

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-4157-16T3

P.J.H.,

Plaintiff-Respondent,

v.

R.S.H.,

Defendant-Appellant.

Submitted February 14, 2018 — Decided June 4, 2018

Before Judges Koblitiz and Suter.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Middlesex
County, Docket No. FV-12-1749-17.

Deborah A. Rose, attorney for appellant.

Brickfield & Donahue, attorneys for respondent
(Paul B. Brickfield, on the brief).

PER CURIAM

Defendant R.S.H. appeals from a final restraining order (FRO)
entered on May 4, 2017¹ under the Prevention of Domestic Violence

¹ Defendant's notice of appeal mistakenly referenced the FRO as
entered on May 22, 2017.

Act (the Act), N.J.S.A. 2C:25-17 to -35.² Defendant contends the court erred by finding he committed the predicate offense of harassment, as defined in N.J.S.A. 2C:33-4, and in finding the FRO was necessary to protect plaintiff P.J.H. from domestic violence in the future. We affirm.

I

The parties were divorced on April 10, 2017, after nearly sixteen years of marriage. They have three children. Their property settlement and support agreement (PSA) was incorporated into the Dual Final Judgment of Divorce. The PSA provided that "regular communication between the parties regarding any matter relating to the children shall be in writing through text or email." The PSA also referenced a consent order with civil restraints from September 12, 2016, which was incorporated into the PSA except for its parenting time schedule. That consent order provided the parties were each "prohibited from having any oral, personal or other form of contact or communication with the other party" except for communication necessary for the divorce or the children.

On April 19, 2017, just a few days after their divorce, plaintiff obtained a temporary restraining order under the Act

² We use initials because of the underlying domestic violence litigation. R. 1:38-3.

based on the predicate acts of criminal restraint, stalking and harassment. The complaint alleged that defendant called her several times from his phone and from restricted phone numbers. Plaintiff claimed she received text messages that accused her of dating a co-worker. The complaint also alleged a history of domestic violence.

A final restraining order hearing was conducted on May 4, 2017. We relate relevant evidence from the hearing.

On Easter Sunday April 16, 2017, plaintiff dropped off the children to defendant at 8:00 p.m. and went home. He thought her parenting time was supposed to continue to the next morning. At home, she missed two phone calls that she claimed were from defendant and was awakened by someone knocking and ringing the doorbell. It was her twelve-year-old son and his friend. Her son wanted to retrieve his play station. She also received a text from defendant at 10:16 p.m. that her son wanted his play station. Defendant was in the parking lot. The text added, "I don't care if [Sam]³ is there[;] that's not my concern." Plaintiff texted defendant that he was harassing her. Regarding Sam, defendant texted, "The boys saw him leave. Keep lying to yourself."

³ This is a fictitious name for a co-worker with whom defendant alleged plaintiff had an affair.

Plaintiff received another text at 11:07 p.m. that her son needed something from his room. Defendant brought the child back to plaintiff's house for a shirt. Plaintiff testified she believed that defendant thought she was with someone else and was using their son to check on her.

Defendant texted at 11:32 p.m., "It's just hard to explain to [our son] why [Sam] was there. Happy Birthday." After that, defendant texted plaintiff at 5:25 a.m., "The kids are my 1st priority and having [Sam] in your home instead of letting [our son] in is a problem." The text messages continued on April 17, 2017. Defendant texted at 3:06 p.m., "having [our son] see the old guy at your house yesterday was inappropriate." Then three hours later at 6:08 p.m., defendant texted, "Just curious how long were you cheating on me with him at this point it doesn't matter we are divorced so was it at Darren's wedding[?]" At 11:28 p.m. that night, defendant texted, "I know your [sic] busy with your boyfriend. I tried calling you earlier" to discuss taking one of the children to the doctor. On April 18, at 8:15 a.m., defendant texted, "I don't care that you're sleeping with [Sam]. It does upset me that [our child] is exposed to that," and advised he was "going to fight for full custody [of one of their children]."

Throughout this exchange, plaintiff repeatedly asked defendant to stop the messages. She testified on questioning by the court that she was "very much afraid of [defendant]."

Defendant testified and denied that his intent was to harass plaintiff. He wanted to introduce a phone message left by plaintiff where he claimed his son could be heard in the background. The tape apparently related to defendant's assertion that Sam physically disciplined the child. The court denied defendant's request to play the tape.

Plaintiff testified about two earlier incidents with defendant. On February 26, 2017, she alleged defendant followed her to her car after their son's basketball game and that defendant blocked her ability to get into her car. Defendant denied this. Plaintiff testified that on August 2016, defendant "hit food out of my hands as I tried to bring it to my kids" and then he "smeared" it on the windshield and used "aggressive language." He denied this as well. Plaintiff testified on cross-examination that she did not ask for a restraining order regarding these incidents.

The Family Part judge did not find that defendant was using his son to check on plaintiff nor was there proof that tied him to any phone calls. However, the court found the text messages were "troubling," concluding that the "nature of the text messages . . . [was] harassment." Although defendant's suspicions about

plaintiff and Sam could be true, the court stated that did not give defendant "the right to continue to question her personal life as he has done in the text messages." He said defendant was repeatedly talking about Sam even after she told him to stop. "He keeps going. It is subtle. But it is continuous." The court considered testimony about the incident on February 26, 2017, finding plaintiff's testimony to be credible but not defendant, who gave no reason why plaintiff would make up this testimony. The judge concluded a final restraining order was needed because the conduct was repeated and harassment had been proven. An FRO was entered on May 4, 2017, which restrained defendant from plaintiff's residence and from a specifically identified co-worker.

On appeal, defendant claims his conduct in sending text messages to plaintiff did not constitute harassment but simply was marital contretemps. He argues that the court abused its discretion and violated due process by not permitting him to present certain evidence to refute the allegations.

II

We accord "great deference to discretionary decisions of Family Part judges[,]" Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012), in recognition of the "family courts' special jurisdiction and expertise in family matters[.]" N.J. Div. of

Youth & Family Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). "[F]indings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare, 154 N.J. at 411-12 (citing Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

The trial court "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, 125-26 (App. Div. 2006). This determination is made "in light of the previous history of violence between the parties." Ibid. (quoting Cesare, 154 N.J. at 402). The court also must determine whether a restraining order is required to protect the party seeking restraints from future acts or threats of violence. Id. at 126-27. That means "there [must] be a finding that 'relief is necessary to prevent further abuse.'" J.D. v. M.D.F., 207 N.J. 458, 476 (2011) (quoting N.J.S.A. 2C:25-29(b)).

A person commits the offense of harassment if, "with purpose to harass another, he (a) [m]akes, 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" N.J.S.A. 2C:33-4(a). In evaluating a defendant's intent, a judge is entitled to use "[c]ommon sense and experience." State v. Hoffman, 149 N.J. 564, 577 (1997). Because direct proof of intent is often absent, "purpose may and often must be inferred from what is said and done and the surrounding circumstances," and "[p]rior conduct and statements may be relevant to and support an inference of purpose." State v. Castagna, 387 N.J. Super. 598, 606 (App. Div. 2006; see also H.E.S. v. J.C.S., 175 N.J. 309, 327 (2003) (quoting Hoffman, 49 N.J. at 577) ("[A] purpose to harass may be inferred from . . . common sense and experience").

Here, the FRO was entered based on the court's finding that the predicate act of harassment was proven. There was substantial evidence in the record to support this finding. The court considered the late night texts by defendant that continually questioned plaintiff about her relationship with a co-worker. The texts were contrary to their civil restraining order that provided the parties' communication was only to be about the divorce or their children. It continued over the course of three days.

In evaluating these texts the court properly considered the parties past history of domestic violence. In this regard the


court found plaintiff's testimony credible and not defendant's. The trial judge has the feel of the case having had the opportunity to hear and to observe the witnesses. See N.J. Div. of Youth & Family Servs. v. E.P., 196 N.J. 88, 104 (2008) (deferring to factual findings of the trial court "because it has the opportunity to make first hand credibility judgments about the witnesses who appear on the stand; it has a feel of the case that can never be realized by a review of the cold record"). We defer to the credibility determinations of the trial judge. There was sufficient evidence for the court to find that the text messages were made inconveniently and were likely to annoy and intended to harass her about a relationship. Additionally, the court found that there was a need to protect plaintiff because of the continuing nature of the conduct. That finding also was supported by the record.

This case is not like L.M.F. v. J.A.F., 421 N.J. Super. 523, 525 (App. Div. 2011), cited by defendant. There was no proven history of domestic violence in that case and the messages related to the children and not to plaintiff's alleged relationship with another person. In L.M.F., we noted that had the communications been about "subjects other than legitimate concerns about the children's lives," they may have been viewed as "infused with a purpose to harass." Id. at 536.

We also find no abuse of discretion by the court's evidence ruling that barred admission of a phone message defendant wanted to introduce. This message purported to relate to whether Sam had physically disciplined their son. Defendant claimed this motivated his actions and he told the judge that at the end of the proceedings. We find no misapplication of the court's discretion by precluding testimony that relates to other issues particularly when defendant had the opportunity to testify in the hearing.⁴

Affirmed.

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


CLERK OF THE APPELLATE DIVISION

⁴ Plaintiff's request for attorney's fees for the appeal is premature and must be made by motion. R. 2:11-4.