

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2645-21
A-2778-21

B.C.P.,

Plaintiff-Respondent,

v.

D.W.P.,

Defendant-Appellant.

D.W.P.,

Plaintiff-Appellant,

v.

B.C.P.,

Defendant-Respondent.

Submitted February 6, 2023 — Decided February 14, 2023

Before Judges Whipple, Mawla, and Marczyk.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Morris County,
Docket Nos. FV-14-0607-22 and FV-14-0608-22.

Einhorn, Barbarito, Frost & Botwinick, PC, attorneys
for appellant (Matheu D. Nunn, Bonnie C. Frost, and
Jessie M. Mills, on the briefs).

Kalish Law Group, attorneys for respondent (Lawrence
H. Kalish and Patrick J. Foy, on the briefs).

PER CURIAM

These are back-to-back appeals, which we have consolidated for purposes of this opinion. In A-2645-21, appellant D.W.P.¹ appeals from a March 31, 2022 order granting respondent B.C.P. a final restraining order (FRO) pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. In A-2778-21, D.W.P. challenges an order entered the same date denying him an FRO against B.C.P. We affirm.

The parties were married for over three decades and have two adult sons. D.W.P. was a retired law enforcement officer whose pension was the parties' source of income. They resided in a home D.W.P. received from his mother, which was titled solely in his name. The younger son was residing with them when the underlying incident took place on February 1, 2022.

¹ We use the parties' initials pursuant to Rule 1:38-3(d)(9) and (10).

Prior to then, in May 2020, police were called to the residence over an argument when D.W.P. received a letter from B.C.P.'s divorce lawyer advising him of her intent to file for divorce. The parties agreed to wait until after the eldest son's wedding. In May 2021, D.W.P. informed B.C.P. he wanted to see other people. B.C.P. agreed on the condition D.W.P. not bring anyone to the marital residence. In November 2021, the eldest son was married, and the following month B.C.P. served D.W.P. with a divorce complaint.

D.W.P. testified B.C.P.'s attitude changed after she filed the complaint for divorce. There was "[a] lot of ranting" and she slammed doors and yelled. On January 23, 2022, she sent him the following two texts: "Limp dick even with a skank whore. [Laugh out loud] . . . Funny[;]" and "DIE!!!!!!". The next day B.C.P. texted: "I hate you and want you dead BUT I did not take any money last night. I swear the cunt must have robbed you while you were passed out[.]" And the next day B.C.P. texted: "Die!!!!!! Move to [U]nion. Fuck your skank. LEAVE ME ALONE[.]" D.W.P. discovered B.C.P. wrote "Fuck you!" on a desk calendar. B.C.P. also left sticky notes with similar comments on D.W.P.'s belongings but stopped doing so when the younger son asked her.

On January 31, 2022, D.W.P. went to a social club and drank alcohol during the day. When he returned home, he crashed into a stanchion attached to

the residence and passed out in his truck.² The younger son was home with B.C.P. He called his older brother, who advised him to make sure the truck was in park and remove the keys from the ignition. B.C.P. removed all the spare keys for the family's vehicles from the truck's glove box where D.W.P. stored them. When the older son arrived, he and his brother carried D.W.P. into the house and laid him on a couch to sleep.

The following morning, D.W.P. awoke in search of the keys. He called the younger son, who advised him the keys for his vehicle were next to him. However, D.W.P. wanted the spare keys for all the other vehicles as well. B.C.P. went to the younger son's room to remove the spare keys before D.W.P. could find them. He demanded she give him the keys, and when she refused, he decided to search for them in her purse.

B.C.P. went to her bedroom and attempted to close the door but could not prevent D.W.P. from entering. A struggle ensued over B.C.P.'s purse, and the younger son, who was still on the telephone with D.W.P., heard B.C.P. screaming for help. He testified he never heard his mother "scream like that

² As will be discussed later, D.W.P. claimed he drove home, hit the stanchion, drank a pint of alcohol inside the vehicle in the driveway, and passed out.

before." He yelled to his father to stop, then turned his vehicle around and headed back to the home.

D.W.P. testified he was searching for the keys to the other vehicles because they were titled in his name, and B.C.P. was removing things from the home. He claimed as he was on the phone with his son, B.C.P. raced into the son's room to take the keys. D.W.P. then headed away from the son's room toward B.C.P.'s bedroom to remove the keys from her pocketbook. He claimed "she came forcefully through the door. The door hit [him] on the foot and very lightly in[] the head." D.W.P. raced B.C.P. to her pocketbook and "[s]he then came for the pocketbook and with her forward momentum [they] fell onto the bed." He claimed B.C.P. threatened to stab him. D.W.P. then left with the pocketbook and eventually police arrived.

B.C.P. denied threatening to stab D.W.P. She testified she alone had been sleeping in the former marital bedroom since May 2021. Therefore, when D.W.P. attempted to get her pocketbook from the room, she attempted to get there first. However, D.W.P. "slammed the door on [her and she] just kind of blocked it with [her] shoulder." As she tried to get to the pocketbook, D.W.P. "took his right arm and grabbed [her] around the neck[,] . . . hit [her] in the upper lip, the nose, and . . . the left cheek, and then slammed [her] down in a chokehold

onto the bed on [her] right cheek . . . hitting [her] head on the remote control." She screamed: "He's killing me. He's killing me. He just broke my nose." D.W.P. then let B.C.P. go and left with her pocketbook.

Officers Christopher Heredia and Faith Niemynski were among those who responded to the February 1, 2022 incident. Officer Heredia described B.C.P. as "excited or rattled." Her face was flushed, but she did not point the officer to specific injuries and refused medical attention. She told the officer D.W.P. "placed his arm around her head" during the incident causing her to scream. She declined a restraining order. Officer Niemynski recalled even fewer details and referenced Officer Heredia's report during her testimony. She testified she did not observe injuries on B.C.P. and likewise recounted she declined medical attention or a restraining order.

D.W.P. testified B.C.P.'s text messages made him nervous and scared. He needed an FRO because he could not sleep due to B.C.P.'s conduct over several months, including threats, her following him, and the text messages and notes. He feared she would physically harm him or make false allegations against him, and he was in danger.

B.C.P. explained D.W.P. was "very controlling." He "use[d] fear and manipulation . . . always threaten[ed]" her by noting the assets were in his name.

She stated "I'm kind of like trained after all these years. As long as I'm being good, he'll be okay, not physical" She explained once she sought a divorce, D.W.P. started taking everything away from her. In January 2020, D.W.P. sent her a text message, which said: "[Your] stuff will be in the street[. H]ave fun in Newark[.] I see [where you] went[.] I am putting a restraining order on [you] tomorrow[. D]on't come home "

According to B.C.P., D.W.P. drank throughout the day and night and became "[s]cary" and "unpredictable" when he was drunk. "His behavior is just completely erratic." B.C.P. described a history of domestic violence, including a June 2020 incident in which D.W.P. attempted to forcibly have sex with her while he was drunk. She evaded him by claiming she had to go to the bathroom and then fleeing to a bathroom and locking herself in it.

B.C.P. explained she sent D.W.P. angry messages regarding his girlfriend because he spent the family's money on the girlfriend rather than retaining an attorney to move the divorce along. She sent him the sexually explicit texts because their pharmacy had contacted her regarding ready prescriptions, and when she went to pick them up, she discovered it was Viagra for D.W.P.

B.C.P. testified she wanted an FRO because she was afraid of D.W.P. In addition to the history of domestic violence, she adduced seven photographs

taken the day after the February 1, 2022 incident, showing bruising on her shoulders and upper neck, and testified she had a bump behind her right ear. She explained she sought medical attention the day after the incident.

The trial judge found "portions of [D.W.P.]'s testimony strained credibility and were not consistent with the testimony of other witnesses." She described his testimony as "very self serving and not believable under all of the circumstances of this case." "During his testimony . . . he did not maintain eye contact and was looking down."

D.W.P. "did not report being hit with the door to the police nor is it referenced in his initial TRO that was denied by the [m]unicipal [c]ourt or in the TRO that was filed in Superior Court" The judge also noted B.C.P.'s alleged threat to stab D.W.P. was not reported to police or included in the initial TRO.

The judge found D.W.P.'s testimony he had not been drinking at the social club on January 31, 2022, and only drank and passed out while in the driveway, lacked credibility. She stated: "It strains credibility to believe that he immediately ingested a pint of alcohol upon his arrival home and was immediately so intoxicated that he passed out" Further, his testimony that "he and [B.C.P.] fell onto the bed because of her momentum [was not] at all

believable" because D.W.P. was "six-foot-four and 220 pounds, and . . . [B.C.P.] was significantly smaller and shorter than him."

B.C.P.'s testimony was

more credible. Her demeanor and affect was consistent with the testimony that she was providing. She admitted facts despite them being against her interest and she maintained eye contact throughout her testimony. Further, her version of the events was corroborated by [the younger son] as well as by the statement that she wrote contemporaneously to the incident and was further supported by the pictures . . . [in] evidence.

B.C.P. admitted she used offensive language in the text messages and sticky notes she left for D.W.P. The judge found this added to her credibility because "[h]er demeanor was consistent and appropriate to the topic and she did appear emotional and fearful" The judge found the evidence admitted corroborated B.C.P.'s lengthy testimony that D.W.P. was controlling, manipulative, and threatened B.C.P. using the "economic imbalance" and "losing everything if she were to leave."

The judge concluded Officer Heredia's testimony was not reliable because his recollection of who called police was inconsistent with the other witnesses' testimony and "[h]is version lacks specificity and detail." Similarly, Officer Niemynski's testimony was "not helpful to the [c]ourt's analysis" because she

was not the primary officer and had to reference "the police report numerous times during her testimony" and could not recall the answer to several questions.

The judge found the younger son's testimony "extremely credible." "[H]is demeanor, tone, and body language led [the judge] to believe that his testimony was truthful. He did not exaggerate He appeared extremely concerned about his mother's safety as well as about his father's drinking. His testimony was consistent and believable."

The trial judge concluded the texts and messages B.C.P. sent to D.W.P. did not constitute harassment because B.C.P.'s intent was to express her "upset, hurt, and ang[er]" to D.W.P. rather than alarm or annoy him. Further, D.W.P. did not need an FRO because there was no immediate risk to his safety.

The judge found B.C.P. proved D.W.P. assaulted her. B.C.P.'s version of the event was more credible and corroborated by the younger son who "heard the scuffle and the screaming." The photographic evidence of the bruises showed they were "in the shape of fingers across [B.C.P.]'s upper chest. The location of these bruises is consistent with the description given by [B.C.P.] of how her husband grabbed her during the altercation."

The trial judge further found B.C.P. proved harassment pursuant to N.J.S.A. 2C:33-4(c). Her testimony regarding D.W.P.'s ongoing alcohol abuse

was corroborated by the son, and the threats related to economic issues were corroborated by the marital residence deed in evidence showing it was in D.W.P.'s name only and his text threatening to discard her belongings. The judge concluded this was evidence of a course of conduct designed to alarm or seriously annoy B.C.P.

The judge determined an FRO was necessary to protect B.C.P. "from immediate danger and to prevent further abuse" based on the history of domestic violence. She was convinced the behavior would continue unless an FRO was granted.

In A-2645-21, D.W.P. raises the following points:

POINT I

THE TRIAL COURT ERRED WHEN IT ENTERED
A[N FRO] AGAINST [D.W.P.].

Subpoint A.

The [t]rial [c]ourt's finding of assault was conclusory, failed to include the appropriate legal analysis, and thus cannot constitute a predicate act.

Subpoint B.

[D.W.P.] did not have the intent required to commit the predicate act of harassment.

Subpoint C.

[B.C.P.] failed to demonstrate that she is in need of the protection of a[n FRO].

Subpoint D.

The record demonstrates that the [t]rial [c]ourt made erroneous factual and credibility findings.

In A-2778-21, D.W.P. raises the following points:

POINT I

THE TRIAL COURT ERRED WHEN IT DISMISSED [D.W.P.]'S TRO; AN FRO IS REQUIRED TO PROTECT HIM FROM FURTHER ABUSE OF [B.C.P.].

Subpoint A.

The [t]rial [c]ourt erred when it failed to find that [B.C.P.] committed the predicate act of harassment, notwithstanding that she admitted to committing the acts alleged by [D.W.P.] because she wanted to "[m]ake him hurt[.]"

Subpoint B.

[D.W.P.] requires the protection of a[n FRO] to protect him from further abuse.

The trial court's findings of fact are binding on appeal if "supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 412 (1998). An appellate court may not set aside a trial court's factual findings unless convinced "they are so manifestly unsupported by or inconsistent with

the competent, relevant and reasonably credible evidence as to offend the interests of justice." Ibid. (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)).

We defer to fact-finding by the Family Part because of its "special expertise in the field of domestic relations." Ibid. "Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Ibid. (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). The deferential standard is applied "because an appellate court's review of a cold record is no substitute for the trial court's opportunity to hear and see the witnesses who testified on the stand." Balducci v. Cige, 240 N.J. 574, 595 (2020). However, we owe no deference to the trial court's ruling on an issue of law, which we review de novo. Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Pursuant to the PDVA, assault occurs where there is an "[a]ttempt to cause or purposely, knowingly or recklessly cause bodily injury to another" N.J.S.A. 2C:12-1(a)(1). "Bodily injury is defined as 'physical pain, illness or any impairment of physical condition.'" N.B. v. T.B., 297 N.J. Super. 35, 43 (App. Div. 1997) (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." Ibid. (citing State v. Bazin, 912 F. Supp. 106, 115 (D.N.J. 1995) ("Even the slightest physical contact, if done intentionally, is considered a simple assault under New Jersey law.")). "When the predicate act is an offense that inherently involves the use of physical force and violence, the decision to issue an FRO 'is most often perfunctory and self-evident.'" A.M.C. v. P.B., 447 N.J. Super. 402, 417 (App. Div. 2016) (quoting Silver v. Silver, 387 N.J. Super. 112, 127 (App. Div. 2006)).

Harassment under N.J.S.A. 2C:33-4(c)³ exists where a person "[e]ngages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy . . . [an]other person." "A finding of a purpose to harass may be inferred from the evidence presented. Common sense and experience may inform that determination." State v. Hoffman, 149 N.J. 564, 577 (1997) (internal citation omitted). "[S]erious annoyance under subsection (c) means to weary, worry, trouble, or offend." Id. at 581. In assessing whether there is harassment under the PDVA, the court must "consider the totality of the circumstances to determine whether the harassment statute has been violated[.]" including "an evaluation of the [victim's] circumstances." Cesare, 154 N.J. at

³ We address only this part of the harassment statute because D.W.P. only sought a finding on this section in A-2778-21, and the judge relied on this section in entering an FRO in B.C.P.'s favor in A-2645-21.

404. The totality of the circumstances includes the propensity of abusers to "have an unhealthy need to control and dominate their partners" Hoffman, 149 N.J. at 585. Indeed, "[d]omestic violence is a term of art which describes a pattern of abusive and controlling behavior which injures its victim." Corrente v. Corrente, 281 N.J. Super. 243, 246 (App. Div. 1995).

Pursuant to these principles, we affirm substantially for the reasons expressed in the trial judge's oral opinion. We add the following comments.

The record amply supports the judge's finding that D.W.P. assaulted B.C.P. Not only was there physical evidence of the assault, the judge's detailed and thorough credibility findings were unassailable and convince us her decision to accept B.C.P.'s version of the February 1, 2022 incident was neither an abuse of discretion nor a mistake of law. Likewise, the totality of the circumstances supported the judge's findings D.W.P. engaged in a course of alarming conduct constituting purposeful harassment. Indeed, other than seeking her right to a divorce, B.C.P.'s conduct did not justify the harassment D.W.P. directed at her over the course of several months, including the economic threats and controlling behavior.

The trial judge correctly denied D.W.P. an FRO. The PDVA does not police expressions of anger. "[T]he exchange of vulgarities on numerous

occasions and inappropriate expressions of anger . . . is not harassment." Chernesky v. Fedorczyk, 346 N.J. Super. 34, 40 (App. Div. 2001). B.C.P.'s conduct was a response to D.W.P.'s hurtful conduct. Although uncivil, her conduct did not threaten his safety and he did not need the protection of an FRO to bring it to an end. See Silver, 387 N.J. Super. at 127 (holding an FRO is necessary to protect victims of domestic violence "from an immediate danger or to prevent further abuse").

Affirmed in A-2645-21 and affirmed in A-2778-21.

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



CLERK OF THE APPELLATE DIVISION