

RECORD IMPOUNDED

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parties in the case and its use in other cases is limited. R.1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1177-15T2

D.L.,

Plaintiff-Appellant,

v.

S.L.,

Defendant-Respondent.

Submitted May 16, 2017 — Decided July 28, 2017

Before Judges Suter and Grall.

On appeal from the Superior Court of New
Jersey, Chancery Division, Family Part, Bergen
County, Docket No. FV-02-2100-15.

D.L., appellant pro se.

Law Offices of Crew Schielke, L.L.C., attorneys for
respondent (Crew Schielke, on the brief).

PER CURIAM

Plaintiff D.L. appeals the October 6, 2015 order dismissing
her complaint filed under the Prevention of Domestic Violence Act
(the Act), N.J.S.A. 2C:25-17 to -35, and vacating the June 1, 2015

temporary restraining order (TRO) entered in her favor.¹ We affirm.

I.

On May 31, 2015, D.L. (Debbie) and S.L. (Steve),² who were divorcing, met in front of Steve's parents' house for Steve to drop off their two young children to Debbie, as they agreed to in a consent order from their matrimonial case. Another matrimonial order from April 2015 provided the parties "shall not introduce a significant other to the parties' children." In clear violation of that order, Steve arrived with his girlfriend in the car along with the children. Debbie became "upset," entered Steve's vehicle to pick up their son, while telling Steve he was violating the order. An argument commenced, which continued as Steve and Debbie transferred the children from Steve's to Debbie's vehicle. Debbie testified Steve pushed her repeatedly while she was holding their son. Steve said that Debbie hit him in the jaw as he was holding their daughter. When Steve was between the open car door and the car, Debbie tried to close the door on him, but in the process,

¹ Defendant S.L. did not appeal the dismissal of his complaint and TRO against D.L. arising from the same events.

² We use initials and pseudonyms throughout the opinion because of the underlying domestic violence litigation. R. 1:38-3. We have used first names for the parties because they have the same last name.

she was knocked to the ground. Steve then tried to take their son into the house, but Debbie wedged herself between him and the child. She claimed Steve put his hands on her neck and threatened to kill her. Debbie was secretly making an audio recording on her phone, just as she had done twelve times prior, but the recording was allegedly incomplete because it failed to record the threat. Steve was scratched and Debbie was bruised, although the bruises were not apparent immediately. She did not seek medical attention.

The police charged Debbie with assault. The parties separately applied for TROs from a municipal court judge, but no restraints were granted.

On June 1, 2015, Debbie filed a domestic violence complaint in the Superior Court, which alleged the predicate offenses of assault, N.J.S.A. 2C:12-1; harassment, N.J.S.A. 2C:33-4; and terroristic threats, N.J.S.A. 2C:12-3, and was granted a TRO against Steve. The complaint did not list any prior incidents of domestic violence, but did state defendant "is very violent, hot tempered, intimidating and threatening" and that he "has a history of drug abuse," and it listed three domestic violence docket numbers and a matrimonial docket number.

On June 5, 2015, Steve filed a domestic violence complaint in the Superior Court and applied for a TRO, which was granted.

His complaint alleged the predicate acts of assault, harassment and stalking, N.J.S.A. 2C:12-10(b).

The parties' complaints were tried together before a Family Division judge who was familiar with the parties through their matrimonial case. On October 6, 2015, following four days of trial, the judge entered an order that dismissed Debbie's domestic violence complaint because the court "determined that the plaintiff's allegations of domestic violence ha[ve] not been substantiated," and also dismissed the TRO.³

In its oral October 6, 2015 decision, the court found that it had the "benefit of seeing the parties . . . during the course of extended proceedings" and "to observe the parties." The court presided over their matrimonial action and "had the benefit of seeing the parties there, too." Because of this, the court stated it could "speak with a greater ability to address credibility, and . . . whether they are afraid of the other party."

In addressing the predicate acts, the court found the May 31 confrontation constituted "domestic contretemps" and was not domestic violence. Neither party proved an intent to harass. The court found Debbie did not prove Steve committed terroristic threats and rejected Steve's claim that Debbie stalked him.

³ Steve's domestic violence complaint also was dismissed but that order was not included in the record on appeal.

However, the court found "there was an assault" and that the parties purposely and recklessly "caused bodily injury to another, not of a serious nature."

