

## RECORD IMPOUNDED

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Although it is posted on the internet, this opinion is binding only on the  
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-1760-15T3

K.R.,

Plaintiff-Appellant,

v.

V.R.,

Defendant-Respondent.

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V.R.,

Plaintiff-Respondent,

v.

K.R.,

Defendant-Appellant.

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Argued June 6, 2017 – Decided June 26, 2017

Before Judges Fasciale and Gilson.

On appeal from Superior Court of New Jersey,  
Chancery Division, Family Part, Mercer County,  
Docket Nos. FV-11-315-16 and FV-11-320-16.

Daniella Gordon argued the cause for  
appellant.

Jennifer Zoschak argued the cause for respondent (Oswald & Zoschak, P.C., attorneys; Ms. Zoschak, on the brief).

PER CURIAM

In these consolidated appeals, K.R. (plaintiff) appeals from an October 13, 2015 dismissal of a temporary restraining order (TRO) she obtained against V.R. (defendant), and a final restraining order (FRO) defendant obtained against her entered pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. We reverse and remand for further proceedings consistent with this opinion.

In 2012, the parties had a son together, and later married in 2014. The parties had an argument on September 4, 2015. Plaintiff alleged that on that date, defendant had harassed her, assaulted her, and engaged in criminal mischief. Defendant alleged that plaintiff had harassed him and engaged in terroristic threats. They both obtained TROs against each other.

At the FRO hearing, the judge took testimony from the parties and defendant's cousin. Plaintiff testified that defendant verbally assaulted her, and then grabbed her and pushed her. Defendant testified that plaintiff blocked him from exiting the bathroom, threatened him with a knife, and tossed a potted plant at him striking him in the head. The cousin testified plaintiff admitted to her that she had thrown the plant at defendant.

The judge entered the orders under review by primarily relying on the testimony from the cousin. He denied plaintiff's request for an FRO, and dismissed and vacated the TRO she obtained against defendant. He gave no reasons for the vacation of the TRO. The judge granted defendant's request for an FRO. The judge rendered a short oral opinion.

On appeal, plaintiff argues that the judge erred by failing to (1) admit into evidence photographs and audio recordings; (2) make sufficient findings of fact and conclusions of law; and (3) issue the orders based on inadequate evidence.

In a domestic violence case, we accord substantial deference to a Family Part judge's findings, which "are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 412 (1998). We accord that deference especially when much of the evidence is testimonial and implicates credibility determinations. Ibid. We do not disturb the judge's factual findings and legal conclusions, 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." Ibid. (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)).

When determining whether to grant an FRO pursuant to the PDVA, the judge must make two determinations. Silver v. Silver, 387 N.J. Super. 112, 125-26 (App. Div. 2006). Under the first Silver prong, 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. The parties alleged the following predicate acts: harassment, terroristic threats, and criminal mischief.

A person is guilty of harassment where, "with purpose to harass another," he or she:

- a. Makes, 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. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or
- c. Engages 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)-(c).]

Harassment requires that the defendant act with the purpose of harassing the victim. J.D. v. M.D.F., 207 N.J. 458, 486 (2011).

A judge may use "[c]ommon sense and experience" when determining a defendant's intent. State v. Hoffman, 149 N.J. 564, 577 (1997).

N.J.S.A. 2C:12-3, terroristic threats, states:

a. 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. . . .

b. 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.

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" is "physical pain, illness or any impairment of physical condition[.]" N.J.S.A. 2C:11-1(a).

N.J.S.A. 2C:17-3(a)(1) provides in pertinent part that "[a] person is guilty of criminal mischief if he . . . [p]urposely or knowingly damages tangible property of another." The term "'[p]roperty of another' includes property in which any person other than the actor has an interest which the actor is not privileged to infringe, regardless of the fact that the actor also

has an interest in the property." N.J.S.A. 2C:20-1(h). In N.T.B. v. D.D.B., 442 N.J. Super. 205, 219 (App. Div. 2015), we held that married parties who jointly own a home each hold "a separate and distinct interest" in the residence. Therefore, if one party "purposely or knowingly" damages that property, he or she has committed the predicate act of criminal mischief. Id. at 217, 219-20.

The judge did not make sufficient findings of fact as to these predicate acts. He found that plaintiff assaulted defendant, but did so in a summary fashion, which prevents our full review of that finding. Rule 1:7-4(a) "requires specific findings of fact and conclusions of law." Pressler & Verniero, Current N.J. Court Rules, comment 1 on R. 1:7-4 (2017). On this record, we are also unable to determine whether the judge found the parties established the other alleged predicate acts.

Under the second Silver prong, a judge must also determine whether a restraining order is required to protect the plaintiff from future acts or threats of violence. Silver, supra, 387 N.J. Super. at 126-27. Under that determination, there must be a finding that "relief is necessary to prevent further abuse." J.D., supra, 207 N.J. at 476 (quoting N.J.S.A. 2C:25-29(b)). It is well established that commission of one of the predicate acts of domestic violence set forth in N.J.S.A. 2C:25-19(a) does not, on

its own, "automatically . . . warrant the issuance of a domestic violence [restraining] order." Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. 1995). Although that determination "is most often perfunctory and self-evident, 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 -29(a)(6)], to protect the victim from an immediate danger or to prevent further abuse." Silver, supra, 387 N.J. Super. at 127. The judge made no findings as to the second Silver prong.

We would have remanded for a statement of reasons and conclusions of law, but the evidentiary errors require a reversal and a new FRO hearing on both TROs.


"As a general rule, admission or exclusion of proffered evidence is within the discretion of the trial judge whose ruling is not disturbed unless there is a clear abuse of discretion." Dinter v. Sears, Roebuck & Co., 252 N.J. Super. 84, 92 (App. Div. 1991). Evidence with probative value to a material issue is relevant. N.J.R.E. 401. All relevant evidence is admissible unless excluded by evidential rule or statute. N.J.R.E. 402. N.J.R.E. 403 requires the balancing or weighing of probative value against undue prejudice and places the burden on a party urging exclusion to show that the prejudice substantially outweighs the probative value justifying its exclusion.

In evaluating a claim of domestic violence, the court may consider the plaintiff's circumstances and past incidents of abuse. Cesare, supra, 154 N.J. at 405 (citing Hoffman, supra, 149 N.J. at 585). "Although a court is not obligated to find a past history of abuse before determining that an act of domestic violence has been committed in a particular situation, a court must at least consider that factor in the course of its analysis." Id. at 402. There was no such analysis here.

Importantly, the judge did not admit into evidence the photographs or audio recordings offered by plaintiff. Both were relevant. The photographs allegedly depicted plaintiff's injuries, and plaintiff contended they were also relevant on credibility grounds. The audio recordings purportedly proved her allegations of assault.

We therefore reverse the orders, remand, and direct that the court conduct an FRO hearing anew.

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

  
CLERK OF THE APPELLATE DIVISION