RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2061-15T2
A-0828-16T2

T.D.J.,

Plaintiff-Respondent,

v.

J.B.-J.,

Defendant-Appellant.

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.B.-J.

Defendant-Appellant.

Submitted March 30, 2017 – Decided June 14, 2017

Before Judges Lihotz and Whipple.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FV-07-1568-16 and Morris County, Docket No. FO-14-278-16.

J.B.-J., appellant pro se (Docket No. A-2061-15).

Lesnevich, Marzano-Lesnevich & Trigg, L.L.C., attorneys for respondent T.D.J. (Matthew N. Tsocanos, of counsel and on the brief; Corrie Sirkin, on the brief).

John Rue & Associates, attorneys for appellant (Docket No. A-0828-16) (Krista Lynn Haley, on the briefs).

Fredric M. Knapp, Morris County Prosecutor, attorney for respondent State of New Jersey (Paula Jordao, on the brief).

PER CURIAM

In these back-to-back matters, which we consolidate for the purposes of this opinion, defendant J.B.-J. appeals from a December 10, 2015 order granting a Final Restraining Order (FRO) against her, as well as from a September 19, 2016 judgment of conviction finding her guilty of contempt for violating the FRO. We affirm both.

Plaintiff T.J. and defendant married in January 2011 and divorced in November 2015. Both were doctors previously employed at the same hospital. After separating, plaintiff tried to limit communication with defendant; however, throughout the divorce proceedings, defendant continued to send plaintiff emails. Defendant emailed plaintiff from six different email addresses and began using the email addresses to send text messages to plaintiff's phone. On May 3, 2015, defendant emailed plaintiff the following from one account: "[T.], keep up the attitude and

I'll be dropping by and punching you in the face like you deserve. I'll bring by a few friends and family who would love to knock you out as well as break your other hand." Defendant testified this statement was in relation to plaintiff owing her money. On May 4, 2015, defendant emailed plaintiff saying, "The reality you created is going to start to suck for you very soon." On June 15, 2015, she emailed plaintiff, saying she was "parked out front," and "I literally live <5 minutes away and I'll be back until you give me what you took from me."

Plaintiff asked his phone carrier for assistance but learned he could not block the text messages. However, he was able to have the emails segregated into a separate folder marked "J." In an effort to block the communication with defendant, plaintiff switched work locations. Plaintiff also moved into a new apartment.

On September 24, 2015, before the parties finalized the marital settlement agreement (the agreement), defendant emailed plaintiff:

> And b[y] t[he] w[ay], I'm not dragging this out.
>
> I don't give a fuck if this takes 12 months or a year.
>
> I'm never getting married again.

> I'll always be [J.B-J.] I'm not changing my name.
>
> I'm staying on your insurance for 36 months after the divorce is final.
>
> And I'm going to come for you the rest of your life.
>
> No harassment or threat. Just fact.
>
> You deserve it.

October 2, 2015, she emailed him again:

> It's coming [T.].
>
> Brace for it.

Plaintiff forwarded the email to his attorney who told him to ignore it, and plaintiff's attorney forwarded the email to defendant's attorney, asserting defendant's emails to plaintiff constitute harassment.

The parties engaged in mediation and signed the agreement on October 23, 2015. Plaintiff requested a clause in the agreement that, "[t]he parties agree that they shall limit all communications to each other except as may be necessary to implement the terms of this Agreement."

Defendant continued to email plaintiff after they signed the agreement limiting contact. On the day the parties executed the agreement, defendant sent plaintiff another email, ending with the following message:

> And for the record, this isn't the end - its just the beginning.
>
> I can't wait to see what happens next.

Defendant emailed plaintiff on November 2, 2015:

> Really [T.]????
> You just don't give a shit. Just wait for yours. It is inevitable. I will never forget this.
> You are the most disrespectful person I have ever met in my life.

On November 6, 2015, plaintiff filed a harassment report with the police. The parties were divorced on November 16, 2015, and later the same day, plaintiff came home and found pictures all around his car and defendant's wedding dress on his windshield.

Defendant emailed plaintiff's phone on November 18, 2015:

> [Twenty] phone calls so far that say you suck at life and you realized one day of your mistake. I'm not deserving of it being thrown away no matter what you think happened. You will never even talk to me about anything. Really? What a maricon.

The next day defendant texted plaintiff's phone:

> You broke my heart and ruined my dream of having a family of my own. I hate you.

Defendant emailed plaintiff regarding plaintiff's attorney on November 21, 2015, stating "Tell Francesco to fuck off from me. She can't save you from what you've done." On the day of the divorce, defendant told plaintiff's attorney to "[c]all the fucking police, you fucking bitch. Do it," and yelled at

plaintiff, "[w]hat the fuck is wrong with you? You fucking piece of shit."

The communications continued, and defendant left more objects at plaintiff's home. On November 25, 2015, defendant texted plaintiff stating, "Found your prayer book. Look out for it." She also emailed him that day, writing, "Asshole, my anger will never dissipate. Good luck."

A few days later, plaintiff found his prayer book torn up and thrown all over his car. Defendant also left some items on the porch of his parents' house, including defendant's wedding bouquet and a shirt plaintiff's parents had given defendant. Defendant also left boxes full of various items on plaintiff's porch. Written on the boxes were notes saying plaintiff was "disrespectful" and "hurt people."

Plaintiff secured a temporary restraining order against defendant on November 29, 2015. A final restraining order (FRO) hearing was held on December 10, 2015. Plaintiff testified about the various communications defendant sent him. He also testified defendant threatened to damage his career and have his medical license revoked.

Plaintiff testified he requested defendant stop contacting him multiple times. Defendant's attorney also requested she stop contacting plaintiff. Defendant admitted she was aware plaintiff

did not want her contacting him. Following the hearing, the judge issued an FRO based on harassment, barring defendant from having "any oral, written, personal, electronic, or other form of contact or communication with" plaintiff or his parents. She was also prohibited from "making or causing anyone else to make harassing communications" to the protected parties, as well as prohibited from "stalking, following, or threatening" to do so. Defendant appealed the order on January 21, 2016.

On May 10, 2016, defendant sent a message to plaintiff's brother-in-law on Facebook. In the message, defendant asked the brother-in-law for a favor and discussed the restraining order. Defendant stated,

> I filed an appeal of his restraining order . . . . I just learned [T.] has hired an attorney to shut down my appeal. Please consider talking to him and asking him to leave this alone . . . . If you talk to him, I thank you. I know you are a good man. Please consider it. Take care.

The brother-in-law forwarded the message from defendant to plaintiff's personal email on June 1, 2016. Plaintiff reported the message to the police, believing it to be a violation of the FRO.

On June 2, 2016, defendant was charged with contempt, contrary to N.J.S.A. 2C:29-9(b)(2), for violating the FRO and "communicating with victim's brother-in-law via email asking him

to communicate with the plaintiff to drop the [FRO]." On June 3, 2016, defendant followed up her Facebook message to the brother-in-law by stating, "Thanks for getting me arrested."

On September 19, 2016, the trial judge found defendant guilty of contempt for violating the FRO, sentenced her to one year of probation, the VISTA program, ten hours of community service, and relevant fines. Defendant appealed her conviction on October 27, 2016.

I.

We first address defendant's appeal of the FRO. Defendant argues the trial judge who issued the FRO erred by failing to view her actions in light of the lack of past domestic violence between the parties. We disagree.

When determining whether a final restraining order is appropriate in a domestic violence matter, the judge must first "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." Silver v. Silver, 387 N.J. Super. 112, 125 (App. Div. 2006). The judge should make this determination "in light of the previous history of violence between the parties." Ibid. (quoting Cesare v. Cesare, 154 N.J. 394, 402 (1998)).

The court should consider the following to determine if a predicate act occurred:

> (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)(1)-(6) (emphasis added).]

The judge should consider the parties' relationship and history to determine if the relevant acts rise to the level of harassment. J.D. v. M.D.F., 207 N.J. 458, 484 (2011) ("The smallest additional fact or the slightest alteration in context . . . may move what otherwise would appear to be non-harassing conduct into the category of actions that qualify for issuance of a restraining order."). Prior abusive acts may be considered whether or not those acts have been the subject of prior domestic violence litigation. N.J. Div. of Youth & Family Servs. v. I.H.C.,

415 N.J. Super. 551, 574 (App. Div. 2010) (citing Cesare, supra, 154 N.J. at 405).

Here, the trial judge found defendant had committed the predicate act of harassment under N.J.S.A. 2C:33-4(a) and (c). An individual has committed harassment if

> with purpose to harass another, he
>
> a. Makes, or causes 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.
>
> . . . .
>
> c. Engages 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.]

Contrary to defendant's claims, the trial judge considered the context of the relationship and the totality of the circumstances. The judge noted defendant knew plaintiff suffered from anxiety but continued to contact him. The judge also considered defendant had been asked to stop communicating with plaintiff on multiple occasions and agreed through a provision in the agreement the parties would not contact each other.

The judge's finding defendant harassed plaintiff was based on credible evidence in the record. Plaintiff presented numerous

emails from defendant from before, during, and after their divorce proceedings wherein defendant included threatening messages. Plaintiff testified these emails caused him fear of physical harm, as well as fear that defendant would never leave him alone. Defendant's motivation to harass was manifest. The communications were unilaterally initiated by defendant and were not responsive to any message from plaintiff. See R.G. v. R.G., __ N.J. Super. __ (App. Div. 2017) (slip op. at 18).

Defendant argues the court erred applying the second prong of the Silver analysis by finding a restraining order was necessary. We disagree.

Under the second prong of Silver, the trial court should determine "whether the court should enter a restraining order that provides protection for the victim." Silver, supra, 387 N.J. Super. at 126. The court must consider the factors set forth in N.J.S.A. 2C:25-29(a), when making this determination. Id. at 127. The court shall act to "protect the victim from an immediate danger or to prevent further abuse." Ibid.

Here, the trial judge discussed the numerous actions plaintiff took to avoid defendant and found he needed protection from her. The judge found, "It's self-evident that the . . . plaintiff needs to be protected . . . ."

Defendant also argues an FRO was not necessary due to the lack of physical violence; however, the FRO was to protect plaintiff from defendant's harassment. The lack of physical violence is irrelevant. Defendant's reliance on Kagen v. Egan, 322 N.J. Super. 222 (App. Div. 1999), is also misplaced, as Kagen, dealt with one incidence of trespass whereas defendant's actions were numerous, and defendant has not been accused of trespass.

We are not persuaded by defendant's argument the trial court erred relying on the subjective fear of plaintiff. In Cesare, the Supreme Court found "under an objective standard, courts should not consider the victim's actual fear[;] courts must still consider a plaintiff's individual circumstances and background in determining whether a reasonable person in that situation would have believed the defendant's threat." Cesare, supra, 154 N.J. at 403 (citing State v. Milano, 167 N.J. Super. 318, 323 (Law. Div. 1979)). Here, the judge noted while defendant argued plaintiff had a "heightened sense of fear," he applied an objective standard, while still noting plaintiff's personal circumstances. We discern no error in the determination.

Defendant argues the trial judge misconstrued evidence by finding defendant had moved "down the street" from plaintiff. Defendant herself told plaintiff she "lived <5 minutes away" in one of her emails. Even if the finding was inaccurate, the finding

did not prejudice defendant. The record contains sufficient evidence of harassment by defendant whether or not she moved to be near the defendant.

II.

We now turn our attention to the judgment of conviction for contempt. Defendant argues her conduct did not violate the FRO. We disagree.

For the State to prove a disorderly person's contempt of court, the State must establish the defendant "knowingly" violated a restraining order beyond a reasonable doubt. N.J.S.A. 2C:29-9(b)(2). Knowingly is defined as

> [a] person acts knowingly with respect to the nature of his conduct or the attendant circumstances if he is aware that his conduct is of that nature, or that such circumstances exist, or he is aware of a high probability of their existence. A person acts knowingly with respect to a result of his conduct if he is aware that it is practically certain that his conduct will cause such a result. "Knowing," "with knowledge" or equivalent terms have the same meaning.
>
> [N.J.S.A. 2C:2-2(b)(2).]

Here, the State was required to prove defendant contacted the brother-in-law "with purpose to harass" the plaintiff and with purpose to "cause" the brother-in-law "to make a communication in a manner likely to cause annoyance or alarm" to plaintiff. See State v. Castagna, 387 N.J. Super. 598, 605 (App. Div. 2006)

(citing N.J.S.A. 2C:33-4(a)). We are satisfied the State has met this burden.

We reject defendant's argument she did not violate the FRO because plaintiff's brother-in-law was not protected by the FRO and the FRO did not prohibit her from asking him to "consider" talking to plaintiff. The FRO prohibited defendant from "making or causing anyone else to make harassing communications." Her message to the brother-in-law requested he "consider" speaking to plaintiff regarding the FRO to ask him to "leave this alone." She proceeded to thank the brother in-law "if" he talked to plaintiff and to "please consider it." Thus, she violated the FRO because she asked a third party to contact plaintiff for her and provide a message similar to those she had been sending him previously. Defendant asserts she did not think the brother-in-law would send the message to plaintiff; however, her own words make her intention evident.

Defendant also argues the State did not prove she acted knowingly when she violated the FRO, and her actions did not warrant a criminal violation because they were trivial in nature. We disagree.

A defendant may be guilty of violating a restraining order even if a defendant thinks she or he is acting within the parameters of the order. See State v. J.T., 294 N.J. Super. 540,

544-45 (App. Div. 1996) (finding a man who was banned from property but continuously placed himself just outside the property is guilty of harassment and contempt). Defendant knew of the restraining order and knew she could not contact plaintiff directly, but she proceeded to attempt to contact plaintiff through his brother-in-law anyway.

Last, defendant contends her sentence was improper and claims the judge failed to address mitigating factors. We reject this argument.

An appellate court may review and modify a sentence if the trial court's determination was "clearly mistaken." State v. Jabbour, 118 N.J. 1, 6 (1990). A judge must fully explain his or her findings regarding aggravating and mitigating factors and reasoning for the sentence imposed. R. 3:21-4(g).

The judge found aggravating factor three, risk of re-offense, and nine, deterrence, appropriate because of defendant's failure to understand her conduct violated the FRO. He found no mitigating factors. We discern no error in the judge's determination.

Affirmed.