The court declined to enter a restraining order, finding there was no need to "protect the victim from immediate danger or to prevent further abuse." The court took into account Debbie's testimony about the events on May 31 and her agreement in 2014 to dismiss a prior TRO. Debbie testified she feared Steve but when asked what she was afraid of answered "I don't know. I'm afraid that something is going to happen to me." The court did not "observe any . . . body language" that Debbie was "in fact . . . in fear of the defendant." As the court stated, "I sat and I observed her during the course of the proceedings, and my sense was not that she's afraid of her safety[.]" Further, the court found Debbie "knew exactly what she was doing" because she recorded twelve other contacts with Steve, none of which "yielded any incidents," and "was in a situation where she could control what she had to say because she knew exactly what she was doing." With respect to Steve, the court found there "was not a moment that [the court] felt that [Steve] was in any way afraid of his wife, and he needed a restraining order to protect his life, safety or well-being[.]" The court found "that [n]either party met, by a

preponderance of the evidence, that they needed a restraining order to protect their life, safety and well-being."

Debbie alleges on appeal that the court abused its discretion by relying on preconceived notions about the parties from the matrimonial proceedings, misapplying the law and circumventing court rules. These alleged errors included not admitting relevant evidence, denying certain cross-examination, not ruling on a specific charge or ruling on a charge that was not alleged, and in the court's conduct of the trial proceedings. Debbie alleges the court "led" defense counsel, abused its discretion in allowing Steve to ask questions of the judge and relied on inaccurate notes of the proceedings. We have considered these arguments in light of the record and applicable law and conclude none have merit.

II.

Our review of a trial court's factual findings is limited. Factual findings are binding on appeal when supported by adequate, substantial, credible evidence. Rova Farms Resort, Inc. v. Inv'r's Ins. Co., 65 N.J. 474, 484 (1974). Findings and conclusions of the trial judge are entitled to enhanced deference in family court matters. Cesare v. Cesare, 154 N.J. 394, 413 (1998). We defer to credibility assessments made by a trial court unless they are manifestly unsupported by the record, because the trial court had the critical ability to observe the parties' conduct and demeanor

during the trial. See N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008); Weiss v. I. Zapinsky, Inc., 65 N.J. Super. 351, 357 (App. Div. 1961). We are mindful of the deference owed to the determinations made by family judges who hear domestic violence cases. See Cesare, supra, 154 N.J. at 411-12.

The entry of a domestic violence restraining order requires the trial court to make certain findings. See Silver v. Silver, 387 N.J. Super. 112, 125-26 (App. Div. 2006). 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. The court should make this determination "in light of the previous history of violence between the parties." Ibid. (quoting Cesare, supra, 154 N.J. at 402). Next, the court must determine whether a restraining order is required to protect the party seeking restraints from future acts or threats of violence. Id. at 126-27. That means "there [must] be a finding that 'relief is necessary to prevent further abuse.'" J.D. v. M.D.F., 207 N.J. 458, 476 (2011) (quoting N.J.S.A. 2C:25-29(b)).

We discern no error by the court in its conclusion that the predicate acts of harassment and terroristic threats were not proven by a preponderance of the evidence. "The Supreme Court has emphasized the care a trial court must exercise to distinguish

between ordinary disputes and disagreements between family members and those acts that cross the line into domestic violence." R.G. v. R.G., 449 N.J. Super. 208, 225 (App. Div. 2017) (citing J.D., supra, 207 N.J. at 475-76). In Peranio v. Peranio, 280 N.J. Super. 47, 56-57 (App. Div. 1995), we found the Act was not intended to address a "domestic contretemps" such as bickering or arguments between married parties.

A person commits the offense of harassment if, "with purpose to harass another, he . . . [s]ubjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so." N.J.S.A. 2C:33-4(b). In evaluating a defendant's intent, a judge is entitled to use "[c]ommon sense and experience." State v. Hoffman, 149 N.J. 564, 577 (1997). 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," and "[p]rior conduct and statements may be relevant to and support an inference of purpose." State v. Castagna, 387 N.J. Super. 598, 606 (App. Div.), certif. denied, 188 N.J. 577 (2006); see also H.E.S. v. J.C.S., 175 N.J. 309, 327 (2003) ("'[A] purpose to harass may be inferred from . . . common sense and experience.'" (quoting Hoffman, supra, 149 N.J. at 577)).

A person commits the offense of terroristic threats if "he threatens to commit any crime of violence with the purpose to

terrorize another." N.J.S.A. 2C:12-3(a). The offense is also committed if a person "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." N.J.S.A. 2C:12-3(b).

The court's rejection of both the harassment and terroristic threats charges rested squarely on its credibility determination that although the parties' argument escalated to a physical encounter, there was no evidence of a purpose or intent by Steve to engage in the confrontation in order to harass Debbie, or to threaten violence or imminent fear of death. The court found the parties behaved "miserably" toward each other, but that what occurred was "domestic contretemps" and not domestic violence.

