SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2221-21

K.G.,

Plaintiff-Respondent,

v.

R.G.,

Defendant-Appellant.

Submitted October 17, 2022 – Decided February 2, 2023

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket No. FV-08-1118-22.

Stacy L. Spinosi, attorney for appellant.

Cockerill, Craig & Moore, LLC, attorneys for respondent (Barbara Barclay Moore, on the brief).

PER CURIAM

Defendant R.G. appeals from a March 24, 2022 final restraining order (FRO) entered against him 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 affirm.

I.

Plaintiff K.G. and R.G. divorced in 2016 following eight years of marriage. Beginning in 2020, significant custody and parenting time issues arose between the parties involving their two daughters.[1] The parties' daughters Ellen, born December 2005, and Sarah, born December 2008, began to refuse to see their mother K.G. for parenting time.[2] This resulted in significant custody litigation, and the family was ordered to participate in reunification therapy. The court eventually awarded plaintiff full custody and suspended defendant's parenting time in June 2021.[3]

Despite the court's order, parenting time issues persisted. Plaintiff filed various enforcement applications in New Jersey and Pennsylvania, where defendant resided, following the entry of the June 25, 2021 order. In July 2021,

[1] We need not recount the entire history of the acrimonious custody dispute, which is the subject of a separate opinion issued on the same date as this matter. We only address those facts relevant to this domestic violence action.

[2] We utilize initials and pseudonyms to protect the confidentiality of the parties and their children. R. 1:38-3(d)(3).

[3] Plaintiff in this action is the defendant in the custody litigation.

the children ran away from plaintiff and contacted their paternal grandfather, who transported them to defendant's residence. A Pennsylvania court ordered the children returned to plaintiff. There was a subsequent contempt proceeding in Pennsylvania on March 3, 2022, where the Pennsylvania court again ordered defendant to return the children to plaintiff.[4] Defendant was permitted a ten-minute phone call and ten text messages each day with the children pursuant to the then-existing New Jersey custody and parenting time order.

On March 7, 2022—four days after the Pennsylvania contempt proceeding—plaintiff obtained a temporary restraining order (TRO) against defendant. The complaint alleged defendant went to plaintiff's residence at 2:30 a.m. but sped off. In addition, plaintiff alleged defendant returned later that afternoon demanding to see the children, and when plaintiff tried to shut her front door, defendant held it open saying "you better make them talk to me." Plaintiff further alleged she was "in fear for her life and her children's lives."

The FRO trial was held on March 24, 2022. Plaintiff testified she woke up around 2:30 a.m. to the sound of her children running down the stairs towards the door. She was able to stop one of the children, but the other one said, "[n]o

[4] The court further ordered defendant "shall be arrested by the local police or sheriff['s] department should the minor children be found in [his] home . . . ."

we are leaving." Plaintiff testified she asked her fiancé to look outside to see who was there to pick up the children. The fiancé advised her he saw defendant speeding off. Plaintiff later testified she did not see defendant outside the house. Defendant had no in-person parenting time, although he was permitted to speak with the children for ten minutes between 7:00 p.m. and 9:00 p.m. Defendant was allowed ten text messages per day consistent with the June 25, 2021 court order. Over objection from defendant, the court admitted two custody orders from New Jersey and four orders from Pennsylvania.

Plaintiff testified defendant returned to her home later that afternoon at 1:50 p.m. She stated he knocked, and when she opened the door, he held it open and stated, "I want to talk to the girls." She noticed defendant had Ellen's retainer, and she thought he was going to give it to her and leave. She claims he said, "[w]ell, I'm talking to them." She asked defendant to leave the property, but defendant refused. She then stated she was going to call the police and shut the door. Defendant eventually returned to his car. He initially indicated he would wait for the police, but he left and said he was going to the police station. She testified she was "scared" during the period of time defendant remained outside of her house.

Defendant testified he was having "regular" communications with the children up until the evening of March 6, 2022. When he did not get his regular texts "all of a sudden," he thought it was a "little bizarre." When they did not text him the following morning, he drove to defendant's home. He also testified plaintiff had mentioned at some point "via the girls" about dropping off Ellen's retainer, so he also brought that with him. Defendant testified he knocked on the door and said he had the retainer and asked, "are they alive?" Defendant stated plaintiff responded he should not be at her house and she wanted him to leave. Defendant testified he did not hold the door open or block her car in the driveway. He testified he did not ask to see the children, but instead asked "can I talk to them?" Defendant also testified when he asked one of the girls through the upstairs window if they were okay and why plaintiff took their phones away, his daughter responded "[w]e tried to run away."

