# RECORD IMPOUNDED



SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2520-21

E.W.J.J.,[1]

Plaintiff-Respondent,

v.

B.S.L.P.,

Defendant-Appellant.

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Argued March 15, 2023 – Decided April 25, 2023

Before Judges Accurso and Firko.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FV-13-1153-22.

Greg S. Gargulinski argued the cause for appellant (Rudnick, Addonizio, Pappa & Casazza, attorneys; Mark F. Casazza, of counsel and on the briefs; Greg S. Gargulinski, on the briefs).

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

Robert H. Siegel argued the cause for respondent (Siegel Law LLC, attorneys; Robert H. Siegel, of counsel and on the brief).

PER CURIAM

Defendant, B.S.L.P., appeals from a March 9, 2022 final restraining order (FRO) entered in favor of plaintiff, E.W.J.J., pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, based on harassment, N.J.S.A. 2C:33-4. The parties previously had a dating relationship and lived together but never married. They have two minor children in common. Because the Family Part judge did not apprise defendant of the serious consequences that could result from the entry of an FRO and of her right to retain legal counsel, we are constrained to vacate the FRO on that basis. We also conclude that plaintiff did not prove by a preponderance of the evidence that defendant committed harassment warranting reversal.

I.

On November 18, 2019, defendant obtained an FRO against plaintiff by default, and she was granted sole legal and residential custody of the children.[2] Two years later, a judge amended the FRO and granted plaintiff joint legal custody and parenting time, which included alternate weekends and Wednesday

[2] Docket Number FV-13-0630-12.

overnights. On February 17, 2022, plaintiff sent a text message to defendant seeking an extra day of parenting time on President's Day because the children were off from school for a three-day weekend and his birthday was that Friday. In a long thread of sharply worded text messages, defendant denied plaintiff's request claiming their daughter had plans to attend a "fancy princess ball" on President's Day with her friends.

Defendant's text messages went on to accuse plaintiff of being "illiterate," a "worthless drunk," and a "scumbag." In her multiple successive text messages, defendant told plaintiff to "fuck off" and that he makes her "sick." She continued with "no one gives a fuck about your birthday. Your [sic] one year closer to dying thank God." Defendant also sent plaintiff an image of a school excuse slip filled out by the children's pediatrician and added:

> here's the dr you didn't pay for and her note for school. Maybe this weekend you [c]an give them COVID. THEY BOTH HAVE A COUGH FROM LAST VISIT DO NOT TAKE THEM TO PUBLIC PLACES THEY HAVE TO STAY INSIDE ONE PLACE. Dr.'s orders. Keep them away from others bc it is contagious.

In response, plaintiff relented and agreed to abide by the regular parenting time schedule for that weekend and confirmed the time to exchange the children at the police station. Defendant replied two minutes later with another text message calling plaintiff a "woman beater," who "will hook up with literally

anything," and "dry humps everyone around [her]." A few minutes later, defendant sent plaintiff another text message stating the children don't want to see him, referred to his girlfriend as "that fat-ass," he was "disgusting," "don't take a butcher knife to your face and attempt to show the kids one shred of the father you used to be," and he and his girlfriend are "cunts." Defendant added plaintiff is a "degenerate," and he and his girlfriend are "two losers" who "deserve to be shot in the face for what [they] are doing to my daughter." Defendant concluded with "mark my words, I'm done with you and your land cow."

Plaintiff responded shortly thereafter, "I just meant I can be there as early as 5:15 after work to pick the kids up tomorrow." Defendant texted him back "great, super, no fucking thanks." Defendant went on to state she knows what plaintiff's "militant ass is like" and does not want to subject their children to sleeping with "strange women" or "on tiny sofas." Defendant continued with another text message stating plaintiff did not care about their son's "special needs" or their daughter's "emotional state," and that plaintiff "ruins families."

Plaintiff obtained a temporary restraining order (TRO). The complaint alleged the predicate act of harassment and that there was an active FRO between the parties in which defendant is the victim. The complaint did not set

forth any other prior history of domestic violence reported or unreported between the parties.

