

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-5460-14T1

D.S.,

Plaintiff-Respondent,

v.

C.S.,

Defendant-Appellant.

Submitted January 18, 2017 – Decided March 3, 2017

Before Judges Yannotti, Fasciale, and Gilson.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Passaic
County, Docket No. FV-16-1804-15.

C.S., appellant pro se (Matthew R. Petracca
and Nicholas A. De Palma, on the briefs).

Karen A. Lodeserto, attorney for respondent.

PER CURIAM

Defendant appeals from a June 25, 2015 final restraining order (FRO) entered pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. The Family Part found that defendant had made terroristic threats to kill plaintiff, who is her former husband, and his current wife. The court also found

that defendant had harassed plaintiff by sending him a series of threatening emails. Defendant also challenges the change of custody ordered by the Family Part. We affirm.

Defendant and plaintiff were married in 1996, and divorced in 2007. They have two children: A son, who was born in 1998, and a daughter who was born in 2001. At the time of their divorce, the parties agreed to share joint legal custody of their children, with defendant having primary residential custody and plaintiff enjoying "liberal" parenting time.

In April 2015, plaintiff sought and obtained a temporary restraining order (TRO) against defendant, based on allegations of terroristic threats, N.J.S.A. 2C:12-3, and harassment, N.J.S.A. 2C:33-4. A one-day trial took place on June 25, 2015, during which the court heard testimony from both parties, the parties' daughter, and a witness.

The daughter and the witness testified that defendant threatened to kill plaintiff and his current wife. Indeed, the daughter recorded one of the threats against plaintiff's current wife. In that recording, defendant stated that she would kill the current wife and break both her legs with a baseball bat. The witness testified that defendant came to her home and told her that she was planning to hire someone to kill plaintiff and his current wife or she would get a gun and kill them herself.

The evidence at trial also included a series of emails defendant sent to plaintiff. In those emails, defendant made repeated threats against plaintiff, which included:

- I will twist your fucking head off if you think of showing up at my restaurant.
- Sleep with one eye open tonight prick.
- You will pay for your crimes against an innocent child who didn't deserve it. It will never happen to her again. Watch yourself, you sick bastard.

Based on the evidence at trial, the Family Part judge found that defendant had committed the predicate acts of terroristic threats and harassment. In reaching those conclusions, the court found that the testimony of the daughter was credible. The court also relied on the testimony of the witness. Thus, the court found that defendant had threatened to kill plaintiff and his current wife on several different occasions. The court also found that the emails constituted both terroristic threats and harassment. Having found that defendant had committed the predicate acts, the court went on to find that there was a need for a restraining order to prevent further abuse.

At the time the TRO was entered, plaintiff was given temporary custody of the two children. The Family Part judge interviewed

the daughter on June 9, 2015, prior to the FRO trial. Following the entry of the FRO, the Family Part continued the temporary custody of the children with plaintiff. The court also directed defendant to engage in reunification therapy with her daughter and went on to rule that defendant could resume parenting time based on the recommendation of the therapist. At the time that the FRO was entered, the son was seventeen years old and the daughter was fourteen years old. They are now eighteen and fifteen years old, respectively.

On appeal, defendant challenges both the entry of the FRO and the change of custody. Specifically, defendant argues that the Family Part erred in (1) finding terroristic threats; (2) finding harassment; (3) entering an FRO without finding it was necessary to protect plaintiff; (4) changing the custody of the children; and (5) denying her motion for a change of venue. Defendant also contends that her due process rights were violated.

Our scope of review is limited when considering an FRO issued following a bench trial. A trial court's findings are binding on appeal "when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 412 (1998) (citing Rova Farms Resort, Inc. v. Inv. Ins. Co., 65 N.J. 474, 484 (1974)). This deference is particularly appropriate where the evidence at trial is largely testimonial and hinges upon a court's ability to

assess credibility. Ibid. We also keep in mind the expertise of family judges who routinely hear domestic violence cases. Id. at 413. Consequently, we will not disturb the "factual findings and legal conclusions of the trial judge 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." S.D. v. M.J.R., 415 N.J. Super. 417, 429 (App. Div. 2010) (quoting Cesare, supra, 154 N.J. at 412). Nevertheless, when we address a question of law, a "trial judge's findings are not entitled to that same degree of deference if they are based upon a misunderstanding of the applicable legal principles." N.J. Div. of Youth & Family Servs. v. Z.P.R., 351 N.J. Super. 427, 434 (App. Div. 2002) (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The PDVA was enacted to further New Jersey's "strong policy against domestic violence." Cesare, supra, 154 N.J. at 400. Domestic violence occurs when an adult or emancipated minor commits one or more of the acts covered by the PDVA. N.J.S.A. 2C:25-19(a). When determining whether to grant an FRO, a trial judge must engage in a two-step analysis. Silver v. Silver, 387 N.J. Super. 113, 125-26 (App. Div. 2006). "First, the judge 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; see also N.J.S.A. 2C:25-29(a) (providing that an FRO may only be granted "after a finding or an admission is made that an act of domestic violence was committed"). Second, the court must determine that a restraining order is necessary to provide protection for the victim. Silver, supra, 387 N.J. Super. at 126-27; see also J.D. v. M.D.F., 207 N.J. 458, 476 (2011) (explaining that an FRO should not be issued without a finding that "relief is necessary to prevent further abuse" (quoting N.J.S.A. 2C:25-29(b))).