Defendant also testified he recorded the incident (video and audio) when he went to plaintiff's home. The video was subsequently played on the record. The video recording captured the following: Defendant asked if the children were alive and why they had not texted him; there was a brief exchange regarding the retainer; plaintiff advised defendant the children did not have their phones because she had them; plaintiff shut the door; defendant opened the

storm door; plaintiff reopened the interior door—there was a discussion regarding the police being called—and plaintiff again shut the door; defendant remained holding open the storm door, asked when he would get his call for the day, and plaintiff responded she was working on getting a phone for them "right now"; defendant then moved to the front lawn and spoke to one of the children through the second story window, asking if the child was "alright" and "not hurt"; plaintiff again opened the door and told defendant to leave the property and that he had no right being there, and she shut the door; defendant responded by saying he did not care, she could call the police because she had also gone to his house all of the time and did the same thing; defendant returned to his car and turned off the camera. On cross-examination, defendant admitted once he realized the girls were okay, he did not immediately leave the property. Rather he left "shortly" thereafter.

Defendant also called M.K., his girlfriend, as a witness. She testified she sleeps on defendant's chest. She stated she knew defendant did not leave the house in the early morning hours of March 7, 2022, because she was using an ovulation tracker and it was a "green week."

The trial court subsequently rendered an oral decision. With respect to the initial incident on March 7, when defendant was allegedly in front of

plaintiff's home and subsequently drove away at 2:30 a.m., the court noted plaintiff did not personally observe defendant outside her home. Moreover, the court found M.K.'s testimony credible defendant was home from 10:00 p.m. in the evening of March 6 until the following morning. Therefore, the court determined there was no predicate act of domestic violence for that early morning incident.

As to the incident the following afternoon at 12:52 p.m., there was no dispute defendant went to plaintiff's home. The court referenced the custody orders in effect at the time and noted defendant did not have any in-person parenting time scheduled. The court also noted defendant was limited by court order to a daily phone call and text messaging. The court discussed defendant's video recording, which was entered into evidence, and found he approached plaintiff's home "clearly without invitation" under the pretext of returning a retainer—which he could have left in the mailbox—to one of the children. It further noted defendant could have filed an appropriate application in the Family Part or had an attorney or another individual return the retainer. The court found the interaction between defendant and plaintiff went "downhill" and defendant's tone and the nature of his inquiries—"[a]re the children alive?", "[w]here are they?", "[w]hy am I not getting their text message?"—coupled with the fact he

was not invited to be at the home and had no in-person parenting time—to be a concern. Plaintiff's comments she would call the police and her concerns, given the ongoing custody battle, supported her contention she was concerned about defendant's presence at her home, where the children were.

Addressing the first prong of Silver v. Silver,[5] the court concluded it was "more than satisfied" defendant intended to harass plaintiff, and he was not there simply to deliver a retainer, but to gain some type of parenting time to which he was not entitled. As to the second prong of Silver, the court noted, given the parties' history and based on its review of the testimony, video, and court orders, plaintiff "clearly" had reason to be fearful for herself and the children. The court also noted an FRO was necessary to keep defendant from interfering with plaintiff at her home during her parenting time.

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 "[w]e grant substantial deference to the trial court's findings of fact and the legal conclusions based upon those findings." Ibid. "The general rule

[5] 387 N.J. Super. 112 (App. Div. 2006).

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 particularly appropriate where the evidence is largely testimonial and hinges upon a court's ability to make assessments of credibility. Id. at 412. 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).

The entry of an FRO requires the trial court to make certain findings, pursuant to a two-step analysis. See Silver, 387 N.J. Super. at 125-27. 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) (stating, "[i]n 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 TRIAL COURT VIOLATED DEFENDANT'S DUE PROCESS RIGHTS BY FIRST ALLOWING PLAINTIFF TO TESTIFY OUTSIDE THE ALLEGATIONS IN HER COMPLAINT AND THEN REFUSING TO ALLOW DEFENDANT TO CALL A WITNESS TO REBUT PLAINTIFF'S NEW ALLEGATIONS.
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> POINT II
>
> THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING DEFENDANT ENGAGED IN CONDUCT OF HARASSMENT JUSTIFYING ENTRY OF A [FRO].
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> POINT III
>
> THE TRIAL COURT ABUSED ITS DISCRETION BY ENTERING A [FRO] AGAINST DEFENDANT BY ASSUMING INTENT WHEN CREDIBLE EVIDENCE PROVED OTHERWISE.
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> POINT IV
>
> THE TRIAL COURT ABUSED ITS DISCRETION BY FINDING THAT A RESTRAINING ORDER WAS NECESSARY AS THE ONLY WAY TO KEEP DEFENDANT FROM INTERFERING WITH CUSTODY/PARENTING TIME SITUATION.

Defendant's argument plaintiff was permitted to testify outside the allegations of her complaint is unavailing. He submits plaintiff and the court improperly focused on the various court orders which suspended defendant's in-person parenting time and awarded plaintiff full custody. Defendant also claims the allegations he went to plaintiff's home for parenting time, or to coordinate the children running away, were new allegations. He argues he was only there to return a retainer and check on the children. Defendant further claims the orders were only introduced to prejudice defendant. He additionally argues the court prevented him from calling his daughter as a witness regarding the alleged early morning incident where the girls were trying to leave the house and he was allegedly outside.

Appellate courts accord substantial deference to a trial court's evidentiary rulings, including the admission or exclusion of evidence, and only reverse if the trial court abused its discretion. Estate of Hanges v. Metro. Prop. & Cas. Ins. Co., 202 N.J. 369, 374 (2010); Hisenaj v. Kuehner, 194 N.J. 6, 12 (2008). The trial court's admission of the prior custody orders was not an abuse of discretion. First, the orders were not a surprise and cannot be characterized as forming a new allegation raised at trial. Rather, the orders provide a backdrop against which the court could evaluate the domestic violence allegations and

trial testimony. Defendant had no in-person parenting time. As the court noted, "[t]here was no need for him to be [at plaintiff's home]." The orders further provide context for why plaintiff was concerned with defendant's presence at her home and his attempt at self-help to enforce the court orders after not receiving text messages from his children—for a day.

As the court noted, plaintiff could have contacted his attorney or filed a motion. Both parties were well acquainted with the court system given their motion practice in the custody case. Moreover, while defendant asked if the children "were alive" when plaintiff came to the door—as he asserts he went to plaintiff's home, in part, to check on the children—he never contacted the local police but instead drove from Pennsylvania to New Jersey to confront plaintiff about not receiving his regular text messages from the children—apparently for one day. The orders, therefore, allowed the court to analyze defendant's actions and the allegation of plaintiff's complaint under the totality of the circumstances. In short, the court did not abuse its discretion in admitting the custody orders into evidence.

Defendant claims he was not permitted to call his daughter as a witness to rebut the allegation defendant was involved in the children's plan to run away during the 2:30 a.m. incident. The trial court ultimately rejected plaintiff's

claims regarding the early morning incident as the court found M.K.'s testimony credible defendant did not leave their residence during the early morning hours of March 7. The trial court did not base its decision on any alleged predicate act of harassment from the incident earlier that day, but rather on defendant's conduct in the afternoon incident. Accordingly, defendant was not prejudiced by his daughter not being called as a witness regarding the earlier event. The court ultimately found defendant harassed plaintiff based on the second incident, and there was no indication the daughter's testimony was germane as to this incident. As a result, the purported error was not "clearly capable of producing an unjust result . . . ." R. 2:10-2.

IV.

Defendant next argues the trial court erred by finding defendant engaged in harassment of plaintiff. He argues the court did not specifically identify the section of the harassment statute it relied upon in rendering its decision. Defendant assumes the court relied on N.J.S.A. 2C:33-4(c) and argues his uninvited presence on plaintiff's property did not equate to a course of alarming conduct with the purpose to annoy because plaintiff had a history of going to defendant's home uninvited.

N.J.S.A. 2C:33-4 provides:

> [A] person commits a petty disorderly persons offense if, with purpose to harass another, he:
>
> a. Makes, 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;
>
> b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or
>
> c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

For a finding of harassment under N.J.S.A. 2C:33-4, the actor must have the purpose to harass. Corrente v. Corrente, 281 N.J. Super. 243, 249 (App. Div. 1995) (citing D.C. v. T.H., 269 N.J. Super. 458, 461-62 (App. Div. 1994)); E.K. v. G.K., 241 N.J. Super. 567, 570 (App. Div. 1990). 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)).

