SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0873-16T3

E.T.,

Plaintiff-Respondent,

v.

J.B.,

Defendant-Appellant.

Argued December 21, 2017 – Decided January 16, 2018

Before Judges Simonelli, Haas and Gooden Brown.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Camden County, Docket No. FV-04-0872-17.

D. Ryan Nussey argued the cause for appellant (Klineburger and Nussey, attorneys; D. Ryan Nussey and Carolyn G. Labin, on the briefs).

Alexandra A. Zeiger argued the cause for respondent (Rutgers Domestic Violence Clinic, Rutgers Law, attorneys; Victoria Chase, on the brief).

PER CURIAM

Defendant J.B. appeals from the October 11, 2016 final restraining order (FRO) entered against him and in favor of

plaintiff E.T., pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, based on harassment, N.J.S.A. 2C:33-4(c). We reverse.

The parties met online sometime prior to November 2015. Plaintiff was a resident of the Philippines, while defendant was a United States citizen. Defendant visited plaintiff just two times in the Philippines, and then asked her to move to the United States and live with him in November 2015. Before the end of December, plaintiff told defendant she was pregnant, and the parties married on December 30, 2015.[1]

By January 2016, the parties' nascent relationship was already in jeopardy because they simply did not get along with each other and began to argue.[2] According to plaintiff, one day in either January or February, defendant came home from work and told her to pack her bags because he was going to take her to the airport so she could return to the Philippines. The parties then drove to an airport, turned around, and came back home. Plaintiff

[1] The parties' child was born in August 2016.

[2] Defendant testified that he paid to have plaintiff's application for a Green Card processed, and he assisted in filing the appropriate paperwork. It is not clear from the record when plaintiff received her Green Card, but the parties agree that plaintiff received authorization to work in the United States sometime in March 2016. However, plaintiff did not work during the parties' brief marriage because she was pregnant for the entire period prior to their separation in September 2016.

also testified that, sometime in June 2016, she called the police because, during another argument, defendant threatened to take her to the airport.

On September 8, 2016, defendant asked plaintiff to feed the baby. She refused and defendant told her to leave the home because he was going to file for a divorce. He objected when plaintiff stated she would take the parties' child with her. Plaintiff called a friend, who lived about a block away, and arranged to move in there. She then called the police for assistance in taking the child with her. After assessing the situation, the police told the parties that plaintiff could take the child.

The next day, plaintiff returned by herself to the parties' home. She testified that she wanted to talk to defendant and pick up some of her personal items. Defendant refused to let her into the house, and plaintiff used her key to enter. Plaintiff was in the house for approximately ten minutes. Defendant decided to use his cellphone to make a video recording of plaintiff so she could not later claim he acted inappropriately.

On the video, which lasts approximately five minutes and forty seconds, plaintiff can be seen going from room to room retrieving clothes, towels, cotton balls, soap, and other items. Defendant took the video from outside the rooms plaintiff entered. At one point, defendant asked plaintiff to return the house keys,

but she refused. Defendant made only three additional statements to plaintiff during the video.[3] In response to these statements, plaintiff smiled at defendant, held up the items she was taking, and commented on some of them. As plaintiff left the house, she turned toward defendant's cellphone camera, smiled, and then walked down the street to the neighbor's home where she was staying.

On September 13, 2016, defendant went to the neighbor's house and asked if he could see the baby. The neighbor went to speak to plaintiff, came back to the front door, and told defendant that plaintiff had refused to let him visit the child. Defendant then went home. The next day, plaintiff filed for, and obtained, a temporary restraining order against defendant. When asked why she was seeking a FRO, plaintiff testified she was "afraid of what [defendant] can do to me because I don't have any family here. I don't have any friends here. I don't have anything here. I just arrived in America."[4]

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[3] These statements were: (1) "Everything she's taking is bought with my money. She's stealing my money"; (2) "Everything she's taking was purchased with my money. She's taking all the things purchased with my money"; and (3) "Let this be the record that she's taking all the items purchased with my money."

