RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2137-15T4

T.F.,

Plaintiff-Respondent,

v.

F.S.,

Defendant-Appellant.

Argued December 20, 2016 – Decided July 7, 2017

Before Judges Leone and Vernoia.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket No. FV-03-0797-16.

Daniel E. Rybeck argued the cause for appellant (Weir & Partners, LLP, attorneys; Mr. Rybeck, on the briefs).

Brenda R. Maneri argued the cause for respondent (Sitzler and Sitzler, attorneys; Ms. Maneri, on the brief).

PER CURIAM

Defendant F.S. appeals from a December 14, 2014 final restraining order (FRO). We vacate the FRO and remand for a new hearing.

I.

Plaintiff T.F. and defendant began dating in 2012, and started living together in 2013. They broke up on November 9, 2015, when defendant moved out.

On November 14, 2015, plaintiff filed her original complaint under the Prevention of Domestic Violence Act of 1991 (Act), N.J.S.A. 2C:25-17 to -35. She alleged that after they broke up, defendant texted her accusing her of taking his car keys. When she texted him telling him not to contact her again, he sent her three text messages and an e-mail, which she charged constituted the predicate act of harassment. She said there was no history of domestic violence. A municipal court judge issued a temporary restraining order (TRO).

On November 18, 2015, plaintiff filed her first amended complaint seeking an FRO based on the originally-charged predicate act of harassment. However, she also alleged a prior history of domestic violence in 2013, 2014, and 2015. The prior history included an allegation defendant performed unwanted oral sex on her and then vaginally raped her on October 31, 2015. She alleged harassment and sexual assault charges were pending. Another

municipal court judge noted the complaint was being "amended for past history."

On December 1, 2015, plaintiff filed her second amended complaint adding sexual assault as a predicate act. She stated: "Initial predicate included a sexual assault incident but the box for sexual assault crime was not checked off." She also stated she had to amend the TRO to include sexual assault because the police "wanted to leave it off the initial TRO in hopes of doing a consensual intercept with [defendant]." The trial court allowed plaintiff to amend "to add to predicate and history."[1]

The trial court held the FRO hearing on December 10, 2015. Plaintiff testified as follows about the alleged October 31 sexual assault. She and defendant were having an in-home date night when she took a call from a male graduate school classmate. Defendant became angry. Plaintiff apologized and went to bed. Defendant grabbed her arm, flipped her onto her back, and forcefully jammed his tongue down her throat. She told him to stop, but he kept butting his face into her face and tried unsuccessfully to penetrate her vaginally. He performed oral sex on her, and she

[1] Plaintiff also listed as another predicate act of harassment that defendant gave her "intimidating looks of disgust" in the courthouse on November 19, 2015 and tried to leave with her.

told him to stop. He asked her to perform oral sex on him, but she refused. He then penetrated her vaginally.

Plaintiff testified that the next day she told defendant she was sore and torn from the vaginal penetration. She also testified she sought medical attention on November 6, 2015.

Plaintiff testified she did not report the sexual assault to the police initially because she "was petrified" defendant would retaliate and she needed to get her family involved. She testified she first reported the sexual assault to the police on November 10, 2015.[2]

On redirect, plaintiff testified she told the police about the sexual assault on November 9 and 10, 2015, but an officer did not want her to include the sexual assault in the original complaint because the police were considering recording with plaintiff's consent a conversation between plaintiff and defendant's knowledge a consensual intercept and "did not want to let [defendant] know that there was an active investigation" into the sexual assault. She testified she amended the complaint to mention the sexual assault, but a court officer or domestic

[2] Plaintiff did not testify on direct about the originally-charged predicate act of harassment by text and e-mail. She briefly testified defendant gave her a "death glare" in the courthouse on November 19. He disputed her version.

violence liaison did not check off the sexual assault box, so plaintiff had to amend the complaint again.

Defendant testified he and plaintiff had consensual intercourse on October 31 and he did not do anything forcibly or against her will. He testified that, on the day they broke up, she said she was going to call the police and say he assaulted her.

At the conclusion of the December 10 FRO hearing, after closing arguments, the trial court deferred issuing its opinion until December 14. The court stated it was concerned with "the delay in – alleging that the sexual assault took place" and "the fact that this sexual assault case was not presented to the Court by way of a temporary restraining order until much later." Plaintiff's counsel offered to call the detective who took plaintiff's statement; the court said it would "love to hear from" him. Defendant's counsel asked to be allowed to confront the detective and to subpoena rebuttal witnesses.

On December 14, plaintiff called Detective Damiano DePinto. DePinto provided the parties with a police report concerning his and his department's investigation of plaintiff's allegations. He then testified as follows. He did not become involved with the investigation until November 14, when he took plaintiff's statement. He was not involved on November 10 when plaintiff made

her initial report. However, based on his "reading the report," he testified she complained of harassment and sexual assault but did not apply for a TRO. On November 14, she applied for a TRO, and "the Judge was advised of the entirety of what she was alleging, but for investigative reasons, we had left off the allegations of sexual assault and just left the harassment on there." The judge found no probable cause for the criminal complaints but granted the TRO. A day or two later, the prosecutor's office indicated the plan to record a conversation between plaintiff and defendant "couldn't be done with the restraining order in effect."

On cross-examination, defendant's counsel marked the police report DePinto had just provided. The trial court sustained objections to defense counsel's attempt to use the report to cross-examine Detective DePinto and refused to allow him to call DePinto or plaintiff in rebuttal to cross-examine them with the report.

The trial court credited plaintiff's testimony that defendant had sexually assaulted her. The court also found plaintiff's delay in reporting the sexual assault "was driven by the prosecutor's office, as well as the police department." The court issued an FRO.

II.

Defendant argues the trial court erred in refusing to allow testimony regarding the police report and its information about plaintiff's reasons for the delay in filing a complaint alleging sexual assault. We must hew to our standard of review. "'[C]onsiderable 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. Kuropchak, 221 N.J. 368, 385 (2015) (citation omitted). "Under that standard, 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."'" Ibid. (citations omitted).

We find the trial court abused its discretion. Although the police report corroborated some aspects of plaintiff's testimony, it was inconsistent with her claim that she did not initially seek a TRO for sexual assault because the police told her they hoped to conduct a consensual intercept with defendant.

The November 10 portion of the report, prepared by Officer Glen Horay, stated as follows. Plaintiff told Horay that defendant forced her to have sexual intercourse on October 31, but that she did not report the incident prior to November 10 "because she wanted to speak to her counselor first." Horay told plaintiff she

could apply for a TRO immediately, but she "chose not to pursue any charges against [defendant] at this time," and she signed a form "declining an immediate restraining order." She told Horay "she was going to wait and see if [defendant] has any further contact with her and that if he does, she would respond back to apply for a restraining order." She asked Horay not to contact defendant about her allegations "because she is hoping that he just leaves her alone." Horay concluded no police action was required.

A November 24 portion of the report prepared by Horay stated that on November 14 plaintiff said she wanted to apply for a TRO and pursue charges against defendant. The report did not state that the police told plaintiff not to include the sexual assault allegations in her initial complaint because the police were trying to do a consensual intercept of defendant.

When defendant's counsel tried to cross-examine DePinto about plaintiff's "wait and see" statement, the trial court sustained the objection because the statement was referenced in Horay's report, not DePinto's report, and DePinto had "no knowledge of that." However, plaintiff's counsel already elicited DePinto's testimony about plaintiff's initial statements to Horay on November 10.

The trial court also would not allow defendant's counsel to cross-examine DePinto about the portion of the report DePinto prepared on November 20. DePinto's portion of the report related plaintiff's November 14 statements about the sexual assault, including a statement that she sought treatment from a medical provider on November 6 but did not tell the provider she was sexually assaulted until the yeast and bacterial results "eventually" came back. When defendant's counsel tried to ask DePinto if plaintiff made that statement, the court sustained an objection, ruling DePinto was called just to determine "whether there was a substantial delay or a delay as a result of police investigation."

Defendant's counsel asked to call DePinto on rebuttal, but the trial court ruled: "There's no rebuttal. It's just a matter of making a determination as to whether or not . . . this complaint of sexual assault was delayed by the police or by the Judge or by . . . the plaintiff." When defendant's counsel pointed out he had just received the information in the report, the court ruled it would not "allow any further examination of the officer. He's here for one purpose and one purpose only."

The trial court also precluded cross-examination of plaintiff about the information in the report which was inconsistent with her testimony. Defendant's counsel argued he had no opportunity

to cross-examine plaintiff with the information in the newly-provided report. He asked to call plaintiff in rebuttal. The court denied that request, stating: "[W]hen you were last here, I heard all the testimony, and there was my request with regard to having . . . the detective here to make a determination as to the delay"; "that's the extent of it"; and "[i]t's over and done with, counsel." However, after hearing "all the testimony" presented by both parties on December 10, the court allowed plaintiff to reopen the record on December 14 to present additional testimony from DePinto which the court thought had been lacking, but prevented defendant from presenting any additional testimony in rebuttal.

A trial court has discretion on whether to reopen the record, but "consideration should be given to the prejudice to the opposing party." State v. Cullen, 428 N.J. Super. 107, 111-12 (App. Div. 2012) (citing State v. Menke, 25 N.J. 66, 71 (1957)). A defendant should not be "precluded from offering such rebuttal proofs as he might choose" that are responsive and admissible. See State v. Menke, 44 N.J. Super. 1, 7 (App. Div.), aff'd, 25 N.J. 66 (1957); see State v. Sturdivant, 31 N.J. 165, 178 (1959) (upholding the admission of additional evidence where "the trial court offered the defense an opportunity to produce surrebuttal evidence"), cert. denied, 362 U.S. 956, 80 S. Ct. 873, 4 L. Ed. 2d 873 (1960).

Similarly, a trial court may "exercise reasonable control over the mode and order of interrogating witnesses." N.J.R.E. 611(a). "We recognize that 'the trial court has a wide range of discretion regarding the admissibility of proffered rebuttal evidence.'" Casino Reinvestment Dev. Auth. v. Lustgarten, 332 N.J. Super. 472, 497 (App. Div.) (citation omitted), certif. denied, 165 N.J. 607 (200). However, defendant's proposed "rebuttal" testimony from DePinto and plaintiff "both challenged and contradicted testimony produced for the [plaintiff]" and "was neither cumulative nor repetitive of testimony offered in [defendant]'s case." See id. at 497, 498 (finding the exclusion of "rebuttal testimony was an abuse of discretion").

Further, "[r]ebuttal evidence is permissible when necessary because of new subjects introduced on direct or cross-examination of [the] witnesses." State v. Cook, 330 N.J. Super. 395, 418 (App. Div.), certif. denied, 165 N.J. 486 (2000). Here, not only did DePinto's testimony introduce new subjects, but he produced a report previously unknown to defendant which was inconsistent with plaintiff's testimony.

Plaintiff stresses the trial court's statements that it wanted to hear from DePinto about "the delay in filing" and about "when the sexual assault was recorded in relation to the TRO being filed." Although ordinarily "[c]ross-examination should be

limited to the subject matter of the direct examination and matters affecting the credibility of the witness," N.J.R.E. 611(b), "nevertheless, reasonable latitude should be permitted to assure [the cross-examination's] inclusion of relevant material." Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, 1991 Supreme Court Committee Comment on N.J.R.E. 611 (2016). The cross-examination sought by defendant was relevant and went to what the court had identified as a key issue — plaintiff's delay in reporting the alleged sexual assault. Indeed, defendant's question about plaintiff's decision not to seek a TRO on November 10 was within the scope of DePinto's testimony on direct.

The trial court disallowed that question because it asked DePinto about the portion of the report prepared by Officer Horay, but plaintiff had already opened the door by asking DePinto about plaintiff's statement on November 10 even though he lacked personal knowledge and was basing his testimony on Horay's portion of the report. "The 'opening the door' doctrine is essentially a rule of expanded relevancy and authorizes admitting evidence which otherwise would have been irrelevant or inadmissible in order to respond to (1) admissible evidence that generates an issue, or (2) inadmissible evidence admitted by the court over objection." State v. James, 144 N.J. 538, 554 (1996). By questioning DePinto about plaintiff's statement to Horay about which DePinto had no personal

knowledge, plaintiff "open[ed] the door to introduction of other parts of that statement." State v. Farthing, 331 N.J. Super. 58 (App. Div.), certif. denied, 165 N.J. 530 (2000). Allowing plaintiff to elicit that plaintiff told the police about the sexual assault on November 10, while precluding defendant from showing why she chose not to seek a TRO on November 10, "runs counter to the sense of fairness our cases and rules strive to achieve." State v. B.M., 397 N.J. Super. 367, 380-81 (App. Div. 2008).

"[O]rdinary due process protections apply in the domestic violence context, notwithstanding the shortened time frames for conducting a final hearing[.]" J.D. v. M.D.F., 207 N.J. 458, 478 (2011). Improperly "denying defendant the opportunity to cross-examine witnesses or to present witnesses violates due process." Id. at 481 (citing Peterson v. Peterson, 374 N.J. Super. 116, 124-26 (App. Div. 2005)). Thus, in J.D., our Supreme Court held the trial court violated due process by not allowing the defendant to question the plaintiff's boyfriend because the court "decided that plaintiff's proofs sufficed." Ibid. In Peterson, supra, we held the trial court erred in not allowing the defendant to cross-examine the plaintiff and her witness or call witnesses. 374 N.J. Super. at 124-26. Citing J.D. and Peterson, we recently ruled in another domestic violence case

> that the trial judge erred when he barred plaintiff from calling defendant to the witness stand. Neither the rules of procedure nor the rules of evidence prohibit a civil litigant from calling an adverse party to testify. And, even though we recognize that trials in domestic violence matters are usually brief, loosely-conducted affairs, our courts must be vigilant to ensure that parties' procedural due process rights are maintained.
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> [N.B. v. S.K., 435 N.J. Super. 298, 308 n.12 (App. Div. 2014).]

Here, the trial court similarly abused its discretion. "The trial court undoubtedly exercised its judgment with the best of intentions; however, we are unable to determine to what extent plaintiff's domestic violence claims might have been successfully challenged if defendant had not been deprived of his constitutional right to due process and a fair trial." Peterson, supra, 374 N.J. Super. at 125. Thus, we must vacate the FRO and remand.

III.

Defendant argues plaintiff failed to offer sufficient evidence to show a predicate act of domestic violence. To the contrary, she presented sufficient evidence for the trial court to find a "sexual assault," which is a predicate act under the Act. N.J.S.A. 2C:25-19(a)(7); see N.J.S.A. 2C:14-2.[3]

[3] It is unclear whether the trial court found defendant committed a predicate act of harassment. The court made no mention of the

Defendant also contends the trial court erred in determining that "a restraining order is necessary, upon an evaluation of the fact[or]s set forth in N.J.S.A. 2C:25-29a(1) to -29a(6), to protect the victim from an immediate danger or to prevent further abuse." J.D., supra, 207 N.J. at 475-76 (quoting Silver v. Silver, 387 N.J. Super. 112, 126-27 (App. Div. 2006)). In making that determination, a court must consider "[t]he previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse." N.J.S.A. 2C:25-29(a)(1); accord Silver, supra, 387 N.J. Super. at 126.

Plaintiff testified defendant had a previous history of domestic violence. In particular, she alleged that on July 19, 2015, he jumped on top of her, angrily butted his head into her head, and loudly demanded who she was "f**king," making her "very fearful." That testimony, coupled with her testimony that defendant sexually assaulted her on October 31, 2015, was sufficient for the trial court to find an FRO was needed. Indeed,

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originally-charged harassment by text and e-mail. The court mentioned that plaintiff believed there were "some intimidating observations" on November 19, but made no other findings concerning that charge. The court later stated "that harassment would be incorporated in the whole picture of events here, but that the sexual assault . . . is prevalent in this matter." Neither party addresses the validity of any harassment finding, nor do we, as we are remanding for a new hearing in any event.

"one sufficiently egregious action [may] constitute domestic violence under the Act, even with no history of abuse between the parties." Cesare v. Cesare, 154 N.J. 394, 402 (1998).[4]

Thus, the testimony offered by plaintiff, if credited, provided sufficient evidence to find a sexual assault and a need for an FRO. Nonetheless, we must vacate the FRO and remand due to the trial court's preclusion of the cross-examination and calling of witnesses to test the credibility of that testimony. In light of that history, "we direct, in an abundance of caution, that a different judge be assigned to conduct the new [FRO] hearing so that credibility assessments may be made anew." State v. Hreha, 217 N.J. 368, 386 (2014).[5]

[4] Plaintiff also testified as follows. In December 2013, defendant complimented her "ass" and smacked it hard, leaving a handprint. He angrily flipped two folding tables during an argument in January or February 2014. In May 2014, he moved out, then kept trying to find and talk to her begging for another chance, was told to leave by her father, and threatened her father. During an argument on April 4, 2015, defendant bit his knuckle and revved his car engine when she was in front of the car, scaring her. While assembling furniture on October 25, 2015, he angrily told her: "You have a hard f**king head. You do not need a drill." Defendant disputed plaintiff's version of the prior history. We need not comment or rely on these prior acts alleged by plaintiff.

[5] As we are remanding, we need not address defendant's assertions that the trial court relied on a recording it had ruled inadmissible, misapprehended that there was a "medical assessment" of the sexual assault, or misstated that defendant "often" tried to reconcile with plaintiff.

Vacated and remanded for a new hearing on whether to issue an FRO. The TRO remains in place. We do not retain jurisdiction.