The court's factual findings show it found harassment under N.J.S.A. 2C:33-4(a). Under subsection (a), the court must find:

> (1) [D]efendant made or caused to be made a communication; (2) defendant's purpose in making or causing the communication to be made was to harass

> another person; and (3) the communication was in one of the specified manners or any other manner similarly likely to cause annoyance or alarm to its intended recipient.
>
> [State v. Hoffman, 149 N.J. 564, 576 (1997).]

In Hoffman, the Court explained the first element targets harassing communications and only requires a single act for a finding of harassment. Id. at 580. The second element requires proof the defendant acted "with purpose to harass the intended recipient of the communication . . . ." Id. at 582. In addition, the third element does not require serious annoyance, and the impact upon the victim does not have to be as severe as that required to sustain a conviction under subsection (c). Id. at 581.

The court did not determine defendant engaged in a "course of alarming conduct" under N.J.S.A. 2C:33-4(c). Rather, the trial court's findings were consistent with harassment under N.J.S.A. 2C:33-4(a). We are satisfied the court did not err in finding defendant committed the predicate act of harassment. Defendant's conduct and communications were sufficient to "likely . . . cause annoyance or alarm" to plaintiff given the totality of the circumstances and the custody orders in place at the time. That the court did not specifically identify the statute section does not require us to disturb the order entered. Rather, the

court's decision defendant harassed plaintiff was supported by adequate, substantial, credible evidence.

Defendant next argues the court erred by "assuming" his intent to harass plaintiff. Defendant claims the court only focused on what plaintiff said and ignored his explanations. Because this case turned almost exclusively on the testimony of the witnesses, we defer to the Family Part judge's credibility findings, as he had the opportunity to listen to the witnesses and observe their demeanor. See Gnall v. Gnall, 222 N.J. 414, 428 (2015). The court based its decision on the testimony of the witnesses, the video, and the custody orders.

Defendant argues he did not "think he was harassing plaintiff" if he was just going to her home, as plaintiff had gone to his home in the past. A purpose to harass may be inferred from the evidence. State v. McDougald, 120 N.J. 523, 566-67 (1990). Common sense and experience may also inform a determination or finding of purpose. Hoffman, 149 N.J. at 577 (citing State v. Richards, 155 N.J. Super. 106, 118 (App. Div. 1978)). Here, the court articulated its reasons for concluding defendant's intent was to harass plaintiff, and its findings were supported by the record.

Defendant next contends the trial court improperly entered an FRO by finding it was the only way to prevent defendant from interfering with custody

and parenting time orders. Defendant contends the trial court did not need to enter a restraining order. Plaintiff counters the trial court properly considered the individual circumstances and history of the parties within the context of the allegations. She argues the PDVA "effectuates the notion that the victim of domestic violence is entitled to be left alone[,]" which "is, in essence, the basic protection the law seeks to assure these victims." Id. at 584. Plaintiff contends the trial court properly held plaintiff had reason to be fearful, given the history of the case.

Obtaining an FRO is not the means by which to enforce a custody order. However, defendant's conduct here must be viewed in the context of the then-existing custody orders. The court's reference to the custody orders was incidental to the finding of harassment and the need to protect plaintiff from future acts of harassment. Again, the trial court determined defendant showed up uninvited and confronted plaintiff about the children following a single day of not receiving communications from his teenage daughters. This came a matter of days following the contempt proceeding in Pennsylvania where the children were returned to plaintiff in accordance with the New Jersey order. The court noted the return of the retainer was a pretext. Defendant acknowledged he did not immediately leave the property even after assuring the children were not

harmed in any way. Moreover, defendant engaged in self-help to enforce a custody order when he was familiar with the process for filing a motion to seek judicial relief concerning parenting time issues. Additionally, despite his purported concern for the children, defendant did not call local law enforcement, but instead drove from Pennsylvania to New Jersey to confront plaintiff.

In short, there was no valid custody-related reason to go to plaintiff's home. We conclude the court properly determined prong two of Silver was satisfied based on the totality of the circumstances.

To the extent we have not addressed the parties' remaining arguments, we are satisfied they are without sufficient merit to warrant further discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.