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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2944-20

G.K.H.,

Plaintiff-Respondent,

v.

D.M.R.,

Defendant-Appellant.

Submitted October 11, 2022 – Decided December 8, 2022

Before Judges Susswein and Berdote Byrne.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FV-02-1854-21.

DeMarco & DeMarco, attorneys for appellant (Michael P. DeMarco, on the brief).

Curt J. Geisler, attorney for respondent.

PER CURIAM

Defendant appeals from a final restraining order (FRO) entered against her pursuant to the Prevention of Domestic Violence Act of 1991 (PDVA),

N.J.S.A. 2C25-17 to -35, claiming the trial court erred in finding a predicate act of domestic violence occurred and an FRO was necessary to prevent immediate danger to the victim or further abuse. Because we find no reason to disturb the trial court's findings, we affirm.

Plaintiff and defendant were previously in a "dating relationship" and have one child (Mark)[1] together who was almost two years old at the time of the alleged domestic violence. Defendant had an existing FRO against plaintiff. Pursuant to this prior FRO, the parties were court-ordered to exchange custody of Mark at the Garfield police department in Bergen County.

On April 16, 2021, defendant drove to the Garfield police department to drop off Mark.[2] When defendant was standing next to her car, [she] said "[k]eep talking that shit, [plaintiff], and . . . [y]ou're going to get yourself slapped again, fag." Defendant then drove away, giving plaintiff the middle finger, and yelling "Faggot."

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[1] We use initials and pseudonyms to protect the privacy of individuals and the records of this proceeding. R. 1:38-3(d)(9).

[2] The incidents that occurred on April 16, and April 18, 2021, and July 21, 2019, were captured on body and dashboard cameras worn by plaintiff and in his car. The July incident was captured on plaintiff's cellphone. Plaintiff testified he started to record his interactions with defendant in 2020, because he is "afraid of her" and "just if anything was to happen to me."

On April 18, 2021, plaintiff traveled to the Garfield police department to drop off Mark. Defendant grabbed Mark, swung him around in an "aggressive manner," and walked back to her car. Plaintiff also testified while defendant was doing this she said, "[g]et away from him" . . . "[y]ou faggot." Plaintiff replied, "[w]hoa, easy with my child" to which plaintiff claims defendant said, "[h]e's not your child . . . get away from me, you faggot."

Following a five-day bench trial, the trial court made specific credibility determinations, found defendant's testimony was contrary to the videotapes of the parties' encounters, plaintiff's testimony was credible and corroborated by the videotapes, and ruled defendant committed the predicate act of harassment, pursuant to subsections (a) and (c) of N.J.S.A. 2C:33-4 and an FRO was necessary to protect plaintiff from immediate danger or prevent further abuse.

Our review of an FRO is limited. C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020). "We accord substantial deference to Family Part judges, who routinely hear domestic violence cases and are 'specially trained to detect the difference between domestic violence and more ordinary differences that arise between couples.'" Ibid. (quoting J.D. v. M.D.F., 207 N.J. 458, 482 (2011)); see also S.K. v. J.H., 426 N.J. Super 230, 238 (App. Div. 2012).

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." T.M.S. v. W.C.P., 450 N.J. Super. 499, 502 (App. Div. 2017) (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). Further, "[d]eference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Cesare, 154 N.J. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)); see also D.M.R. v. M.K.G., 467 N.J. Super. 308, 323 (App. Div. 2021) ("Since this case turned almost exclusively on the testimony of the witnesses, we defer to the Family Part judge's credibility findings, as he had the opportunity to listen to the witnesses and observe their demeanor.").

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)). We review findings and conclusions of law de novo. C.C., 462 N.J. Super. at 428.

The trial court found defendant committed the predicate act of harassment. See N.J.S.A. 2C:25-19(a)(13). Specifically, it found defendant's conduct on April 16, and April 18, 2021, constituted harassment under both subsections (a)

and (c). 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" and "[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., 207 N.J. at 487.

Here, the trial court properly determined, based on the evidence presented, defendant acted with the purpose to harass plaintiff. Defendant argues her conduct was mere words and speech that cannot be punished under the First Amendment "unless it is 'likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.'" State v. Burkert, 231 N.J. 257, 281 (2017) (quoting Terminiello v. Chicago, 337 U.S. 1, 4 (1949)).

