SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1291-21

S.J.S.,

Plaintiff-Respondent,

v.

R.J.D.,

Defendant-Appellant.

Submitted December 13, 2022 – Decided April 6, 2023

Before Judges Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Middlesex County, Docket No. FV-12-0823-22.

Evan F. Nappen Attorney at Law, PC, attorneys for appellant (Louis P. Nappen, on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant appeals from a final restraining order (FRO), which was entered pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A.

2C:25-17 to -35.[1] Defendant argues the trial judge erred in finding plaintiff had proven the predicate act of harassment and that the FRO was needed to ensure plaintiff's future protection. Because the judge's findings were supported by substantial credible evidence, we affirm.

I.

The parties had an "on and off" dating relationship for twenty-two years. Twelve years into the relationship, plaintiff found out defendant was married. In 2018, plaintiff told defendant she was "done," and if he wanted to continue their relationship, he had to divorce his wife. The parties' physical relationship ended then, but they continued to communicate. Plaintiff testified that in June 2021, she again had told defendant she was "done" and stopped communicating with him. According to plaintiff, defendant "doesn't take no for an answer." Defendant continued to attempt to contact plaintiff, calling her and sending her "thousands of text messages . . . ." Plaintiff did not respond to any of them.

On October 7, 2021, plaintiff filed a domestic-violence complaint against defendant, alleging the predicate acts of harassment, lewdness, stalking, and cyber harassment. In the complaint, plaintiff asserted that since their June break-up, defendant had sent her "over 2,000 messages from various cell phone

[1] We use initials in accordance with Rule 1:38-3(d)(10).

numbers after she blocks one" and on that day had "sent from his phone an image of a male friend's car in her driveway indicating that he was outside her home." She claimed defendant had "threatened to post provocative/nude photos of . . . plaintiff if she d[id] not respond to him." A judge granted plaintiff a temporary restraining order.

A different judge conducted a hearing regarding plaintiff's FRO application. Plaintiff represented herself; defendant was represented by counsel. Plaintiff testified and called her daughter as a witness. Defendant also testified.

According to plaintiff, she was at home with a friend on October 7 when her "cell phone started going off rapidly with messages [from defendant] saying, '[p]ick up the phone. You need to pick up the phone. You need to be civil. You need to talk to me.'" Defendant called her and left a message, saying "[y]ou need to answer the phone if you know what's good for you . . . ." Plaintiff did not answer. Defendant sent a photograph of a car that was in her driveway, assuming she was dating someone. He then sent her about a dozen text messages and threatened to send her more the next day. Plaintiff also testified that since June 2021, defendant had sent her approximately 2,500 text messages using forty-nine different telephone numbers. In addition to texting her, defendant also called her personal and work phones. Plaintiff testified defendant had told

her he would call and text her "from a new number every day." She testified he had filled up her voicemail inbox multiple times. According to plaintiff, defendant "rapid fire" texted her nude photographs of her, telling her "I can do this all night and I have more." Defendant texted her that he was "going to continue on pushing [her] buttons until [he] g[o]t what [he] want[ed]" and threatened he would "continue on posting [her] pictures where [he wanted] to post them." Plaintiff testified defendant's texts and calls had "upset" and "angered" her and had made her feel "threatened" and "very anxious." Plaintiff believed defendant was acting "purposely," citing texts in which he had told her he knew he was "stressing" her and telling her to call him.

Plaintiff also testified defendant recently had "hacked" into her Wi-Fi and had sent her text messages with eyeball emojis stating, "I see you working from home . . . ." Right after her printer had stopped working, defendant texted her, "I know you're having trouble. I know things are going wrong. Why don't you call me? . . . Why don't you ask me to help you? You know I can help you." Plaintiff testified defendant previously had installed a camera system in her house but had kept the password and "would hack into [it] and see what [she] was doing; who was at [her] home."

In addition, plaintiff testified defendant had come to her workplace and parked his car in a way that blocked her car. When she asked him how he had found her that day, he told her he knew "everything" and admitted he had been following her.

When asked why she thought she needed an FRO, plaintiff stated: "he has told me that I am his property, he owns me. He has . . . told me [he] has never given up. He had too much invested in this."

Plaintiff's daughter testified that defendant's "phone calls and the text messages do not stop" and from June had been "going on . . . nonstop." She testified that "[i]n an hour visit, we're 200 text messages and [ten to twelve] phone calls in." She was present on October 7, 2021, and confirmed defendant had been "calling and texting [plaintiff] rapidly." She had seen his car parked on her mother's street. She described defendant as being "very scary," "very dangerous," "very sick in the head," and "capable of many things," citing the thousands of text messages he had sent using nearly fifty different phone numbers. She described defendant's "verbal and mental abuse" of plaintiff as being "beyond . . . it is out of control." She also testified she was "scared when [plaintiff] goes to sleep every night" that defendant will have somebody hurt her.

In his testimony, defendant admitted he had changed his phone number forty-nine times between June and October 2021, but claimed he had done so because "the daughter is very involved in the relationship . . . and blocks [him] from communicating with [plaintiff]." He faulted plaintiff for not responding to his messages, asserting she should have had "a civil conversation" with him to tell him "let's end it for real . . . ." He denied ever threatening to post her nude photographs on the internet, driving past her home, or hacking into her camera. He entered into evidence texts plaintiff had sent him that pre-dated the June 2021 break-up. He did not deny sending plaintiff approximately 2,500 texts between June and October 2021.

At the conclusion of the hearing, the judge placed her decision on the record. She found defendant's testimony not credible, noting the evidence he had presented related to events that took place during the parties' twenty-two year relationship and not after the June 2021 break-up. She found plaintiff's testimony credible and corroborated by her daughter's testimony and even some of defendant's testimony.[2] The judge found plaintiff had sent a message to

[2] Defendant contends the judge found plaintiff's testimony about the forty-nine changes in defendant's phone number not credible. Defendant misreads the judge's opinion. The judge found not credible defendant's testimony that plaintiff's daughter had somehow caused him to change the numbers. Moreover,

defendant, "even if it was non-verbal": "She did not respond in months, but he continued to send messages. He continued to reach out. He wanted to communicate with her, but she did not [want] him to communicate at all and did not respond." Despite plaintiff's "very clear" message, defendant sent plaintiff approximately 2,500 text messages and left her voicemail messages in the months following their break-up.

Based on those factual findings, the judge found plaintiff had proven the predicate act of harassment, citing the language of N.J.S.A. 2C:33-4(a). She also held plaintiff had established the necessity of an FRO, finding:

> It is clear that although she has not responded to him, [defendant] has not gotten it. He asked how come she didn't call the police sooner.
>
> She gave a response to that by saying she was hoping that he would finally wake up and realize she did not want to be bothered with him.
>
> Well, ultimately, she did call the police; whether she called the police the first day or the 101st day or the 1,001st day, she ultimately did because the communications did not end.
>
> So, the court based on the continuous course of conduct, including what the court does believe is a photograph of a person's car at her house and a question as to whether or not it's a boyfriend and to give me back

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in his testimony defendant conceded he had changed his phone number forty-nine times from June to October 2021 in an effort to reach plaintiff.

> the $15,000 you owe me, the court does believe that that was done by [defendant] and the court does believe that it is a sufficient basis upon which [plaintiff] can get a restraining order.

On the same day, the judge issued the FRO.

On appeal, defendant argues the trial judge erred by failing "to properly administer" the second prong of Silver v. Silver, 387 N.J. Super. 112, 126-27 (App. Div. 2006), and by failing to find defendant had "purposely committed all elements required for a finding of harassment."[3] We disagree and affirm.

II.

The scope of our review is limited in an appeal involving an FRO issued after a bench trial. 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); see also Gnall v. Gnall, 222 N.J. 414, 428 (2015). We defer to a trial judge's factual findings unless they are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably

[3] Defendant also argues New Jersey's harassment statute, N.J.S.A. 2C:33-4, is unconstitutional. Defendant admittedly did not raise that argument before the trial judge. Accordingly, we decline to consider it on appeal. See Alloco v. Ocean Beach & Bay Club, 456 N.J. Super. 124, 145 (App. Div. 2018) (applying "well-settled" principle that appellate courts will not consider an issue that was not raised before the trial court).

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. We review de novo a trial judge's legal conclusions. 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 between couples.'" 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). We defer to a trial judge's credibility determinations "because the trial judge 'hears the case, sees and observes the witnesses, and hears them testify,' affording [the trial judge] 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" Gnall, 222 N.J. at 428 (quoting Cesare, 154 N.J. at 412).

