

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2335-21

J.H.L.,

Plaintiff-Respondent,

v.

F.S.Y.,

Defendant-Appellant.

Submitted June 1, 2023 – Decided June 26, 2023

Before Judges Accurso and Natali.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Bergen County,
Docket No. FV-02-0513-22.

Moshood Muftau, attorney for appellant.

Wilentz, Goldman & Spitzer PA, attorneys for
respondent (Pierre Chwang and Amy Francis
Lemanski, of counsel and on the brief).

PER CURIAM

Defendant F.S.Y.¹ appeals from an amended final restraining order (FRO) entered in favor of plaintiff J.H.L. pursuant to the Prevention of Domestic Violence Act of 1991 (PDVA), N.J.S.A. 2C:25-17 to -35. We affirm.

I.

At the time the court entered the FRO, the parties were married. They also share a daughter, who is now two years old. In her complaint seeking a temporary restraining order (TRO), plaintiff asserted defendant committed the predicate acts of criminal coercion, terroristic threats, false imprisonment, and harassment based on his actions on September 2, 2021.²

Judge Mark T. Janeczko granted plaintiff a TRO and presided over a four-day final hearing. Plaintiff and defendant both testified at that proceeding, as did their neighbor, G.S., who recorded a portion of the September 2, 2021 incident.

According to plaintiff, at approximately 6:00 a.m. on September 2, 2021, she heard defendant screaming from their basement after he discovered flooding

¹ We use initials to protect the victim's privacy and the confidentiality of these proceedings. R. 1:38-3(d)(9).

² Plaintiff amended the TRO on September 8, 2021, to include the prior acts of domestic violence referenced infra at p. 5.

from Hurricane Ida ruined several of his collectibles, including boxes of Transformer toys. After defendant told her to come downstairs, plaintiff found him "hitting the wall [and] ceiling, . . . screaming[,] and yelling." Defendant then told plaintiff to "kneel down and apologize," as he blamed her for choosing to live in the home and for moving his collectibles to the basement.

For several hours, defendant continually berated plaintiff, telling her she would have to compensate him for everything damaged and she could not go anywhere until she "submit[ted] all the claims to the insurance company." Defendant also threatened to kick her out of the residence, "send [their] daughter for adoption," and divorce her, leaving her with nothing but "the clothing that [she] was wearing." Plaintiff further recounted that during the incident defendant prevented her from caring for their daughter by physically blocking her while he continued to scream at her to file the necessary insurance claims and order replacement collectibles.

G.S. lived in the apartment above the parties' and called the police. She also recorded a nine-minute video that contained audio of defendant screaming. Plaintiff attempted to introduce the audio at the final hearing but because it was substantially inaudible, the judge found the recording was probative only to the

extent it contained raised voices. Defendant admitted that it was his voice in the recording.

Additionally, during his tirade, defendant grabbed plaintiff's guitar and threatened to break it when the police arrived. While the police were on the scene, plaintiff brought their daughter to a friend's house. She then returned to the house around 10:00 a.m. and recounted her version of the morning's events to the police. The police left the house at which point defendant forced plaintiff to remove G.S.'s belongings out of a library they allowed her to use as a music room, as retribution for G.S. contacting the police.

Defendant then made plaintiff take pictures of the damaged collectibles. According to plaintiff, she was forced to kneel for two hours taking pictures, during which time defendant took her phone, cash, and car keys and made her feel as though she could not leave, eat, or use the bathroom. Defendant also stood "right behind [her]" and screamed again that he was going to divorce her and put their daughter up for adoption. Plaintiff also testified defendant stated, "I want to punch you but I don't know how I can . . . legally, but I want to punch you and I want to destroy you with all I have, I want to kill you and [G.S.]."

At approximately 6:30 p.m., defendant went to dinner and plaintiff left to pick up their daughter. Several hours later, at around 10:30 p.m., defendant

called plaintiff and told her to return home immediately. When plaintiff refused, defendant threatened to call the police and report that she had kidnapped their daughter. At that point, plaintiff called the police and, when they arrived at her friend's house, requested a TRO.

In addition to the September 2, 2021 incident, plaintiff recounted six incidents, which took place between winter 2019 and July 2021, in which defendant had yelled at her, threatened to divorce her, and either hit or threw objects in their home in anger. On one occasion, defendant burned "at least [thirty] books" in their fireplace, including her religious books. Plaintiff characterized defendant as "dangerous" and "violent," stated he "doesn't stop pouring out his anger" even when she is holding their baby, and maintained the only way to stop his abusive conduct was for the court to issue an FRO "so she can go back to [her] normal life" and "protect [their] daughter." Plaintiff also testified she was constantly "anxious" and "worried" about when defendant was "going to flip out."

Defendant disputed certain portions of plaintiff's testimony and claimed plaintiff acted on her own accord in many respects during the September 2, 2021 incident. He conceded he told plaintiff to kneel and apologize, but testified he only did so because she asked, "what do you want me to do," and when she

started to kneel, he told her "no, don't be stupid, don't do that." He also admitted to having threatened to break plaintiff's guitar and acknowledged he was "juvenile about it" and decided not to break the guitar before the police arrived. He similarly claimed he was merely being "juvenile" when he took plaintiff's phone and keys and did so only because she offered to pay for the damages and he knew she did not have enough money to do so.

Defendant further conceded plaintiff kneeled to take pictures for the insurance claim, but testified she kneeled without being asked and he did not prevent her from standing, eating, drinking, or going to the bathroom. When asked whether he told plaintiff that he wanted to kill her, he stated, "I don't recall ever telling her that." He admitted stating he wanted to kill G.S., however, but claimed "it was a figure of speech, at best. I was expressing a lot of frustration."

After considering the testimony, documentary evidence, and audio recording of the incident, Judge Janeczko concluded plaintiff satisfied both prongs of Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006), and granted her request for an FRO. Although he determined the allegations failed to establish the predicate acts of assault, false imprisonment, or terroristic threats, the judge concluded plaintiff "show[ed] by a preponderance of the evidence that defendant committed acts of harassment." He also found

plaintiff's "life, health, and well-being have been and are endangered by defendant's acts and that the entry of a restraining order is necessary for plaintiff's protection." Judge Janeczko issued an FRO, which he later amended on March 4, 2022, and this appeal followed.³

II.

On appeal, defendant challenges the judge's credibility and factual findings supporting his legal conclusion plaintiff satisfied both prongs of Silver. First, defendant contends Judge Janeczko erred in concluding his actions on September 2, 2021, established the predicate act of harassment, instead describing the incident as a "quarrel between husband and wife" and "clear domestic contretemps." He similarly claims his conduct, while "juvenile," was

³ Judge Janeczko's December 20, 2021 FRO also ordered defendant to pay plaintiff \$1000 per week in unallocated support, awarded defendant supervised parenting time, and permitted plaintiff's counsel to file an application for attorneys' fees. The court later granted plaintiff's request for fees in the amount of \$16,402.50 and incorporated its decision in the amended FRO issued on March 4, 2022. Although defendant's notice of appeal included the March 4, 2022 order, he failed to address any error with respect to those provisions in his brief before us and we therefore consider any arguments regarding the fee award and the other provisions in the March 4, 2022 order waived. See Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2023) ("[A]n issue not briefed is deemed waived."); Telebright Corp. v. Dir., N.J. Div. of Taxation, 424 N.J. Super. 384, 393 (App. Div. 2012) (deeming a contention waived when the party failed to include any arguments supporting the contention in its brief).

insufficient to "rise to criminal harassment," and excuses his taking of plaintiff's cellphone and wallet as "teasing and inappropriate . . . [but] not harassment." Additionally, he argues the court erred when it relied, in part, on the audio recording of the incident as plaintiff never laid an appropriate foundation for its admissibility, and it constituted inadmissible hearsay.

Defendant also takes issue with the judge's factual findings and legal conclusions under Silver's second prong. He specifically argues the judge's credibility findings are not supported by the record, his factual findings under N.J.S.A. 2C:25-29(a) were incomplete and based on plaintiff's inconsistent testimony, and his finding regarding past incidents of domestic violence failed to consider that those events did not result in the entry of domestic violence orders. In essence, defendant contends the record fails to support the court's legal conclusion an FRO was necessary to protect plaintiff from "imminent danger and further abuse," particularly because "[t]he predicate act did not involve any physical contact [or] . . . threat of physical contact." We disagree with all of these arguments and affirm substantially for the reasons set forth in Judge Janeczko's December 20, 2021 oral decision.

Our scope of review of an FRO is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We accord substantial deference to family judges' findings of fact

because of their special expertise in family matters. Id. at 413. That deference is particularly strong when the evidence is largely testimonial and rests on a judge's credibility findings. Gnall v. Gnall, 222 N.J. 414, 428 (2015). We will "not disturb the 'factual findings and legal conclusions of the trial judge unless [we are] convinced that 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., 65 N.J. 474, 484 (1974)). A judge's purely legal decisions, however, are subject to our plenary review. Crespo v. Crespo, 395 N.J. Super. 190, 194 (App. Div. 2007) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

As we explained in Silver, 387 N.J. Super. at 125, a judge deciding a domestic violence case has a "two-fold" task. First, the judge must determine if the plaintiff has proven by a preponderance of evidence that the defendant committed one of the predicate acts referenced in N.J.S.A. 2C:25-19(a), such as harassment, N.J.S.A. 2C:33-4, as conduct constituting domestic violence. Silver, 387 N.J. Super. at 125-26. The judge is also required to construe any such acts in light of the parties' history to better "understand the totality of the circumstances of the relationship and to fully evaluate the reasonableness of the

victim's continued fear of the perpetrator." Kanaszka v. Kunen, 313 N.J. Super. 600, 607 (App. Div. 1998); N.J.S.A. 2C:25-29(a)(1).

Second, assuming a predicate offense is proven, a court must next assess "whether a restraining order is necessary, upon an evaluation of the fact[or]s 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." J.D. v. M.D.F., 207 N.J. 458, 475-76 (2011) (quoting Silver, 387 N.J. Super. at 126-27). N.J.S.A. 2C:25-29(a) lists the following six non-exhaustive factors:

- (1) The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse;
- (2) The existence of immediate danger to person or property;
- (3) The financial circumstances of the plaintiff and defendant;
- (4) The best interests of the victim and any child;
- (5) In determining custody and parenting time the protection of the victim's safety; and
- (6) The existence of a verifiable order of protection from another jurisdiction.

[N.J.S.A. 2C:25-29(a)(1)-(a)(6).]

Applying these standards to defendant's arguments on appeal, we are satisfied there was substantial credible evidence to support Judge Janeczko's finding plaintiff satisfied both prongs of Silver. As noted, with respect to the first prong, the judge determined defendant committed the predicate act of harassment. Under N.J.S.A. 2C:33-4:

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.

[N.J.S.A. 2C:33-4(a) to (c).]

"Each of [the] three subsections [of N.J.S.A. 2C:33-4] is 'free-standing, because each defines an offense in its own right.'" State v. Hoffman, 149 N.J. 564, 576 (1997) (quoting State v. Mortimer, 135 N.J. 517, 525 (1994)). Under subsection (a), "there need only be proof of a single communication." J.D., 207 N.J. at 477. Further, "to annoy" under subsection (a) means "to disturb, irritate, or bother." Hoffman, 149 N.J. at 580. Subsection (c) "requires proof of a course

of conduct." J.D., 207 N.J. at 478. "That may consist of conduct that is alarming or it may be a series of repeated acts if done with the purpose 'to alarm or seriously annoy' the intended victim." Ibid. "[S]erious annoyance under subsection (c) means to weary, worry, trouble, or offend." Hoffman, 149 N.J. at 581.

Proof of a purpose to harass is an essential element of N.J.S.A. 2C:33-4. See L.D. v. W.D., 327 N.J. Super. 1, 5 (App. Div. 1999). "A finding of a purpose to harass may be inferred from the evidence presented[,] and "[c]ommon sense and experience may inform that determination." Hoffman, 149 N.J. at 577. Because direct proof of intent is often absent, "purpose may and often must be inferred from what is said and done and the surrounding circumstances," and "[p]rior conduct and statements may be relevant to and support an inference of purpose." State v. Castagna, 387 N.J. Super. 598, 606 (App. Div. 2006).

We reject defendant's contention the judge incorrectly determined he committed the predicate act of harassment after considering all the evidence. As a threshold matter, Judge Janeczko credited plaintiff's testimony over defendant's, explicitly characterizing her as the more credible witness. Conversely, the judge did not find defendant's testimony believable, describing him as "a very articulate[,] intelligent individual" who attempted to "put his spin

on" the facts. The judge also noted defendant never expressly denied plaintiff's claims, but instead "attempted to explain them away" or "polish" them up.

In evaluating the first Silver prong, 387 N.J. Super. at 125-26, Judge Janeczko found defendant made plaintiff kneel for two hours, threatened to break her guitar in retribution, stated he wanted to harm her, and made plaintiff feel unable to leave their home until she finished filing insurance claims for defendant's collectible toys with the intent to harass her. Relying on C.M.F. v. R.G.F., 418 N.J. Super. 396, 404 (App. Div. 2011), the judge explained defendant's anger "d[id] not necessarily negate the intent to harass." On this point, he determined defendant would have "no legitimate purpose for making [plaintiff] kneel . . . unless there was a purpose to annoy or seriously alarm" her, defendant's threats to break plaintiff's guitar "serve[d] no legitimate purpose other than to alarm [plaintiff]," and defendant similarly took plaintiff's car keys and phone to alarm her. The judge therefore concluded defendant's actions on September 2, 2021, constituted a predicate act of harassment under N.J.S.A. 2C:33-4(c).⁴

⁴ Although Judge Janeczko relied on N.J.S.A. 2C:33-4(c), we are satisfied his factual findings support a conclusion defendant also committed predicate acts of harassment under subsection (a), which requires only a "single . . . communication, as long as defendant's purpose in making it . . . was to harass

We are satisfied Judge Janeczko's factual findings fully support a determination that defendant's actions on September 2, 2021, qualify as harassment under N.J.S.A. 2C:33-4(c). Taken together, defendant's actions in verbally abusing defendant with various threats of harm, divorce, and putting their daughter up for adoption, forcing her to kneel and document the damages to his collectibles without reprieve for two hours, threatening to break her guitar, and taking her phone, keys, and cash were clearly done with the purpose to annoy or alarm plaintiff, and did in fact accomplish that purpose.

We are also unpersuaded that Judge Janeczko erroneously relied on non-authenticated audio evidence. In support of this argument, defendant relies on the judge's observation that defendant's screaming "was captured on . . . a tape made by . . . a neighbor." Defendant conceded at trial, however, that he screamed at plaintiff and it was his raised voice in the recording. The judge clearly referenced the recording only to confirm admitted facts and otherwise relied on his credibility findings in determining defendant's actions constituted harassment.

and as long as it was made in a manner likely to cause annoyance or alarm to the intended recipient." J.D., 207 N.J. at 477.

As noted, the commission of a "predicate act is necessary, but alone insufficient, to trigger relief provided by the [PDVA]." R.G. v. R.G., 449 N.J. Super. 208, 228 (App. Div. 2017). With respect to the second Silver prong, 387 N.J. Super. at 126-27, Judge Janeczko considered the N.J.S.A. 2C:25-29 factors and found there was a history of domestic violence between the parties, "including threats, harassment, and physical abuse, even if there were no prior adjudications of domestic abuse." He also determined there was an immediate danger to plaintiff, particularly noting defendant "did not know" with certainty whether he threatened to kill plaintiff, instead testifying "that he [didn't] think that he threatened to kill her." With respect to the parties' financial circumstances, Judge Janeczko noted defendant's threats that he would divorce plaintiff and leave her with nothing. The judge also concluded a protective order would be in the best interests of their child.

We are satisfied there was ample credible evidence supporting Judge Janeczko's findings, and that he properly balanced the factors in determining an FRO was necessary to protect plaintiff from future acts of domestic violence. The judge's conclusion was based on defendant's conduct on September 2, 2021, as well as the prior incidents recounted by plaintiff, and his finding that plaintiff

credibly testified these events caused her severe fear and anxiety for herself and her child.

Given our deferential standard of review, as well as our consideration of the testimony provided at trial, we perceive no basis to second-guess Judge Janeczko's factual and credibility findings. Accordingly, his conclusion that plaintiff established the need for an FRO, as a matter of law, is unassailable.

To the extent we have not specifically addressed any of defendant's remaining arguments, it is because we have concluded they are without sufficient merit to warrant 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