

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-3792-21

D.S.,

Plaintiff-Respondent,

v.

E.R.,

Defendant-Appellant.

Submitted September 18, 2023 – Decided October 4, 2023

Before Judges Marczyk and Chase.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Hudson County,
Docket No. FV-09-1381-22.

Berse Law, LLC, attorneys for appellant (Samuel J.
Berse, on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant E.R. appeals from the June 27, 2022 final restraining order ("FRO") entered in favor of plaintiff D.S. under the Prevention of Domestic

Violence Act ("PDVA"), N.J.S.A. 2C:25-17 to -35. Defendant argues he could not have committed the predicate act of terroristic threats against plaintiff, because he only threatened plaintiff's new boyfriend. Having reviewed the record and the applicable legal principles, we affirm.

On December 4, 2021, plaintiff obtained a temporary restraining order ("TRO") against defendant. Plaintiff amended the TRO, alleging that on November 27, 2021, defendant began calling her in a drunken state informing her that he wanted to rekindle their relationship. Plaintiff alleged that defendant's statements became violent and threatened her new boyfriend stating that he would "slice his throat." Plaintiff claimed defendant went on to tell her new boyfriend that he would find plaintiff dead soon, and that defendant would be the sole parent of their infant child. The next morning, defendant allegedly texted plaintiff that if she went to the police something bad would happen to her. In her TRO, plaintiff claimed there were many prior incidents of domestic violence.

Both parties represented themselves at trial and testified. Plaintiff testified the parties previously had a dating relationship, lived together, had a baby, but never married. She explained that on November 27, 2021, defendant kept calling her, including on FaceTime, and she kept hanging up. At some

point her boyfriend got on the phone with defendant and according to plaintiff, defendant "threatened me; he threatened the guy I was dating at the time that he was going to slice his neck." Plaintiff further testified defendant, ". . . basically, [h]e was going to come after- -" and "[h]e like, lost his, like lost it...[H]e started texting really crazy stuff. And it's not the first time he's done this...." To corroborate this part of her testimony, plaintiff provided the court text messages which reflect the following conversation:

[Defendant:] YOU, SERIOUSLY, F[****D] UP!!!
[Plaintiff:] U told him u we're gonna slice his throat?
[Defendant:] Yup!!!!'

The text chain reflects the following morning plaintiff texted defendant, telling him he could get arrested for what he had done. Defendant replied, "Get me locked up And just WATCH what Happens!!!?"

Concerning prior incidents of domestic violence, plaintiff testified regarding an incident that occurred in July 2020, when defendant came to her house soon after their baby was born. Plaintiff testified that defendant broke a glass mirror in the hallway and then continued into the apartment, where defendant said he was going to hurt her family, including telling her brother that he would slice his throat. Her neighbors called the police, and ultimately two neighbors barged into plaintiff's apartment and, together with plaintiff's mother,

restrained defendant from hitting plaintiff's brother. Plaintiff provided text messages from that day, which reflected that because she chose to side with her family, defendant stated he was going to "STRESS YOU OUT TO THE POINT OF DEATH!" Defendant continued texting that because of plaintiff's brother, "I HAVE NO CHOICE BUT TO GO FOR THE JUGULAR . . . TODAY, I WANT BLOOD." Plaintiff went on to discuss that defendant was aggressive towards her "time and time again." She also testified defendant called the DCPD on her, and in January 2021, defendant said he was going to kill her. She then played a recording of the conversation where she confronted defendant about telling her he would kill her, and defendant responded, "Slowly but surely" Plaintiff discussed how she has lupus, which defendant is aware of, so when he "says he's going to stress me out . . . he's going to stress me out to the point that I die from my lupus."

In explaining why she felt she needs a final restraining order against defendant, plaintiff testified defendant refused to go for help and has an extensive history of violence, including getting arrested for his behavior. She concluded, "And I'm very afraid that he's going to be the reason I do die young, or my kids get hurt, because he has no self-control[.] And me and my kids, as long as he has no self-control, we are in danger."

In his testimony, defendant admitted to sending the text messages plaintiff provided. He described it as "a verbal sparring that was occurring" between them and that he sent the texts "because [he] was in a bad state" and "still angry over what occurred." As to the July 2020 incident, defendant testified that he was in plaintiff's residence before her brother arrived, denied ever saying that he was going to slice his throat, and further denied having a knife on him. In his final testimony, defendant testified he felt the restraining order was "completely false."

At the conclusion of testimony, the trial court found plaintiff was more credible than defendant and the text messages were consistent with her testimony. The court went on to find defendant said he was going to slice her new boyfriend's throat, which constituted "a threat of the commission of a crime of violence for the purpose of terrorizing [plaintiff] and causing her to do whatever it was [defendant] wanted her to do at that time" The court held this terroristic threat was an act of domestic violence against plaintiff under the PDVA. The trial court then determined a restraining order was necessary to protect plaintiff against further domestic violence, given the prior acts of domestic violence and the evident hostility defendant showed to plaintiff

because of her new relationship. As such, the court entered an FRO against defendant. This appeal followed.

I.

Our limited scope of review of a trial court's findings is well established. See Cesare v. Cesare, 154 N.J. 394, 411 (1998). "[W]e grant substantial deference to the trial court's findings of fact and the legal conclusions based upon those findings." Moynihan v. Lynch 250 N.J. 60, 90 (2022). We will not disturb the court's factual findings and legal conclusions "unless [we are] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Cesare, 154 N.J. at 412 (quoting Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)).

We also accord deference to the factual findings of Family Part judges because that court has "special jurisdiction and expertise in family matters[.]" Cesare, 154 N.J. at 413. Conversely, a trial judge's decision on a purely legal issue is subject to de novo review on appeal. Crespo v. Crespo, 395 N.J. Super. 190, 194 (App. Div. 2007). To the extent the trial court's decision implicates questions of law, we independently evaluate those legal rulings de novo. Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995).

Domestic violence is a serious problem in our society, described by our Supreme Court as a "pattern of abusive and controlling behavior injurious to its victims." Peranio v. Peranio, 280 N.J. Super. 47, 52 (App. Div. 1995); accord Corrente v. Corrente, 281 N.J. Super. 243, 246 (App. Div. 1995); State v. Chenique-Puey, 145 N.J. 334, 340 (1996) (stating that domestic violence "persists as a grave threat to the family, particularly to women and children"). Our Legislature thus designed the PDVA to "assure the victims of domestic violence the maximum protection from abuse the law can provide." N.J.S.A. 2C:25-18. Therefore, in matters involving domestic violence, our Supreme Court has held the findings of a trial court "are binding on appeal when supported by adequate, substantial, credible evidence." T.M.S. v. W.C.P., 450 N.J. Super. 499, 502 (App. Div. 2017) (quoting Cesare 154 N.J. at 411-12).

II.

The entry of an FRO under the PDVA requires the trial court make certain findings, pursuant to a two-step analysis. See Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). Initially, 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. The trial court should make this determination "in light of the previous

history of violence between the parties." Ibid. (quoting Cesare, 154 N.J. at 402). A terroristic threat, under N.J.S.A. 2C:12-3, is a predicate act under the PDVA. N.J.S.A. 2C:25-19(a)(3).

Secondly, if the court finds a predicate act, the court must determine "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; see also J.D. v. M.D.F., 207 N.J. 458, 475-76 (2011) (noting the importance of the second Silver prong). These factors include, but are not limited to, "[t]he previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse." N.J.S.A. 2C:25-29(a)(1). In those cases where "the risk of harm is so great," J.D., 207 N.J. at 488, the second inquiry "is most often perfunctory and self-evident" Silver, 387 N.J. Super. at 127.

III.

In the present matter, defendant challenges the trial court's legal findings under the first Silver prong. He contends that plaintiff failed to satisfy this predicate act of terroristic threats because at no time did defendant threaten to slice plaintiff's throat. Defendant believes the trial court "misapplied the law"

by determining defendant's threats to plaintiff's new boyfriend, that he was going to slice his throat, constituted a terroristic threat to plaintiff.

Under N.J.S.A. 2C:12-3(b), a defendant commits a crime of the third degree "if he threatens to kill another with the purpose to put him in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out." N.J.S.A. 2C:12-3(b). In Cesare, the Court, when discussing section (b), held that "[t]he pertinent requirements [in a terroristic threats case] are whether: (1) the defendant in fact threatened the plaintiff; (2) the defendant intended to so threaten the plaintiff; and (3) a reasonable person would have believed the threat." Cesare, 154 N.J. at 402.

In this case, the defendant was alleged to have violated N.J.S.A. 2C:12-3(a). A person commits a terroristic threat under subsection (a) "if he threatens to commit any crime of violence with the purpose to terrorize another . . . in reckless disregard of the risk of causing such terror" N.J.S.A. 2C:12-3(a) (emphasis added). In contrast to N.J.S.A. 2C:12-3(b), under N.J.S.A. 2C:12-3(a), the terroristic threat need not be made directly to a victim but can be made indirectly through a third party. See State v. Butterfoss, 234 N.J. Super. 606 (Law. Div. 1988). A threat communicated to a third party may in appropriate

circumstances be sufficient to require the granting of a FRO. See McGowan v. O'Rourke, 391 N.J. Super. 502, 506 (App. Div. 2007); State v. Milano, 167 N.J. Super. 318, 323, aff'd 172 N.J. Super. 361 (App. Div. 1980). Therefore, the proper focus under section (a) is on defendant's state of mind and intentions when comments are made.

Based on the totality of the circumstances, including the previous history between the parties, the overwhelming evidence in this case reflects the trial court was correct in finding defendant's comments to plaintiff's new boyfriend were meant to terrorize plaintiff. The comments were made over the phone when defendant knew plaintiff was present. They were part of a volley of comments defendant made to both plaintiff and her new boyfriend. They were the same "slice your throat" comments defendant had previously made to plaintiff's brother in front of her. When confronted by plaintiff via text message, defendant admitted to making the threat. The next morning defendant menacingly continued, "Get me locked up And just WATCH what Happens!!??".

IV.

It is firmly established the commission of one of the acts of domestic violence set forth in N.J.S.A. 2C:25-19(a) does not "automatically . . . warrant

the issuance of a domestic violence [restraining] order." Corrente, 281 N.J. Super. at 248. The determination as to whether such an order should be issued under the second prong of Silver must be made "in light of the previous history of domestic violence between the plaintiff and defendant including previous threats, harassment and physical abuse and in light of whether immediate danger to the person or property is present." Ibid. As to plaintiff's need for an FRO, we affirm substantially for the reasons expressed by the trial judge in his decision, which is amply supported by the record. To the extent we have not addressed any of defendant's remaining arguments, we conclude they are without sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

Affirmed.

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


CLERK OF THE APPELLATE DIVISION