The FRO trial was scheduled for February 28, 2022, but was adjourned that day at plaintiff's request on the record because his attorney was on vacation. The judge asked defendant if she had any questions for the court but did not advise her of the right to retain counsel or what the consequences of an FRO being entered against her were. The FRO trial was conducted the following week by Zoom. Plaintiff was represented by counsel, and defendant was self-represented.

At the beginning of the FRO hearing on March 7, 2022, the judge asked defendant if she recalled "the negative ramifications that are involved if an [FRO] is entered" as explained during opening remarks earlier that morning.[3] Defendant confirmed that she did. However, there is nothing in the record to indicate the judge explained the serious consequences of an FRO and informed defendant of her right to retain counsel prior to the commencement of the hearing.

Plaintiff testified about the content of defendant's emails and how he felt "hurt" and "threatened" by her words. According to plaintiff, the court granted

[3] The judge's preliminary remarks to defendant are not contained in the record.

him parenting time every other weekend and permitted the parties to communicate in a civil manner with regard to issues involving the children. Plaintiff added because defendant knew where he lived and she was not "bound" by any kind of order as he was, "she can lawfully show up to my doorstep and, you know, possibly inflict some kind of harm between me and my significant other that has really nothing to do with anything that's going on between" the two of them. He also felt defendant was threatening his significant other. Plaintiff explained this was the first time defendant ever directed a threatening message against him, and she never previously stated she would shoot him. Because plaintiff feared for his safety, he requested an FRO. Plaintiff testified he "deserve[d] a layer of protection myself from [defendant]" and just wanted to confirm a pick-up and drop-off time for the children "without further harassment or false allegation of [him] trying to hurt [the] children."

Defendant cross-examined plaintiff. In response to her question about why he waited two days to seek a TRO, plaintiff answered the lapse of time was due to the multiple messages she sent him, which started on Friday of the holiday weekend. Plaintiff did not read the "shoot you in the face" message until Sunday of President's Day weekend—two days later. Plaintiff also acknowledged he received a rather obtuse apologetic text message from defendant, which read:

> sorry for the text messages the other day you have no idea the pressures I am under with them bc I love them and want the best for them. Obvi [sic] when the school tells me my beautiful little girl has issues with her dad I don't like it, and maybe I should keep my opinion to myself bc it is irrelevant for you. They are my responsibility, I shouldn't yell at you for it, not only do you not care you need only to worry about you. So there you go, my attempt at being civil and fair.

Defendant testified the parties have a "very tumultuous relationship" and that she "deeply" regretted sending the vulgar text messages to plaintiff. Defendant represented she will never go to plaintiff's residence and does not own any weapons. According to defendant, plaintiff was retaliating against her for not allowing him parenting time with the children on President's Day. Defendant admitted she was "furious" and needed to "calm down." She sent the "apologetic" text message to plaintiff after her husband reviewed defendant's text messages to plaintiff and told her she behaved wrongly. She agreed.

On cross-examination, defendant acknowledged there was a court order in place permitting her to text plaintiff in a civil manner about matters involving the children only. Defendant admitted to changing her cellular phone number and not advising plaintiff of the new number, thereby making it difficult for them to communicate about the children. No other witnesses testified. The

judge admitted part of a letter, a prior court order, and the text messages into evidence.[4]

Two days later, the judge placed her decision on the record. No finding was made as to jurisdiction under the PDVA, but jurisdiction is conferred because the parties had a romantic relationship and children together. The judge found plaintiff's testimony more "credible" than defendant's testimony and that he met his burden of proof by a preponderance of the evidence. In contrast, the judge found defendant was "disingenuous" and noted she waited two days before sending plaintiff an apology.

The judge also found plaintiff proved the predicate act of harassment based on the volume of text messages defendant sent in response to his "simple inquiry" about seeing the children. The judge found defendant's text messages included "offensively coarse language" and "were made with the purpose to harass" plaintiff under N.J.S.A. 2C:33-4 and State v. Hoffman, 149 N.J. 564, 580-81 (1997). After applying the two-prong test under Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006), the judge found an FRO was necessary to protect plaintiff from an immediate danger or to prevent further

[4] Plaintiff has included documents in his appendix and factual arguments in his merits brief that were not part of the record below in violation of Rule 2:5-4(a). Therefore, we are not considering these documents or arguments in our opinion.

abuse because of the "devolution of the communications" between the parties and "an escalation in defendant's behavior."

On appeal, defendant primarily argues her due process rights were violated because she was not advised of her right to obtain counsel. Defendant also contends the judge erred in finding she committed acts of domestic violence instead of domestic contretemps, and the judge abused her discretion in finding an FRO was necessary to protect plaintiff from immediate danger or further abuse pursuant to Silver v. Silver.

II.

Our Supreme Court has noted, "ordinary due process protections apply in the domestic violence context, notwithstanding the shortened time frames for conducting a final hearing . . . that are imposed by the statute." J.D. v. M.D.F., 207 N.J. 458, 478 (2011) (internal citations omitted). One of those important rights is the right to counsel. As we recently held in A.A.R. v. J.R.C., "due process does not require the appointment of counsel for indigent defendants in a domestic violence proceeding seeking an FRO." 471 N.J. Super. 584, 588 (App. Div. 2022) (citing D.N. v. K.M., 429 N.J. Super. 592, 606 (App. Div. 2013)). However, it requires "a defendant understands that [they have] a right

to retain legal counsel and receive a reasonable opportunity to retain an attorney." Ibid. (citing D.N., 429 N.J. Super at 606).

Moreover, due process requires trial courts to inform "domestic violence defendants, in advance of trial, of the serious consequences should an FRO be entered against them." Ibid. This is because the issuance of an FRO "has serious consequences to the personal and professional lives of those who are found guilty of what the Legislature has characterized as a serious crime against society." Ibid. (quoting Franklin v. Sloskey, 385 N.J. Super. 534, 541 (App. Div. 2006)); see also N.J.S.A. 2C:25-18.

For example, "a defendant is subject to fingerprinting, N.J.S.A. 53:1-5, and the Administrative Office of the Courts maintains a central registry of all persons who have had domestic violence restraining orders entered against them." Peterson v. Peterson, 374 N.J. Super. 116, 124 (App. Div. 2005) (internal citations omitted). Such defendants are also prohibited from possessing weapons. State v. W.C., 468 N.J, Super. 324, 333-34 (App. Div. 2021) (quoting N.J.S.A. 2C:58-3(c)(6)). Additionally, if a defendant violates a restraining order, such violation "constitutes contempt, and a second or subsequent non-indictable domestic violence contempt offense requires a minimum term of

thirty days' imprisonment." Peterson, 374 N.J. Super. at 124 (quoting N.J.S.A. 2C:25-30).

To prevent further abuse, "the issuing court may also impose a number of other wide-reaching sanctions impairing a defendant's interests in liberty and freedom . . . ." Ibid. (quoting N.J.S.A. 2C:25-29(b)). Finally, "familial relationships may be fundamentally altered when a restraining order is in effect." A.A.R., 471 N.J. Super. at 589 (quoting Chernesky v. Fedorczyk, 346 N.J. Super. 34, 40 (App. Div. 2001)).

Here, the judge did not inquire if defendant wanted an attorney prior to proceeding with the hearing. That alone requires the FRO be vacated. Moreover, it is not clear from the record what the judge communicated to defendant about the ramifications of an FRO. In short, there is no indication defendant understood the potential consequences of an FRO. Had she "been informed of those consequences at the outset, [she] would have had a more meaningful basis to decide whether to retain counsel." A.A.R., 471 N.J. Super. at 589.

We recognize defendant was represented by counsel when the FRO under docket number FV-13-0630-12 was amended in September 2021, and that she made at least three court appearances, ostensibly with counsel, regarding

custody issues. But this was the first time defendant had to challenge a domestic violence complaint and defend against it. The judge merely asked defendant if she was "ready to proceed" and didn't address her directly on the record about it. The judge should have been more circumspect when defendant stated on the record that she spoke to her "counsel" about the matter, and he told her the text messages at issue simply constitute "domestic contretemps" and not domestic violence.

Defendant could have reasonably interpreted her counsel's comment to suggest that the complaint and TRO would be dismissed. On top of that, defendant inquired on the record whether plaintiff was going to proceed because her attorney led her to believe the complaint and TRO lacked merit. Clearly, the inference to be drawn from this colloquy is defendant did not believe an FRO would be entered against her and that plaintiff would withdraw his complaint. Accordingly, we conclude defendant was not afforded her due process rights, and we therefore vacate the FRO.

III.

Defendant next argues the judge erred in finding she committed the predicate act of harassment under N.J.S.A. 2C:33-4(c). We agree.

Our review of a trial court's decision to enter an FRO in a domestic violence matter is limited. Peterson, 374 N.J. Super. at 121. "A reviewing court is bound by the trial court's findings 'when supported by adequate, substantial, credible evidence.'" Ibid. (quoting Cesare v. Cesare, 154 N.J. 394, 412 (1998)). "This deferential standard is even more appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" L.M.F. v. J.A.F., Jr., 421 N.J. Super. 523, 533 (App. Div. 2011) (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)).

"Reversal is warranted only when a mistake must have been made because the trial court's factual findings are 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice.'" Elrom v. Elrom, 439 N.J. Super. 424, 433 (App. Div. 2015) (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). However, we review de novo "the trial judge's legal conclusions, and the application of those conclusions to the facts." Ibid. (quoting Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

In adjudicating a domestic violence case, the trial judge has a "two-fold" task. Silver, 387 N.J. Super. at 125. The judge must first determine whether the plaintiff has proven, by a preponderance of the evidence, that the defendant

committed one of the predicate acts referenced in N.J.S.A. 2C:25-19(a), which incorporates harassment, N.J.S.A. 2C:33-4, as conduct constituting domestic violence. Id. at 125-26. The judge must 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); see N.J.S.A. 2C:25-29(a)(1).

A finding of harassment requires proof that the defendant acted "with purpose to harass." Silver, 387 N.J. Super. at 124. Although a purpose to harass may, in some cases, be "inferred from the evidence," and may be informed by "common sense and experience," a finding by the court that the defendant acted with a purpose or intent to harass another is integral to a determination of harassment. Hoffman, 149 N.J. at 577.

We note that purposeful conduct "is the highest form of mens rea contained in our penal code, and the most difficult to establish." State v. Duncan, 376 N.J. Super. 253, 262 (App. Div. 2005). Its establishment requires proof, in a case such as this, that it was the actor's "conscious object to engage in conduct of that nature or to cause [the intended] result." N.J.S.A. 2C:2-2(b)(1). A plaintiff's assertion that the conduct is harassing is not sufficient.

J.D., 207 N.J. at 484. Further, a "victim's subjective reaction alone will not suffice; there must be evidence of the improper purpose." Id. at 487.

When deciding the issues of intent and effect, we are mindful of the fact that

> harassment is the predicate offense that presents the greatest challenges to our courts as they strive to apply the underlying criminal statute that defines the offense to the realm of domestic discord. Drawing the line between acts that constitute harassment for purposes of issuing a domestic violence restraining order and those that fall instead into the category of "ordinary domestic contretemps" . . . presents our courts with a weighty responsibility and confounds our ability to fix clear rules of application.
>
> [Id. at 475 (citation omitted).]

"The decision about whether a particular series of events rises to the level of harassment or not is fact-sensitive." Id. at 484.

If a predicate offense is proven, the judge must then assess "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 475-76 (quoting Silver, 387 N.J. Super. at 127). The factors which the court should consider include, but are not limited to:

> (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).]

Although the court is not required to incorporate all of these factors in its findings, "the [PDVA] does require that 'acts claimed by a plaintiff to be domestic violence . . . be evaluated in light of the previous history of violence between the parties.'" Cesare, 154 N.J. at 401-02 (quoting Peranio v. Peranio, 280 N.J. Super. 47, 54 (App. Div. 1995)). Whether a restraining order should be issued depends on the seriousness of the predicate offense, on "the previous history of domestic violence between the plaintiff and defendant including previous threats, harassment, and physical abuse," and on "whether immediate

danger to the person or property is present." Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. 1995).

The court must exercise care "to distinguish between ordinary disputes and disagreements between family members and those acts that cross the line into domestic violence." R.G. v. R.G., 449 N.J. Super. 208, 225 (App. Div. 2017) (quoting J.D., 207 N.J. at 475-76). The PDVA is not intended to encompass "ordinary domestic contretemps." Corrente, 281 N.J. Super. at 250. Rather, "the [PDVA] is intended to assist those who are truly the victims of domestic violence." Silver, 387 N.J. Super. at 124.

Here, defendant admitted she authored and sent the text messages at issue. There is no doubt defendant was angry and coarse in the number and tone of the text messages she sent to plaintiff in light of his innocuous request to have parenting time for an extra day when the children were off from school during a three-day holiday weekend. But the question to be considered is whether defendant sent the text messages with the intent to harass. N.J.S.A. 2C:33-4. Based on our careful review of the record, we conclude there was no evidence to support the intent to harass, warranting reversal.

In R.G., we held defendant's expressions to be "juvenile, uncouth, foulmouthed, insulting, and belligerent." 449 N.J. Super. at 228. And, although

defendant's manner of expressing himself was "unacceptable and repugnant," we concluded that plaintiff failed to show a sufficient nexus between the shoving incident and the domestic relationship between the parties. Id. at 229. Defendant's actions in R.G. did not constitute a "pattern of abusive and controlling behavior" of the type intended to be prevented under the PDVA. Id. at 230.

In State v. Burkert, our Supreme Court pronounced the PDVA "was never intended to protect against the common stresses, shocks, and insults of life that come from exposure to crude remarks and offensive expressions, teasing, and rumor mongering, and general inappropriate behavior. The aim of subsection (c) is not to enforce a code of civil behavior or proper manners." 231 N.J. 257, 285 (2017). The victim's subjective response alone is insufficient to constitute harassment, "there must be evidence of the improper purpose." R.G., 499 N.J. 208 at 255.

In the matter under review, we conclude the evidence failed to prove that harassment had been committed. Defendant expressed her frustration over disturbing issues involving the children she recently encountered. We reiterate defendant's text messages to plaintiff were coarse, offensive, and disrespectful. We have recognized the "ability to instantaneously and effortlessly send

electronic messages," which has led to a "gateway unfettered by reflection and open to rash, emotionally driven decisions." R.G., 449 N.J. Super. at 226-27 (quoting L.M.F., 421 N.J. Super. at 534).

Such is the case here. And, although plaintiff testified to receiving prior harassing text messages from defendant, he didn't offer any proof to buttress his testimony. Plaintiff also admitted that defendant never threatened him or his significant other before. The judge did not consider the lack of a previous history of domestic violence between the parties in which defendant had been the victim. Courts are required to consider the previous history of domestic violence between the parties, including harassment, threats, and physical abuse in determining whether the PDVA has been violated. Hoffman, 149 N.J. at 578-81. Moreover, defendant's text messages do not constitute a "pattern of abusive and controlling behavior," as contemplated by the PDVA. R.G., 449 N.J. Super. at 228-30. We conclude the record is insufficient to demonstrate defendant's text messages evidenced a "purpose to harass." Therefore, the judge's issuance of the FRO cannot withstand scrutiny and is reversed.

The FRO must also be reversed under the second prong of the Silver analysis based on the lack of proof that restraints are necessary to protect plaintiff "from an immediate danger or to prevent further abuse." Silver, 387

N.J. Super. at 127. The judge erred in finding an "escalation" in defendant's behavior because there was no prior domestic violence history reported or unreported that was included in the complaint leading to the TRO, and plaintiff did not offer any evidence of defendant's purported prior harassment much less of it rising to a new level.[5] The judge did not engage in a principled analysis of why she found that to be the case. We conclude plaintiff is not entitled to an FRO because he did not prove harassment was committed by defendant, and the court's analysis of the second prong of the Silver analysis is unsupported by the facts in the record.

To the extent we have not addressed defendant's other arguments, it is because they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Vacated and reversed. We do not retain jurisdiction.



[5] The judge noted on the record that she spoke to another judge in the vicinage handling the custody matter for this family, which led her to the conclusion, at least in part, that defendant's conduct was escalating. A trial court must base its ruling on the evidence of record and not independent fact findings or facts "outside the record." See, e.g., Lazovitz v. Board of Adjust., Berkeley Heights, 213 N.J. Super. 376, 382 (App. Div. 1986).