RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-0549-21
A-0633-21

A.P.V.,

Plaintiff-Respondent,

v.

G.T.,

Defendant-Appellant.

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G.T.,

Plaintiff-Appellant,

v.

A.P.V.,

Defendant-Respondent.

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Submitted October 11, 2022 – Decided January 20, 2023

Before Judges Enright and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Salem County, Docket Nos. FV-17-0353-21 and FV-17-0068-22.

G.T., appellant pro se.

Respondent has not filed a brief.

PER CURIAM

In this one-sided appeal, G.T. (Gina) challenges the denial of her request for a final restraining order (FRO) and dissolution of her temporary restraining order (TRO) against A.P.V. (Adam), her former boyfriend, pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35.[1] Gina also appeals the denial of her application to dissolve Adam's FRO against her pursuant to Carfagno v. Carfagno, 288 N.J. Super. 424 (Ch. Div. 1995). We affirm.

We derive the following pertinent facts and procedural history adduced during the bench trials. Each party testified on their own behalf. The parties' initial dating relationship lasted approximately three months from December 2019 through March 2020. After a brief breakup, the parties reconciled in April 2020 and continued an "on and off" relationship throughout April and May 2020.

[1] We identify the parties by initials and use pseudonyms to protect their identities in domestic violence matters pursuant to Rule 1:39-3(d)(9) and (10).

Gina, believing Adam was cheating on her, attempted to terminate their relationship in May 2020 and requested the return of her house key. Adam texted Gina to meet him at a specific cemetery in Pilesgrove. Gina, perceiving the text to be a threat, immediately contacted the Woodstown State Police. She was advised not to meet Adam and was told an officer would retrieve her house key.

Gina testified they briefly reconciled but, once again, the relationship terminated at the end of June 2020. Gina claimed Adam appeared at her home after she had asked him not to do so. She stated Adam initiated incessant and harassing telephone calls and text messages over the course of three days. For instance, in early July, she received forty-nine calls from a restricted number, which she alleged belonged to Adam based on answering one call and identifying his voice.

Based on the incidents in July 2020, Gina applied for and received the first a TRO against Adam alleging harassment. Gina claimed Adam repeatedly called and texted her, including calls her from a restricted number, and appeared at her house without invitation. After a hearing on Gina's application in August 2020, the judge denied the FRO and dismissed the TRO.

After her first TRO was dismissed, Gina testified the parties saw each other in a casino about a year after the breakup. She explained she had an "uncomfortable" interaction with Adam in the casino. Because Gina wanted to file another TRO, she returned.

Gina returned to the casino to file a report regarding the encounter with Adam. Gina requested a copy of a video of the encounter but was informed such request was only authorized pursuant to a court document or subpoena. Eventually, the casino notified Gina there was no video surveillance for the date of the encounter.

Following the dismissal of Gina's first TRO, Adam obtained a TRO in April 2021 against Gina alleging harassment. Adam claimed Gina "excessively" telephoned "several times a day," left voicemails referencing a "social media dispute," and followed him to the casino. Adam also claimed on one occasion he witnessed her drive past his residence.

The parties were ordered to appear for a FRO hearing. Following a bench trial over three nonconsecutive days, the trial judge granted Adam's application for a FRO against Gina in April 2021.[2]

[2] Gina filed a timely appeal of the FRO, A.P.V. v. G.T., Docket No. A-2429-20, which was later dismissed for lack of prosecution.

In July 2021, Gina obtained a second TRO against Adam, alleging harassment and stalking. She cited numerous alleged calls and text messages from Adam between May 25 and July 22, 2021. Gina testified during the subsequent FRO hearing she received a call followed by a series of text messages and knew the text messages were from Adam because the number was the same one from which he had just called her. Although it was not Adam's usual number, Gina said she identified his voice.

Gina also played one voicemail for the trial judge, in which an "unidentified male voice" said "[Gina], call me back." She played a second and third message for the trial judge involving an unidentified male voice saying something indiscernible, and the "operator" message from the voicemails. Gina, however, did not have any information regarding the owner of the phone number from which the text messages were sent.