The trial court found defendant's threat to slap plaintiff fell within the statutory definition of N.J.S.A. 2C:33-4(a). It specifically found plaintiff's testimony, corroborated by the video evidence from April 16, and 18, 2021, and defendant's comments supported a finding of harassment. Considering the totality of the circumstances, and in light of the parties' continuously hostile encounters in the presence of their young child despite the public setting of a

police station, the trial court found defendant acted with the requisite intent for harassment.

Defendant reliance solely on Burkert to support her position her conduct was mere domestic contretemps is misplaced. The conduct at issue here was not mere words; defendant threatened to slap plaintiff, made an obscene gesture to him, hurled insults in his direction, and acted in anger when she aggressively grabbed Mark from him. Defendant's communications constituted harassment pursuant to N.J.S.A. 2C:33-4(a) as the communications were "offensively coarse language" used in a "manner likely to cause [plaintiff] annoyance or alarm."

The trial court also properly found defendant harassed plaintiff pursuant to N.J.S.A. 2C:33-4(c), the catchall provision for conduct not addressed in subsections (a) or (b). See Hoffman, 149 N.J. at 580. The trial court found "[t]here is no reason for this kind of conduct other than to annoy [plaintiff]." Defendant's conduct did not amount to mere words. Rather, when viewed in totality, it was conduct designed for no other reason than to alarm, annoy, "weary, worry, trouble, or offend." Ibid. This was not a case where, on one occasion, defendant angrily shouted an insult. Because no legitimate purpose could be served by defendant engaging in this course of conduct, we decline to

disturb the trial court's finding defendant committed the predicate act of harassment pursuant to N.J.S.A. 2C:33-4(c).

Defendant argues the trial court also erred because it did not consider all of the factors provided in the PDVA, namely, "(1) the existence of immediate danger to person or property; (2) the financial circumstances of the plaintiff and defendant; or (3) the best interests of the [p]laintiff and any child." The trial court did consider the previous history of domestic violence between the parties and was particularly concerned with the best interest of any children. Defendant's argument fails to consider the language in the statute specifically states the trial court is not limited to a consideration of the factors. See N.J.S.A. 2C:25-29(a).

The trial court heard testimony regarding two previous encounters between the parties. First, on July 21, 2019, while the parties were still residing together, plaintiff approached defendant and requested she clean the garage because her "hoarding problem" resulted in clutter in that area. Plaintiff testified after he asked defendant to clean the garage, she "flipped out" and stormed up to the kitchen. Once there, plaintiff testified defendant was

> taking anything that fell into her hands and just throwing it. And, . . . she almost lost her balance and slipped at that point too. But . . . whatever she could find that was close she would just throw it. [Jesse], her

> oldest son, which I also helped raise, he followed her. He had to run out of the way to get -- avoid being hit by . . . a thrown object. Then [defendant] proceeded to rush towards me and . . . hit me right in the face.

Plaintiff testified defendant struck him in the left eye with a "closed fist."

Defendant testified after plaintiff approached her, she closed the door to the garage, locking him there. While she was holding baby Mark, plaintiff broke the door down, almost knocking Mark from her arms. She also denied striking plaintiff in the face, and stated she went towards him in an aggressive manner so she could grab his phone, which he was using to record the encounter.

Another encounter occurred on May 17, 2020, when plaintiff brought a female friend with him on a trip to the Garfield police department to drop off Mark. When defendant saw the female friend, she "went into one of her frenzies[,]" picked up Mark, "ripped off [Mark's] shoes and started throwing them in [plaintiff's] direction." She also ripped Mark's pacifier out of his mouth and threw it.

The trial court did not find credible defendant's testimony that she took off Mark's sneakers out of concern plaintiff put a tracking device in them. She admitted to throwing the pacifier but said she did so out of concern a tracking device was placed on the pacifier clip attached to Mark's shirt.

The trial court found plaintiff's credible statements of fear and the concern these hostile encounters would continue merited entry of an FRO, specifically acknowledging plaintiff's fear of being falsely accused of violating his restraining order, requiring him to videotape every encounter. The trial court found defendant assaulted plaintiff.

Finally, defendant argues the FRO was unnecessary because defendant already had an FRO against plaintiff at the time of the April 2021 incidents. As the trial court aptly noted, one can be both a defendant and a victim in a domestic violence situation, and nothing in the PDVA precludes a party from obtaining a restraining order merely because the other party previously procured one.

Given the volatile nature of the relationship between these parties, their history of domestic violence, and plaintiff's fear of defendant, the trial court's finding the FRO was necessary to protect plaintiff from immediate danger or further abuse was not an abuse of discretion.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION