SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3482-21

A.M.,[1]

Plaintiff-Respondent,

v.

E.M.,

Defendant-Appellant.

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Submitted June 7, 2023 – Decided July 20, 2023

Before Judges Firko and Natali.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Camden County, Docket No. FV-04-3404-22.

Hark & Hark, attorneys for appellant (Michael J. Collis, on the brief).

Respondent has not filed a brief.

PER CURIAM

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

Defendant E.M. appeals from a June 2, 2022 final restraining order (FRO) entered in favor of his estranged wife, plaintiff A.M., pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, based on the predicate act of harassment, N.J.S.A. 2C:33-4(a). On appeal, defendant contends there is insufficient evidence supporting the judge's finding he committed the predicate act of harassment, and therefore, the judge erred by concluding an FRO is necessary to protect plaintiff from future acts of domestic violence. We disagree and affirm.

I.

The parties separated five years ago. They have four daughters under the age of eighteen. In January 2020, plaintiff moved out of the former marital home without the two younger daughters, but they later lived with her. Prior to their separation, the parties resided in Philadelphia and later both parties moved to New Jersey. For reasons that are not clear in the record, on February 21, 2020, a Pennsylvania court issued a temporary custody order granting plaintiff custody of the two younger daughters and defendant custody of the two older daughters. The record also references a Pennsylvania court order that denied plaintiff's request for a restraining order against defendant.

Plaintiff testified that defendant and the two older daughters moved in with her on July 15, 2021, because defendant's house was being renovated, and plaintiff agreed to "help him out." Defendant was supposed to leave the next month, but the living arrangement continued until May 9, 2022, when plaintiff was granted a temporary restraining order against defendant, and she was granted exclusive possession of her residence. Plaintiff alleged all four children wanted to stay with her, and the two older daughters did not want to go with defendant.

The complaint alleged the predicate act of harassment. Plaintiff claimed defendant told her that he would not let the children "come back with you;" she was "unstable;" and he told the children plaintiff was going to put them "in a basement like when she left last time." In addition, plaintiff stated in her complaint that defendant told her, "I am afraid you will take them out of state," and "you are messing with the wrong person. I am going to take your life . . . and make your life a living hell."

Plaintiff also alleged defendant told her, "I will do whatever it takes to take you out" and "make this the last day you will see." According to plaintiff, defendant said he would "work voodoo" on her. Plaintiff learned from one of the children that defendant recently purchased a gun. The police notified the

Division of Child Protection and Permanency about the incident. The complaint also alleged defendant committed prior acts of domestic violence against plaintiff.

At the ensuing trial, plaintiff and defendant offered differing versions of the events leading to plaintiff's filing of her complaint. Plaintiff was self-represented. She testified defendant became "hostile" on May 9 and stated, "you don't know who you're dealing with, bitch, because if you mess with me and you take my kids away, I'm going to end you." Plaintiff testified defendant was cursing and using foul language that morning in front of the children. Defendant went on to call plaintiff "Satan," a "coward," and "naive," and stated to stop "lying" and "bullshitting" him. Plaintiff testified she learned defendant had a gun and felt "threatened" by him because he has been a veteran for over twenty years. She claims he uses "witchcraft," "voodoo," "hoodoo," and has a "mental problem," but "he doesn't know it."

Plaintiff also stated defendant came up to her face and was loud, which shook her up. In terms of prior history, plaintiff testified defendant "punched the walls right by her face" when she was eight months pregnant in 2016. Plaintiff recounted another prior incident when defendant saw one of her text messages, wherein she "misspelled Michele for Michael." Defendant

interrogated her about the message for two or three hours holding "a knife in his hand" over her while she was in bed. This incident occurred at two or three o'clock in the morning.

Plaintiff testified she was denied a restraining order in Pennsylvania because defendant "didn't physically hurt her," of his longstanding military status at McGuire Air Force Base, and because he is a grand sheik in the Muslim community. Plaintiff explained she felt "isolated" and "didn't have friends." Plaintiff added defendant has "emotionally abused" her and stopped the children from seeing family, causing them stress. Plaintiff requested an FRO to "protect" her and the children from defendant because he blames her for everything, and "intimidate[s]" the children. Plaintiff testified defendant violated their contract not to turn the daughters against plaintiff, not to curse, and not to be inappropriate, when she agreed to allow him to stay with her. On cross-examination, plaintiff stated it was her understanding that defendant "was going to hurt [her]" and "verbal abuse is very serious" as she has experienced for the past thirteen years by defendant.

Defendant, who was represented by counsel, testified on the day of the incident, he was getting the daughters ready for school when plaintiff walked in angrily, said, "we're going to get to the bottom of this," stood over the girls, and

in a "forceful[,] angry tone" asked them who they wanted to live with. Defendant stated he thought plaintiff was "bullying the girls" and it "upset" him. Defendant claimed he reassured the children that plaintiff would not move with them to another state.

Defendant admitted to calling plaintiff a "bitch" but denied ever threatening her. He also acknowledged punching the wall in 2016 because two of the daughters fell down the steps because plaintiff didn't put up the divider. Defendant denied having any knowledge about a prior incident involving a knife. Plaintiff waived cross-examination of defendant. No items were moved into evidence by either party.

Following the parties' testimony, the judge put her decision on the record. The judge did not decide jurisdiction under the PDVA, but jurisdiction is established because the parties are married and have four children in common. The judge found plaintiff's testimony more credible than defendant's testimony and that she met her burden of proof by a preponderance of the evidence. The judge found plaintiff proved the predicate act of harassment under N.J.S.A. 2C:33-4(a), because defendant "engaged in communication in offensively coarse language . . . in a manner likely to cause annoyance or alarm."

The judge noted "[y]ou don't say things like I'm going to end you and I'm going to do whatever it takes in the context of an argument about custody of the children," especially here when custody has been an issue since 2016. The judge found the parties' split custody arrangement was a "toxic situation."

The judge found defendant committed domestic violence against plaintiff in the past and credited her testimony about defendant holding a knife over her. The judge found defendant was not credible about the knife incident and that "he skewed his testimony to put himself in a good light." Regarding the May 9 incident, the judge found defendant was "heated" that day and "he said what he meant," including all the "nasty words" he directed at plaintiff by calling her "a naive bitch, an evil bitch, Satan," a "coward," and "weak." The judge then granted the FRO, noting the restraining order was necessary to protect plaintiff from any future acts of domestic violence "to make this stop." This appeal followed.

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 v. Silver, 387 N.J. Super. 112, 125 (App. Div. 2006). 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).

Here, plaintiff alleged that defendant engaged in harassment. A person is guilty of harassment where, "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;
>
> b. Subject another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or
>
> c. Engage in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.
>
> [N.J.S.A. 2C:33-4.]

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 "[c]ommon 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) (citations omitted).

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.
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> [Id. at 475 (internal citation omitted).]

"[T]he decision about whether a particular series of events rises to the level of harassment or not is fact-sensitive." Id. at 484. Only by considering the parties'

prior relationship and the parties conduct under the totality of the circumstances can a court determine whether a communication constituted harassment. Pazienza v. Camarata, 381 N.J. Super. 173, 182-84 (App. Div. 2005).

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) (citing N.J.S.A. 2C:25-29(a)(1)-(2)).

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) (citing 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 (quoting Kamen v. Egan, 322 N.J. Super. 222, 229 (App. Div. 1999)).

Defendant claims there is insufficient evidence supporting the court's finding he committed predicate acts of harassment. More particularly, he argues the record lacks evidence he acted with the purpose to harass plaintiff or that he engaged in any other course of alarming conduct to seriously annoy plaintiff. Defendant contends his communications to plaintiff did not put her in fear for her safety or "intolerably interfere" with her expectation of privacy. Defendant contends his language that he would "end" plaintiff and do whatever he could related to their custody dispute and does not constitute harassment.

Defendant also challenges the judge's finding that his testimony was less credible than plaintiff's testimony and denies plaintiff needs the protection of an FRO in light of their custody dispute and plaintiff's past conduct of "parental kidnapping." Defendant admitted to punching the wall in 2016, but felt it was justified because plaintiff forgot to put up the divider for the stairs, causing two of the children to fall down the stairs.

The evidence amply supports the judge's finding defendant made communications likely to cause annoyance or alarm, and at the same time, engaged in a course of alarming conduct and repeatedly committed acts with the purpose to alarm and seriously annoy plaintiff. Defendant's purpose to harass is

established by his own words and conduct buttressed by the history of domestic violence.

The judge explicitly found plaintiff more credible than defendant and highlighted that multiple times in her decision. Those credibility findings are significant because the judge found defendant calling plaintiff a "bitch" and stating he will "end her" constituted harassment in the face of a longstanding custody dispute dating back to 2016. Moreover, the judge emphasized she found plaintiff credible in terms of the parties' prior history of domestic violence and believed plaintiff's testimony that defendant punched a wall when she was pregnant and confronted her with a knife. The vulgar and repetitive nature of these communications and actions support a finding of harassment under N.J.S.A. 2C:33-4(a).

Here, the judge correctly determined defendant's unrelenting course of conduct directed at plaintiff over a period of six years despite her requests that he follow their contract and control his anger—which was not isolated—supports the judge's finding an FRO was necessary to protect plaintiff against future acts of domestic violence. We conclude there is no basis to disturb the judge's factual findings or legal conclusions. The judge heard testimony from the parties and had ample opportunity to assess credibility. There exists

sufficient evidence in the record to support both Silver prongs, and render the totality of the circumstances, and we see no evidentiary errors, oversight, or abuse of discretion.

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).

Affirmed.