Gina further testified at some point Adam "inserted" himself in a visitation "dispute" between Gina and her youngest daughter. She stated Adam also approached her daughter and gave her a copy of the FRO he had against Gina. Gina claimed she did not introduce Adam to her daughter at any time while they were dating. When asked by the trial judge if Gina had photos of Adam driving past her house, she replied she did not.

Adam testified on his own behalf. He recounted the parties' tumultuous dating history. He testified that his last phone contact with Gina was June 30, 2020. He denied calling or texting Gina after June 2020. Adam testified that he has a personal cell phone. In support of his testimony, Adam relied on his records from his cell phone provider. He also denied using his work cell phone to contact Gina.

In an August 2021 oral decision, the trial judge denied Gina's request for a FRO and dismissed her second TRO. The judge concluded there was no "independent subscriber information" regarding the origin of the phone calls and text messages, there was only a "series of calls." He further stated he could not find that "the proofs establish by a preponderance of the evidence . . . that it's been established that [Adam] [was] the person who [contacted] [Gina]." Based on the lack of supporting evidence, the judge found Gina failed to establish a predicate act of harassment. The judge similarly found there was no proof to establish the predicate act of stalking.

Also in August 2021, Gina moved pursuant to N.J.S.A. 2C:25-29(d) to dissolve the FRO obtained by Adam. Gina certified Adam "feigned" fear based on texts and calls allegedly made by her since April 2021. At the hearing to

dissolve that FRO, Gina repeated the facts set forth in her certification, which gave rise to the parties' respective TROs.

In opposition to Gina's application to dissolve the FRO, Adam asserted the evidence submitted by Gina was "false." He also argued he had already proven the FRO against Gina was necessary and her assertions to the contrary were "fabricat[ed]."

The motion judge rendered an oral opinion denying Gina's application. The judge determined Gina's application was procedurally deficient because Gina failed to provide a transcript of the April 2021 FRO hearing, as required under N.J.S.A. 2C:25-29(d). The judge stated that although another judge issued the FRO in dispute on April 29, 2021, "and the transcript of that hearing was not provided to the court, . . . I don't find that to be dispositive at this time."

The judge then addressed the merits of Gina's application guided by the Carfagno factors. The judge stated Gina's arguments were merely "critiques or criticisms of the judge's entry."

On appeal, Gina contends the trial judge erred in failing to find she established the predicate acts of harassment and stalking under the PDVA. She also contends the trial judge abused his discretion by failing to consider her evidence regarding the phone calls, text messages, and voicemail sent to her cell

phone. Lastly, Gina argues Adam's acts of harassment and stalking were "frightening to the average person," and therefore, the judge should have granted her request for FRO.

I.

Our review of a decision by a judge assigned to the Family Part is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). In a domestic violence case, we owe substantial deference to a family judge's findings, which "are binding on appeal when supported by adequate, substantial, credible evidence." Id. at 412 (citing Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). The Family Part has special jurisdiction and expertise in these matters. Id. at 413. Accordingly, an appellate court should not disturb the trial court's factfinding unless the court is "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." Id. at 412 (quoting Rova Farms Resort, Inc., 65 N.J. at 484).

This is particularly true where the evidence is testimonial and implicates credibility determinations. Ibid. (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). A trial judge who observes witnesses and listens to their testimony is in the best position to "make first-hand credibility judgments

about the witnesses who appear on the stand." N.J. Div. of Youth & Fam. Servs. v. E.P., 196 N.J. 88, 104 (2008).

The purpose of the PDVA is to "'assure the victims of domestic violence the maximum protection from abuse the law can provide.'" G.M. v. C.V., 453 N.J. Super. 1, 12 (App. Div. 2018) (quoting State v. Brown, 394 N.J. Super. 492, 504 (App. Div. 2007)); see also N.J.S.A. 2C:25-18. It is "intended to address matters of consequence, not ordinary domestic contretemps." Peranio v. Peranio, 280 N.J. Super. 47, 57 (App. Div. 1995).

In deciding whether to grant a final restraining order, a trial court must engage in a two-step inquiry. Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). The judge must first determine whether a plaintiff has proven by a preponderance of the evidence, that a defendant committed one of the predicate acts referenced in N.J.S.A. 2C:25-19(a), which incorporates harassment, N.J.S.A. 2C:33-4, and stalking, N.J.S.A. 2C:12-10, as conduct constituting domestic violence. Id. at 125-26. The judge must construe any such acts in light of the parties' history to better "understand the totality of the circumstances of the relationship and to fully evaluate the reasonableness of the victim's continued fear of the perpetrator." Kanaszka v. Kunen, 313 N.J. Super. 600, 607 (App. Div. 1998); N.J.S.A. 2C:25-29(a)(1).

If a plaintiff has proven a predicate act, the judge must then assess "whether a restraining order is necessary, upon an evaluation of the facts 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." J.D. v. M.D.F., 207 N.J. 458, 475-76 (2011) (quoting Silver, 387 N.J. Super. at 126-27). Whether a restraining order should be issued depends on the seriousness of the predicate offense, on "the previous history of domestic violence between the plaintiff and defendant including previous threats, harassment[,] and physical abuse," and on "whether immediate danger to the person or property is present." Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. l995) (citing N.J.S.A. 2C:25-29(a)); see also Cesare, 154 N.J. at 402.

Having reviewed the record and applying these standards to Gina's arguments on appeal, we discern no basis for disturbing the trial judge's decision to deny Gina's request for a FRO. A person is guilty of harassment "if, with purpose to harass another," he "[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).

Proof of a purpose to harass is an essential element of N.J.S.A. 2C:33-4. See L.D. v. W.D., 327 N.J. Super. 1, 5 (App. Div. 1999). Finding a party had the purpose to harass must be supported by "some evidence that the actor's conscious object was to alarm or annoy; mere awareness that someone might be alarmed or annoyed is insufficient." J.D., 207 N.J. at 487 (citing State v. Fuchs, 230 N.J. Super. 420, 428 (App. Div. 1989)). "[A] purpose to harass can be inferred from a history between the parties." Ibid. (citing State v. Hoffman, 149 N.J. 564, 577 (1997)). "'A finding of a purpose to harass may be inferred from the evidence presented' and from common sense and experience." H.E.S. v. J.C.S., 175 N.J. 309, 327 (2003) (quoting Hoffman, 149 N.J. at 577). In addition, the communication must be delivered to the victim for harassment to occur. R.G. v. R.G., 449 N.J. Super. 208, 226 (App. Div. 2017) (citing J.D., 207 N.J. at 487).

We are satisfied the trial judge appropriately concluded Gina failed to prove by substantial credible evidence in the record that Adam committed harassment as defined by N.J.S.A. 2C:33-4. Gina's allegations that Adam repeatedly called and texted her are unsupported by the record. As specifically noted by the judge, the identity of the person who sent the text messages and made the phone calls could not be corroborated because there were no cell phone

records from a provider linking the cell phone number to Adam. Although Gina testified it was a male voice on the voicemail, she failed to establish it was Adam's voice.

Similarly unpersuasive is Gina's argument that Adam intended to harass her by delivering a copy of the FRO to her youngest daughter. Gina failed to prove that the communication was delivered to her. See R.G., 449 N.J. Super. at 226. In sum, there is no evidence in the record to support harassment or the need for the protection of a FRO.

We next address Gina's argument regarding stalking. In accordance with N.J.S.A. 2C:12-10(b):

> [a] person is guilty of stalking, a crime of the fourth degree, if he purposefully or knowingly engages in a course of conduct directed at a specific person that would cause a reasonable person to fear for his safety or the safety of a third person or suffer other emotional distress.

For the purposes of this statute:

> (1) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person; directly, indirectly, or through third parties, by any action, method, device, or means, following, monitoring, observing, surveilling, threatening, or communicating to or about a person, or interfering with a person's property; repeatedly committing harassment against a person; or repeatedly conveying, or causing to be conveyed, verbal or written threats or threats conveyed

> by any other means of communication or threats implied by conduct of a combination thereof directed at or toward a person.
>
> (2) "Repeatedly" means on two or more occasions.
>
> (3) "Emotional distress" means significant suffering or distress.
>
> (4) "Cause a reasonable person to fear" means to cause fear which a reasonable victim, similarly situated, would have under the circumstances.
>
> [N.J.S.A. 2C:12-10(a).]

The judge's reasons for finding that Adam's conduct did not constitute harassment similarly supported the determination that Adam's conduct did not constitute stalking. Gina presented no evidence other than telephone calls from an unknown person. The judge also found Gina did not identify the caller as Adam. This, coupled with a lack of credible evidence of a repeated course of conduct orchestrated by Adam to follow, monitor, observe, surveil, threaten, or communicate with Gina. Therefore, there was no evidence to support a finding of stalking.

II.

We now turn to Gina's appeal from the denial of her application to dissolve Adam's FRO, consistent with Carfagno, in which she advances sixteen

arguments for the first time on appeal. Among her contentions, Gina argues the motion judge erred by: conducting a virtual hearing; considering the lack of the April 29, 2021 transcript; not permitting oral argument; ruling against the weight of the evidence; not holding a plenary hearing, and misapplying Carfagno. We reject those arguments. Because we are persuaded the judge should have denied Gina's Carfagno application without prejudice, given Gina's failure to provide the transcript of the April 29, 2021 FRO hearing, we affirm the denial of the Carfagno application, albeit for reasons different than those cited by the judge, and do not address Gina's remaining arguments about her request to dissolve the April 29 FRO. See State v. Heisler, 422 N.J. Super. 399, 416 (App. Div. 2011) (noting a reviewing court is free to affirm "on grounds different from those relied upon by the trial court").[3]

N.J.S.A. 2C:25-29(d) provides that an FRO may be dissolved or modified upon application "only if the judge who dissolves or modifies the order is the same judge who entered the order, or has available a complete record of the hearing or hearings on which the order was based." The complete record must

[3] For the benefit of the parties, we also note that typically, we do not consider an issue raised for the first time on appeal, unless the jurisdiction of the court is implicated, or the matter substantially implicates the public interest. See R. 2:10-2; see also Zaman v. Felton, 219 N.J. 199, 226-27 (2014) (citing Nieder v. Royal Indem. Ins. Co., 62 N.J. 229, 234 (1973)).

include, "at a minimum, all pleadings and orders, the court file, and a complete transcript of the final restraining order hearing. Without the ability to review the transcript, the motion judge is unable to properly evaluate the application for dismissal." Kanaszka, 313 N.J. Super. at 606 (App. Div. 1998). That is because, "[w]ith protection of the victim the primary objective, the court must carefully scrutinize the record and carefully consider the totality of the circumstances before removing the protective shield." Id. at 605. In determining if the applicant has shown good cause, the trial court should consider the non-exhaustive list of factors set forth in Carfagno, 288 N.J. Super. at 435. These factors include:

> (1) whether the victim consented to lift the restraining order; (2) whether the victim fears the defendant; (3) the nature of the relationship between the parties today; (4) the number of times that the defendant has been convicted of contempt for violating the order; (5) whether the defendant has a continuing involvement with drug or alcohol abuse; (6) whether the defendant has been involved in other violent acts with other persons; (7) whether the defendant has engaged in counseling; (8) the age and health of the defendant; (9) whether the victim is acting in good faith when opposing the defendant's request; (10) whether another jurisdiction has entered a restraining order protecting the victim from the defendant; and (11) other factors deemed relevant by the court.
>
> [Ibid.]

The relevant factors are weighed "qualitatively, and not quantitatively . . . ." Id. at 442.

"Generally, a court may dissolve an injunction where there is 'a change of circumstances [whereby] the continued enforcement of the injunctive process would be inequitable, oppressive, or unjust, or in contravention of the policy of the law.'" Id. at 433-34 (alteration in original) (quoting Johnson & Johnson v. Weissbard, 11 N.J. 552, 555 (1953)). "Only where the movant demonstrates substantial changes in the circumstances that existed at the time of the final hearing should the court entertain the application for dismissal [of a domestic violence FRO]." Kanaszka, 313 N.J. Super. at 608.

Here, as the judge observed, she was not provided with a transcript of the April 29, 2021 FRO hearing which resulted in the issuance of an FRO against Gina. Accordingly, we are convinced the judge should have denied Gina's Carfagno application without prejudice to Gina supplying the "complete record" to the court. In reaching this conclusion, we take no position on the merits of Gina's application to dissolve the FRO entered against her, and confirm she is free to refile her application, subject to her supplying the trial court with the complete record required under N.J.S.A. 2C:25-29(d).

In sum, we find no basis to disturb the challenged orders.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION