

RECORD IMPOUNDED

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE APPELLATE DIVISION

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2760-21

R.F.,¹

Plaintiff-Respondent,

v.

B.F.,

Defendant-Appellant.

Submitted February 8, 2023 – Decided March 9, 2023

Before Judges Firko and Natali.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Cumberland County,
Docket No. FV-06-0979-22.

Klineburger and Nussey, attorneys for appellant (D.
Ryan Nussey, on the briefs).

Testa Heck Testa & White, PA, attorney for respondent
(Stephen E. Parrey, of counsel and on the brief; Michael
L. Testa, on the brief).

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

PER CURIAM

Defendant B.F. appeals from an April 21, 2022 final restraining order (FRO) entered in favor of plaintiff R.F., her former husband, 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. Because the judge did not make the requisite findings under the harassment statute and did not apply the two-prong test in Silver v. Silver,² we reverse and remand.

I.

The parties separated three years ago and divorced in February 2022. They co-parent their seven-year-old child. In March 2022, plaintiff applied for a temporary restraining order (TRO) after he contacted defendant to discuss the child's fear of her boyfriend and modifying the parenting time plan to prevent the child from living part-time in her new home if the boyfriend was going to be there. According to plaintiff, defendant said to him during their "heated" conversation that she "was going to catch up with [him] and [he] would fucking pay."

Plaintiff also claims defendant told him to "get a restraining order against her because she was going to fuck him up." The phone call made plaintiff feel

² 387 N.J. Super. 112, 125-27 (App. Div. 2006).

"uneasy," along with threats made by defendant's boyfriend, which led to plaintiff seeking a TRO. The complaint alleged the predicate act of harassment and that defendant committed prior acts of domestic violence against plaintiff. The judge entered a TRO following the filing of the complaint. Pursuant to the terms of the TRO, plaintiff was awarded temporary sole custody of the child, and defendant was granted supervised visitation at her parents' home where she was residing. The TRO ordered defendant's boyfriend to have no contact with the child.³ At the ensuing trial, plaintiff and defendant offered differing versions of the events leading to plaintiff's filing of his complaint. No other witnesses testified.

Plaintiff, who was represented by counsel, testified defendant called him a "no-good motherfucker" and a "controlling son-of-a-bitch." He stated defendant's boyfriend "ripped the phone out of [defendant's] hand." The boyfriend then threatened plaintiff and the child with violence by stating he would "take care" of the child's complaining. Plaintiff also testified the boyfriend said, "this is my motherfucking house," "he [would] catch up with [plaintiff,]" and "rub his balls all over him."

³ Defendant filed an application to appeal the TRO, which was denied.

According to plaintiff, the parties have a history of domestic violence. Several months prior, plaintiff claimed defendant threatened in a voicemail message to "burn [him] down to the ground," and "call all [of his] customers," so he "better get a restraining order." Plaintiff testified almost six months earlier, defendant was intoxicated, broke a lamp over his head, and struck him, resulting in a concussion that required medical treatment. He also stated that eighteen months earlier, defendant "got very pissed off with her temper" and "beat [him] to a pulp." Because plaintiff feared for his safety, he requested an FRO. Defendant, who was self-represented, waived cross-examination of plaintiff.

Defendant testified the parties have not had physical contact with each other since their separation three years ago. Since the separation, defendant explained she has been living with her parents, and plaintiff is upset "because [she] got on [her] feet a month ago and bought a house" that her boyfriend is helping her to remodel. Defendant testified the child is not afraid of her boyfriend. The judge admitted photographs into evidence proffered by defendant showing her boyfriend playing with the parties' child and spending time with him at a festival to counter plaintiff's testimony. Defendant

maintained her boyfriend does not get "involved" with plaintiff and that she is "not a violent person."

On cross-examination, defendant denied threatening plaintiff. She claimed plaintiff "always talked nasty to [her] over the phone," and her boyfriend got "upset" on the day in question for that reason. Defendant testified her boyfriend did not threaten plaintiff and did not tell plaintiff he "carries a piece." Defendant denied her boyfriend owns a gun. According to defendant, she believes plaintiff dislikes her boyfriend because plaintiff is "racist." Defendant testified plaintiff "just does not like the fact of another man being in [their child's] life." She also testified that her boyfriend "has no contact with plaintiff." Defendant denied hitting plaintiff with a lamp. She also denied the other prior alleged acts of domestic violence asserted by plaintiff.

Following the parties' testimony, the judge put his decision on the record. After determining the court had jurisdiction under the PDVA based on the parties' former marriage and having a child in common, 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. The judge found plaintiff proved the predicate act of "harassment," but did not mention the

elements of the statute or the subsection(s) applicable to this matter. N.J.S.A. 2C:33-4 provides, in pertinent part, that a person is guilty of harassment

if, with purpose to harass another, [they]:

- a. Make, or cause to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm; [or]
- b. Subject another to striking, kicking, shoving, or other offensive touching, or threaten to do so. . . .

The judge found harassment was proven based on plaintiff's credible testimony, but made no specific factual findings and no finding of a purpose to harass. The judge also made no finding that an FRO was necessary to protect plaintiff from an immediate danger or to prevent further abuse. The judge merely found: plaintiff "doesn't know what else to do," and without an FRO, the "dialogue" between the parties about parenting their child "will just continue to get worse."

On appeal, defendant argues the judge erred in admitting the alleged statements made by defendant's boyfriend in finding defendant committed the predicate act of harassment; the judge did not fully analyze the N.J.S.A. 2C:25-29(a) factors; the judge erred in finding defendant committed acts of domestic

violence instead of domestic contretemps; and the judge failed to clearly state his factual findings and correlate those findings with legal conclusions.

II.

Our review of a trial court's decision to enter an FRO in a domestic violence matter is limited. Peterson v. Peterson, 374 N.J. Super. 116, 121 (App. Div. 2005). "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. Inv'rs 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." N.J.S.A. 2C:33-4; see 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. State v. Hoffman, 149 N.J. 564, 577 (1997).

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. v. M.D.F., 207 N.J. 458, 484 (2011). 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, 248-49 (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). 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 (quoting Kamen v. Egan, 322 N.J. Super. 222, 229 (App. Div. 1999)).

Here, the judge made no finding that defendant acted with the requisite purpose to harass. Accordingly, in the absence of this "integral" finding of a purpose to harass, Corrente, 281 N.J. Super. at 249, the judge's determination that defendant committed the predicate act of harassment cannot stand, warranting reversal and remand for the requisite findings of fact and conclusions of law, see also Pressler & Verniero, Current N.J. Court Rules, cmt. 5.2 on R.

5:7A (2023) ("A final restraining order cannot be sustained when a court fails to articulate the applicable subsection of the harassment statute and to provide the legal and factual basis for finding a purpose to harass.").

The FRO must also be reversed because the judge did not find that restraints were necessary "to protect the victim from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127. As the court explained in Silver, the finding of a predicate act satisfies only the first step in a two-step process. Id. at 126-27. Because "the Legislature did not intend that the commission of one of the enumerated predicate acts of domestic violence automatically mandates the entry of a domestic violence restraining order," plaintiff was obligated to prove and the judge was required to find that restraints were necessary to "protect the victim from an immediate danger or to prevent further abuse." Ibid.

Here, the judge made no such finding. Although the judge noted plaintiff "doesn't know what else to do," he engaged in no principled analysis of why he found that to be the case and made no evaluation of the factors set forth in N.J.S.A. 2C:25-29(a)(1) to -29(a)(6). Absent an expressed holding, or other findings from which we might discern such an implicit determination, we must conclude that reversal and remand is warranted.

We reject defendant's contention that the admission of her boyfriend's alleged hearsay statements was overly prejudicial. Defendant failed to object to the admission of these statements at the trial and we conclude that their admission was not clearly capable of producing an unjust result. R. 2:10-2. Moreover, the judge placed scant reliance on the alleged hearsay statements. While plaintiff claims he was harassed in March 2022 by defendant and "vicariously through her boyfriend's behavior," the judge highlighted that the "heart of this allegation" relates to defendant's own conduct directed at plaintiff. Hence, the judge primarily relied on plaintiff's testimony about defendant's harassment and prior violent behavior, as well as the inevitable future dialogue between the parties.

In sum, we vacate the FRO, reinstate the TRO, and reverse and remand for the judge to: (1) make the requisite findings of fact and conclusions of law as to the predicate act of harassment under N.J.S.A. 2C:33-4; and (2) determine whether an FRO is necessary under Silver and the factors set forth in N.J.S.A. 2C:25-29(a)(1) to -29(a)(6).

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).

Reversed and remanded. We do not retain jurisdiction.

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



CLERK OF THE APPELLATE DIVISION