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); see 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 PDVA also protects "any person who has been subjected to domestic violence by a person with whom the victim has had a dating relationship." N.J.S.A. 2C:25-19(d).

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, 387 N.J. Super. at 125-27. First, 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)). Second, the judge must determine whether a restraining order is necessary to protect the plaintiff from immediate harm or further acts of abuse. Id. at 126-27; see also C.C., 463 N.J. Super. at 429. A previous history of domestic violence between the parties is one of the factors a court considers in determining 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) (explaining that whether a judge should issue a restraining order depends, in part, on the parties' history of domestic violence).

Harassment is one of the statutory predicate acts. See N.J.S.A. 2C:25-19(a)(13). A person commits harassment "if, with purpose to harass another,"

he or she: (a) "[m]akes, or causes to be made, one or more 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). A judge may use "common sense and experience" to determine a defendant's intent and to infer a purpose to harass from the record evidence. D.M.R., 467 N.J. Super. at 323 (quoting H.E.S. v. J.C.S., 175 N.J. 309, 327 (2003)).

Applying those standards, we are satisfied the issuance of the FRO is supported by substantial credible evidence in the record under both prongs of the Silver test. Defendant argues the trial judge should have found that the parties' behavior after the June 2021 break up was no different than their behavior before that break up: plaintiff would say she was "done," defendant would contact her, plaintiff eventually would respond, and they would get back together. The problem with that argument is that plaintiff's behavior was not the same. The judge found plaintiff's testimony credible, and we defer to that credibility finding. The credible evidence demonstrated that unlike in prior break-ups, plaintiff never responded to defendant's efforts to contact her after the June 2021 break up.

Defendant faults plaintiff for never responding and for not telling him to stop contacting her. He even faults her for not calling the police sooner. But as the judge found, "it is very clear that there was a message being sent to [defendant] even if it was non-verbal . . . ." Despite that clear message, month after month, defendant kept sending plaintiff messages. Defendant's argument that the record did not support a finding he had knowingly harassed plaintiff is belied by his own texts. By telling plaintiff he would contact her using "a new number every day," he could send her "rapid fire" texts of her nude photographs " all night and I have more," he was "going to continue on pushing [her] buttons until [he] g[o]t what [he] want[ed]," and that he knew he was "stressing" her and that she should call him, defendant demonstrated the requisite purposeful intent to support the judge's finding of harassment under the PDVA.

Defendant relies on L.M.F. v. J.A.F., Jr., 421 N.J. Super. 523 (2011), but the facts of that case are very different from the facts of this case. In L.M.F., the parties were divorced parents, text messaging was their primary means of communication, and the messages at issue were about their child. Id. at 531, 535. The plaintiff complained about three texting incidents involving four, eighteen, and seven texts from the defendant. Id. at 526-27, 529. As we held, "[d]ivorced parents must necessarily communicate from time to time about their

children" and "[h]ad the communications involved subjects other than legitimate concerns about the children's lives, [the] defendant's persistence might have eventually been viewed as infused with a purpose to harass [the] plaintiff." Id. at 536. The defendant's texts about his child in L.M.F. are vastly different than defendant's conduct in this case. And contrary to defendant's assertion, the use of forty-nine different phone numbers to send an ex-girlfriend thousands of unwanted and unanswered post-break-up messages does not constitute "ordinary domestic contretemps." See Corrente v. Corrente, 281 N.J. Super. 243, 250 (App. Div. 1995) (holding turning off a phone after a fight about finances and the martial home was not harassment but "ordinary domestic contretemps").

Regarding the second prong of Silver, defendant contends the judge "merely" found "the issuance of [an FRO] will make [defendant] stop bothering [plaintiff]." Sending an ex-girlfriend over 2,000 unwanted texts from forty-nine different phone numbers in the months after a break-up isn't mere "bothering"; it's harassment under the PDVA, as the judge correctly held. And "there is no such thing as an act of domestic violence that is not serious." Brennan v. Orban, 145 N.J. 282, 298 (1996).

When asked why she needed an FRO, plaintiff testified defendant had told her she was "his property, he owns [her]," and he "has never given up." That

testimony, the substance and relentless nature of defendant's communications, and the undisputed evidence that despite the clear message plaintiff was sending, it took a restraining order to stop defendant from continuing his harassment support the judge's finding under the second prong of Silver that an FRO was necessary to protect plaintiff from immediate harm or further acts of abuse.

Affirmed.