SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2421-16T1

J.L.,

Plaintiff-Respondent,

v.

E.A.J.,

Defendant-Appellant.

Submitted[1] March 20, 2018 – Decided April 6, 2018

Before Judges Fasciale and Sumners.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FV-02-1186-17.

Leonard S. Miller, attorney for appellant.

Respondent has not filed a brief.

PER CURIAM

Defendant appeals from a January 12, 2017 final restraining order (FRO) entered in favor of plaintiff, his former girlfriend, pursuant to the Prevention of Domestic Violence Act (PDVA),

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[1] The matter was originally listed for oral argument, but counsel waived it.

N.J.S.A. 2C:25-17 to -35. Defendant argues plaintiff failed to produce sufficient proof for the entry of the FRO, and the judge pressured him to consent to the entry of the FRO in exchange for a lower fine. Defendant did not consent, however, and maintained at the FRO hearing that there was no basis for the entry of an FRO against him. We reverse.

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, 411-12 (1998). We accord that deference especially when much of the evidence is testimonial and implicates credibility determinations. Id. at 412. 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, 125-27 (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.

Plaintiff alleged that defendant harassed her.[2] She worked for a fire department, and defendant allegedly sent her colleagues a text message, which purported to be a screenshot of a conversation he had with plaintiff about plaintiff drinking alcohol on a fire truck. Plaintiff admitted at the FRO hearing that she had been drinking on the truck. Defendant testified at the FRO hearing that he sent the message to protect plaintiff from harming herself.

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).]

[2] In the temporary restraining order, plaintiff also checked-off the criminal coercion box. But the judge made no findings about criminal coercion.

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).

The judge made inconsistent findings as to the predicate act of harassment. In concluding that defendant harassed plaintiff, the judge found "the intentions of [defendant] were good, but the result resulted in an uncalled-for confrontation with [plaintiff's work colleagues]." Although the judge found defendant's intentions "good," he found that the text message caused annoyance and alarm, and that defendant acted "with purpose to harass" plaintiff. The judge also focused on plaintiff's perception of defendant's purpose for sending the message. Even if the judge's finding was sufficient to establish the predicate act of harassment, which is not the case, the judge failed to make any findings as to prong two of Silver.

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, 387 N.J. Super. at 127. Under that determination, there must be a finding that "relief is necessary to prevent further abuse." J.D., 207 N.J. at 476 (quoting N.J.S.A. 2C:25-29(b)). It is well established that the 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, 387 N.J. Super. at 127.

As to prong two, plaintiff did not testify that she feared defendant, felt in danger of immediate harm, or anything to that effect. Instead, plaintiff testified at the FRO hearing that "I'm just really mad at him." The judge made no findings as to the second Silver prong.

Finally, the judge improperly attempted to negotiate with defendant that if he consented to the entry of an FRO, the judge would impose a lower fine. After defendant told the judge he wanted nothing to do with plaintiff, the following exchange took place:

> [Judge:] [W]ould you consent . . . [to the FRO?] If I make a ruling without a consent, I have to impose a fine between [$]50 and $500. Usually, I impose something within the [$]375-to[$]500 range.
>
> . . . .

> [If you consent,] I would consider this as a settlement and impose only the minimum $50 fine.
>
> . . . .
>
> [Defendant:] When you say "consent[,]" I'm not sure what that —
>
> [Judge:] So that you have no contact [with plaintiff] . . . .
>
> . . . .
>
> I will find that there is a voluntary [permanent FRO].
>
> [Defendant:] Well, wait. I'm sorry, sir. When you say permanent [FRO], . . . I don't want that on my record . . . .
>
> [Judge:] The only way it would not go on your record is if I find [that] there's no basis for it.
>
> . . . .
>
> You're not consenting to [the FRO] then?
>
> [Defendant:] No, sir. I can't.

It is improper for a judge to seek defendant's consent to the entry of an FRO in exchange for a lower fine.

Reversed.