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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3208-20

J.R.,[1]

Plaintiff-Respondent,

v.

E.J.J.,

Defendant-Appellant.

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Argued May 11, 2022 – Decided May 25, 2022

Before Judges Hoffman, Whipple and Susswein.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FV-07-2849-21.

Philip Petrullo argued the cause for appellant (Russo Petrullo Law Group, LLC, attorneys; Philip Petrullo, on the brief).

Thomas H. Vigneault Jr. argued the cause for respondent.

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[1] We use initials to preserve the confidentiality of court records concerning domestic violence. R. 1:38-3(d)(9).

PER CURIAM

Defendant appeals from a June 2, 2021 final restraining order (FRO) entered against him pursuant to the New Jersey Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. We affirm.

I.

We provide a detailed recitation of the facts based on the testimony presented during the FRO proceedings. Plaintiff and defendant maintained a romantic relationship for about six years, eventually having one child, E.J. When the trial court held the FRO hearing, E.J. was five years old. Plaintiff and defendant ended their romantic relationship in August 2020, but continued cohabitating until December 2020.

In January 2021, plaintiff and defendant had an argument in a tattoo parlor. Plaintiff eventually obtained a recording of this incident from the tattoo shop's security cameras. The video displayed defendant's "yelling and screaming" at plaintiff, defendant's "snatching [plaintiff's] phone out of [her] hand," and defendant's leaving the tattoo shop while speaking with plaintiff's boyfriend on her phone.

After this incident, plaintiff filed a domestic violence complaint and obtained a temporary restraining order (TRO) against defendant. On February

12, 2021, following a trial, the Family Part found that the evidence presented did not establish that defendant committed an act of domestic violence in the tattoo parlor encounter and dismissed plaintiff's complaint; however, plaintiff did not produce the security video from the tattoo parlor at the February 12, 2021 FRO trial.[2]

The incident causing plaintiff to file the complaint under review occurred on May 7, 2021, when defendant made threatening statements to plaintiff. Plaintiff sent defendant a text message requesting defendant to tell his mother, who was watching E.J. at the time, to allow E.J. to answer plaintiff's video call. Defendant responded "[m]aybe."

Eventually, plaintiff received a video call; however, when plaintiff accepted the video call, she was speaking with defendant, not E.J. Plaintiff recounted that defendant said "Fuck you, bitch. Here, E.J., talk to your whack-ass mother. You're a terrible ass mother." Defendant continued, stating, "I'm going to fuck you up and I'm going to fuck your boyfriend up." Plaintiff then asked defendant if he was threatening her, to which defendant responded, "Yes, it's a threat. I'm going to fuck you up and I'm going to fuck your boyfriend up."

[2] From our review of the record, it does not appear that plaintiff obtained the security video from the tattoo parlor incident until after the February 12, 2021 FRO trial.

This conversation lasted about five minutes before plaintiff ended the video call. Defendant then called plaintiff again via video call. At this point, plaintiff heard defendant in the distance shouting "I'm going to fuck you up, bitch." Defendant testified he was going "fuck [plaintiff] up in a legal sense," not physically.

Plaintiff testified that defendant's threats made her feel "[s]cared . . . because [defendant] has put hands on [her] before." Plaintiff revealed defendant has "beat on [her]" before, which was one reason she left the relationship. Plaintiff further described how defendant has punched her and slapped her in front of E.J. Moreover, plaintiff said she had a recording of defendant admitting to beating her.

Later in plaintiff's testimony, she alleged that defendant has stalked her in the past. Plaintiff recounted that defendant has "[sat] outside her mother's home, where plaintiff resides, and that defendant [has] been caught driving around the area."

Plaintiff claimed she feared defendant would carry out his threats. She stated she "[does not] feel safe around [defendant], near [defendant], anything." The court found plaintiff made a prima facie showing of domestic violence. The court first took judicial notice of the fact that the incident in the tattoo parlor resulted in a finding that plaintiff failed to establish domestic violence.

The judge found plaintiff sustained her burden of demonstrating a predicate act of domestic violence. The court explained:

> The court finds that the statement that [defendant] admits to making was made with the intent to frighten the plaintiff, and accordingly the [c]ourt finds that the plaintiff has carried her burden of proof with regard to the predicate act of terroristic threats.
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> [Defendant] has tried to explain away the statement by indicating that his intent was to merely indicate that he intended to rely upon his legal rights and legal process to fuck her up. His use of his explanation does not carry sufficient weight to overcome the [c]ourt's conclusion that this is more than just a custody dispute. It is a matter in which the defendant has related a controlling nature and a controlling entitlement with regard to property and, and his "possessions. . . ." The [c]ourt is going to issue a final restraining order.
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> . . .
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> The [c]ourt is finding that restraint necessary to prevent the reoccurrence of earlier domestic violence between the parties which is likely to occur given the history . . . .

On appeal, defendant argues the trial court erred in issuing the FRO. He contends plaintiff failed to prove a predicate act of domestic violence by a preponderance of the evidence, the court set forth inadequate factual findings, and the court erred by permitting plaintiff to testify as to events that exceeded the scope of the domestic violence complaint and were the subject of a prior

domestic violence complaint that was dismissed. Additionally, defendant argues that technological issues during the FRO proceedings violated his due process rights.

II.

Our scope of review of Family Part judges' orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We owe substantial deference to the Family Part judge's findings of fact because of his or her special expertise in family matters. Id. at 413. "Deference is especially appropriate 'where the evidence is largely testimonial and involves questions of credibility.'" Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). A judge's fact-finding is "binding on appeal when supported by adequate, substantial, credible evidence." Id. at 411-12 (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). However, we owe no special deference to the trial judge's "interpretation of the law and the legal consequences that flow from established facts." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

When determining whether to grant an FRO under the PDVA, N.J.S.A. 2C:25-29, a judge must undertake a two-part analysis. Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). First, "the judge 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. Second, the judge must determine whether a restraining order is necessary to protect the plaintiff from future acts or threats of violence. Id. at 127. Since this case turned almost exclusively on the testimony of the witnesses, we defer to the Family Part judge's credibility findings as he had the opportunity to listen to the witnesses and observe their demeanor. Gnall v. Gnall, 222 N.J. 414, 428 (2015). We discern no basis on this record to question the judge's credibility determinations.

We first address defendant's argument that the court erred by permitting plaintiff to testify to events not explicitly mentioned in the domestic violence complaint which were the subject of a prior domestic violence complaint that was dismissed. Due process requires a party receive "notice defining the issues and an adequate opportunity to prepare and respond." H.E.S. v. J.C.S., 175 N.J. 309, 321-22 (2003) (quoting McKeown-Brand v. Trump Castle Hotel & Casino, 132 N.J. 546, 559 (1993)). "There can be no adequate preparation where the notice does not reasonably apprise the party of the charges, or where the issues litigated at the hearing differ substantially from those outlined in the notice." Nicoletta v. N. Jersey Dist. Water Supply Comm'n of N.J., 77 N.J. 145, 162

(1978) (quoting Dep't of L. & Pub. Safety v. Miller, 115 N.J. Super. 122, 126 (App. Div. 1971)).

We are satisfied that defendant received "an adequate opportunity to prepare and respond" to plaintiff's complaint. J.C.S., 175 N.J. at 321-22 (quoting McKeown-Brand, 132 N.J. at 559). Plaintiff's May 7, 2021 domestic violence complaint noted: "[PLAINTIFF] STATED THAT [DEFENDANT] HAS ABUSED HER IN THE PAST BUT DID NOT REPORT IT. . . ." Plaintiff testified that defendant had punched her in the past. Defendant objected, claiming he did not have adequate notice of these allegations because plaintiff did not testify to the specific dates and times of this prior physical abuse. We reject defendant's argument that plaintiff needed to testify as to the specific dates and times of the prior physical abuse, so long as defendant received adequate notice of the allegations to defend against them. See Roe v. Roe, 253 N.J. Super. 418, 421-32 (App. Div. 1992) ("If the Legislature had intended to limit admissibility only to prior adjudications of domestic violence, as opposed to 'the previous history,' we are certain the statute would have clearly said so."). Further, the court offered defendant more time to prepare before permitting plaintiff's testimony. Accordingly, we discern no error from the court's permitting plaintiff to testify to defendant's past abuse.

The record also does not suggest plaintiff sought to re-litigate the incident in the tattoo parlor as a basis for an FRO. Defendant's May 7, 2021 outburst during a videocall with plaintiff served as the basis for this FRO. The court thus did not err in allowing plaintiff to testify to defendant's behavior in the tattoo parlor. The judge also did not err in allowing plaintiff to play a video recording of this incident.

We next address defendant's argument that the court erred in finding plaintiff established a predicate act of domestic violence by a preponderance of the evidence. The PDVA, N.J.S.A. 2C:25-19(a), "defines domestic violence by referring to a list of predicate acts that are otherwise found within the New Jersey Code of Criminal Justice." J.D., 207 N.J. at 473. If a plaintiff establishes that a predicate act has been committed by a preponderance of the evidence, the court must then make a finding that "relief is necessary to prevent further abuse." J.D., 207 N.J. at 476. Terroristic threats, prohibited by N.J.S.A. 2C:12-3, provides that:

> A person is guilty of a crime of the third[-]degree if he threatens to commit any crime of violence with the purpose to terrorize another or to cause evacuation of a building, place of assembly, or facility of public transportation, or otherwise to cause serious public inconvenience, or in reckless disregard of the risk of causing such terror or inconvenience.