The court did find that assault occurred. A simple 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' means physical pain, illness or any impairment of physical condition[.]" N.J.S.A. 2C:11-1(a). We agree with the trial court that the record supported the claim of assault because the parties recklessly caused minor injury to each other during the incident.

This finding did not end the analysis required by the Act. "Commission of a predicate act is necessary, but alone

insufficient, to trigger relief provided by the Act." R.G., supra, 449 N.J. Super. at 228 (citing Silver, supra, 387 N.J. Super. at 126-27 (stating once a plaintiff establishes a predicate act, the court must determine "whether a restraining order is necessary, upon an evaluation of the [factors] . . . to protect the victim from an immediate danger or to prevent further abuse")); see also Bittner v. Harleysville Ins. Co., 338 N.J. Super. 447, 454 (App. Div. 2001). A court must also consider additional factors that include "(1) [t]he previous history of domestic violence between the [parties], including threats, harassment and physical abuse; (2) [t]he existence of immediate danger to person or property; . . . [and] (4) [t]he best interests of the victim and any child." N.J.S.A. 2C:25-29(a)(1), (2) and (4).

We defer to the Family Part judge's credibility assessments because she had the ability to observe the parties in the domestic violence trial and their matrimonial proceedings. See Cesare, supra, 154 N.J. at 412-13. Debbie expressed that she was fearful of Steve, but she could not say what she feared. Her body language did not show fear. Debbie "knew what she was doing" when she secretly recorded defendant. Of the twelve prior contacts that were recorded, there were no incidents indicating immediate danger. Debbie agreed to dismiss a prior TRO because she lacked proof. On this record, we agree with the trial court's finding

based on its credibility assessment that Debbie did not establish the need for a restraining order.

The other arguments raised on appeal present limited need for discussion. Debbie claims that a singular statement in a case management conference suggested that the court held preconceived beliefs about the parties. We are confident based on our review of the proceedings that the court decided the case based on the evidence without any bias or pre-judgment by the trial court.

Debbie contends the court erred in making certain evidentiary rulings. Our review "is limited to examining the decision for abuse of discretion." Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008) (citing Brenman v. Demello, 191 N.J. 18, 31 (2007)). "Considerable latitude is afforded a trial court in determining whether to admit evidence, and that determination will be reversed only if it constitutes an abuse of discretion." State v. Feaster, 156 N.J. 1, 82 (1998) (citations omitted), cert. denied, 532 U.S. 932, 121 S. Ct. 1380, 149 L. Ed. 2d 306 (2001); see also State v. J.A.C., 210 N.J. 281, 295 (2012) (citations omitted). An appellate court should not substitute its own judgment for that of the trial court, unless "the trial court's ruling 'was so wide of the mark that a manifest denial of justice resulted.'" State v. Marrero, 148 N.J. 469, 484 (1997) (quoting State v. Kelly, 97 N.J. 178, 216 (1984)).

Much of Debbie's criticism focused on her requests to expand testimony about a party for Steve's father on May 23, 2015. We are fully satisfied, however, that the court did not abuse its discretion in its evidentiary rulings with respect to the May 23rd party.

The court did not err in permitting Steve's counsel to present evidence in support of the stalking claim after he seemed to rest his case. His failure appeared to be inadvertent, the trial was still in progress, Debbie's counsel had a full opportunity to cross-examine Steve, and there was no prejudice given the court's ruling that Steve failed to prove the claim. A trial is to be a "search for truth." See McKenney v. Jersey City Med. Ctr., 167 N.J. 359, 370 (2001) (citation omitted); Kernan v. One Wash. Park Urban Renewal Assocs., 154 N.J. 437, 467 (1998) (Pollock, J., concurring). The court's ruling was consistent with that objective.

On appeal, Debbie relies on a magazine article from the "The Police Chief" to support her contention that she was stalked, but she did not allege that predicate act in her domestic violence complaint nor was the article part of the evidence before the trial court. The trial court properly did not make any ruling on her allegation she was stalked by Steve, because it was never part

of her complaint and her counsel acknowledged "[i]t's a - - defense. It's not - - a claim."

Debbie's contention the judge did not rule on her terroristic threats claim is erroneous because the judge stated, "I certainly don't find that there were terroristic threats that occurred" Even if this comment related to Steve's claim against Debbie instead of her claim against him, she was not prejudiced because of the court's finding that a restraining order was not necessary to protect either of the parties.

Debbie's further arguments are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION