SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2384-20

B.E.D.,

Plaintiff-Respondent,

v.

D.S.W.,[1]

Defendant-Appellant.

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Argued December 14, 2022 – Decided January 10, 2023

Before Judges Gilson, Gummer and Paganelli.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Camden County, Docket No. FV-04-2013-19.

Scott T. Schweiger argued the cause for appellant (Graziano & Flynn, PC, attorneys; Scott T. Schweiger, on the briefs).

David W. Sufrin argued the cause for respondent (Zucker Steinberg & Wixted, PA, attorneys; David W. Sufrin, of counsel and on the brief).

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[1] We use initials to protect the confidentiality of the parties. R. 1:38-3(d)(10).

PER CURIAM

Defendant D.S.W. appeals from a March 15, 2021, final restraining order (FRO) entered against him and in favor of plaintiff B.E.D., pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35.

Plaintiff obtained a temporary restraining order (TRO) against defendant following an incident that occurred between the parties in the presence of their almost two-year-old daughter. Plaintiff alleged the predicate act of terroristic threats. Thereafter, plaintiff amended her complaint, adding additional facts, predicate acts of assault and harassment, and providing a more detailed history of the parties' relationship. The court issued an amended TRO (ATRO).

Following a two-day trial, the judge awarded plaintiff an FRO, finding that defendant had committed the predicate act of harassment. N.J.S.A. 2C:33-4(b). Defendant appealed, and we vacated the FRO, reinstated the ATRO, and remanded the matter to the trial court to make credibility findings and amplified findings of fact and conclusions of law. B.E.D. v. D.S.W., No. A-3436-18 (App. Div. July 20, 2020) (slip op. at 13).

On remand, the trial judge determined that: (1) plaintiff was a credible witness and defendant was not; (2) plaintiff had proved that defendant committed the predicate acts of harassment, N.J.S.A. 2C:33-4(a) to (c); assault,

N.J.S.A. 2C:12-1(a); and trespass, N.J.S.A. 2C:18-3(b); (3) the parties had a history of domestic violence; and (4) an FRO was necessary to protect plaintiff.

Defendant appeals, arguing that the trial judge erred by: (1) failing to make the requisite findings of fact to support the conclusion that the predicate acts had been committed; (2) adding and finding harassment and trespass that had not been pled or not supported by the facts; (3) finding plaintiff was in need of an FRO; (4) impermissibly relying on Battered Woman Syndrome and the maxim "falsus in uno, falsus in omnibus" [false in one, false in all] in making his credibility determinations; and (5) improperly relying on testimony and evidence that was subject to a prior restraining order that was dismissed following an adjudication on the merits.

Because the trial judge made appropriate credibility determinations, his factual findings are supported by substantial credible evidence, and those facts were correctly applied to the law, we affirm.

I.

At the outset, we address two of defendant's arguments: (1) our remand limited the trial judge's consideration only to the predicate act found at trial, N.J.S.A. 2C:33-4(b); and (2) the trial judge added predicate acts that were not included in the amended complaint.

A.

We reject defendant's argument that the remand was limited to the predicate act found by the trial judge before the first appeal. N.J.S.A. 2C:33-4(b). Instead, having determined that the trial judge had "failed to make credibility findings or specific findings of fact or conclusions of law," we were "unable to determine whether the court found plaintiff established the other predicate acts alleged in her complaint." B.E.D., slip op. at 12-13. We remanded the matter for the trial judge to determine if "defendant committed any [pled] predicate acts." Id. at 13. Accordingly, the remand encompassed all pled predicate acts and was not as limited as defendant asserts.

B.

We reject defendant's argument that the trial judge added predicate acts that had not been pled. Defendant contends that the trial "judge has now added additional 'predicate acts' . . . . These 'new acts' were not included in [p]laintiff's complaint . . . ." Specifically, defendant objects to the finding of the predicate act of harassment under N.J.S.A. 2C:33-4(a).[2] However, plaintiff alleged harassment in both the complaint and amended complaint. In her amended

[2] Defendant's argument includes the trial judge's findings regarding harassment under N.J.S.A. 2C:33-4(c) and trespass under N.J.S.A. 2C:18-3(b). We address these predicate acts later in this opinion.

complaint, plaintiff included allegations involving defendant's video-recorded conduct:

> [Defendant] proceeded to take his phone out and video record in [plaintiff's] face stating "The baby's sick, I want to come back tomorrow." [Plaintiff] told [defendant] that she was not sick, but [defendant] insisted the baby was sick. [Defendant] continued to argue with [plaintiff] about coming back the next day to visit the child. [Plaintiff] called the police, and [defendant] stopped recording the altercation.

