SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5618-14T3

H.C.F.,

Plaintiff-Respondent,

v.

J.T.B.,

Defendant-Appellant.

Argued November 2, 2016 – Decided September 7, 2017

Before Judges Fuentes, Carroll and Gooden Brown.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket No. FV-14-1099-15.

Jill Anne LaZare argued the cause for appellant (Law Offices of Jill Anne LaZare, LLC, attorney; Ms. LaZare, on the briefs).

Sarah J. Jacobs argued the cause for respondent (Jacobs Berger, LLC, attorneys; Amy L. Bernstein, on the brief).

PER CURIAM

Defendant (husband) appeals from a July 1, 2015 final restraining order (FRO) entered against him in favor of plaintiff

(wife) pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. We affirm.

We summarize the relevant facts. Plaintiff, then forty-years-old, and defendant had known each other since high school and married in 2008. Their daughter was born in 2011 and all three resided in a two-story three-bedroom house in Chatham. Although plaintiff paid the mortgage on the home, both parties' names were on the mortgage and the deed. Plaintiff had a degree in finance from Georgetown University and a MBA from UC Davis and worked full-time for the Nielsen Company, while defendant worked part-time for the YMCA and served as a stay-at-home parent.

On June 24, 2015, plaintiff filed a complaint against defendant seeking injunctive relief under the PDVA alleging that defendant committed acts of domestic violence, specifically criminal mischief and harassment. In her complaint, plaintiff alleged that at 10:30 a.m. on June 24, 2015, defendant "punched a door with a closed fist causing the door to come off the hinges" after the parties "were involved in an argument" and defendant became angry. The complaint also alleged that defendant possessed a firearm and had "communicated via text in February of 2015 that he would end his life to stop plaintiff's suffering." According to the complaint, there was no prior history of domestic violence.

The Family Part judge conducted an evidentiary hearing on July 1, 2015, during which both parties were represented by counsel. At the hearing, plaintiff testified that for the past two-and-a-half years, plaintiff and defendant had been sleeping in separate bedrooms in their Chatham home. According to plaintiff, on the morning of June 24, 2015, while washing up in the upstairs bathroom, she "noticed that . . . [her] whole neck was red and swollen[.]" Plaintiff asked defendant "to come upstairs and to look at [her] neck." Plaintiff waited for defendant in her bedroom; their daughter was in plaintiff's bedroom watching television on the bed.

When defendant came upstairs, plaintiff asked defendant whether he could "see if there's like a bug bite or anything here[.]" Without looking at plaintiff, defendant stated, "your neck is not red. You're fine." Plaintiff retorted "thanks for caring[.]" As defendant went to get their daughter from the bed, he responded "you're such a fucking bitch[.]" In reply, plaintiff asked "this is what you say to me?" At that point, plaintiff testified defendant exhibited "this rage" that "struck a lot of fear in [her]." Defendant then stated, "why do you say these things" and "turned around" and punched her bedroom door.

According to plaintiff, defendant struck the door, which she described as a "big solid wood door[,]" in its "[u]pper right-hand

corner" with his right hand, cracking its paint and dislodging a screw. Plaintiff testified that when defendant punched the door, he was standing about "an arm's length" from her and punched the door with such force that "the door came off . . . both hinges" and "fell against . . . a wall" behind the door inside the bedroom. According to plaintiff, the door ended up approximately "three-and-a-half feet" from the bed where their daughter remained throughout the incident.

Plaintiff testified that after witnessing the incident, their daughter asked defendant why he hit the door and why he had "a boo-boo on his hand[.]" The child's question caused defendant to leave the bedroom and run downstairs. Plaintiff believed defendant "was going to leave because, usually, he just leaves[] [when] we have any disagreement[.]" However, instead of leaving, defendant asked her to come downstairs. Plaintiff thought, "this is it, he went and got the gun," referring to a gun defendant had acquired when the couple lived in Arizona. Although she was afraid for herself and her daughter, she left her daughter on the bed in her bedroom where she believed she was safe and went downstairs to "face" defendant.

