.J.S.A. 2C:25-19(a)(1)-(19). See State v. Lee, 411 N.J. Super. 349, 352-53 (App. Div. 2010) (interpreting the absence of "attempt" from the list of predicate acts under the PDVA as reflecting legislative intent to not deem such criminal attempts as sufficient to support an FRO). I note that, by comparison, SASPA, which was adopted in 2015 long after the PDVA's enactment, has a broader listing of predicate acts, and expressly states that victims of "nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct," can obtain restraints under that statute. N.J.S.A. 2C:14-14(a)(1) (emphasis added); see also N.J.S.A. 2C:5-1(a) (generally defining the forms of unlawful "attempt" under the Criminal Code).

It is unclear why attempted criminal sexual contact is an eligible predicate act under SASPA but is not under the PDVA. Regardless, in this case, because it was tried under the PDVA rather than SASPA, the trial judge had no occasion to consider whether defendant's conduct comprised "substantial steps" in a course of conduct planned to culminate with nonconsensual sexual contact. See N.J.S.A. 2C:5-1(a)(3) (defining attempt to encompass certain "substantial steps").

Because SASPA was intended to "fill the gap" to provide an equivalent process to the PDVA for victims of certain violent offenses to obtain civil restraints, see N.J.S.A. 2C:14-14(a)(1), the Legislature may wish to consider this disparity.