RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5343-14T3

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

J.C.,[1]

Defendant-Appellant.

Argued February 13, 2017 – Decided March 2, 2017

Before Judges Sabatino, Haas and Currier.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Burlington County, Docket Nos. FO-03-258-15, FO-03-270-15 and FO-03-322-14.

Scott A. Krasny argued the cause for appellant (Furlong and Krasny, attorneys; Mr. Krasny and Andrew Mark Ferencevych, on the brief).

Jennifer B. Paszkiewicz, Assistant Prosecutor, argued the cause for respondent (Robert D. Bernardi, Burlington County Prosecutor, attorney; Ms. Paszkiewicz, of counsel and on the brief).

---

[1] We use initials for the parties to protect the identity of the individual who procured the domestic violence restraining order that defendant, his ex-wife, subsequently violated, and which led to the present contempt case. See N.J.S.A. 2C:25-33; R. 1:38-3(d)(9).

PER CURIAM

After a bench trial, the Family Part found defendant J.C. guilty under N.J.S.A. 2C:29-9(b)(2) of two charges of contempt for violating an outstanding final restraining order ("FRO") that had been issued in favor of C.C., defendant's ex-husband and the father of her children. In addition, upon hearing testimony at a separate proceeding immediately after the contempt trial, the Family Part also found defendant guilty of a violation of probation ("VOP"), based on her same wrongful conduct.

The trial court sentenced defendant to two consecutive thirty-day jail terms for the contempt offenses, plus another consecutive thirty-day jail term for the VOP. The court also imposed a two-year period of probation, along with other terms and conditions that defendant does not challenge. The trial court granted defendant's motion for bail pending this appeal. Consequently, the ninety-day aggregate custodial portion of her sentence has yet to be served.

On appeal, defendant raises the following arguments:

> POINT ONE
>
> THE TRIAL COURT IMPROPERLY CONSOLIDATED THE CHARGES INTO A SINGLE PROCEEDING WHICH PERMITTED THE STATE TO INTRODUCE OTHER CRIMES EVIDENCE WITHOUT THE TRIAL COURT CONDUCTING THE PROPER BALANCING TEST (not raised below).

POINT TWO

THE CONVICTIONS WERE AGAINST THE WEIGHT OF THE EVIDENCE PRESENTED BECAUSE APPELLANT CONTACTED EX-HUSBAND REGARDING THEIR CHILDREN WHICH WAS AUTHORIZED.

POINT THREE

THE TRIAL COURT ERRED IN SENTENCING APPELLANT TO CONSECUTIVE PERIODS OF INCARCERATION AND CONCURRENT PERIODS OF PROBATION WITHOUT CONSIDERING THE AGGRAVATING AND MITIGATING FACTORS (not raised below).

Having considered these arguments in light of the record and the applicable law, we affirm defendant's convictions but remand for resentencing.

The record reflects that defendant and C.C. were married and are the parents of two minor children. They divorced in July 2012, with defendant being assigned primary residential custody of the children.

On April 1, 2014, the Presiding Judge of the Family Part in Mercer County issued an FRO against defendant, after finding proven acts of harassment by defendant against her former spouse. The restraining order generally bars defendant from having contact with C.C., his mother, his brother, his girlfriend, and other specified persons. The FRO contains a limited exception allowing the parties to exchange email "only as to all children's issues."

Five weeks after the FRO was issued, defendant was charged with contempt for allegedly sending C.C. over 150 improper emails within that time span. After a hearing, defendant was found guilty of contempt on July 23, 2014. She was sentenced for that initial contempt offense to one year of probation. She was also ordered to submit to a psychiatric evaluation and receive anger management counseling. Defendant did not appeal that conviction.

The present charges arose out of a series of emails that defendant transmitted to C.C. in March and April 2015. Without repeating here at length the contents of those communications, suffice it to say that they are replete with angry diatribes against C.C. For instance, the emails call C.C. a "true jackass", tell him that "[y]ou suck", and repeatedly belittle and criticize him. Several times within the emails, defendant expressly acknowledges that they could be used to "send [her] to jail." Defendant even states in one email her awareness that she is "breaking the law in typing this[.]"

Defendant contends that the March and April emails were justified under the FRO because they ostensibly concerned the couple's children, and were labeled with subjects referring to the children. The trial court sensibly rejected this characterization.

While portions of the emails do refer to the children, they clearly go beyond the permitted scope of the FRO by repeatedly lambasting defendant's character with vitriolic and offensive language. A party who is subject to court-ordered domestic violence restraints on communications with the victim cannot mask patent violations of those restraints by interspersing references to the children within her diatribe.

The present case is manifestly distinguishable from the decisions cited in defendant's brief in which the terms of the FRO denoting permissible communications were ambiguous, or where the defendant's contacts with the parent covered by the restraints were far less severe and repetitive. Cf. State v. D.G.M., 439 N.J. Super. 630, 634-42 (App. Div. 2015) (reversing a domestic violence contempt conviction where defendant had briefly videotaped the victim at his child's soccer game, where the FRO did not clearly prohibit such brief filming); State v. S.K., 423 N.J. Super. 540, 547 (App. Div. 2012) (reversing a contempt conviction stemming from defendant's presence at his children's soccer game attended by his ex-wife, where the terms of the FRO were likewise ambiguous); State v. Finamore, 338 N.J. Super. 130, 132 (App. Div. 2001) (reversing a contempt conviction for improper telephone communications where the terms of the FRO were unclear and bordered on "indecipherable"); State v. Wilmouth, 302 N.J.

Super. 20, 22-23 (App. Div. 1997) (reversing a contempt finding where the defendant had engaged in the singular act of asking the victim in a "gruff voice" if he would see their daughter the following day).

Here, by contrast, the record plainly shows that "the evidence . . . allow[s] at least a reasonable inference that a defendant charged with violating a restraining order knew [her] conduct would bring about a prohibited result." S.K., supra, 423 N.J. Super. at 547 (internal citations omitted). Defendant's multiple admissions in the emails that she realized their transmission could result in her future imprisonment is clear and unrefuted proof that she possessed such knowledge. See N.J.R.E. 803(b)(1) (codifying the hearsay exception for statements by a party-opponent).

We also must give appropriate deference to the trial judge's fact-finding and credibility assessments of the witnesses, who included defendant herself. Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 483-84 (1974); Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). Accordingly, we affirm the court's finding of guilt for all of the emails in question from March and April 2016, and reject defendant's claim that her conviction is against the weight of the evidence.

Likewise, the finding of guilt for the VOP is clearly supported by the record. That record includes the unassailable testimony of defendant's probation officer attesting that he had explained to her after her 2014 conviction that she could face criminal sanctions if she persisted in violating the FRO, as well as defendant's signed acknowledgment of the terms of her probation that also warned her of the need for compliance.

We are also unpersuaded by defendant's claim that the court improperly consolidated for a unitary bench trial the charges in the State's two contempt complaints. The first complaint concerned an email defendant sent on March 18, 2015, and the second complaint concerned three emails that defendant sent on April 3 and 4, 2015. The complaints were sufficiently related in time and substance to justify them being tried at the same time, but separately from the VOP charge. Case law reflects that courts in the past have similarly tried multiple contempt charges together in the same non-jury setting. See, e.g., State v. L.C., 283 N.J. Super. 441, 443-44 (App. Div. 1995), certif. denied, 143 N.J. 325 (1996) (affirming one of the defendant's two contempt convictions, resulting from a consolidated bench trial, and finding that the conviction requires a minimum probation term of one year); State v. Bowser, 272 N.J. Super. 582, 583-84 (App. Div. 1993) (holding that the enhanced penalty provision of N.J.S.A. 2C:25-30 should

not be applied when the first and second contempt matters are tried simultaneously).

Although it is not directly on point in the Family Part[2], the analogous criminal rule, Rule 3:15-1(a), authorizes courts to try two or more charges together if those offenses could have been joined in the same charging document. That is the situation here, given the "similar character" of the prohibited emails, see Rule 3:7-6, their proximity in time, and the common participants involved.

We reject defendant's claim that the court's decision to combine the contempt charges into a single bench trial unfairly prejudiced her and improperly allowed the court to consider "spillover" proofs of other bad acts that might be excludable under N.J.R.E. 404(b). Defendant has not cited any reported opinion under N.J.R.E. 404(b) that has overturned contempt convictions arising from a single non-jury trial at which a defendant's multiple bad acts were considered by the court.

We discern no unfair prejudice stemming from the joinder of these matters. Indeed, the trial judge presumably would have been

[2] See N.J.S.A. 2C:25-30 (instructing that domestic violence contempt proceedings not involving indictable offenses be tried in the Family Part, "subject to any rules or guidelines established by the Supreme Court to guarantee the prompt disposition of criminal matters").

aware of the other pending charges against defendant on her docket if she had tried them in succession. Nor do we accept defendant's conjecture that she would have been acquitted of contempt for the March 2015 email, which she contends was comparatively more innocuous than the later ones in April 2015, if it had been tried first on a stand-alone basis. As we have already discussed, the emails were all clearly outside of the permissible boundaries of the FRO, whether considered separately or collectively.

We lastly turn to the issues raised concerning defendant's sentence. We are mindful that N.J.S.A. 2C:25-30 prescribes that a defendant found guilty of contempt for violating a domestic violence restraining order must be sentenced to a mandatory minimum of a thirty-day jail term for any "second or subsequent" violation. Here, as defendant concedes, that thirty-day mandatory minimum is triggered by defendant's earlier conviction for contempt in 2014. However, as the assistant prosecutor frankly acknowledged to us at oral argument, there is no statutory provision that disallows concurrent, rather than consecutive, thirty-day jail terms being imposed for multiple successive contempt violations in appropriate circumstances.

The judge who presided over the sentencing, who took over the case after the trial judge had retired, appropriately recognized the need to sanction the persisting nature of defendant's improper

communications. Even so, defendant correctly points out that the sentencing judge did not expressly conduct a formal Yarbough analysis on the record as to why the imposition of three consecutive, rather than concurrent, thirty-day custodial terms were warranted in this case. See State v. Yarbough, 100 N.J. 627 (1985), cert. denied, 475 U.S. 1014, 106 S. Ct. 1193, 89 L. Ed. 2d 308 (1986). Nor did the judge refer explicitly to aggravating and mitigating factors, the latter of which defendant urges are pertinent here because of her lack of a criminal record, other than these FRO contempt violations, and her responsibilities as the mother of the parties' young children. See State v. Fuentes, 217 N.J. 57, 74 (2014) (generally instructing sentencing courts to address and weigh aggravating and mitigating factors explicitly).

In light of these considerations, we remand this matter for resentencing, at which time the trial court can reconsider whether the aggregate ninety-day custodial term is appropriate and place on the record its analysis more fully. At the resentencing, the court shall take into account any pertinent changes in defendant's status or behavior since the time of her sentencing, including any progress she has made with her anger management issues. State v. Randolph, 210 N.J. 330, 354-55 (2012). We also suggest that the trial court and the prosecutor explore whether there are currently

any programs or mechanisms in the vicinage that might enable defendant to serve her jail time on weekends or at other times that will accommodate her parental or other responsibilities, although we do not mandate such a disposition.

Affirmed as to defendant's conviction, remanded for resentencing. We do not retain jurisdiction. Bail shall continue in the trial court's discretion pending the resentencing hearing.