[N.J.S.A. 2C:12-3(a)[3].]

However, we recently struck down the "reckless disregard" portion of N.J.S.A. 2C:12-3(a) as facially overbroad in violation of the First Amendment. State v. Fair, 469 N.J. Super. 538 (App. Div. 2021); U.S. Const. Amend. 1. In that case, we determined the "reckless disregard" portion of section (a) could swallow up constitutionally protected speech that falls short of unprotected "true threats." Id. at 548. Accordingly, we must analyze whether the record demonstrates that the court relied on the "reckless disregard" portion of N.J.S.A. 2C:12-3(a). We conclude it does not.

Our analysis depends on whether the court found defendant acted "with the purpose" to terrorize plaintiff. N.J.S.A. 2C:12-3(a). "A finding of a purpose [] may be inferred from the evidence presented," informed by "[c]ommon sense and experience[.]" D.M.R. v. M.K.G., 467 N.J. Super. 308, 323 (2021) (quoting

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[3] N.J.S.A. 2C:12-3 consists of two sections, (a) and (b). N.J.S.A. 2C:12-3(b) provides:

> "[a] person is guilty of a crime of the third degree if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out."

Because it is undisputed that defendant did not threaten to kill plaintiff, we do not address section (b).

State v. Hoffman, 149 N.J. 564, 577 (1997)). Indeed, "the previous history, if any, of domestic violence between the parties . . . . 'helps to inform the court regarding defendant's purpose, motive'" and "otherwise ambiguous communications or behavior[.]" J.D., 207 N.J. at 479 (quoting H.E.S. 175 N.J. 309, 327 (2003)). See also State v. Castagna, 387 N.J. Super. 598, 606 (App. Div. 2006).

In his oral opinion, the judge clearly explained:

> The [c]ourt finds that the statement that [defendant] admits to making was made **with the intent to frighten the plaintiff**, and accordingly the [c]ourt finds that the plaintiff has carried her burden of proof with regard to the predicate act of terroristic threats.
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> . . .
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> The [c]ourt is finding that restraint is necessary to prevent the reoccurrence of earlier domestic violence between the parties which is likely to occur given the history. . . .

The judge did not indicate that defendant acted "in reckless disregard" that his words would frighten plaintiff, nor did the judge utter anything of semantic equivalence. The judge found defendant made his statements "with the intent" to frighten plaintiff. "Common sense and experience" make clear the judge relied on the "purpose" portion of N.J.S.A. 2C:12-3(a), not the "reckless disregard" portion. D.M.R., 467 N.J. Super. at 323 (2021) (quoting Hoffman,

149 N.J. at 577). The record also makes clear that defendant's "conscious object" of his statement was to frighten plaintiff. J.D., 207 N.J. at 479 (quoting H.E.S., 175 N.J. at 327). Indeed, when plaintiff responded to defendant's first round of threats by asking "[I]s this a threat?" defendant responded by stating "Yes, it's a threat. I'm going to fuck you up and I'm going to fuck your boyfriend up." The record therefore amply supports that the judge relied on the "purpose" portion of N.J.S.A. 2C:12-3(a). The court explained this on the record, and therefore made adequate factual findings to support entry of an FRO.

We also reject defendant's contention that technological issues during the FRO proceedings violated his due process rights. "The United States Supreme Court has recognized the due process guarantee expressed in the Fourteenth Amendment to the United States Constitution includes 'the requirement of "fundamental fairness"' in a legal proceeding." In re Adoption of Child ex rel. M.E.B., 444 N.J. Super. 83, 88 (App. Div. 2016). While the New Jersey Constitution "does not expressly refer to the right to due process of law," the Supreme Court "has engrafted these protections upon Article I, Paragraph 1 of the State Constitution, concluding it also 'protect[s] against injustice and, to that extent, protect[s] values like those encompassed by the principle[s] of due process.'" Ibid. The right to due process entitles a civil litigant to, inter alia, a

fair hearing. Ibid. "Fundamentally, due process requires [notice and] an opportunity to be heard at a meaningful time and in a meaningful manner." Doe v. Poritz, 142 N.J. 1, 106 (1995). Due process is a flexible concept that depends upon the particular facts and circumstances of the case. Ibid.

The record is bereft of support for defendant's claim. Technological issues disrupted the FRO proceedings only a few times. Further, the FRO proceedings ran from 11:17 a.m. to 2:08 p.m. and again from 4 p.m. to 4:40 p.m. Defendant was consequently "heard at a meaningful time and in a meaningful manner." Poritz, 142 N.J. at 106.

Any arguments not addressed lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1).

Affirmed.

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

CLERK OF THE APPELLATE DIVISION