"[A] defendant . . . engages in a 'communication' by pointing a camera at a domestic violence victim from a standpoint close enough as to be observed by the victim." State v. D.G.M., 439 N.J. Super. 630, 640 (App. Div. 2015). In D.G.M., the videotaping was considered communication even though the filming lasted only seconds. Id. at 634 n.5. This definition of communication would similarly apply to "communication" in N.J.S.A. 2C:33-4(a). Therefore, plaintiff's allegation of defendant's video-recorded conduct, in conjunction with her allegation that defendant committed harassment, placed defendant on notice of plaintiff's claims. There was nothing new added by the trial judge.

II.

Our scope of review of the grant or denial of an FRO is limited. See C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020). We accord substantial deference to family judges' findings of fact because of their special expertise in

family matters. N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). 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 [court] 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. Balducci v. Cige, 456 N.J. Super. 219, 233 (App. Div. 2018) (alteration in original) (quoting In re Forfeiture of Pers. Weapons & Firearms Identification Card Belonging to F.M., 225 N.J. Super. 487, 506 (2016)). "[W]e owe no deference to a trial court's interpretation of the law and review issues of law de novo." Cumberland Farms, Inc. v. N.J. Dep't. of Env't Prot., 447 N.J. Super. 423, 438 (App. Div. 2016).

III.

The trial judge made detailed credibility findings and determined that plaintiff was a more credible witness. In reaching this conclusion, the trial judge found: (1) defendant's video supported plaintiff's version of events and showed defendant "exercising power and control over plaintiff" and (2) plaintiff was "neither confrontational nor argumentative no matter who asked her questions,"

"provided clear credible testimony, with direct and spontaneous answers," and there was no indication she was "hiding anything."

By contrast, the trial judge found: (1) defendant's video objectively "contradicted" his testimony and was consistent with his "exercising power and control over plaintiff"; (2) defendant's testimony was "confrontational and argumentative regardless of" who asked him questions; and (3) defendant "refused to give a direct answer to a question," "ignored the questioning process," offered "a self-aggrandizing story previously rehearsed," and was "not a . . . sincere witness; rather he was argumentative, hostile, and evasive, and the manner of his testimony produced negative feeling."

Defendant argues that the trial judge erred in his assessment of the parties' credibility because the trial judge based his assessment: (1) "solely on a finding that plaintiff is the victim of Battered Women Syndrome" and (2) the "invocation of the maxim 'falsus in uno, falsus in omnibus' [which was] completely misplaced, inappropriate and amounts to reversible error."

We reject this argument because defendant overstates the trial judge's reliance on the syndrome and maxim. In making his findings the trial judge appropriately relied on an abundance of other indicia to support his finding that

plaintiff was a credible witness and defendant was not. Therefore, we discern no basis to disturb the trial judge's credibility determinations.

IV.

The trial judge found plaintiff had testified credibly regarding the parties' interaction on January 19, 2019. In that regard, the judge found that defendant had come to visit the child. When he arrived, plaintiff unlocked the door, while holding the child. Defendant then pushed the door open, forcing plaintiff and the child into the closet behind the door. Plaintiff was stunned by that action, and the child started to cry. Defendant then grabbed the child, the child became more upset, and defendant became frustrated, stating "I am going to kill her."

Plaintiff sensed that something was wrong, and she asked defendant to calm down. Defendant, however, pulled out his cell phone and started to video record plaintiff. Plaintiff became more scared and asked defendant to stop videotaping her and to leave. He refused and continued videotaping her for several more minutes. Plaintiff then called the police, and defendant left before the police arrived.

V.

When determining whether to grant an FRO, a trial judge must engage in a two-step analysis. Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div.

2006). "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; see also N.J.S.A. 2C:25-29(a) (providing that an FRO may only be granted "after a finding or an admission is made that an act of domestic violence was committed"). Second, the court must determine that a restraining order is necessary to provide protection for the victim. Silver, 387 N.J. Super. at 126-27; see also J.D. v. M.D.F., 207 N.J. 458, 475-76 (2011) (explaining that an FRO should not be issued without a finding that relief is "necessary to prevent further abuse" (quoting N.J.S.A. 2C:25-29(b))).

A.

In addressing the first Silver inquiry, the trial judge determined that plaintiff established defendant had committed five predicate acts of domestic violence. Those acts included: (1) three acts of harassment, one each under subsections (a), (b) and (c) of N.J.S.A. 2C:33-4; (2) simple assault, N.J.S.A. 2C:12-1; and (3) trespass, N.J.S.A. 2C:18-3(b).

The trial judge concluded that defendant had violated the harassment statute, N.J.S.A. 2C:33-4(a). Under that subsection, "a person commits . . . a[n] . . . offense if, with purpose to harass another, he: [m]akes, or causes to be made,

one or more communications . . . [in] any other manner likely to cause annoyance or alarm." The trial judge found "harassment occurred when defendant ignored numerous requests by the plaintiff to stop videotaping her as she was followed in her home. This purposeful act . . . annoyed the plaintiff." We discern no error in the trial judge's finding of fact or his statutory interpretation. The trial judge reasonably found that defendant's "four minute" videotaping of plaintiff was a "communication" under the statute. See D.G.M., 439 N.J. Super. at 640-41. Further, the circumstances surrounding defendant's videotaping, following plaintiff around her home as she carried their crying child, provide sufficient evidence to support the conclusion that defendant acted with "purpose" to harass. "A finding of a purpose to harass may be inferred from the evidence presented." State v. Hoffman, 149 N.J. 564, 577 (1997) (citing State v. McDougald, 120 N.J. 523, 566-67 (1990), and State v. Avena, 281 N.J. Super. 327, 340 (App. Div. 1995)). "Common sense and experience may inform the determination." Ibid. (citing State v. Richards, 155 N.J. Super. 106, 118 (App. Div. 1978)). Moreover, "[a]nnoyance under that subsection means to 'disturb, irritate or bother.'" Cesare, 154 N.J. at 404 (quoting Hoffman, 149 N.J. at 580). Defendant's conduct was "likely to cause annoyance or alarm." N.J.S.A. 2C:33-4(a).

Further, the trial judge concluded that defendant had violated subsection (b) of the harassment statute. Under this subsection, "a person commits . . . a[n] . . . offense if, with purpose to harass another, he: subjects another to striking, kicking, shoving or other offensive touching . . . ." The trial judge found "defendant's action of using the front door to shove plaintiff into a closet was purposeful and annoying." We again discern no error in the trial judge's finding of fact or his statutory interpretation. The judge found that defendant, with purpose to harass plaintiff, had pushed the front door open, forcing plaintiff into the closet behind the door. Those factual findings are supported by credible evidence in the record and, in turn, support a legal conclusion that defendant violated subsection (b) of the harassment statute. "Using the front door to shove plaintiff into the closet" is "subject[ing] another to striking, . . . shoving, or other offensive touching . . . ." N.J.S.A. 2C:33-4(b).

Further, the trial judge found that defendant had committed an assault under N.J.S.A. 2C:12-1(a). "A person is guilty of assault if the person: Attempts to cause or purposely, knowingly or recklessly causes bodily injury to another." The trial judge found "defendant [had] shoved the plaintiff into a closet, . . . causing her to be stunned, [which was] purposeful conduct intended to cause bodily injury to the plaintiff." We discern no error in the trial judge's factual

findings or statutory interpretation on this issue. Defendant pushed the front door causing plaintiff to be shoved into the closet and to be "stunned." "Bodily injury is defined as 'physical pain, illness or any impairment of physical condition.'" State ex rel. S.B., 333 N.J. Super. 236, 242 (2000) (quoting N.J.S.A. 2C:11-1(a)). "Not much is required to show bodily injury. For example, the stinging sensation caused by a slap is adequate to support an assault." State v. Stull, 403 N.J. Super. 501, 505 (App. Div. 2008) (quoting N.B. v. T.B., 297 N.J. Super. 35, 43 (App. Div. 1997)). "[P]hysical discomfort, or a sensation caused by a kick during a physical confrontation, as well as pain, as that word is commonly understood, is sufficient to constitute bodily injury for purposes of a prosecution for a simple assault." S.B., 333 N.J. Super. at 244. Defendant's causing plaintiff to be "stunned" after forcing her into the closet door is a bodily injury for purposes of assault.

A plaintiff need establish only a single predicate act. Cesare, 154 N.J. at 402. Therefore, we need not address defendant's arguments or analyze the trial judge's finding of trespass, N.J.S.A. 2C:18-3, or harassment under N.J.S.A. 2C:33-4(c). Moreover, affirming the trial judge's finding under N.J.S.A. 2C:33-49(b) and N.J.S.A. 2C:12-1(a) renders moot defendant's argument that the trial judge impermissibly considered acts beyond our remand.

B.

The trial judge evaluated defendant's conduct "in light of the previous history of violence between the parties." Silver, 387 N.J. Super. at 125-26 (quoting Peranio v. Peranio, 280 N.J. Super. 47, 54 (App. Div. 1995)). The trial judge found that defendant had "committed serious acts of domestic violence throughout the parties' relationship" and that "plaintiff was pushed, bullied, strangled, threatened with a gun and sexually abused." These findings are sufficiently supported in the record and establish a history of domestic violence.

Defendant argues that "[a]ll of the prior acts of domestic violence alleged . . . occurred before a TRO obtained on April 3, 2017, which was dismissed following a trial on the merits." However, we already decided that "[b]ecause defendant failed to object at trial to the admission of evidence in support of plaintiff's application for a prior [TRO] against him, we discern no need to consider the arguments." B.E.D., slip op. at 3. We find no basis to revisit that determination.

Further, defendant argues that the sexual-abuse allegations, focusing mainly on a February 2017 incident, were impermissibly considered by the trial judge. We note that plaintiff's testimony was not limited to one act of sexual abuse; instead, she testified to "instances" and "incidents."

Nonetheless, we already observed:

> . . . plaintiff acknowledged she did not allege defendant forced her to engage in sexual intercourse. Plaintiff claimed she was "too scared" and "too embarrassed" to include that allegation in her previous complaint." Unrepresented by counsel at the prior FRO hearing, plaintiff did not tell that trial court about "all of the issues that [she was] having that made [her] fear for safety." Again, she claimed she was embarrassed and afraid to disclose those issues to the Burlington County family court, which ultimately denied her application for an FRO.
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> [B.E.D., slip op. at 6.]

Therefore, defendant's attempt to preclude evidence of sexual abuse is misguided. In J.F. v. B.K., we found a "procedural unfairness" where plaintiff had testified to acts of domestic violence that were dismissed in a prior hearing. 308 N.J. Super. 387, 392 (App. Div. 1998). "Even if those acts had been alleged in the present complaint, plaintiff would be precluded under principles of res judicata and collateral estoppel from relitigating allegations which had been decided adversely to her in the earlier hearing." Ibid. (citing State v. Gonzalez, 75 N.J. 181, 186-87 (1977), and Allesandra v. Gross, 187 N.J. Super. 96, 103 (App. Div. 1982)).

However, in this matter, plaintiff did not "relitigate" allegations "decided adversely to her in the earlier hearing" because they had never been addressed.

Res judicata "contemplates that when a controversy between parties is once fairly litigated and determined it is no longer open to relitigation." Lubliner v. Bd. of Alcoholic Beverage Control, 33 N.J. 428, 435 (1960). Application of res judicata "requires substantially similar or identical causes of action and issues, parties, and relief sought," as well as a final judgment. Culver v. Ins. Co. of N. Am., 115 N.J. 451, 460 (1989). The term "collateral estoppel" refers to the "branch of the broader law of res judicata which bars relitigation of any issue which was actually determined in a prior action, generally between the same parties, involving a different claim or cause of action." Sacharow v. Sacharow, 177 N.J. 62, 75-76 (2003) (quoting State v. Gonzalez, 75 N.J. 181, 186 (1977)). Because the earlier hearing did not encompass the allegations of sexual abuse raised here, plaintiff was not precluded from presenting the evidence.

The trial court's analysis satisfactorily addresses the first inquiry under Silver.

C.

The second inquiry is whether the court should enter a restraining order that provides protection for the victim. Silver, 387 N.J. Super. at 127. "Although this second determination . . . is most often perfunctory and self-evident, the guiding standard is whether a restraining order is necessary, upon

evaluation of the factors set forth in N.J.S.A. 2C:25-29a(1) to -29a(6), to protect the victim from an immediate danger or to prevent further abuse." Ibid.

In assessing the statutory factors, the trial judge found relevant: (1) the previous history of domestic violence between the parties including threats, harassment, and physical abuse; (2) the existence of immediate danger to person or property, N.J.S.A. 2C:25-29(a)(2); and (3) the best interests of the victim and any child, N.J.S.A. 2C:25-29(a)(4). The trial judge relied on his determination under the first Silver inquiry to find that the parties had a previous history of domestic violence. Further, the trial judge determined that given the acts of domestic violence, the potential for future acts is "clear," finding the existence of immediate danger. Lastly, noting the parties' child's presence during the entire January 19, 2019, episode and that future conflicts can arise concerning the child, the trial judge determined that an FRO was in the best interests of plaintiff and the child. Therefore, the trial judge determined that plaintiff "requires the protection of an FRO." Ibid. We find no error in the trial judge's interpretation of N.J.S.A. 2C:25-29(a)(1) to -29(a)(6) or the finding that an FRO was necessary in this matter.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION