

RECORD IMPOUNDED

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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-2867-21

A.M.K.,¹

Plaintiff-Respondent,

v.

R.S.L.,

Defendant-Appellant.

Argued June 15, 2023 – Decided July 31, 2023

Before Judges Currier and Enright.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Camden County,
Docket No. FV-04-3227-22.

John R. Stein argued the cause for appellant (The Law
Firm of John R. Stein, LLC, attorneys; John R. Stein,
on the brief).

Victoria Chase argued the cause for respondent
(Rutgers Law Domestic Violence Clinic, attorneys;

¹ We use initials to protect the domestic violence victim's privacy. R. 1:38-3(d)(10).

Lindsey Harris, law student, appearing pursuant to Rule 1:21-3(b), and Nicholas Gangemi, law student, appearing pursuant to Rule 1:21-3(b), on the brief).

PER CURIAM

Defendant appeals from the May 16, 2022 final restraining order (FRO) entered against him under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, after a trial. Because the trial court did not make any findings regarding the necessity for an FRO, we vacate the FRO and remand to the trial court to articulate its required findings. See Silver v. Silver, 387 N.J. Super. 112, 126-27 (App. Div. 2006).

We derive the following facts from the trial testimony. The parties met in the summer of 2017 through a local theater community. Their relationship was a professional one for several years until they began dating in August 2021. At the time, plaintiff was in a relationship with another man and defendant was married and had a girlfriend. At the beginning of their relationship, the parties texted each other from morning until night, discussing their future, and "sexting."

According to plaintiff, during their liaison, the parties engaged in oral sex on multiple occasions, vaginal sex on one occasion, defendant urinated and spit in her mouth, forced her to eat her feces, hit and choked her. Plaintiff stated

defendant strangled her to the point of unconsciousness. She testified she felt defendant was controlling her and she was under duress. Plaintiff presented pictures of bite marks on her breasts and thighs, and marks on her thighs where defendant struck her. Plaintiff testified she felt she had to comply with defendant's requests because he knew where she lived and worked. She said defendant also stated he could kill her if he needed to. During the trial, plaintiff said she needed the FRO because she was "very afraid" of defendant.

Plaintiff stated she blocked defendant from communicating with her on Facebook in mid-December 2021. After plaintiff ended the relationship, she stated defendant contacted her two times and then appeared in the grocery store where she worked. After that, plaintiff applied for a temporary restraining order (TRO). She alleged the predicate acts of harassment and sexual assault. She also referred to various acts of assault, including that she was "hit," "bitten," "slapped," and "strangled until unconscious[]."

During his testimony, defendant testified the parties discussed every sexual act before they engaged in it and all of the conduct between them was consensual. He described their liaison as a "BDSM"² relationship. Defendant stated plaintiff requested he do certain acts with and to her, including being

² This is an abbreviation for bondage, discipline, sadism, and masochism.

choked, bruised, and spanked. He produced text messages in which plaintiff referenced many of the acts, her request for the conduct, and her enjoyment of it. Defendant also produced the following text message sent by plaintiff in December 2021:

[Plaintiff]: Right now I need to find me and figure out who I am and what I want. This is not [goodbye] forever. I do wish the best for you always.

[Defendant]: All I ask is that you go to your doc's appointments, all of them, the psych doc, the OBGYN. Do that.

[Plaintiff]: I will, I promise. I love you.

[Defendant]: I love you too.

[Plaintiff]: I believe you're a good person and that you care about me and never meant to harm me. But to restore things I think I need space. I think I need to find a validation within myself, and love myself and find my own will to live. This is so hard. I can't talk to Tony. I'm going to lose you, I can feel it. I don't know what to do. I'm falling so hard into a void.

[Defendant]: Do you need me to not talk to you for your sake or do you need to not talk to you because of what Tony said.

[Plaintiff]: A mix of both I think. Leaving this channel open right now at least at this point in time. . . . But I know I need to focus on myself and my relationship with God and the next steps. And if I want to fix things with him, I can understand why he would be afraid of me continuing to be close to you. . . . This is so hard. You've helped me so much. This is so hard for me. I'm sorry about everything.

Defendant denied ever telling plaintiff he could kill her. He stated he texted plaintiff in mid-January 2022, asking "How are things working out?" He sent her an email in April 2022, stating; "I hope that spring is treating you well[.] Peace." Later that month, defendant sent plaintiff another email, asking if there was "[a]ny chance of a conversation." Because plaintiff had blocked any email messages from defendant, the messages went into her spam folder.

Defendant further testified he did go to the supermarket where plaintiff worked but he was searching for a certain type of mushroom he was unable to find at five other stores. Since she worked in the bakery, he did not think he would see her. However, as he walked into the store, plaintiff was sitting at an outside table. When she asked him whether he was shopping at the store, defendant told her he was looking for mushrooms. According to defendant, plaintiff then picked up her phone and he walked into the store.

Defendant testified he suspected plaintiff broke off their relationship because she learned her boyfriend was going to propose to her at Christmas and she did not want defendant to tell her boyfriend about their liaison and sexual conduct. Defendant agreed in a text that he would not reveal any information to the boyfriend.

At the conclusion of the parties' testimony, the court found defendant assaulted plaintiff beyond the point to which someone could consent. The judge specifically referred to the choking incidents and the physical abuse seen in the pictures admitted into evidence. The judge found that "defendant readily admits that he choked plaintiff to the point where she . . . almost passed out" and "[t]hat's a dangerous thing[] to do because one could die from that. And one does not consent to dying" The judge further stated "[o]ne cannot consent to being injured. One cannot consent to losing consciousness from being choked. These actions the [c]ourt finds are clear abusive conduct on . . . defendant's part. These actions are of such nature that the [c]ourt must find that there was abusive conduct." In addition, the judge found defendant's "assaultive conduct" was "egregious." He further stated: "That this repeat conduct on . . . defendant's part can create an indication of . . . plaintiff being abused[,] and immediate danger is apparent from the testimony of the parties."

On appeal, defendant asserts the court erred in its factual findings and in issuing the FRO.

In reviewing a court's decision to grant or deny an FRO, "we accord great deference to discretionary decisions of Family Part judges," Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012), in recognition of the

"family courts' special jurisdiction and 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)). "[F]indings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare, 154 N.J. at 411-12 (citing Rova Farms Resort, Inc. v. Inv.'s Ins. Co., 65 N.J. 474, 484 (1974)). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 26 (2014) (quoting Manalapan Realty, LP v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The entry of a domestic violence restraining order requires a trial court to make certain findings. See Silver, 387 N.J. Super. at 125-26. The court "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, e.g., N.J.S.A. 2C:25-19(a)(2). If a trial court finds a defendant has committed a predicate act of domestic violence, it next must determine if a restraining order is needed for the victim's protection. Silver, 387 N.J. Super. at 126.

The court found defendant committed the predicate act of assault.³ But he failed to explain why an FRO was necessary "to protect the victim from an immediate danger or to prevent further abuse" following as assessment of the factors set forth in N.J.S.A. 2C:25-29(a)(1) to (6). Id. at 127. Without this determination, we cannot conduct a meaningful review of whether the FRO was properly issued. Therefore, we must remand for further findings regarding the second Silver prong.

Defendant did not deny he hit, bit, and choked plaintiff to the point where she almost lost consciousness. Instead, he testified the conduct was consensual. And plaintiff presented pictures of bruising and bite marks substantiating her injuries. Therefore, the finding of assault was supported by the evidence and the judge on remand does not need to further explain his findings under the first Silver prong.

As the judge noted, a person cannot consent to bodily harm under the described circumstances. N.J.S.A. 2C:2-10(b), the defense of "[c]onsent to bodily harm," states:

³ Under N.J.S.A. 2C:12-1, a person is guilty of assault if they "(1) Attempt[] to cause or purposely, knowingly or recklessly cause[] bodily injury to another; or (2) Negligently cause[] bodily injury to another with a deadly weapon; or (3) Attempt[] by physical menace to put another in fear of imminent serious bodily injury."

When conduct is charged to constitute an offense because it causes or threatens bodily harm, consent to such conduct or to the infliction of such harm is a defense if:

(1) The bodily harm consented to or threatened by the conduct consented to is not serious;

[N.J.S.A. 2C:2-10(b) (emphasis added).]

Not only did the assault here result in bruising and bite marks, but plaintiff was choked until she became unconscious. Defendant's conduct caused significant bodily injury and could have resulted in plaintiff's death. Therefore, the trial court's finding that plaintiff could not consent to the assaultive conduct, specifically choking, was supported on legal grounds. Plaintiff proved the predicate act of assault.

Therefore, we vacate the court's order granting the FRO and remand to the trial court to make the required findings regarding the need for an FRO. The court should issue its findings and decision without further testimony or argument from the parties or counsel. This is not an opportunity for the parties to "re-do" the trial.

The remand decision should be completed within thirty days of the filing of this opinion. The TRO remains in effect until further order of the trial court.

Vacated in part and remanded for further proceedings in accordance with this opinion. We do not retain jurisdiction.

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



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