RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1145-16T1

L.M.W.,

Plaintiff Respondent,

v.

A.P.,

Defendant-Appellant.

Submitted November 2, 2017 – Decided January 12, 2018

Before Judges Simonelli and Rothstadt.

On appeal from Superior Court of New Jersey, Chancery Division, Family Division, Morris County, Docket No. FV-14-0972-16.

Gray Law Group, LLC, attorneys for appellant (David E. Gray, of counsel and on the brief).

Carmagnola & Ritardi, LLC, attorneys for respondent (Domenick Carmagnola, of counsel and on the brief; Philip A. Portantino, on the brief).

PER CURIAM

Defendant A.P. appeals from the June 1, 2016 final restraining order (FRO) entered against him pursuant to the Prevention of Domestic Violence Act of 1991 (PDVA), N.J.S.A. 2C:25-17 to -35, based on harassment, N.J.S.A. 2C:33-4(c).[1] We reverse.

Defendant and plaintiff L.M.W. dated for approximately six weeks. Plaintiff sent defendant a text message on May 12, 2016, ending their relationship. Defendant sent plaintiff a text message expressing his affection for plaintiff and desire to continue their relationship, and stated he would call her. Plaintiff replied in a text message stating: "You don't need to call me. There's nothing really to talk about[.] I told you how I felt."

Defendant continued sending plaintiff text messages, repeatedly asking her to call him and expressing his desire to continue their relationship. Plaintiff sent defendant a text message stating: "Listen — please stop contacting me. I'm not interested anymore." Defendant did not comply and sent plaintiff several text messages, requesting an explanation for the breakup.

[1] Defendant also appealed from the October 5, 2016 order denying his motion for reconsideration, but did not address this issue in his merits brief. The issue, therefore, is deemed waived. Sklodowsky v. Lushis, 417 N.J. Super. 648, 657 (App. Div. 2011); Pressler & Verniero, Current N.J. Court Rules, cmt. 5 on R. 2:6-2 (2018).

Plaintiff sent defendant a text message stating: "This is the last time I am telling you to stop texting and calling me. I am NOT interested. If you try and contact me again I will call the police." Defendant did not comply and continued sending defendant text messages requesting an explanation for the breakup and asking plaintiff to meet or call him. From May 12, 2016, to May 15, 2016, defendant sent plaintiff twenty-five text messages and called her thirteen times, sometimes leaving voice messages. Plaintiff admitted that the content of the text messages was not threatening.

On May 15, 2016, plaintiff went to the police for assistance in stopping defendant from contacting her. The police called defendant and advised him to stop contacting plaintiff. Defendant stopped text messaging and calling plaintiff. However, on May 26, 2016, he sent flowers to plaintiff's home along with a handwritten note stating:

> I know it[']s been a few weeks since we spoke last. It sucks that a few foolish texts between us made [us] go from hot to cold in a snap of a finger. Texting you can say/mean one thing and it can be taken/read a totally different way . . . It sucks and happens all the time . . .
>
> Honestly I was just trying to help you out. I thought you would think it was sweet and make you smile. Also I always said your drive to push on with all you have on your plate is hot

> cause you don[']t see that in many people [nowadays].
>
> I know you have your guard up and have had a rough past. Just know I wasn[']t playing games with your head and heart. You['re] a real sweet girl inside and out and wouldn't ever do that.
>
> It would be awesome to just put this petty foolishness behind us cause everything[']s been great times and nothing but smiles since we met. [Your wall] just came down and things were def[initely] heating up between us! It was hot! It [would] be great to hear from you soon[.]

On May 26, 2016, plaintiff obtained a temporary restraining order against defendant based on harassment. Following a hearing, the trial judge found the parties had a dating relationship, there were no prior acts of domestic violence, and there was no threat of violence. However, addressing defendant, the judge stated:

> what is extremely disconcerting, sir, is you just didn't take no for an answer. And [plaintiff] repeatedly told you, "Stop contacting me." She doesn't owe you a reason. She doesn't owe you an explanation. You don't have a past. You don't have children together.
>
> . . . .
>
> And . . . you had . . . I guess about six weeks together. You kept texting her. So, she did the polite thing and had the police call you. And they told you, "Leave her alone, don't contact her." It wasn't enough.
>
> Then, you had to send her a flower with a note, "Please call." It . . . never stopped.

> It still doesn't stop. You know, it's . . . unfortunate because you're a mature man. You're intelligent. But for some reason, your emotions have overtaken your common sense.
>
> And that's why I'm . . . granting a restraining order against you.

The court did not find a purpose to harass or that a FRO was necessary to protect plaintiff from further harassment. The court subsequently denied defendant's motion for reconsideration. This appeal followed.

As a threshold matter, we reject plaintiff's argument that defendant's appeal from the FRO is untimely.[2] An appeal from a trial court's final judgment or order must be filed within forty-five days of its entry. R. 2:4-1. The time to appeal is tolled by the filing of a motion for reconsideration, and the time remaining to file the appeal resumes from the date of the order adjudicating the motion for reconsideration. R. 2:4-3.

Here, the FRO was entered on June 1, 2016. Pursuant to Rule 2:4-1, defendant had until July 15, 2016 to file an appeal.

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[2] We decline to address plaintiff's additional argument that defendant's motion for reconsideration was procedurally defective. Although plaintiff raised this argument in opposition to the motion, the judge did not rule on it, and plaintiff did not file a cross-appeal. If a respondent's argument goes beyond the scope of the lower court's decision, it will not be entertained on appeal unless asserted within a separate cross-appeal. Bogey's Trucking & Paving, Inc. v. Indian Harbor Ins. Co., 395 N.J. Super. 59, 64 n. 3 (App. Div. 2007).

However, on June 20, 2016, defendant filed a motion for reconsideration. At that point, twenty-six days remained for him to file an appeal. The court entered an order on October 5, 2016, denying the motion. Accordingly, defendant had until November 1, 2016 to file an appeal from the FRO. Although defendant did not file an appeal until November 18, 2016, on May 18, 2017, we granted him leave to file a notice of appeal from the FRO as within time. Accordingly, all issues relating to the FRO are properly before us.

That being said, we focus on defendant's contention that the judge erred in finding a predicate act of harassment. Defendant argues there was no finding that he acted with a purpose to harass, and the text messages did not establish this element of N.J.S.A. 2C:33-4(c). Defendant also contends there was no finding a FRO was necessary to protect plaintiff from further harassment.

Our review of a trial judge's factual findings, following a non-jury trial, is limited. Elrom v. Elrom, 439 N.J. Super. 424, 433 (App. Div. 2015). "Generally, 'findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence.'" Ibid. (quoting Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). This "[d]eference is especially appropriate when the evidence is largely testimonial and involves questions of credibility." Cesare, 154 N.J. at 412 (citation omitted).

"Reversal is warranted only when a mistake must have been made because the trial court's factual findings are 'so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice[.]'" Elrom, 439 N.J. Super. at 433 (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). "Consequently, when a reviewing court concludes there is satisfactory evidentiary support for the trial court's findings, 'its task is complete and it should not disturb the result[.]'" Ibid. (quoting Beck v. Beck, 86 N.J. 480, 496 (1981)). However, we review de novo the trial judge's legal conclusions, and the application of those conclusions to the facts. Ibid. (quoting Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013)).

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 demonstrates by a preponderance of the evidence that defendant committed a predicate act of domestic violence. 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."

A finding of harassment requires proof the defendant acted with a purpose to harass. See Silver, 387 N.J. Super. at 124. Although a purpose to harass may, in some cases, be "inferred from the evidence" and from "[c]ommon sense and experience[,]" a finding by the court that the defendant acted with a purpose or intent to harass another is integral to a determination of harassment. State v. Hoffman, 149 N.J. 564, 576-77 (1997). 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. 2006) (quoting Webster's II New College Dictionary 504 (1995)).

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)).

Here, the judge made no finding, and the evidence does not show, that defendant acted with the requisite purpose, nor may defendant's text messages be viewed as implicitly embodying a

purpose to harass. Absent evidence that defendant sent the text messages for the purpose of harassing plaintiff, what occurred here was not harassment within the meaning of N.J.S.A. 2C:33-4. L.M.F. v. J.A.F., Jr., 421 N.J. Super. 523, 535 (App. Div. 2011). Accordingly, in the absence of this "integral" finding of a purpose to harass, the judge's determination that defendant committed a predicate act cannot stand and the FRO must be reversed and vacated.

Even viewed expansively, we cannot conclude from the judge's findings that defendant engaged in any communications or conduct that rose to the level of what the Legislature intended as "domestic violence." 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, 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 245-46. 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 continued to text message plaintiff after she told him to stop. Defendant's acts, while obviously inappropriate, 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). Under these circumstances, we conclude that defendant's acts 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 did not find a FRO was necessary to protect plaintiff "from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127.

Reversed. The matter is remanded to the trial court to vacate the FRO.