

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-4097-15T4

C.S.,

Plaintiff-Respondent,

v.

M.A.K.,

Defendant-Appellant.

Submitted August 30, 2017 – Decided September 8, 2017

Before Judges Rothstadt and Vernoia.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, Docket No. FV-13-1301-16.

Law Offices of Jef Henninger, attorneys for appellant (Mr. Henninger, on the brief).

Maria DelGaizo Noto, attorney for respondent.

PER CURIAM

Defendant M.A.K. appeals from a May 4, 2016 final restraining order ("FRO") entered in favor of plaintiff C.S. pursuant to the Prevention of Domestic Violence Act of 1991 ("PDVA"), N.J.S.A. 2C:25-17 to -35. We affirm.

We derive the following facts from the record of the FRO trial at which the parties and a responding police officer testified. At the time of the final hearing, the parties had been involved in a dating relationship for approximately six years and lived together for the last two in defendant's home with plaintiff's son who is developmentally disabled. On Christmas in 2011, defendant gave plaintiff an automobile. After the parties' relationship soured, defendant allowed plaintiff and her son to continue to live in his home, but he demanded that the automobile be returned to him by April 1, 2016.

When plaintiff did not return the vehicle as demanded, the parties began to argue when they arrived home from their respective jobs at approximately 4:00 p.m. Prior to coming home, defendant had been drinking at a local bar. When he arrived, he approached plaintiff and demanded the keys to the car. Plaintiff refused and the argument ensued. According to plaintiff, during the course of the argument, defendant grabbed her throat with two hands, applying pressure to the point that she could not breathe and felt pain, before throwing her into the furniture and her falling to the ground. Later that night, plaintiff discovered that she suffered a large bruise to her leg as result of the fall. Defendant denied he touched plaintiff

and stated that he merely "put [his] hands up" as plaintiff ran by him, leaving the house while holding her neck and screaming.

A neighbor called the police and two officers responded to the scene. One of them spoke to plaintiff and found her to be in hysterics, stating she had great difficulty speaking. Eventually, she explained that defendant tried to strangle her and threw her across the room. She also complained of pain in her neck. According to the officer, he never observed any marks on plaintiff's neck or any other evidence of physical injury. When he later spoke to defendant, the officer found him to be calm and cooperative.

At the FRO hearing, plaintiff testified to defendant's history of threats and physical violence. Defendant denied that he was ever violent or that he ever committed an act of domestic violence against plaintiff, but stated that she in fact was violent towards him.

In a comprehensive oral decision placed on the record on May 4, 2016, Judge Angela White Dalton made detailed credibility findings as to the alleged assault and found plaintiff's testimony credible, while defendant's was not. The judge concluded that defendant committed an assault under N.J.S.A. 2C:12-1, and that plaintiff needed a FRO for her protection.

On appeal, defendant contends that contrary to the judge's findings, plaintiff did not prove that defendant committed "a predicate offense by a preponderance of the evidence." According to defendant, Judge Dalton failed to appreciate the significance of the officer's testimony that there were no physical marks on plaintiff's neck that would confirm an assault had been committed. He also argues that there was no evidence that an FRO was necessary "to protect . . . plaintiff from future acts of domestic violence" because the parties' "relationship [was] no longer intact and [they] demonstrate[d] that they have no desire to come into contact with each other." We disagree.

Our review of a trial judge's fact-finding function is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). A judge's fact-finding is "binding on appeal when supported by adequate, substantial, credible evidence." Id. at 411-12 (citing Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)). Moreover, "[b]ecause of the family courts' special jurisdiction and expertise in family matters, appellate courts should accord deference to family court factfinding." Id. at 413.

"Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'"

Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). This is so because the judge has the opportunity to see and hear the witnesses as they testify, thereby developing a "'feel of the case' that can never be realized by a review of the cold record." New Jersey Div. of Youth & Family Servs. v. G.M., 198 N.J. 382, 396 (2009) (quoting New Jersey Div. of Youth and Family Servs. v. E.P., 196 N.J. 88, 104 (2008)). A judge's purely legal decisions, however, are subject to our plenary review. Crespo v. Crespo, 395 N.J. Super. 190, 194 (App. Div. 2007) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

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 assault, N.J.S.A. 2C:12-1, 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); N.J.S.A. 2C:25-29(a)(1).

If a predicate offense is proven, the judge must then assess "whether a restraining order is necessary, upon an evaluation of the facts 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." J.D. v. M.D.F., 207 N.J. 458, 475-76 (2011) (quoting Silver, supra, 387 N.J. Super. at 126-27). 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)); see also Cesare, supra, 154 N.J. at 402.

Applying these standards, we find defendant's arguments to be without sufficient merit to warrant discussion in a written opinion, R. 2:11-3(e)(1)(E), and we affirm substantially for the reasons set forth in Judge Dalton's thorough and thoughtful oral opinion. Suffice it to say, contrary to defendant's arguments, there is no requirement for a victim of an assault to display physical marks evincing the predicate act. As long as the

evidence demonstrates that there was an attempt "to cause . . . bodily injury to" the victim, N.J.S.A. 2C:12-1(a)(1), that includes "physical pain, illness or any impairment of physical condition," N.J.S.A. 2C:11-1(a); see also State v. Stull, 403 N.J. Super. 501, 505 (App. Div. 2008), an assault occurred. Moreover, the fact that the parties have ended their relationship and are likely to separate does not in and of itself warrant the denial of an FRO where the evidence supports a finding that it is needed to protect a victim.

Affirmed.

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



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