I. Terroristic Threats

A person is guilty of terroristic threats if that person

threatens to commit any crime of violence with the purpose to terrorize another or . . . threatens to kill another with the purpose to put [that other person] 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.]

Here, the trial court found that defendant had made threats to kill plaintiff and his current wife. The court also found that the emails, when considered cumulatively, were threats designed to terrorize plaintiff. Those findings are supported by substantial credible evidence in the record.

II. Harassment

A person commits harassment "if, with purpose to harass another, he [or she]: a. [m]akes, 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[.]" N.J.S.A. 2C:33-4(a). Having listened to the testimony in this case and having considered the exhibits, including the emails sent by defendant, the trial court found that the emails were sent with a purpose to harass plaintiff and were designed and likely to cause annoyance or alarm. Those findings are also supported by substantial credible evidence in the record.

III. The Need for an FRO

Defendant argues that there was no evidence supporting the finding that plaintiff needed the protection of an FRO. The trial court, however, found that defendant's actions demonstrated that she was reaching a "boiling point" and could engage in further acts of domestic violence. Accordingly, the court held that plaintiff was in need of an FRO to prevent future abuse. That finding was also supported by substantial credible evidence in the record.

IV. The Change of Custody

Defendant also argues that the court erred by granting plaintiff temporary custody of the children. That provision of the order is permitted by N.J.S.A. 2C:25-29(b), which allows the court to grant "any relief necessary to prevent further abuse," including modification of "temporary custody of [] minor [children]." Defendant had threatened acts of violence, including murder. While the threats were not directed at the children, such threats could have serious adverse effects on them. In that regard, defendant's daughter testified that her mother was "obsessed" and appeared paranoid. The court did not abuse its discretion in granting a change of custody.

Defendant further argues that the court erred by leaving visitation entirely in the hands of a therapist. That contention misconstrues the FRO. The FRO did not state that the therapist would make the final determination. Instead, the FRO said that the therapist could make a recommendation. Any future change of custody would have to be addressed in an appropriate motion to the court. Moreover, the FRO did not preclude defendant from seeking further relief regarding custody.

V. The Denial of the Change of Venue

Rule 4:3-3(a) provides in pertinent part "a change of venue may be ordered by . . . the Assignment Judge . . . if there is a

substantial doubt that a fair and impartial trial can be had in the county where venue is laid[.]" "[I]f the motion is made pursuant to [Rule] 4:3-3(a)(2) . . ., the movant has the burden of demonstrating good cause for the change." Pressler and Verniero, Current New Jersey Court Rules, comment on R. 4:3-3 (2017). The word "may" indicates the court has discretion to grant or deny the motion depending on the particular circumstances. R. 4:3-3(a). As such, we review the trial court's ruling under an abuse of discretion standard.

Here, defendant argues that the court should have ordered a change of venue because plaintiff was a Paterson police officer and plaintiff's current wife had siblings who worked in the Passaic County courthouse. There was no showing that the trial judge had any knowledge or connection to plaintiff or any of the siblings of plaintiff's current wife. Our review of the record convinces us that defendant received a fair and impartial trial. Accordingly, we find no abuse of discretion in the refusal to transfer the case to another county.

VI. Due Process

Defendant contends that her due process rights were violated in three primary respects. First, she argues that the trial court permitted the recording to be introduced even though the recording was not identified in the complaint filed with the TRO.

Our review of the trial record establishes that defendant and her counsel were given adequate notice of the recording and there was no due process violation in admitting the recording into evidence. Indeed, defendant acknowledged that she knew she was being recorded and that the recording was authentic.

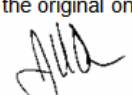
Second, defendant contends that the change of custody was made without adequate notice. As already discussed, the change of custody was initially made when the TRO was entered. The FRO trial was then conducted several months later and, after finding that the FRO was warranted, the court continued the temporary custody arrangement without prejudice to a future motion. That undisputed procedure establishes that defendant had adequate notice regarding the temporary change of custody.

Finally, defendant argues that her due process rights were violated when the court left the reunification in the hands of the therapist. As already pointed out, the court did not enter such an order.

Defendant's other arguments concerning due process and other alleged errors concerning the FRO or the change of custody are without sufficient merit to warrant further discussion in a written opinion. See 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