SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2122-21

S.A.,

Plaintiff-Respondent,

v.

M.F.I.,

Defendant-Appellant.

Submitted November 14, 2022 – Decided December 1, 2022

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FV-12-1342-22.

Ansell Grimm & Aaron, PC, attorneys for appellant (Alfred M. Caso, of counsel and on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant M.F.I.[1] appeals from a February 22, 2022 final restraining order (FRO) entered in favor of plaintiff S.A., pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. We affirm.

The parties were married for four years and have an infant son. The underlying incident occurred in the late evening of December 18 and early morning hours of December 19, 2021. Old Bridge Township Police assisted plaintiff, who speaks limited English, in filing an initial domestic violence complaint and obtaining a temporary restraining order (TRO) on December 19. Approximately one week prior to trial, plaintiff amended the TRO to include a history of domestic violence. The predicate act, which remained the same in both TROs, alleged defendant got on top of plaintiff, "put his hands to her neck, as to choke her, but he did not squeeze. . . . Defendant eventually released her and she made her way to the front door. He then opened the front door and pushed her out the door."

The history of domestic violence alleged in the amended TRO included defendant calling plaintiff degrading names "on a regular basis and in front of his mother and other family members[;] . . . regularly forc[ing plaintiff] to have sexual relations against [her] will[;]" in 2019, throwing a glass at plaintiff

[1] We use initials pursuant to Rule 1:38-3(d)(9) and (10).

because he believed she had a boyfriend and did not want to have sex with him; in 2020, throwing away plaintiff's prescribed sleep medication; in 2021, breaking plaintiff's cell phone and throwing her out of the marital residence; and two days prior to the predicate incident, taking plaintiff's phone from her.

At trial, plaintiff testified and called her sister-in-law[2] as a witness. Defendant testified on his own behalf.

Plaintiff explained her mother-in-law had been living with the parties and was often critical of plaintiff's abilities as a cook and homemaker. On December 18, at approximately 1:00 p.m., the mother-in-law scolded plaintiff about her cooking, and plaintiff attempted to address the issue with defendant, who ignored her. Plaintiff called her aunt and then her mother, informing them she could no longer tolerate the marriage and wished for a divorce. The aunt refused plaintiff's pleas, and the mother reminded her she had a baby and urged her to calm down.

Defendant left the house at approximately 3:00 p.m. and did not return until approximately 10:30 p.m. Defendant ate dinner around midnight and then came into the bedroom where plaintiff and the baby were sleeping, demanding sex. Plaintiff refused because defendant smelled of alcohol, but defendant

[2] The sister-in-law is married to one of defendant's brothers.

became aggressive, took plaintiff's phone away, and pushed her. Plaintiff testified defendant held her hands down, sat on her chest, and attempted to have sex with her. She was trying to get up and screamed for help from her mother-in-law who was in the next room. Defendant grabbed her neck because he did not want his mother to hear her screams. Plaintiff testified she "was hardly . . . able to breathe. . . . [And i]t was very painful." Defendant released plaintiff because the baby woke up screaming. Plaintiff ran into the living room and defendant followed her. He told her he was divorcing her and to leave the house.

Defendant kicked plaintiff in her hip, which had been previously operated on, causing her pain. Plaintiff testified she left the home wearing only a "night dress[,]" shoes, and a blanket handed to her by the mother-in-law. Plaintiff started walking and asked a stranger for help, and police arrived shortly afterwards. Police took plaintiff back to the home and when she informed them defendant had taken her phone away, he claimed he knew nothing about it. Officers called plaintiff's phone and eventually found it hidden in a drawer underneath the child's clothes. Plaintiff returned with police to the station. There, she took pictures of the marks left by defendant and called her sister-in-law who came to pick her up.

Plaintiff described the history of domestic violence in detail. She told the court "[o]f all the incidents, the one which happened in December when he sat on [her] chest," scared her. She explained that even with a TRO in place, defendant's mother and sister pressured her, and she was "really scared about the whole situation."

The defense attempted to cross-examine plaintiff using a police report by admitting the report under the business records hearsay exception. The trial judge denied the request because the statements in the report were inadmissible hearsay.

The sister-in-law's testimony corroborated plaintiff's. She described plaintiff as disheveled, "very upset[, and] . . . crying." She also testified plaintiff had "a bruise on her neck, and some scratches on her arm." She took two pictures of plaintiff's injuries, which were admitted into evidence. The sister-in-law testified defendant called her three weeks after the incident warning her not to contact or help plaintiff and that she "could get in trouble for helping her."

Defendant testified that around noon on December 18, his mother was attempting to cook lunch, when plaintiff woke up and started fighting with her for being in the kitchen. He alleged plaintiff became angry when plaintiff broke a candle she had made during the argument. Defendant left at 6:00 p.m. to visit

a friend and claimed plaintiff contacted the friend's wife at 7:00 p.m. looking for defendant, asserting if he did not return, she would call the police. He alleged she called back at 9:00 p.m. and threatened to commit suicide, which prompted him to return home.

When defendant returned at 10:00 p.m., he ate dinner until 10:30 p.m. and watched television until midnight. He claimed he entered the bedroom and attempted to "cuddle" with plaintiff, and she rebuffed him. When defendant attempted to kiss plaintiff's forehead, she threatened to call the police because he did not cooperate in getting her a green card, and that she would get her own green card. He asserted she then started screaming and kept "slamming in the door, . . . like[:] 'Watch, I'm gonna call the cops on you. I know how to get my green card.'" Defendant alleged he opened the front door and let plaintiff go outside to "cool down." When she did not return, he went to look for her. He denied choking or attempting to forcefully have sex with plaintiff, and stated when police arrived, they observed no injuries on her. He asserted plaintiff had a history of suicide attempts.

On cross-examination, defendant conceded plaintiff left the house in a blanket and he did not check to see if she had her phone. He claimed he called the sister-in-law because he did not want any of his family members to violate

the TRO. However, he asserted the sister-in-law was biased because the family had stopped talking to his brother because of a financial dispute. He also conceded his mother and sister visited plaintiff, notwithstanding the TRO.

The trial judge found plaintiff's testimony credible and reached the opposite conclusion regarding defendant. He credited plaintiff's version of the events on December 18 and 19, finding defendant's version "didn't make a lot of sense" and was not believable. Defendant was "aware of [plaintiff's] history of suicide[attempts, he] heard her threaten to commit suicide, and [he] didn't call the cops. [He] didn't hustle home [and] . . . didn't, upon arrival at home, go in and talk to her." Noting the events that had transpired earlier that day, the judge also rejected defendant's testimony he attempted to cuddle with plaintiff when he returned home. Defendant never denied plaintiff's claim he sat on her chest, held her hands down, and took her phone. The judge found the pictures plaintiff admitted into evidence proved the injuries to her throat, and concluded defendant tried to overpower plaintiff, put his hands on her throat, and took her phone. He found the sister-in-law "very credible," and her testimony regarding plaintiff's injuries "was essentially unchallenged" and corroborated plaintiff's testimony.

The trial judge concluded plaintiff proved the predicate act of harassment pursuant to N.J.S.A. 2C:33-4(b), by showing defendant held her down and kicked her when he was throwing her out of the house. Pursuant to Silver v. Silver, the judge concluded defendant's use of physical force and violence made the entry of an FRO "often [']perfunctory and self-evident[.]'" 387 N.J. Super. 112, 127 (App. Div. 2006). Further, analyzing N.J.S.A. 2C:25-29(a)(1)-(6), the judge concluded an FRO was necessary for plaintiff's protection because of the history of domestic violence. Indeed, the judge noted defendant failed to rebut plaintiff's claim that he threw a glass at her in 2019, threw out her medication in 2020, broke her phone and threw her out of the house in 2021, and called "her vulgar names[,] . . . putting her down."

Defendant raises the following points on appeal:

> POINT I: IT IS PLAIN ERROR FOR THE TRIAL COURT TO NOT CONSIDER THE POLICE REPORTS AND/OR TESTIMONY FROM RESPONDING OFFICERS ON DECEMBER 18, 2021[,] CONTRADICTING THE TESTIMONY OF PLAINTIFF . . . .
>
> POINT II: THE TRIAL COURT ERRED IN ALLOWING PLAINTIFF. . . TO TESTIFY AT TRIAL AS TO PREDICATE ACTS NOT ALLEGED IN THE TRO AND [AMENDED]TRO . . . IN VIOLATION OF [DEFENDANT'S] RIGHT TO DUE PROCESS.

POINT III: THE TRIAL COURT ERRED IN DETERMINING [DEFENDANT'S] INTENT WAS IRRELEVANT TO A FINDING OF HARASSMENT.

POINT IV: THE TRIAL COURT ERRED IN DETERMINING [PLAINTIFF] WAS MORE CREDIBLE.

I.

In domestic violence matters, the trial court's findings of fact are binding on appeal when "supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 412 (1998) (citing Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). "Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Ibid. (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). "Because a trial court 'hears the case, sees and observes the witnesses, [and] hears them testify,' it has a better perspective than a reviewing court in evaluating the veracity of witnesses." Ibid. (alteration in original) (quoting Pascale v. Pascale, 113 N.J. 20, 33 (1988)). Thus, "an appellate court should not disturb the 'factual findings and legal conclusions of the judge unless [it is] convinced . . . they are so manifestly unsupported by[,] or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Ibid. (alteration in original) (quoting Rova Farms, 65 N.J. at 484).

A trial judge sitting as a fact finder can disregard irrelevant or improper evidence. State v. Kunz, 55 N.J. 128, 144-45 (1969). "Our review of the trial court's evidential rulings 'is limited to examining the decision for abuse of discretion.'" Ehrlich v. Sorokin, 451 N.J. Super. 119, 128 (App. Div. 2017) (quoting Parker v. Poole, 440 N.J. Super. 7, 16 (App. Div. 2015)).

II.

In Point I, defendant argues his trial counsel erred and prejudiced the outcome of the case by not calling a police officer to testify regarding the police reports defendant sought to admit into evidence.[3] He urges us to view the error under the plain error standard. R. 2:10-2. "Under that standard, we disregard any alleged error 'unless it is of such a nature as to have been clearly capable of producing an unjust result.'" State v. Funderburg, 225 N.J. 66, 79 (2016) (quoting R. 2:10-2). Reversal is warranted only where an error raises "reasonable doubt . . . as to whether the error led the [fact finder] to a result it otherwise might not have reached." Ibid. (first alteration in original) (quoting State v. Jenkins, 178 N.J. 347, 361 (2004)).

[3] To the extent defendant is alleging ineffective assistance of counsel as cause for reversal, we note domestic violence proceedings are civil, not counsel mandatory, and ineffective assistance of counsel claims do not apply.

N.J.R.E. 803(c)(6) permits the admission of a statement contained in records of regularly conducted activity

> made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make such writing or other record.
>
> This exception does not apply if the sources of information or the method, purpose or circumstances of preparation indicate that it is not trustworthy.

At the outset, we note defendant's brief does not explain the reason why trial counsel sought to confront plaintiff with the police report, and although the report was marked for identification, defendant's appendix does not include it. Regardless, we glean from the transcript defendant was attempting to use the report, which was dated December 19, to show the officer who prepared it observed no injuries on plaintiff's neck or arms. Indeed, in ruling the report inadmissible, the judge noted the statements in the document were "not [plaintiff's] recorded recollections, they are somebody else's who's not here to support them[]" and defendant "ask[ed] the [c]ourt to make the assumption that it was written down correctly."

We discern no abuse of discretion by the trial judge. Although N.J.R.E. 803(c)(6) does not require "testimony of the custodian or other qualified witness

as a condition for admission of business records[,]"[4] it still requires the proponent establish the record was "made at or near the time of observation by a person with actual knowledge or from information supplied by such a person," which could not be established here without an officer's testimony. For these reasons, we discern no reversible error.

III.

In Point III, defendant asserts the trial judge erred because he "did not have the purpose to annoy, bother, alarm, or . . . harass . . . ." He argues the judge found harassment without finding he had an intent to harass. As proof of his claim, defendant cites the following passage from the judge's findings: "I have an act; it doesn't matter your motivation. It doesn't matter if it was good, intended or not, not when I have an actual physical touching and an act of kicking that I believe."

N.J.S.A. 2C:33-4(b) defines harassment as "[s]ubject[ing] another to striking, kicking, shoving, or other offensive touching . . . ." Our Supreme Court has stated: "Subsection (b) (the assault and battery or physical contact harassment section) deals with touchings or threats to touch, and it does not

[4] Biunno, Weissbard & Zegas, Current N.J. Rules of Evidence, 1991 Supreme Court Comm. Cmt. on N.J.R.E. 803(c)(6) (2022).

require the intended victim to be annoyed or alarmed." State v. Hoffman, 149 N.J. 564, 580 (1997).

We have thoroughly reviewed the record and conclude defendant is mistaken. When the judge's comment is reviewed in context, it is readily apparent he was explaining why he did not believe defendant's testimony that he entered the bedroom to cuddle with plaintiff. The substantial, credible, and unrebutted evidence in the record supports the finding defendant purposely subjected plaintiff to assaultive behavior as described in N.J.S.A. 2C:33-4(b).

IV.

Finally, the arguments raised in Points II and IV lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.