

RECORD IMPOUNDED

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This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1631-21**

H.A.,

Plaintiff-Respondent,

v.

S.M.A.,

Defendant-Appellant.

Submitted February 28, 2023 – Decided July 31, 2023

Before Judges Messano and Gilson.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Union County, Docket
No. FV-20-1531-21.

Law Offices of Jonathan F. Marshall, attorneys for
appellant (Jeff Thakker, of counsel; William E.
Wackowski, on the briefs).

The Law Offices of Hisham Hamed, LLC, attorney for
respondent (Hisham Hamed, on the brief).

PER CURIAM

In an action brought under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, the court must consider "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" (first Silver prong), and, if so, "whether a restraining order is necessary . . . to protect the victim from an immediate danger or to prevent further abuse" (second Silver prong). Silver v. Silver, 387 N.J. Super. 112, 125–27 (App. Div. 2006).

Following a trial over several non-consecutive days, here, the Family Part judge entered a final restraining order (FRO) against defendant S.M.A. in favor of her estranged husband, plaintiff H.A.¹ On appeal, defendant argues the judge erred by denying her attempt to introduce in evidence GPS coordinates from her cellphone to rebut plaintiff's claims. Additionally, defendant contends the judge's "predicate[]act findings . . . and conclusions of law" were entirely "inadequate," and she urges us to remand the matter for further proceedings before a different judge. Defendant also claims that because of this inadequacy, she is unable to address the judge's findings on the second Silver prong.

¹ We use initials and pseudonyms throughout this opinion pursuant to Rule 1:38-3(d)(10).

We have considered these arguments in light of the record and applicable legal standards. We affirm.

I.

Plaintiff secured an amended temporary restraining order (TRO) against defendant on June 22, 2021, based on the allegations of harassment and assault.² Plaintiff claimed defendant had threatened to kill him during a phone call on June 2, sent him threatening text messages and stabbed him on June 6. The complaint noted that defendant had an active TRO against plaintiff issued in New York.

The parties are immigrants to this country; plaintiff from Egypt and defendant from Palestine; they married in January 2019. The two had been separated for some period before the events occurred that gave rise to plaintiff's complaint.

At trial, plaintiff testified that on June 6, 2021, he returned to the parties' former marital residence in Union Township to pick up some things he had left behind. Defendant was no longer living there, but A.S., an acquaintance of

² In his oral opinion following trial, the judge said plaintiff alleged defendant committed additional predicate acts of "contempt and . . . any other crime involving risk of death or serious bodily injury." The amended TRO complaint in the appellate record does not contain these allegations.

plaintiff, had moved in with his family. Plaintiff said the doorbell rang, he answered it, and defendant entered the house. They argued over their pending divorce and a deed defendant had allegedly forged.

During the altercation, defendant cut plaintiff across his chest with a fruit knife. When A.S. tried to intervene, defendant cut him too. Plaintiff called 9-1-1, police responded to the scene, and plaintiff was treated for his injuries at University Hospital. Photos of plaintiff's injuries and the police report of the incident were admitted into evidence.

Although it was not listed as a predicate act of domestic violence in the TRO complaint contained in the appellate record, plaintiff testified without objection about another incident that occurred on June 22, 2021. Plaintiff said defendant again stabbed him with a small kitchen knife as he retrieved mail from his mailbox. Plaintiff "fell and lost consciousness" and was taken to Trinitas Hospital in Elizabeth. He again identified photographs of his injuries, and a police report of the incident, both of which were later introduced into evidence.³

³ The police report indicates this incident was witnessed by I.H., who confirmed that defendant struck plaintiff and was swinging a knife in his direction. I.H., however, did not testify at trial.

Defendant was arrested. Plaintiff testified that on July 7, defendant called him from jail. She threatened to kill him, or "get someone else to kill [him]."

A.S. testified regarding the June 6 incident. He generally corroborated plaintiff's version, although there were inconsistencies between the two. For example, plaintiff testified the incident occurred around 5:00 p.m., but A.S. said it happened in "the late morning" before noon. Plaintiff testified that defendant was "bigger" than him, but A.S. described the woman who cut plaintiff as "small to medium" in build.⁴

Defendant denied the allegations, stating on June 6 she was shopping with family members; she produced receipts from two stores, one of which clearly indicated a purchase made at 4:12 p.m. Defendant said she proceeded to a store in Watchung where her brother worked. A photograph from defendant's cell phone, showing her and her family and time-stamped 4:35 p.m., was admitted into evidence. Defendant produced a private investigator who testified that the shortest route from the Watchung store to the scene of the alleged knifing was 8.7 miles and took approximately fourteen minutes to drive.

⁴ The hearing took place using Zoom, and A.S. said he was only able to see the person who was speaking and the interpreter on the screen. He also said that plaintiff's female assailant was wearing a surgical mask. The alleged assault took place in the midst of the recent COVID-19 pandemic.

A.E. and S.E., defendant's brother and sister, testified and confirmed much of her testimony. Both said the family remained at the Watchung store from approximately 4:30 p.m. until around 6:00 p.m. K.S., one of the store's employees who took the cell phone photographs of the family, testified they were still at the store when he left work at 5:30 p.m.

Defendant also denied the knife attack that allegedly occurred on June 22, 2021. She testified that she and her seven-year-old daughter, who defendant home schooled, were at home until police arrived at approximately 9:00 p.m. and arrested her.

Immediately following the completion of the testimony, the judge entered an oral opinion on the record. Focusing solely on the alleged June 6 assault, the judge found plaintiff was "a credible witness[,] whose "testimony was consistent" and "delivered with . . . an appropriate demeanor." The judge found A.S. to be credible, and that he "corroborated much of what [plaintiff had] said." He noted that A.S. had "no axe to grind" and no reason to "perjure himself." Additionally, the judge questioned why plaintiff "would [have] inflicted such horrific wounds on his own body."

The judge said defendant may have had the "usual motive" in crimes of violence, "extreme anger." He mused that defendant may have wanted to "harm

[plaintiff] enough, and to do it multiple times to . . . persuade [plaintiff] into leaving, because he's afraid and [to] go back to his country." The judge did not find defendant "to be credible." The judge also found defendant's relatives were likely biased. He explained that even though defendant had been criminally charged, defendant's relatives never went to law enforcement to provide proof of her purported alibi. Lastly, the judge credited plaintiff's testimony about defendant's post-arrest call from jail, noting it had a "severe impact" on his finding.

The judge found defendant committed the predicate act of assault. He then considered the evidence pursuant to the second Silver prong and entered the FRO.

II.

"The scope of appellate review of a trial court's fact-finding function is limited. 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) (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). "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). Moreover, "[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Cesare, 154 N.J. at 413. However, we do not defer to the judge's legal conclusions "if they are based upon a misunderstanding of . . . applicable legal principles." T.M.S. v. W.C.P., 450 N.J. Super. 499, 502 (App. Div. 2017) (quoting N.T.B. v. D.D.B., 442 N.J. Super. 205, 215 (App. Div. 2015)).

A.

Defendant first contends the judge erred by denying her attempt to testify, using her cell phone's stored GPS information, how long she was at her brother's store in Watchung on June 6. Plaintiff's counsel objected, contending defendant was not qualified as an expert, and the testimony "would have to go through multiple layers of authentication" before being admitted. Defense counsel's retort was "everyone uses GPS now and everyone understands it," and the objection was only to the weight of the proposed evidence, not its admissibility. The judge ruled defendant was "not qualified to testify about this technology" and sustained plaintiff's objection.

"When a trial court admits or excludes evidence, its determination is 'entitled to deference absent a showing of an abuse of discretion, i.e., [that] there has been a clear error of judgment.'" Griffin v. City of East Orange, 225 N.J. 400, 413 (alteration in original) (quoting State v. Brown, 170 N.J. 138, 147 (2001)). As such, "we will reverse an evidentiary ruling only if it 'was so wide [of] the mark that a manifest denial of justice resulted[,]" Rowe v. Bell & Gossett Co., 239 N.J. 531, 551–52 (2019)(first alteration in original) (quoting Griffin, 225 N.J. at 413), or it was based on a "misapplication of the law[,]" Cap. Health Sys., Inc. v. Horizon Healthcare Servs., Inc., 230 N.J. 73, 80 (2017) (citing Pomerantz Paper Corp. v. New Cmty. Corp., 207 N.J. 344, 371 (2011)).

While society and our courts have "[g]enerally [accepted] the accuracy of GPS devices," State v. McDuffie, 450 N.J. Super. 554, 570 (App. Div. 2017), defendant cites no New Jersey case that has admitted the testimony of a lay witness regarding GPS coordinates extracted from a cell phone without some evidence demonstrating the witness's proficiency and knowledge of the technology and its reliability and accuracy. In McDuffie, the State's GPS evidence was fully supported by expert testimony. Id. at 565. Without going into detail, most of the out-of-state cases defendant cites are inapposite.

We acknowledge that on occasion our courts have permitted a lay witness to offer testimony regarding his specialized knowledge of "technical [and] arcane" details when the witness had dealings with the technology as an employee. E & H Steel Corp. v. PSEG Fossil, LLC, 455 N.J. Super. 12, 26 (App. Div. 2018). However, in this case, defendant never sought to detail her familiarity with the GPS technology imbedded in her cell phone, its accuracy or reliability. The judge properly sustained plaintiff's objection. Additionally, even if the judge erred in excluding defendant's testimony in this regard, given the specific credibility findings the judge generally made regarding plaintiff's and defendant's testimony, the error was not "clearly capable of producing an unjust result." R. 2:10-2.

B.

Defendant argues the judge's findings regarding the predicate acts alleged by plaintiff were "inadequate." She contends the judge only made findings regarding the June 6 assault and not the other allegations. Defendant contends the judge admonished plaintiff for not responding to the questions posed, thereby questioning the basis for the judge's credibility findings. Defendant claims the judge was not specific in detailing why he concluded her testimony lacked credibility.

"Appellate courts owe deference to the trial court's credibility determinations . . . because it has 'a better perspective than a reviewing court in evaluating the veracity of a witness.'" C.R. v. M.T., 248 N.J. 428, 440 (2021) (quoting Gnall, 222 N.J. at 428). Contrary to defendant's claims, the judge did explain why he was crediting plaintiff's account of the events and not defendant's general denials. The argument warrants no further 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