RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2209-20

A.A.,

Plaintiff-Respondent,

v.

I.A.,

Defendant-Appellant.

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Argued January 13, 2022 – Decided May 20, 2022

Before Judges Haas and Mitterhoff.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Morris County, Docket No. FV-14-0710-20.

Matthew James Troiano argued the cause for appellant (Einhorn, Barbarito, Frost & Botwinick PC, attorneys; Brian D. Kenney, of counsel and on the briefs; Matheu D. Nunn, on the briefs).

Gregory A. Pasler argued the cause for respondent (DeTommaso Law Group, LLC, attorneys; Gregory A. Pasler, of counsel and on the brief).

PER CURIAM

Plaintiff commenced this action, pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, based on an allegation that defendant assaulted him by scratching his arm. The allegation arose from an incident on March 27, 2020 in which the parties, who were in the middle of a five-year-long divorce proceeding, had an argument at their shared home after plaintiff took away one of their son's electronic devices. The argument turned physical, resulting in plaintiff being cut and scratched by his wife and son. After the incident, Officer Daniel Cacciabeve arrived at the home. Cacciabeve observed long cuts on plaintiff's arm and subsequently arrested defendant, charging her with simple assault.

On June 26, 2020, after trial, Judge James M. DeMarzo rendered an oral opinion and judgment granting a final restraining order (FRO) against defendant, finding the evidence satisfied both prongs of Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006). He found defendant committed simple assault, N.J.S.A. 2C:12-1, by scratching plaintiff's arm and causing long bloody cuts. The judge concluded that an FRO was warranted based on past turmoil between the parties, including two prior domestic violence appearances, and the need to establish solid boundaries to avoid future incidents.

On appeal, defendant presents the following arguments for our consideration:

> POINT I
>
> THE SECOND FACTOR UNDER SILVER V. SILVER WAS NOT MET AND THE RULING WAS AGAINST THE WEIGHT OF THE CREDIBLE EVIDENCE.
>
> > A. There [I]s [N]o [N]eed for an [O]rder to [P]rotect the Plaintiff from "[I]mmediate [D]anger of [F]urther [A]cts of [D]omestic [V]iolence."
> >
> > > 1. Defendant's Claim that the October 2015 Incident was a History of Domestic Violence Is Barred by the Doctrine of Res Judicata.
> > >
> > > 2. Defendant's Claim that the October 2015 Incident was a History of Domestic Violence Is Barred by the Doctrine of Collateral Estoppel.
> >
> > B. A [FRO] [I]s [N]ot [R]equired [W]hen the [F]actors [U]nder N.J.S.A. 2C:25-29a are [E]valuated.
> >
> > C. There Were Other [R]emedies to [S]eparate the [P]arties without [E]ntering a [FRO].
>
> POINT II

THE PREDICATE ACT OF SIMPLE ASSAULT WAS NOT PROVED BY A PREPONDERANCE OF THE EVIDENCE AT THE TRIAL LEVEL.

A. The [E]lements of Simple Assault [W]ere [N]ot [P]roven by the Plaintiff.

B. The [M]inor [S]on of the [P]arties [S]hould [H]ave [B]een [P]ermitted to [T]estify as to [S]pecific [F]acts [R]elevant to the [A]lleged [A]ssault.

C. The [F]rustrations of the [T]rial Court with the [P]arties, [W]hile [U]nderstandable, led to a [D]ecision that was [U]nsupported by and [I]nconsistent with, the [C]ompetent, [R]elevant, [A]dmissible and [R]easonably [C]redible [E]vidence so that an [U]njust [R]esult [O]ccurred, and the [R]uling [O]ffends the [I]nterests of [J]ustice.

We reject defendant's arguments and affirm, substantially for the reasons set forth in the judge's through and thoughtful opinion. We add the following comments.

Our review of a trial judge's fact-finding function is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). A judge's findings of fact are "binding on appeal when supported by adequate, substantial, credible evidence." Id. at 411-12 (citing Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)).

Deference is particularly warranted where, as here, "the evidence is largely testimonial and involves questions of credibility." Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). Such findings become binding on appeal because it is the trial judge who "sees and observes the witnesses," thereby possessing "a better perspective than a reviewing court in evaluating the veracity of witnesses." Pascale v. Pascale, 113 N.J. 20, 33 (1988) (quoting Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)). Therefore, we will not disturb a judge's factual findings unless convinced "they are so manifestly unsupported by or inconsistent with the competent, relevant[,] and reasonably credible evidence as to offend the interests of justice." Rova Farms, 65 N.J. at 484 (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)).

After considering the testimony and documents submitted at trial, the judge agreed with plaintiff's version of the events. In that regard, plaintiff's account was supported, in several instances, by documentation that included videos and photographs of his injuries and Officer Cacciabeve's testimony. On the other hand, the judge found defendant's "credibility to be lacking[,]" and the judge did not "believe her testimony . . . at all."

Although the judge had some critical remarks regarding both of the parties, there is no evidence that his remarks resulted in unfair prejudice to defendant. After careful examination of the record, we are satisfied that the evidence amply supported the judge's determination that the predicate act of assault was satisfied by defendant scratching plaintiff's arm and that an FRO was necessary to protect plaintiff from further harm.

We also reject defendant's argument that the judge should have ordered civil restraints. A judge cannot order civil restraints without the consent of both parties. See e.g., State v. B.A., 458 N.J. Super. 391, 402 (App. Div. 2019) (noting that plaintiff obtained a temporary restraining order (TRO) against defendant "but then agreed to the entry of civil restraints[,]" which included both parties consenting "to [the] entry of an Indefinite Temporary Restraining Order (ITRO).").

We find equally unavailing defendant's argument that the judge should have let the child testify. Although the judge was not inclined to allow the child to testify, he did state "I may have . . . to consider[] bringing in the child . . . to testify. You know, but that's not on me. That's on these parents, and that's on you counsels. . . . if . . . you're going to put a [twelve year old] . . . up on the

stand . . . that's on you." The child did not testify because defendant never sought to call him as a witness.

To the extent we have not addressed defendant's remaining arguments, we find they lack sufficient merit to warrant discussion in a written opinion. See R. 2:11-3(e)(2).

Affirmed.