

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3319-21

M.B.,

Plaintiff-Appellant,

v.

C.C.,

Defendant-Respondent.

Submitted August 29, 2023 – Decided September 7, 2023

Before Judges DeAlmeida and Berdote Byrne.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Essex County, Docket
No. FV-07-2638-22.

Connell Foley LLP, attorneys for appellant (Meghan K.
Musso and Patricia A. Lee, of counsel and on the brief;
Yvette Donaldson Brown and Hannah Teller, on the
brief).

Respondent has not filed a brief.

PER CURIAM

Plaintiff appeals from the trial court's denial of a final restraining order (FRO), claiming the trial court erred in determining plaintiff failed to prove the predicate acts of harassment, terroristic threats, or stalking pursuant to Prevention of Domestic Violence Act of 1991 (PDVA), N.J.S.A. 2C:25-17 to 35, and failed to prove the threat of imminent future harm or risk of future abuse pursuant to Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006). The trial court's findings are not supported by credible evidence and, indeed, are inconsistent with the evidence and admissions at trial. Accordingly, we vacate the order denying the FRO and remand for a new trial before a different judge. At the new trial, the judge shall consider the evidence and testimony from the first trial, including defendant's admissions.

The parties were involved in a romantic relationship from June 2019 through August 2021. Plaintiff moved out of defendant's apartment in August 2021, while pregnant with their son. The trial court granted plaintiff a temporary restraining order (TRO) on March 25, 2022, which was served on defendant. The complaint was amended on May 6, 2022, to allege a violation of the TRO by defendant when he sent plaintiff money through a third-party application. The court held an FRO hearing on May 10, 2022, denied the FRO, and dismissed the TRO. It subsequently denied a motion for a stay of the dismissal of the TRO.

pending appeal, although the stay was unopposed by defendant. We granted plaintiff's motion for a stay, reinstating the TRO pending the outcome of this appeal.

Our review of an FRO is generally limited. C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020). In matters involving domestic violence, the Supreme Court has held the findings of a trial court "are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998).

Nevertheless, our review of questions of law "are not entitled to that same degree of deference if they are based upon a misunderstanding of the applicable legal principles." R.G. v. R.G., 449 N.J. Super. 208, 218 (App. Div. 2017) (quoting N.T.B. v. D.D.B., 442 N.J. Super. 205, 215-16 (App. Div. 2015)); see also H.E.S. v. J.C.S., 175 N.J. 309, 329-31 (2003) (remanding to the trial court because it failed to "consider the totality of the circumstances surrounding the complaint, including past incidents of domestic violence and defendant's behavior"); D.M.R. v. M.K.G., 467 N.J. Super. 308, 325 (App. Div. 2021) (reversing the trial court's entry of a FRO due to lack of findings, no prior history of domestic abuse existing between the parties, and plaintiff's lack of fear.). We review conclusions of law de novo. C.C., 463 N.J. Super. at 428.

When determining whether an FRO pursuant to the PDVA should issue, a trial court must make two distinct determinations. Silver v. Silver, 387 N.J. Super. at 125-27. First, 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.

With respect to the predicate act of harassment, N.J.S.A. 2C:33-4 requires the perpetrator act "with [the] purpose to harass another." Such a finding "may be inferred from the evidence presented" but "[c]ommon sense and experience may inform that determination." State v. Hoffman, 149 N.J. 564, 577 (1997). It may also be inferred from the parties' history. J.D. v. M.D.F., 207 N.J. 458, 487 (2011).

Plaintiff testified she was not comfortable being alone with defendant during prearranged visitation with their infant son and wanted family members present when visitation occurred. On March 25, defendant sent her seventeen "argumentative" text messages, calling her obscene names and using obscene language, because he did not want family members present when he visited his child. One of defendant's texts threatened to call police and tell them plaintiff was suffering from post-partum depression, stating "[i]f you keep on with this line that you are creating[,] and I take you to court[,] literally you can lose all

rights and be seen as mentally unfit" Defendant also left voicemail messages that day, which were moved into evidence, where he used obscene language and made non-specific threats, including "[i]t's not gonna end out work-workin' [sic] well for you." Several hours after sending that message, defendant sent a text asking "Can we go to the mall tomorrow then [?]" Plaintiff testified these messages "were very concerning because [defendant's] behavior is very erratic."

During the weeks immediately prior to the entry of the TRO, defendant called and texted plaintiff numerous times. On March 1, defendant called or texted plaintiff over fifty times asking for his passwords and login information to online accounts, which she had previously given him when she moved out. Between 2:47 and 3:10 that afternoon, defendant called plaintiff thirty-two times.

With respect to the parties' prior history, plaintiff testified as to a disagreement about money in March 2021, wherein defendant took plaintiff's wallet and phone after she refused to buy him marijuana. When plaintiff tried to retrieve the items, he strangled her until she fell to the floor. Plaintiff testified she decided not to call the police out of fear he would hurt her again and because defendant threatened to kill her. Plaintiff also testified defendant punched holes

in the bathroom door while she was inside the bathroom. A November 4, 2020, photo of these holes was moved into evidence. Both parties called the police when plaintiff was moving out of the apartment because of an argument. Plaintiff also testified defendant would threaten to strike her in an attempt to have her miscarry the baby "every two weeks" until she moved out.

The trial court made credibility determinations, finding plaintiff credible, and finding her allegations were not disputed by defendant. The court then stated:

the defendant said very little. He generally did not deny the allegations. He specifically admitted to having choked the plaintiff in the past in 2021. He very honestly testified that he has issues with his behavior that he is working on. . . . While at times the defendant's testimony was incredible All in all I think the defendant testified credibly.

Despite these credibility determinations and defendant's admissions, the trial court found plaintiff failed to prove terroristic threats, stalking, or harassment. Specifically with respect to harassment, the trial court found plaintiff failed to prove "a continuing course of alarming conduct" because defendant's purpose in calling and texting her over fifty times on March 1 was to obtain the passwords to his online accounts. Additionally, terming the March

25 communications "conversations" between the parties, the court found "[defendant] did not intend to harass. He had a reason for calling."

We conclude the trial court misapplied the law when it found plaintiff did not prove harassment because defendant's intention on March 1 was to obtain his passwords and his intention on March 25 was to "discuss" the terms of visitation. The trial court also misconstrued the law when it found plaintiff failed to prove a course of conduct pursuant to the statute.

There was insufficient evidence to support the finding that defendant's primary purpose on March 1 was to obtain passwords for his online accounts. Indeed, that finding is inconsistent with the testimony at trial. Defendant did not attempt to contact plaintiff, leave a polite or even neutral voice mail message, and wait for her to respond. Instead, he called her over thirty-two times in twenty-three minutes. The calls began at 6:21 a.m. and did not end until after 4:00 p.m. The subsequent communications on March 25 were not "conversations between" the parties. Most of those calls were unsolicited communications from defendant to plaintiff after she made clear she did not wish to communicate with him.

Moreover, a plaintiff need not prove a "course of conduct" to establish harassment. In specific circumstances, one act can meet the definition of

harassment. Hoffman, 149 N.J. at 580 ("[S]ubsection (a) proscribes a single act of communicative conduct when its purpose is to harass."); State v. J.T., 294 N.J. Super. 540, 545 (App. Div. 1996) (holding a course of alarming conduct "does not require any minimum amount of time . . ."). The non-specific threats made on March 25 appear to have been made with no other intention but to annoy or harass, as they served no other legitimate goal. The fifty calls and messages on March 1, followed by more insistent communications on March 25, leading plaintiff to seek a TRO, could well establish an alarming course of conduct. The seventeen argumentative text messages and voicemail messages began at 6:34 a.m. and did not end until March 26, and they were replete with obscene language and non-specific threats of what would happen to plaintiff if she did not cooperate with defendant.

Based upon the record before us, including defendant's admissions and the trial court's credibility findings, there was no credible evidence supporting the finding that plaintiff did not prove harassment. We therefore remand for a new trial. Because we have determined to remand for a new trial on harassment, we also direct that at the new trial the court address and make new determinations on plaintiff's claims of terroristic threats and stalking.

After finding defendant violated the TRO by sending plaintiff money through a third-party app for payment of his cell phone bill, the trial court found defendant in contempt for violation of the TRO¹ but nonetheless found plaintiff failed to prove immediate risk of future harm pursuant to Silver. Although conceding "[i]t's the prior history that gives me more, almost more concern than the present because the defendant did admit to having choked the plaintiff in August of 2021" the court denied plaintiff an FRO.

If a court finds a predicate act occurred pursuant to N.J.S.A. 2C:25-19(a), "the judge must determine whether a restraining order is necessary to protect the plaintiff from future danger or threats of violence." D.M.R., 467 N.J. Super. at 322. "Although this second determination — whether a domestic violence restraining order should be issued — is most often perfunctory and self-evident, the guiding standard is 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." Silver, 387 N.J. Super. at 127. N.J.S.A. 2C:25-29 provides "[t]he court shall consider but not be limited to" six factors, including the previous history of domestic

¹ Although the trial court's finding of contempt is not before us on appeal, we discern no error with respect to that finding.

violence between the parties. "[W]hether the victim fears the defendant" is an additional factor the trial court may consider. G.M. v. C.V., 453 N.J. Super. 1, 13 (App. Div. 2018). The court must determine, pursuant to the totality of the circumstances, whether the FRO is necessary "to protect the victim from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127; C.C., 463 N.J. Super. at 436; see also N.J.S.A. 2C:25-29(b) ("the court shall grant any relief necessary to prevent further abuse."). The inquiry is necessarily fact specific. Silver, 387 N.J. Super. at 127-28 (remanding for further fact finding).

Reviewing the totality of the circumstances, the probability for further abuse to plaintiff is supported in the record, and there was no credible evidence supporting the finding that a FRO was not necessary, particularly in light of its finding defendant violated the TRO.

Defendant's own admissions regarding his inability to control his behavior and the instances of prior abuse strongly suggest a risk of imminent harm or, at minimum, risk of future abuse. Defendant began his testimony by stating "I'm not here to deny my actions. You know, I'm an emotional being. . . . It is a toxic trait." He admitted when plaintiff became pregnant, he "was driven by anger. I was driven by regret." When testifying in response to the March 1

texts, he admitted, "I'm a very emotional, driven person and I have to work on this" stating "I want to establish a relationship with her But I do need help[,] and describing himself as a "rank, emotional" person. He testified he fully understood plaintiff found his text messages and voicemails harassing.

Defendant also acknowledged plaintiff's fear of him, admitting "I'm actually frustrated with myself seeing this [the text messages in evidence]. And again, my erratic behavior . . . It's just anger. It's just emotions and no actions." Despite claiming his emotions do not result in actions, he admitted to choking plaintiff in the past until she fell to the floor.

The trial court's focus on the absence of incidents between the parties from the time plaintiff moved out of defendant's apartment through March 1 as determinative of the nonexistence of risk of future harm lacks support in the law. Plaintiff testified defendant's erratic behavior caused her to fear for her safety. Defendant admitted that he struggled to control his emotions and to choking plaintiff in the past. The trial court erred in finding the testimony did not establish the threat of imminent future harm or potential for future abuse by a preponderance of the evidence. See Cesare, 154 N.J. at 402 ("[N]ot only may one sufficiently egregious action constitute domestic violence under the [PVDA], even with no history of abuse between the parties, but a court may also

determine that an ambiguous incident qualifies as prohibited conduct, based on a finding of violence in the parties' past.")

From our review of the evidence, the governing statute, and controlling case law, we conclude the record does not support the trial court's finding that final restraints were not necessary for plaintiff's protection. The order under review is reversed. We remand for a new trial before a different trial judge. At the new trial the court shall consider the testimony from the first trial, including the admissions made by defendant. Given defendant's admissions, the primary issue concerning the harassment claim will be defendant's intent. The TRO is to remain in place until a new order is entered following the trial on remand.

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