SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2282-15T3

E.G.,

Plaintiff-Respondent,

v.

A.G.,

Defendant-Appellant.

Submitted March 14, 2017 – Decided March 27, 2017

Before Judges Leone and Vernoia.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FV-02-1181-16.

Law Offices of Ian J. Hirsch & Associates, L.L.C., attorneys for appellant (Mr. Hirsch, on the briefs).

Kathryn A. Gilbert, attorney for respondent.

PER CURIAM

Defendant, A.G.,[1] appeals from a January 13, 2016 final restraining order (FRO) entered in favor of his wife, plaintiff E.G., pursuant to the New Jersey Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, following a trial. We affirm.

I.

On December 23, 2015, plaintiff filed a domestic violence complaint alleging that over a three-week period defendant committed the predicate act of harassment, N.J.S.A. 2C:33-4, by verbally abusing and harassing plaintiff in person and by text message, striking her in the right eye on December 11, 2015, and preventing her departure from a store parking lot on December 23, 2015. A temporary domestic violence restraining order was entered, and the matter was scheduled for trial on plaintiff's request for a final restraining order.

At the trial, the only witnesses presented were plaintiff and defendant. Based on the judge's observations of the demeanor of the witnesses and his consideration of their testimony, the judge concluded plaintiff's testimony was credible and defendant's was not.

[1] We employ initials to protect the identity of the victim and her family.

The evidence showed plaintiff and defendant are married with six children. At some time prior to December 11, 2015, defendant vacated the parties' marital home. It appears his departure was the result of discord over defendant's suspicion plaintiff was having an affair with a former employee of the parties' business.

At approximately 7:00 a.m. on December 11, 2015, defendant returned to the parties' home and found plaintiff in bed sleeping. He entered the bedroom uninvited, asked two of their children who were present to leave, and argued with plaintiff. Defendant acknowledges he was in the home and addressed the suspected affair with plaintiff. According to plaintiff, defendant slapped her across her face with his left hand, causing her eye to redden and a bruise. Defendant said to plaintiff, "I didn't hit you that hard."

On December 23, 2015, plaintiff was in a local store waiting in line to buy coffee. Defendant was informed plaintiff was in the store and traveled there to see her. Plaintiff saw defendant entering the store and left to avoid a confrontation or argument with defendant inside the store.

Plaintiff exited the store and defendant followed. She walked toward her car and asked defendant to leave. He did not. Defendant followed plaintiff to her car. Once plaintiff was inside the car, defendant held her door open, preventing her from closing the door

and driving away. As defendant held plaintiff's car door open, she feared he would commit "another act of domestic violence." When she was finally able to close the door, defendant attempted to open the rear door of the car but was thwarted when plaintiff locked the car's doors. Plaintiff then drove away. She picked up her children, drove to the police station, and filed the domestic violence complaint.

During the three weeks prior to December 23, 2015, defendant called the parties' house "incessantly" and if plaintiff did not answer her cellphone, defendant would call the house "every five minutes or [] would just text [plaintiff]." If plaintiff did not respond, "it would get worse." Defendant's phone calls during this period would take place "any time," including in the "middle" of the night and "all night." She would answer the calls, tell him the children were sleeping, and hang up, but he would call back. During this time, plaintiff requested that defendant stop calling, but he continued. She eventually turned the ringers off on all of the phones in the house to avoid defendant's calls.

At trial, defendant denied hitting plaintiff on December 11, 2015. He acknowledged traveling to the store on December 23, 2015, but denied preventing plaintiff from closing her car door or preventing her from leaving the premises. Defendant did not dispute calling and texting plaintiff on numerous occasions. He stated the

calls and texts were welcomed by plaintiff. Defendant explained that the source of the parties' marital discord was plaintiff's alleged affair and that he addressed the affair with plaintiff during the December 11, 2015 incident in the bedroom and on December 23, 2015, at the store.

The judge found plaintiff proved the predicate act of harassment under N.J.S.A. 2C:33-4. The judge concluded defendant violated N.J.S.A. 2C:33-4(b) by slapping plaintiff in the face on December 11, 2015, causing plaintiff's injury. The judge found defendant violated N.J.S.A. 2C:33-4(a) by communicating with plaintiff on the phone and by text incessantly and during the middle of the night, and in a manner likely to cause plaintiff annoyance or alarm. The court also determined that defendant's actions, including those that took place at the store, constituted a course of alarming conduct undertaken with the purpose to alarm or seriously annoy plaintiff in violation of N.J.S.A. 2C:33-4(c).

The judge further found defendant's actions were motivated by his anger over plaintiff's alleged affair, and that defendant "physically [took his anger] out on" plaintiff. The judge determined defendant's actions represented a "cycle of control and manipulation," and concluded defendant's actions and anger caused plaintiff fear. The judge recognized there was no prior history of domestic violence between the parties. However, she relied on

defendant's course of conduct constituting the commission of the predicate offense, and concluded plaintiff established a need for a final restraining order to prevent future acts of domestic violence. The judge entered a final restraining order (FRO). Defendant appealed.

II.

We defer to the factual findings of a trial court unless "they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Gnall v. Gnall, 222 N.J. 414, 428 (2015). "[F]indings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016) (quoting Cesare v. Cesare, 54 N.J. 394, 413 (1998)). "'Only when the trial court's conclusions are so "clearly mistaken" or "wide of the mark"' should we interfere to 'ensure that there is not a denial of justice.'" Gnall, supra, 222 N.J. at 428 (quoting N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). Our review of a trial court's legal conclusions is plenary. Manalapan Realty, L.P. v. Twp. Comm., 140 N.J. 366, 378 (1995).

Deference to a trial court's findings of fact "is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Cesare, supra, 154 N.J. at 412 (quoting

In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). "Because of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Id. at 413.

In its consideration of a request for entry of an FRO, the Family Part "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." Silver v. Silver, 387 N.J. Super. 112, 125 (App. Div. 2006). The court must then determine "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." Id. at 127.

Plaintiff alleged, and the court found, defendant committed harassment under N.J.S.A. 2C:33-4. Harassment is one of the predicate acts of domestic violence under the PDVA. N.J.S.A. 2C:25-19(a). Harassment occurs if a person, with purpose to harass another:

> 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.]

When evaluating a claim of harassment, "courts must consider the totality of the circumstances to determine whether the harassment statute has been violated." N.B. v. S.K., 435 N.J. Super. 298, 307 (App. Div. 2014) (quoting Cesare, supra, 154 N.J. at 404). "Whether conduct 'rises to the level of harassment or not is fact-sensitive[,] [and] [t]he smallest additional fact or the slightest alteration in context, particularly if based on a history between the parties,' may make a considerable difference in the application of the PDVA." Ibid. (alterations in original) (quoting J.D. v. M.D.F., 207 N.J. 458, 484 (2011)). The court's "[c]ommon sense and experience may inform that determination." State v. Hoffman, 149 N.J. 564, 577 (1997).

Defendant's challenge to the court's determination he committed the predicate act of harassment under N.J.S.A. 2C:33-4 is based on his version of the facts. He contends the court erred in finding harassment because he did not hit his wife in the face, he did not prevent her from closing the door to her vehicle and leaving the store, and his telephone and text communications were welcome. He further denies acting with a purpose to cause annoyance

or alarm, arguing his actions were solely the result of his desire to resolve the parties' marital strife for their children's benefit.

We find defendant's arguments grounded on his version of the facts lack sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(2), because our review of the record confirms that the court's credibility determinations and findings of fact are supported by substantial credible evidence. Cesare, supra, 154 N.J. at 411-12. We are therefore bound by the court's findings, ibid., and are convinced the court correctly determined defendant's conduct over the three-week period alleged in the complaint constituted harassment under N.J.S.A. 2C:33-4.

Defendant relies on our decisions in Corrente v. Corrente, 281 N.J. Super. 243 (App. Div. 1995), Peranio v. Peranio, 280 N.J. Super. 47 (App. Div. 1995), and Murray v. Murray, 267 N.J. Super. 406 (App. Div. 1993), claiming his actions constituted mere domestic contretemps that the PDVA was not intended to address. We disagree. In Corrente, we found the defendant's phone calls to the plaintiff requesting monies for the payment of their bills and decision to turn off plaintiff's phone service did not constitute domestic violence. Corrente, supra, 281 N.J. Super. at 249-50. In Peranio, we found the PDVA was not intended to address a domestic contretemps such as bickering or arguments between married

parties. Peranio, supra, 280 N.J. Super. 56-57. In Murray, we concluded pre-divorce statements concerning an absence of affection and physical desire did not constitute harassment under the PDVA. Murray, supra, 267 N.J. Super. at 410-11.

The evidence here showed defendant slapped plaintiff in the face causing a bruise, incessantly called and texted plaintiff at extremely inconvenient times after she told him to stop, and followed plaintiff to a store and prevented her from leaving by thwarting her attempts to close her car's doors. Defendant's actions involved the use of physical force to inflict injury, the use of physical resistance to prevent plaintiff from leaving the store parking lot, and unrelenting, unwanted communications. Defendant's actions went well beyond those presented in Corrente, Peranio, and Murray, and the court correctly determined they constituted harassment under N.J.S.A. 2C:33-4 that the PDVA was intended to address.

Defendant next argues the court erred by finding harassment without consideration of the parties' lack of a prior history of domestic violence. A court must consider the totality of the circumstances, including any prior history of domestic violence, in deciding whether the defendant acted with the purpose to cause annoyance or alarm under N.J.S.A. 2C:33-4. Cesare, supra, 154 N.J. at 404-05; State v. Hoffman, 149 N.J. 564, 585 (1997).

The presence or absence of a prior domestic violence history provides context for the determination of whether a defendant acted with purpose to harass, but is not dispositive. Cesare, supra, 154 N.J. at 404-05. "[T]he parties' past history . . . helps to inform the court regarding defendant's purpose," but "'[a] finding of a purpose to harass may be inferred from the evidence presented' and from common sense and experience." H.E.S. v. J.C.S., 175 N.J. 309, 327 (2003) (quoting Hoffman, supra, 149 N.J. at 577).

In fact, the judge expressly addressed and recognized the absence of a prior history of domestic violence between the parties. However, she did not find it dispositive of the issue of defendant's purpose. She rejected as not credible defendant's testimony that his actions were solely for the purpose of reconciliation. Logic supports her conclusion. Defendant's actions are inconsistent with any purpose to reconcile; he slapped his spouse, caused an injury, incessantly attempted to communicate with her despite her requests to be left alone, followed her to a public location to confront her about an alleged affair, and physically interfered with her ability to leave his presence. The judge found defendant's actions were borne of anger and constituted a cycle of manipulation and control, and reasonably inferred they

were for the purpose to harass and to alarm and seriously annoy plaintiff.

Defendant also claims the evidence does not support the court's determination that a final restraining order was required to protect plaintiff from immediate danger or to prevent further abuse. Silver, supra, 387 N.J. Super. at 127. Defendant contends plaintiff does not fear him, he would never harm plaintiff, there is no prior history of domestic violence, and therefore there is no need for an FRO.

Defendant ignores the court's well-supported findings of fact. The court determined that based on defendant's actions and plaintiff's testimony, plaintiff was in fear of him. Moreover, the consistency of defendant's actions, his use of physical force, his infliction of injury, his refusal to ignore plaintiff's requests to be left alone, and his anger about an alleged affair support the court's determination that an FRO was necessary to protect plaintiff. A prior history of domestic violence was not required to support the court's determination because "the need for an order of protection upon the commission of a predicate act of 'domestic violence' . . . may arise even in the absence of such [a history] where there is 'one sufficiently egregious action[.]'" Id. at 128. (quoting Cesare, supra, 154 N.J. at 402). As the judge correctly concluded, defendant's actions during the

three-week period alleged in the complaint established an FRO was required to protect plaintiff here.

Defendant last alleges the court erred by permitting plaintiff to testify there was a domestic violence restraining order entered against defendant at the request of his ex-fiance sixteen years earlier. Plaintiff testified the order "came up" when she and defendant opened up their "dealership" stores, which required that they be fingerprinted. Plaintiff testified she "never really paid attention to" the order. The judge admitted the testimony over defendant's objection, finding the testimony was "relevant," but noting she would "give it whatever weight [she] deem[ed] appropriate considering it's a different individual and that it was [sixteen] years ago." Defendant argues plaintiff's testimony was inadmissible under N.J.R.E. 404(b) and N.J.R.E. 609, was prejudicial, and that the court erred by considering the testimony in making its findings.

We agree the court erred in allowing the testimony. The evidence was not admissible for any proper purpose under either N.J.R.E. 404(b) or N.J.R.E. 609, and was not otherwise relevant. There was no evidence plaintiff's knowledge of the order caused her to fear defendant, or that she perceived any of the conduct alleged in the complaint as a threat or harassment based on her knowledge of the order. Cf. Rosiak v. Melvin, 351 N.J. Super. 322,

327 (Ch. Div. 2002) (finding evidence of a domestic violence incident between defendant and his previous wife admissible to prove plaintiff's understanding of defendant's otherwise ambiguous threat). Based on our review of the record, we discern no basis to conclude the testimony was relevant to any issue before the court, and note that neither counsel nor the court identified the order's relevance. See N.J.R.E. 401 (defining relevant evidence as "evidence having a tendency in reason to prove or disprove any fact of consequence to the determination of the action").

Defendant objected to the admission of the evidence and thus we consider whether its admission constituted a harmful error that was "of such a nature as to have been clearly capable of producing an unjust result." R. 2:10-2. We are satisfied it was not.

During her decision, the judge stated she "considered" the testimony concerning the prior restraining order and that it was a "serious matter" for defendant to "have a restraining order against" him. We do not, however, discern any basis to conclude the judge relied upon the entry of the order in making any of her findings, and the record shows that she did not.

The court's detailed credibility findings were based on her observations of the demeanor of the witnesses, and were made without any reference to or reliance on the limited testimony concerning the order. The court's factual findings were similarly

made without reference to or reliance on the testimony, and are otherwise supported by substantial evidence in the record. We are therefore satisfied admission of the testimony was not capable of producing an unjust result.

Affirmed.