When plaintiff went downstairs, she and defendant discussed their failing marriage. Plaintiff indicated that she could leave and take their daughter, to which defendant replied "you're not

taking [our daughter] anywhere[.]" At that point, defendant went back upstairs and plaintiff followed while continuing their discussion about their marital discord. Defendant tried "to get [their daughter] dressed, but she was agitated" and repeatedly told defendant to "stop trying to trick mommy[.]" According to plaintiff, defendant eventually looked at their daughter "with this rage and this anger that [she had] never seen him have before" and eventually abandoned his efforts to dress her.

After defendant went downstairs, plaintiff dressed her daughter and took her with her to the doctor to have her (plaintiff's) neck examined. Thereafter, she left her daughter at home with defendant to take a nap and then drove to the police station to file a domestic violence complaint and obtain a temporary restraining order. Plaintiff explained she did not take her daughter with her to the police station because of her young age and she did not call the babysitter because "she's only available at nighttime." Plaintiff testified that she went to the police because she "was scared." According to plaintiff, she was "scared every night when [she] go[es] to bed that [defendant]'s going to shoot [her]." Plaintiff stated that defendant did not have a permit for the gun but kept it in the house and refused to tell her its location. Plaintiff also testified about another incident that occurred in February of 2015 when defendant sent her

a text that plaintiff interpreted as a threat that he would use the gun to kill himself.

According to plaintiff, the text stemmed from an argument that occurred after plaintiff witnessed "a major car accident" while driving alone to the doctor for a biopsy. Horrified by the accident, apprehensive about the biopsy, and exasperated by defendant's lack of support, plaintiff communicated via text to defendant her "unhappiness with the marriage, . . . his lack of empathy and his callousness." Defendant responded in a text stating "[d]on't worry. One of these days, I'm going to end my life and your suffering." Concerned for her daughter's safety, plaintiff queried, "is this . . . something you are going to do when you are with her? Do I need to put her in daycare? Is she not safe at home with you?" Defendant responded, "she's safe. I wouldn't do it with her around." Although plaintiff did not discuss the threat with defendant again, she contacted their marriage counselor for help and forwarded the text messages to the counselor who suggested taking defendant to the hospital. During the weeks that followed, plaintiff also met with a divorce attorney.

According to plaintiff, although she was "scared every day when [she left] the house[,]" and she "knew that the marriage was over[,]" she remained in the marital residence with defendant

until the June 24, 2015 incident. Plaintiff explained that she did not act before the incident because she was "paralyzed in fear" and because she was "the bread winner." Plaintiff testified that she "had to pay . . . bills and take care of the house" and she "was afraid . . . he might hurt himself . . . [or] hurt the baby." According to plaintiff, to protect her daughter, she "started coming home early[,] . . . working from home on odd days[, and] canceled business trips." She also started checking her daughter for injuries on a regular basis. Upon being cross-examined about a photo of defendant and their daughter that she had posted on Facebook on June 21, 2015, with the message "Happy Father's Day to the most loving and attentive dad I know[,] [w]e love you[,]" plaintiff explained that she was "trying to make something more positive, so he maybe won't be so horrible."

During his testimony, defendant admitted punching the door as he was exiting plaintiff's bedroom. According to defendant, after he looked at plaintiff's neck as she requested, he told her that he "[didn't] see anything." Plaintiff responded by becoming "extremely upset" and told defendant he did not "love her" and was not "empathetic towards her." Defendant testified that plaintiff "started getting loud" and using "curse words" while their "daughter was on the bed" notwithstanding the fact that he had repeatedly told plaintiff "not to yell at [him] and use curse

words in front of [their] daughter." Defendant acknowledged that it was the "last straw[.]" However, defendant explained that plaintiff "was on the complete opposite corner of the room" when he punched the door. He denied punching the door to annoy or scare plaintiff but testified that he acted out of frustration and regretted the fact that his daughter witnessed the incident.

According to defendant, because the "top hinges came loose" and "[t]he screws started to pull from the door jam," he "removed the door completely and laid it up against the wall." He denied throwing the door against the wall and denied that the door would have fallen on his daughter. He claimed that his punch loosened the hinges and screws because he had failed to properly reinstall the door after removing it to paint plaintiff's bedroom. Defendant acknowledged that "[he] was upset" and when he asked plaintiff to come downstairs, his tone could have been interpreted as forceful and demanding. However, the ensuing argument was "very brief" and they were "calm" and civil. Defendant testified he was accustomed to their daughter insisting on being dressed by plaintiff because she does not spend as much time with their daughter as he does. Consequently, he went into the spare bedroom downstairs while plaintiff dressed her before leaving for the doctor.

Defendant confirmed that plaintiff brought their daughter home for a nap before leaving again and testified that he was

eating dinner when the police arrived. According to defendant, he was surprised because plaintiff never expressed any fear of him. He explained that the February 2015 text was his reaction to plaintiff complaining about his lack of ambition, empathy and love and was written in "a joking manner." He denied threatening to shoot himself or anyone else. Defendant also confirmed that plaintiff asked him to move the gun from its original location in the spare bedroom. However, he testified that he told plaintiff that he had moved the gun to the basement. He explained further that although "the gun [was] always loaded[,]" the "decocker, which is a safety . . . was on" and "[the gun] was kept in a case." He also testified that they had participated in firearms training together in Arizona.

Defendant called as a witness the grandmother of a little boy who had attended classes and had had play dates with his daughter. She testified that in the two years she had known defendant, she had never seen him angry. She also testified that defendant and his daughter were "very close" and had a "great relationship" and she did not believe defendant posed a danger to his child.

In an oral opinion rendered immediately after the hearing, the judge found that the entry of a FRO was justified. The judge noted that the case boiled down "to credibility" and found plaintiff's version more credible, concluding that "it's more

probable that this incident occurred the way the plaintiff says[.]" Applying the first prong of the two-prong Silver[1] analysis, the court determined that plaintiff established by a preponderance of the evidence that defendant committed the predicate acts of criminal mischief and harassment by striking her bedroom door while "engaged in an argument" with plaintiff with enough force to knock it off its hinges and "damage[] the door[.]"

Regarding criminal mischief, the court noted initially that although both parties owned the house, "it does not give [defendant] the right to damage property in the house because the plaintiff and defendant each own an undivided interest." The court continued:

> Defendant claims that the door was weak and needed repair, but the fact is the door is off the hinges.[2] There is a crack on the door . . . and, certainly, it appears, at least to this [c]ourt, that the door was damaged with sufficient force . . . it was taken off the hinges.
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> Clearly, the defendant knew he was doing it and it appears that there's really no . . . issue that the door was damaged and taken off the hinges. It [sic] pulled out of the holes. Defendant even admitted to that and hitting it. That alone is a predicate act of domestic violence, criminal mischief.

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[1] Silver v. Silver, 387 N.J. Super. 112 (2006).

[2] The court was referring to photographs depicting the damaged door that were admitted into evidence.

As to harassment, the court reasoned:

> Harassment becomes a little more contentious and really boils down to credibility . . . .
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> Clearly, the parties had an argument, a disagreement. He made a comment to her and, . . . I have to look at the response. What other reason do you hit a door? Why do you hit a door? . . . [W]hat's a legitimate reason for hitting a door, other than to . . . annoy or to alarm the other party. I can't really see . . . any other decision. I have to believe the plaintiff, that the door was damaged in an argument and looking at the door knocked off the hinges, . . . it's inescapable to me that he damaged the door with intent to harass her, to certainly alarm her. I think it's certainly alarming when somebody knocks a door off the hinges.

The court determined further that entry of the FRO was necessary under the second Silver prong to protect plaintiff and prevent further abuse. In that regard, the court observed:

> And in February, this defendant made comments about ending his life and then didn't just end with that. The response that the plaintiff made was, why would you threaten me with that? He doesn't respond, I'm just kidding, you know I would never do that. His response is, she's safe, which means his daughter. I wouldn't do it with her around. He doesn't deny it.
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> That statement is very, very troubling and combined with the damage to the door, it really leads me to the conclusion that there is a potential. They're in the middle of a divorce, and I understand that . . . I have to be careful of one party . . . taking advantage of another party. But in this case, . . . it's kind of a different situation. The

> plaintiff has the financial wherewithal. She could leave. She could move to another house, if she wanted to. So I don't see that she's trying to take advantage of the defendant. I don't see that as being a legitimate argument.
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> . . . .
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> And then based on his past and the fact that there is a gun in the house and the comments that he made lead this [c]ourt to the conclusion that the statutory requirements are that I take every effort to protect victims and, in this case, I think that, based on the comments that he made, there's a likelihood it might occur and I have to prevent that and, on that basis, I am going to grant the restraining order.

The court also granted plaintiff temporary custody of their daughter and exclusive possession of the marital home, but allowed defendant liberal visitation at plaintiff's discretion after determining that defendant did not pose a danger to their daughter.

This appeal followed. On appeal, defendant argues that the evidence was insufficient to sustain a violation under the PDVA. Specifically, defendant argues that plaintiff "failed to meet her burden of proof" and the court erred in its analysis under Silver. Defendant also argues that the court erred in awarding plaintiff temporary custody of their daughter given the fact that defendant has been the child's primary caregiver.

Factual findings of the trial court should not be disturbed unless they "are so manifestly unsupported by or inconsistent with

the competent, relevant and reasonably credible evidence as to offend the interests of justice." Cesare v. Cesare, 154 N.J. 394, 412 (1998) (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). "Deference to the trial court's factual findings is especially appropriate when the evidence is largely testimonial and involves questions of credibility[,]" In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997), and "[b]ecause of the family courts' special jurisdiction and expertise in family matters[.]" Cesare, supra, 154 N.J. at 413. Reversal is warranted only "if the court ignores applicable standards[.]" Gotlib v. Gotlib, 399 N.J. Super. 295, 309 (App. Div. 2008).

The PDVA provides that a FRO may be issued if the court determines "by a preponderance of the evidence[,]" N.J.S.A. 2C:25-29(a)(1), that the defendant has committed an act of domestic violence "upon a person protected under" the PDVA. N.J.S.A. 2C:25-19(a). A person protected under the PDVA includes "any person who is 18 years of age or older . . . and who has been subjected to domestic violence by a spouse" or "any person, regardless of age, who has been subjected to domestic violence by a person with whom the victim has a child in common[.]" N.J.S.A. 2C:25-19(d). The term "domestic violence" is defined in N.J.S.A. 2C:25-19(a) to mean "the occurrence of one or more" specified acts, known as

predicate acts, including criminal mischief and harassment. N.J.S.A. 2C-19(a)(13).

A person commits criminal mischief if he "[p]urposely or knowingly damages tangible property of another[.]" N.J.S.A. 2C:17-3(a). N.J.S.A. 2C:17-3(a) does not define what constitutes "property of another," but we have interpreted the term to include "damage to a [spouse's] undivided interest in the home as a tenant by the entirety[.]" N.T.B. v. D.D.B., 442 N.J. Super. 205, 220 (App. Div. 2015). Thus, in N.T.B., we held that "in breaking down [a spouse's] bedroom door, [the other spouse] . . . destroy[ed] property of another and therefore committed the predicate act of criminal mischief." Id. at 219.

A person commits harassment "if, with purpose to harass another," he "[e]ngages in any . . . course of alarming conduct . . . with purpose to alarm or seriously annoy such other person." N.J.S.A. 2C:33-4(c). Harassment requires that the defendant act with the purpose of harassing the victim and judges must be mindful that "a party may mask an intent to harass with what could otherwise be an innocent act." J.D. v. M.D.F., 207 N.J. 458, 488 (2011). "A finding of a purpose to harass may be inferred from the evidence presented" and a judge may use "[c]ommon sense and experience" when determining a defendant's intent. State v. Hoffman, 149 N.J. 564, 577 (1997). To that end, an analysis of

whether an underlying act of harassment in the context of domestic violence has occurred requires consideration of the totality of the circumstances. Id. at 584-85.

Pursuant to Silver, supra, 387 N.J. Super. at 125-26, when determining whether to grant a FRO under the PDVA, the judge must make two determinations. 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.

> 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. Therefore, not only may one sufficiently egregious action constitute domestic violence under the Act, even with no history of abuse between the parties, but a court may also determine that an ambiguous incident qualifies as prohibited conduct, based on a finding of [abuse] in the parties' past.
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> [Cesare, supra, 154 N.J. at 402.]

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. Although the latter 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." A.M.C. v. P.B., 447 N.J. Super. 402, 414 (App. Div. 2016) (quoting Silver, supra, 387 N.J. Super. at 127).

Here, we are satisfied there is sufficient credible evidence in the record to support the judge's finding that defendant committed the predicate acts of criminal mischief and harassment. We are also convinced that the record supports the judge's determination that a FRO was required to protect plaintiff and prevent further acts of domestic violence. Defendant's argument that the evidence was insufficient to sustain a finding of a violation of the PDVA under Silver is belied by the record. Moreover, we reject defendant's contention that his conduct could more fairly be characterized as "ordinary domestic contretemps" similar to that in Corrente v. Corrente, 281 N.J. Super. 243, 250 (App. Div. 1995), or that the allegations were merely intended to gain an unfair advantage in the matrimonial action similar to that in Murray v. Murray, 267 N.J. Super. 406, 410 (App. Div. 1993).[3]

[3] We decline to consider the unpublished opinion on which defendant relies in his reply brief. See R. 1:36-3 (stating that "[n]o unpublished opinion shall constitute precedent or be binding on any court"); see also Guido v. Duane Morris LLP, 202 N.J. 79, 91 n. 4 (2010) (rejecting use of unpublished decisions as precedent).

In addition, awarding temporary custody of their daughter to plaintiff was entirely appropriate. After granting an FRO under the PDVA, a trial judge "may issue an order . . . awarding temporary custody of a minor child." N.J.S.A. 2C:25-29(b)(11). When awarding temporary custody, the PDVA requires that the trial judge "presume that the best interests of the child are served by an award of custody to the non-abusive parent." Ibid. When determining parenting time, a court "shall specify the place and frequency of parenting time[,]" but must "protect the safety and well-being of the plaintiff and minor children" and avoid "compromis[ing] any other remedy provided by the court by requiring or encouraging contact between the plaintiff and defendant." N.J.S.A. 2C:25-29(b)(3).

Here, the court presumed that granting plaintiff temporary custody served the child's best interests as required under the statute. The court also appropriately granted defendant "liberal visitation . . . [but] at the discretion of the plaintiff." We reject defendant's contention that his status as a stay-at-home parent allows him to rebut the PDVA's presumption favoring a victim of domestic abuse particularly since the child witnessed the domestic abuse incident. An abuser cannot overcome the statutory presumption by merely showing that he served as the child's primary caretaker prior to the domestic abuse incident. J.D. v. M.A.D.,

429 N.J. Super. 34, 44 (App. Div. 2012). See also Mann v. Mann, 270 N.J. Super. 269, 274 (App. Div. 1993) (upholding grant of temporary custody of parties' three children to victim where abuser committed criminal mischief and harassment). As we noted in J.D., this fact, "standing alone, [is] entirely insufficient to rebut the presumption . . . in light of the Legislature's express declaration that children exposed to domestic violence 'suffer deep and lasting emotional effects' from the experience." Id. at 44 (quoting N.J.S.A. 2C:25-18).

Affirmed.