[4] A few days after the issuance of the TRO, defendant filed a complaint for divorce. The parties were divorced four months later in January 2017.

Following oral argument, the trial judge granted plaintiff a FRO against defendant. The judge did not find that any of the incidents between the parties in September 2016 constituted a predicate act of domestic violence. Instead, the judge went back to what he called "the airport incidents" in January and June 2016, and found that defendant engaged in a "course of conduct" on these two occasions with a purpose to harass plaintiff within the intendment of N.J.S.A. 2C:33-4(c). The judge explained that because plaintiff was an immigrant, there was "a real power imbalance" between the parties and the "symbolic gesture of driving her to the airport, threatening to take her to the airport, in this relationship, in this context, that represents purpose to harass."[5]

The judge next found that a restraining order was necessary because defendant showed a "lack of empathy and kind of domineering style" by making a video recording of plaintiff's return to the

[5] The judge acknowledged that he had not reviewed immigration law to determine whether plaintiff's status in the United States was ever in jeopardy. As previously noted, plaintiff had a work permit, may have already had a Green Card, was married to a United States citizen, and was the mother of a baby born in this country.

home on September 9, 2016.[6] As further support for his ruling, the judge stated:

> [Plaintiff's] not afraid of any physical violence. But the fear comes out of the power imbalance, the financial isolation, the legal isolation, the fear now not just that her immigration status is in jeopardy, but she's going to be separated from her child who is a [United States] citizen.

This appeal followed.

On appeal, defendant argues that the judge mistakenly found that he committed the predicate act of harassment and that a FRO was necessary to protect plaintiff against future acts of domestic violence. We agree.

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)). 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)).

[6] At the same time, however, the judge recognized that many parties make videos of this nature while in the midst of a break-up, and stated "that's an understandable course of conduct."

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 harassment, N.J.S.A. 2C:33-4, 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, 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. l995) (citing N.J.S.A. 2C:25-29(a)); see also Cesare, 154 N.J. at 402.

We first examine whether the record supports the trial judge's conclusion that plaintiff demonstrated by a preponderance of the evidence that defendant committed a predicate act of domestic violence by twice threatening to take her to the airport so she could return to the Philippines and, on one of these occasions, driving her to an airport and then immediately returning home with her. Here, the judge viewed plaintiff's allegations as falling under N.J.S.A. 2C:33-4(c), which provides that harassment occurs when "a person . . . with purpose to harass another . . . [e]ngages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person."

Proof of a purpose to harass is an essential element of N.J.S.A. 2C:33-4. See L.D. v. W.D., 327 N.J. Super. 1, 5 (App. Div. 1999). "A person acts purposely with respect to the nature of his conduct or a result thereof if it is his conscious object to engage in conduct of that nature or to cause such a result." State v. Hoffman, 149 N.J. 564, 577 (1997) (quoting N.J.S.A. 2C:2-2(b)(1)). There must be proof that a defendant's conscious object was to "harass," that is, "annoy," "torment," "wear out," and "exhaust." State v. Castagna, 387 N.J. Super. 598, 607 (App.

Div.) (quoting Webster's II New College Dictionary 504 (1995), certif. denied, 188 N.J. 577 (2006).

Merely knowing that someone would be annoyed, as opposed to having a conscious objective to annoy, is insufficient to prove a purpose to harass. See State v. Fuchs, 230 N.J. Super. 420, 428 (App. Div. 1989). Moreover, a "victim's subjective reaction alone will not suffice; there must be evidence of the improper purpose." J.D., 207 N.J. at 487 (citing State v. Washington, 319 N.J. Super. 681, 691-92 (Law Div. 1998)).

When deciding the issues of intent and effect, we are mindful of the fact that

> harassment is the predicate offense that presents the greatest challenges to our courts as they strive to apply the underlying criminal statute that defines the offense to the realm of domestic discord. Drawing the line between acts that constitute harassment for purposes of issuing a domestic violence restraining order and those that fall instead into the category of ordinary domestic contretemps presents our courts with a weighty responsibility and confounds our ability to fix clear rules of application.
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> [Id. at 475 (citation omitted).]

