

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-0737-21

J.L.F.,

Plaintiff-Respondent,

v.

J.A.F.,

Defendant-Appellant.

Submitted December 5, 2022 – Decided February 21, 2023

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Ocean County, Docket
No. FV-15-0545-22.

Law Offices of Nicholas A. Moschella, Jr., LLC,
attorneys for appellant (Nicholas A. Moschella, Jr., on
the brief).

Respondent did not file a brief.

PER CURIAM

Defendant J.A.F.¹ appeals from a September 28, 2021 final restraining order (FRO) entered against him in favor of plaintiff J.L.F. pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35 (PDVA). Following our review of the record and applicable legal principles, we vacate and remand for further proceedings.

I.

The parties appeared pro se at trial, which was conducted via Zoom. The court asked the parties if they were present when a prior judge had read preliminary remarks on the record earlier in the day. Specifically, the judge asked if they were advised "how the matter was going to go, whether or not [they had] any evidence or any witnesses to present[.]" Defendant responded in the negative. He then clarified he was there, but when he started to ask questions, he was cut off and told "that's for the trial" The court proceeded to ask the parties if they wanted to be represented or proceed without an attorney. Plaintiff advised the court she was going to represent herself. Defendant stated he is going to represent himself "for the time being[.]" but later clarified he waived his right to an attorney.

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

At the conclusion of the trial, after taking testimony from plaintiff, defendant, and their seventeen-year-old daughter, the court made the following findings of fact and conclusions of law. The court noted defendant had been hospitalized due to COVID and left against medical advice. He texted his wife and asked her to come pick him up. She refused because defendant had numerous health issues, and she wanted him to get better. Defendant subsequently obtained an Uber car service ride from the hospital to his home. Plaintiff, who was at work when defendant texted, went home before defendant because she was concerned one of her daughters was there alone.

At some point after defendant was dropped off at his home, he was observed "sitting in the grass because he had fallen" Defendant had suffered a stroke two years earlier resulting in weakness on one side of his body. He was also obese and had difficulty ambulating. Plaintiff testified defendant was screaming for the younger daughter to come get him, not realizing both plaintiff and the older daughter were home. Plaintiff testified she was concerned for her safety and the safety of her daughters based on defendant's behaviors since his stroke. Accordingly, plaintiff called the police. By the time police arrived, defendant had crawled into the house. The police then spoke with both

parties. Plaintiff went to the police station and subsequently obtained a temporary restraining order (TRO) against defendant.

The court noted plaintiff testified about a prior history of mental and verbal abuse and that she had been called home on four occasions over the past year and a half when defendant was having a confrontation with their daughters. Plaintiff testified defendant did not take care of himself, or take his medications, and blamed plaintiff for his problems. The court concluded the parties' older daughter corroborated plaintiff's testimony.

The court noted defendant testified he neither pushed his daughters, threatened them in any way, nor threw anything at plaintiff. It also stated defendant claimed he never punched a hole in the wall, contrary to his daughter's testimony.

The judge proceeded to discuss the "cycle of domestic violence[,] " noting it is not just about physical abuse, but that it is about "dominion and control." The court noted, "there's no doubt in this [c]ourt's mind that this defendant exercised and tried to continue to exercise dominion and control[,] not only over his wife but his two daughters. I don't find his testimony to be credible in denying everything that occurred, saying most of it is lies." The court further stated "[t]he testimony of [plaintiff] and [their daughter] was consistent with

harassment[,] that the defendant wanted to harass the plaintiff and his daughters . . . and the plaintiff was annoyed or alarmed."

The court further stated:

[W]hen the defendant was yelling on the grass, [plaintiff] was afraid for her safety enough that she called the police. She didn't go out and try to deal with the defendant on her own; she called the police. And she testified that was because she's always walking on eggshells with the defendant, that she really wants him to get better but he doesn't do anything to help himself, that he needs mental health treatment; that he's subjected her to emotional abuse not only on September 23[,] 2021[,] but it was as a result of the emotional abuse that he's subjected her to before that led to her actions on September 23[,] 2021[,] of not going out, of not confronting him, of calling the police because she did not want to have the situation escalate as it has done in the past where she has had to come home from work several times to de-escalate a situation that was occurring between the defendant and his daughters.

The court said defendant made physical threats against plaintiff in the past, and she was fearful for her safety. The court further noted, "I am satisfied that on September 23[,] 2021[,] . . . defendant did harass both . . . plaintiff and her daughters . . . by coming home against medical advice even though . . . plaintiff had texted him to say . . . '[d]on't come home. You need help.'" The judge further determined there was a history of domestic violence, and did not find defendant credible in his denials. The judge found defendant engaged in a

"pattern of abusive verbal behavior towards the plaintiff and both children at least in the past two years." The court then granted the FRO, noting the restraining order was necessary to protect plaintiff from any future acts of domestic violence.²

This appeal followed.

II.

Our scope of review is limited when considering an FRO issued by the Family Part. See D.N. v. K.M., 429 N.J. Super. 592, 596 (App. Div. 2013). That is because "we grant substantial deference to the trial court's findings of fact and the legal conclusions based upon those findings." Ibid. "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). "Deference is especially appropriate 'when the evidence is largely testimonial'" and hinges upon a court's ability to make assessments of credibility. Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). We review de novo the court's conclusions of law. S.D. v. M.J.R., 415 N.J. Super. 417, 430 (App. Div. 2010).

² The court also suspended defendant's parenting time and further ordered a risk assessment be completed before defendant could have any parenting time with the children.

The entry of an FRO requires the trial court to make certain findings, pursuant to a two-step analysis. See Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). Initially, the 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." Id. at 125. The trial court should make this determination "in light of the previous history of violence between the parties." Ibid. (quoting Cesare, 154 N.J. at 402). Secondly, the court must determine "whether a restraining order is necessary, upon an evaluation of the factors 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." Id. at 127 (citing N.J.S.A. 2C:25-29(b) ("In proceedings in which complaints for restraining orders have been filed, the court shall grant any relief necessary to prevent further abuse.")); see also J.D. v. M.D.F., 207 N.J. 458, 476 (2011).

III.

Defendant raises the following points on appeal:

POINT I

THE DEFENDANT WAS DENIED A FULL AND FAIR HEARING AND SHOULD BE AFFORDED A NEW TRIAL.

A. The [d]efendant did not knowingly and intelligently waive his right to counsel.

B. Defendant was denied opportunity to cross-examine witnesses.

C. The [c]ourt issued the FRO without full consideration of facts.

Our Supreme Court has noted, "ordinary due process protections apply in the domestic violence context, notwithstanding the shortened time frames for conducting a final hearing that are imposed by the statute." J.D., 207 N.J. at 478 (internal citations omitted). One of those important rights is the right to counsel. As we recently held in A.A.R. v. J.R.C., "due process does not require the appointment of counsel for indigent defendants in a domestic violence proceeding seeking an FRO." 471 N.J. Super. 584, 588 (App. Div. 2022) (citing D.N., 429 N.J. Super. at 606). However, it requires "a defendant understands that he or she has a right to retain legal counsel and receives a reasonable opportunity to retain an attorney." Ibid. (citing D.N., 429 N.J. Super at 606).

Moreover, due process requires trial courts to inform "domestic violence defendants, in advance of trial, of the serious consequences should an FRO be entered against them." Ibid. This is because the issuance of an FRO "has serious consequences to the personal and professional lives of those who are found guilty of what the Legislature has characterized as a serious crime against

society." Ibid. (quoting Franklin v. Sloskey, 385 N.J. Super. 534, 541 (App. Div. 2006)); see also N.J.S.A. 2C:25-18.

For example, "a defendant is subject[ed] to fingerprinting and the Administrative Office of the Courts maintains a central registry of all persons who have had domestic violence restraining orders entered against them." Peterson v. Peterson, 374 N.J. Super. 116, 124 (App. Div. 2005) (internal citations omitted). Additionally, if a defendant violates a restraining order, such violation "constitutes contempt, and a second or subsequent non-indictable domestic violence contempt offense requires a minimum term of thirty days imprisonment." Ibid. To prevent further abuse, "the issuing court may also impose a number of other wide-reaching sanctions impairing a defendant's interests in liberty and freedom" Ibid. (quoting N.J.S.A. 2C:25-29(b)). Finally, "familial relationships may be fundamentally altered when a restraining order is in effect." A.A.R., 471 N.J. Super. at 589 (quoting Chernesky v. Fedorczyk, 346 N.J. Super. 34, 40 (App. Div. 2001)).

Here, the trial judge did inquire if defendant wanted an attorney prior to proceeding with trial. However, the court did not apprise of him of the serious ramifications he faced should an FRO be entered against him. Although it appears there was a prior judge who had a discussion with the litigants, it is not

clear from the record what the judge communicated to defendant. Regardless of what the prior judge may have stated, it is clear defendant had certain questions that were not answered. In short, there is no indication defendant understood the potential consequences of an FRO. Therefore, defendant waiving his right to an attorney for the FRO trial was not fully informed. "Had [he] been informed of those consequences at the outset, he would have had a more meaningful basis to decide whether to retain counsel." A.A.R., 471 N.J. Super. at 589. Accordingly, we conclude defendant was not afforded his due process rights and we vacate the FRO.

Because we are vacating the FRO, we need not reach the balance of the remaining arguments raised on appeal. However, we only briefly address one other issue. Plaintiff testified at length regarding her concern for her daughters and defendant's actions purportedly directed at the children. The transcript demonstrates the trial judge recognized the daughter could not obtain a restraining order, and she tried to focus the witnesses on the alleged harassment of plaintiff as opposed to the daughters. However, plaintiff and the parties' daughter testified extensively about defendant's interaction with both daughters. Moreover, the trial court referenced in its decision the pattern of abusive verbal behavior directed towards the children.

On remand, the trial court should be guided by E.K. v. G.K.,³ where we noted, in cases involving domestic violence, harassment pursuant to N.J.S.A. 2C:33-4 cannot be found even assuming the defendant purposely harmed the couple's child. Id. at 570. Rather, the statute requires a defendant to have injured a child with the purpose to harass the plaintiff. Id. at 571. It is not clear from the record the court made this finding or that it was supported by the testimony. On remand, the court should be mindful of this issue during the re-trial.

IV.

Although we recognize the time and effort the trial court expended in this matter, on remand, we direct a different judge to consider the matter. Pellicer ex rel. Pellicer v. St. Barnabas Hosp., 200 N.J. 22, 59-60 (2009) (citing Entress v. Entress, 376 N.J. Super. 125, 133 (App. Div. 2005)) (remanding to different judge to avoid the appearance of bias or prejudice based upon the judge's prior involvement and credibility determinations). We take no position on whether there are grounds to establish a predicate offense or whether plaintiff can satisfy the second prong of Silver. We leave that to the sound discretion of the new

³ 241 N.J. Super. 567 (App. Div. 1990).

judge. For the reasons noted above, we vacate the FRO, reinstate the TRO, and remand the matter to the trial court for a new trial.

Vacated and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION