

RECORD IMPOUNDED

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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0689-22**

L.D., JR.,

Plaintiff-Respondent,

v.

S.L.D.,¹

Defendant-Appellant.

Submitted September 19, 2023 – Decided October 2, 2023

Before Judges Sumners and Perez Friscia.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Essex County, Docket
No. FV-07-0340-23.

Hegge & Confusione, LLC, attorneys for appellant
(Michael Confusione, of counsel and on the brief).

Respondent has not filed a brief.

PER CURIAM

¹ We use initials to protect the confidentiality of the victim in these proceedings.
R. 1:38-3(d)(10).

Defendant S.L.D. appeals from the September 20, 2022 Final Restraining Order (FRO) entered against him under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. Defendant argues the trial judge erred in finding plaintiff L.D., Jr. had proven the predicate act of terroristic threats and that the FRO was necessary to ensure his future protection. As our review of the record demonstrates, the judge's findings are supported by sufficient credible evidence. We affirm.

The parties are brothers who resided together with their parents. On July 20, 2022, plaintiff obtained a temporary restraining order (TRO) after he filed a domestic violence complaint alleging defendant committed the predicate acts of assault and terroristic threats earlier that day. He also asserted a previous history of domestic violence by defendant.

At the FRO trial, plaintiff testified he was asleep in his bedroom when he was awoken by a commotion. He heard his mother, N.D., raising her voice; his father, L.D., Sr., having a conversation with his brother, defendant; and then a door slam. Plaintiff exited his bedroom to go downstairs. On his way down the stairs, plaintiff encountered defendant with a machete in his hand. Defendant waved the machete at plaintiff, then gestured the machete in an upward motion towards plaintiff and stated, "Yeah, I have got something for you too." Plaintiff

believed defendant's actions were "menacing" and that their elderly parents were disturbed by defendant's presence. He continued down the stairs and reached to grab the machete from defendant's hands. The machete blade was in its sheath and not exposed. The brothers fought on the floor over the possession of the machete, which resulted in plaintiff grabbing "it out of [defendant's] hands" during the tussle. In the interim, L.D., Sr. called the police for assistance and the police arrived shortly after the altercation.

At trial, plaintiff further testified he was the target of prior "menacing" and "aggressive" acts by defendant. On one prior occasion, defendant "brandished the machete," and on another occasion he flashed a gun at plaintiff and stated, "I got something for you." Plaintiff testified the acts were "progressively getting worse," that they were all "directed to [him]," that his brother was "dangerous," and that he was "afraid of what [defendant was] going to do to either to himself or to [their family] in a fit of rage."

L.D., Sr. testified he witnessed defendant going toward his room and then returning down the stairs with the machete. L.D., Sr. testified he "went straight to the phone . . . and called the police because that was going too far." He also observed his sons fighting "to get the machete" while "they were both on the floor." L.D., Sr. found defendant's behavior of "waving the machete" to be

"menacing" and "threatening," and that he was "afraid for" plaintiff during the struggle because "[a]ccidents can happen."

Defendant testified to a history of being mistreated by his older brother. Defendant testified as to the predicate incident and acknowledged he had the machete in his right hand but had "no intention of harming anyone . . . just that [he] needed something to say, yo, leave me alone." Defendant perceived it was plaintiff who attacked him to get the machete "out of [his] hand." Defendant had purchased the machete as a "good tool to have," and admitted to previously brandishing the sheathed machete at plaintiff because "when [he] put[s] it in [his] hand[,] [plaintiff] walks away . . . [and] is smart enough not to come close." As to the prior threatening gun incident, defendant denied ever having a gun in the home.

After hearing the testimony and reviewing the evidence, the judge found insufficient facts to sustain an assault occurred but found plaintiff had proven by a preponderance of the evidence the predicate act of terroristic threats based on plaintiff and L.D., Sr.'s credible testimony. The judge further found an FRO was necessary to protect plaintiff from immediate or future acts of domestic violence.

On appeal, defendant argues the FRO should be vacated as the judge erred in finding the predicate act of terroristic threats based on the facts adduced at trial and in failing to apply the required objective standard of review. Alternatively, defendant argues there was insufficient evidence to support the necessity for an FRO to prevent future abuse. After a careful review of the trial testimony, the judge's findings, and the applicable law, we find no merit in defendant's arguments.

Our review of an FRO issued after a bench trial is limited. C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020). "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). "We defer to the credibility determinations made by the trial court because the trial judge 'hears the case, sees and observes the witnesses, and hears them testify,' affording it 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" Gnall v. Gnall, 222 N.J. 414, 428 (2015) (quoting Cesare, 154 N.J. at 412). We defer to a trial judge's factual findings unless they are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Cesare, 154 N.J. at 412 (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J.

474, 484 (1974)); see also C.C., 463 N.J. Super. at 428. However, we review a trial judge's legal conclusions de novo. C.C., 463 N.J. Super. at 429. "We accord substantial deference to Family Part judges, who routinely hear domestic violence cases and are 'specially trained to detect the difference between domestic violence and more ordinary differences that arise.'" Id. at 428 (quoting J.D. v. M.D.F., 207 N.J. 458, 482 (2011)). "[D]eference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" MacKinnon v. MacKinnon, 191 N.J. 240, 254 (2007) (quoting Cesare, 154 N.J. at 412).

"In the [PDVA], the Legislature has made clear its intention to 'assure the victims of domestic violence the maximum protection from the abuse the law can provide.'" State v. Chenque-Puey, 145 N.J. 334, 340 (1996) (citing N.J.S.A. 2C:25-18). The PDVA protects adults and emancipated minors who have been subjected to domestic violence by "any other person who is a present household member or was at any time a household member." N.J.S.A. 2C:25-19(d); R.G. v. R.G., 449 N.J. Super. 208, 219-20 (App. Div. 2017) (recognizing the definition of "[v]ictim of domestic violence" had the "intent to broaden the application" of the PDVA).

The entry of an FRO under the PDVA requires the trial judge to make certain findings pursuant to a two-step analysis delineated in Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). Initially, "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 (citing N.J.S.A. 2C:25-29(a)). The judge is also required to consider "any past history of abuse by a defendant as part of a plaintiff's individual circumstances and, in turn, factor that history into its reasonable person determination." Cesare, 154 N.J. at 403. "'A single act can constitute domestic violence for the purpose of the issuance of an FRO,' even without a history of domestic violence." C.C., 463 N.J. Super. at 434-35 (quoting McGowan v. O'Rourke, 391 N.J. Super. 502, 506 (App. Div. 2007)). Second, if a predicate act is proven, the judge must determine whether a restraining order is necessary to protect the plaintiff from immediate harm or further acts of abuse. Silver, 387 N.J. Super. at 127; see also C.C., 463 N.J. Super. at 429. A previous history of domestic violence between the parties is one of six non-exhaustive factors a court is to consider in evaluating whether a restraining order is necessary to protect the plaintiff. N.J.S.A. 2C:25-29(a)(1); see also D.M.R. v. M.K.G., 467 N.J. Super. 308, 324-25 (App. Div. 2021)

(finding whether a judge should issue a restraining order depends, in part, on the parties' history of domestic violence).

A terroristic threat, N.J.S.A. 2C:12-3, is a predicate act of domestic violence enumerated under the PDVA, N.J.S.A. 2C:25-19(a)(3). A person commits a terroristic threat

if he threatens to commit any crime of violence with the purpose to terrorize another or . . . threatens to kill another with the purpose to put [that person] in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and likelihood that it will be carried out.

[N.J.S.A. 2C:12-3(a) & (b).]

Proof of a terroristic threat must be evaluated by an objective standard of review. State v. Smith, 262 N.J. Super. 487 (App. Div. 1993); see also State v. Nolan, 205 N.J. Super. 1, 4 (App. Div. 1985) ("[T]he statute merely requires that the threat be made under circumstances which it carries the serious promise of death. Stated somewhat differently, the words or conduct must be of such a nature as would reasonably convey the menace or fear of death to the ordinary hearer."). "The pertinent requirements [in evaluating an alleged terroristic threat] are whether: (1) the defendant in fact threatened the plaintiff; (2) the defendant intended to so threaten the plaintiff; (3) a reasonable person would have believed the threat." Cesare, 154 N.J. at 402.

The judge, in evaluating the first Silver prong, recognized it was plaintiff's burden of establishing a predicate offense by a preponderance of the evidence, and found plaintiff had established defendant committed a terroristic threat. See 387 N.J. Super. at 125; N.J.S.A. 2C:25-29(a). In an oral decision issued on September 20, 2022, the judge found: defendant waved the machete at plaintiff and stated threatening words; defendant intended to threaten plaintiff; and "a reasonable person would have believed that [defendant's] waving of the machete in the air was clearly a threat to [his] brother." The judge acknowledged a "history of brotherly fighting," but assessed the testimony and ultimately found plaintiff's testimony was more credible based on what the judge "observed," "listened" to, and "watched." See Gnall, 222 N.J. at 428. The judge found plaintiff "more credible than [his] brother" and that L.D., Sr. was "clear on his recollection" and provided testimony consistent with plaintiff's testimony. As the judge correctly found, the facts substantially support of a finding of a terroristic threat. The judge correctly examined in detail the elements of a terroristic threat in determining that defendant in fact made a threat, intended to make a threat, and "that a reasonable person would have believed it a threat." Additionally, the judge, contrary to defendant's argument that the required

objective standard of review was not applied, specifically referenced viewing the actions in light of what "a reasonable person would have believed."

We further conclude the judge's findings of prior acts of domestic violence, which consisted of defendant "swinging a machete" and "playing with a gun," are supported by the substantial credible evidence. The judge appropriately considered these prior acts for context in her evaluation as to the predicate act of a terroristic threat. Defendant's arguments that his actions do not qualify as terroristic threats and the judge failed to apply the objective standard are unsupported by the testimony and the judge's cogent oral decision.

With respect to the second Silver prong, the judge found the FRO is necessary to protect plaintiff from immediate and future harm. See 387 N.J. Super. at 126-27. The judge appropriately considered the factors under N.J.S.A. 2C:25-29(a)(1) to (b)(6) and found defendant's actions "are getting worse and worse," and there "is a pattern" which establishes "an immediate danger" to plaintiff. The judge properly considered and found credible the prior history of defendant brandishing the machete and playing with a gun to intimidate plaintiff, which caused plaintiff to have a legitimate fear based on defendant's escalating actions. See N.J.S.A. 2C:25-29(a)(1). The judge's findings are supported by

substantial credible evidence in the record as there is sufficient evidence to support the necessity for an FRO to prevent further abuse.

To the extent we have not addressed any other arguments raised by defendant, we conclude they lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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



CLERK OF THE APPELLATE DIVISION