"[T]he decision about whether a particular series of events rises to the level of harassment or not is fact-sensitive." Id. at 484.

Very recently, our Supreme Court provided additional guidance on what conduct constitutes harassment under N.J.S.A. 2C:33-4(c).

In State v. Burkert, ___ N.J. ___ (2017), the Court made clear that N.J.S.A. 2C:33-4(c) "was never intended to protect against the common stresses, shocks, and insults of life that come from exposure to crude remarks and offensive expressions, teasing and rumor mongering, and general inappropriate behavior. The aim of subsection (c) is not to enforce a code of civil behavior or proper manners." (slip op. at 35-36).

Instead, the Court held, as it did twenty years ago in Hoffman, 149 N.J. at 580-81, "[t]hat the primary thrust of N.J.S.A. 2C:33-4(c) is not to interdict speech, but rather conduct[.]" Burkert, (slip op. at 19). Therefore, the Court "construe[d] the terms 'any other course of alarming conduct' and 'acts with purpose to alarm or seriously annoy' as repeated communications directed at a person that reasonably put that person in fear for his safety or security or that intolerably interfere[d] with that person's reasonable expectation of privacy." Id. at 34-35.

Applying these principles, and viewing the record expansively, we cannot conclude from the judge's findings that defendant engaged in a "course of alarming conduct" or acts that rose to the level of what the Legislature intended as "domestic violence" under the PDVA. For example, in Corrente, the defendant threatened "drastic measure[s]" during an argument with his wife and later disconnected her telephone service. Corrente, 281 N.J.

Super. at 244. We held that this communication and conduct could not be "characterized as alarming or seriously annoying." Id. at 249.

We drew the same conclusion in another case where the defendant repeatedly told his wife that he had no sexual feelings for her, did not love her, and planned to divorce her. Murray v. Murray, 267 N.J. Super. 406, 408, 410 (App. Div. 1993). We likewise found no alarming or seriously annoying conduct where, during an argument, the defendant said to the plaintiff, "I'll bury you." Peranio v. Peranio, 280 N.J. Super. 47, 55-56 (App. Div. 1995).

In this case, defendant told plaintiff he was going to send her to the Philippines during two of their arguments and, on one of these occasions, drove her to an airport and then immediately drove back home with her. Defendant's statements, and his one act, while obviously inappropriate and loutish, simply did not constitute the type of "course of alarming conduct" necessary to sustain the entry of a FRO. Defendant never threatened plaintiff's safety, security, or privacy. Burkert, (slip op. at 35). While plaintiff may have been sensitive about her status in the United States, the evidence in the record shows that she had no objective reason for concern given the fact that she was married to a citizen

of the United States, had a child who was a citizen, and had, or was about to obtain, Green Card status.

Under these circumstances, we conclude that the domestic contretemps that occurred between the parties during their short-term marriage were insufficient to support the entry of a FRO. However, even if this were not the case, the FRO would still have to be reversed because the judge's findings do not support his conclusion that the FRO was necessary to protect plaintiff "from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127. As the judge acknowledged, defendant had never harmed or threatened to harm plaintiff, and the two "airport incidents" occurred months before plaintiff sought a TRO.

The judge found that a FRO was needed because there was a financial and "power imbalance" between the parties now that they were separating. However, while plaintiff had not yet secured a job, she had authorization to work in the United States by the time the parties separated in September 2016 and may have already had her Green Card. The judge also did not explain why the issuance of a routine pendente lite support order in the pending dissolution action, rather than a FRO, would not have been sufficient to address plaintiff's financial concerns.

In addition, the parties had already separated, defendant had filed his complaint for divorce, and they would be divorced just

four months later. While they shared a child together, their future contact would obviously be limited. Although the judge found that defendant showed a "lack of empathy" toward plaintiff, it is now abundantly clear that the harassment statute, N.J.S.A. 2C:33-4(c), was never intended "to enforce a code of civil behavior or proper manners." Burkert, (slip op. at 36). Thus, a FRO was not needed in this case.

Reversed.