

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1437-16T2

C.T.,

Plaintiff-Respondent,

v.

M.T.,

Defendant-Appellant.

Submitted November 14, 2017 – Decided January 3, 2018

Before Judges Gilson and Mayer.

On appeal from Superior Court of New Jersey,
Chancery Division, Family Part, Essex County,
Docket No. FV-07-1351-17.

Chinemerem N. Njoku, attorney for appellant.

Respondent has not filed a brief.

PER CURIAM

While the parties were married, they filed cross-complaints alleging domestic violence against each other. After separate, back-to-back trials on November 10, 2016, the trial court entered a final restraining order (FRO) against each party for violations of the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:29-

17 to -35. C.T.,¹ the wife, was found to have engaged in the predicate act of harassment. N.J.S.A. 2C:33-4(c). M.T., the husband, was found to have engaged in predicate acts of simple assault, N.J.S.A. 2C:12-1(a), and harassment, N.J.S.A. 2C:33-4(b).

M.T. appeals from the FRO entered against him on November 10, 2016. C.T. has not appealed, nor did she respond to M.T.'s appeal. We affirm because the trial court's findings of domestic violence against M.T. and the need for an FRO were supported by substantial credible evidence.

I.

M.T. and C.T. were married for approximately eleven years and have three children together. The parties' relationship has been contentious. They previously obtained temporary restraining orders (TRO) against each other, which were both dismissed on October 25, 2016.

The incidents that gave rise to the entry of the FROs occurred on October 28, 2016. M.T., accompanied by his niece, went to the parties' marital home to get his keys following the dismissal of the prior TRO. According to M.T., C.T. had refused to allow him to return to the home on the previous two days. When he arrived on October 28, he initially was greeted by C.T.'s uncle and then

¹ We use initials to protect the privacy interests of the parties. R. 1:38-3(d)(10).

asked C.T. for the keys to the home. According to M.T. and his niece, who testified during M.T.'s trial, C.T. threatened to poison M.T. The trial court found that testimony to be credible and, consequently, found that C.T. engaged in the predicate act of harassment by alarming conduct. N.J.S.A. 2C:33-4(c). The trial court also found that an FRO was necessary to protect M.T. from further domestic violence.

At C.T.'s trial, she testified that on October 28, 2016, M.T. slapped her in the face and hit her arms. Specifically, she testified that, after she pointed out where the keys were, M.T. became upset, came over to her, and slapped her face. C.T. raised her arms to protect herself, and M.T. hit her arms several times causing scratches. To support her claim, C.T. introduced into evidence six photographs taken on her cell phone of her arms and neck. The trial court found that the photographs showed scratches on her arms and neck.

M.T., who was represented by counsel, testified in his own defense. He denied hitting or scratching C.T. He also introduced into evidence a recording he made on his cell phone that he contended was made while he was in C.T.'s presence on October 28, 2016. He noted that it did not contain any sounds of a fight.

After hearing all of the evidence, the trial court found C.T.'s testimony to be credible and, based on C.T.'s testimony,

found that M.T. committed the predicate acts of simple assault and harassment. The trial court also relied on the photographs that C.T. entered into evidence. With regard to the audio recording, the trial court found that the recording did not establish absence of a domestic violence incident. Instead, the court found that the recording would not have necessarily captured the sound of the slapping and hitting and, thus, it was not persuasive. The court also stated that it was not clearly established that the recording was made at the time of the domestic violence incident.

The court concluded that C.T. was in need of an FRO against M.T. Specifically, the court found that C.T. credibly testified about a history of physical and verbal abuse by M.T. of C.T., and that C.T. was in need of an FRO to prevent further abuse.

II.

On this appeal, M.T. contends that the findings of domestic violence against him are not supported by substantial credible evidence. He also argues that the findings, and in particular the credibility findings, made in the separate trials were inconsistent. Finally, he challenges the trial court's evidentiary ruling concerning the audio recording.

Initially, we note that M.T.'s appellate brief included a certification from M.T., in which he offered new testimony. We disregarded that certification and did not consider it because the

alleged facts were not presented to the trial court and there was no motion to supplement the record. R. 2:5-4; R. 2:5-5; see also Kohn's Bakery, Inc. v. Terracciano, 147 N.J. Super. 582, 584 (App. Div. 1977) (holding that absent a motion to correct or supplement the record, an appellate court will not consider new testimony or evidence on appeal).

Our scope of review is limited when considering an FRO issued by the Family Part following a bench trial. A trial court's findings are binding on appeal "when supported by adequate, substantial, and credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015) (citing Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). 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 trial judges who routinely hear domestic violence cases in the Family Part. N.J. Div. of Youth & Family Servs. v. R.G., 217 N.J. 527, 553 (2014). 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." Gnall, 222 N.J. at 428 (quoting Cesare, 154 N.J. at 412).

Domestic violence occurs when an adult or emancipated minor commits one or more acts upon a person 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. 112, 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:25-19a 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 an FRO is necessary to provide protection for the victim. Silver, 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))). As part of that second step, the judge must assess "whether a restraining order is necessary, upon an evaluation of the fact[or]s 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., 207 N.J. at 475-76 (quoting Silver, 387 N.J. Super. at 127).

Applying these standards to the record in this case, we discern no basis for disturbing the trial court's decision to grant an FRO against M.T. There was substantial credible evidence in the record to support the trial court's findings that M.T. committed simple assault and harassment.

A person is guilty of simple assault if he "purposely, knowingly, or recklessly causes bodily injury to another" N.J.S.A. 2C:12-1(a)(1). Here, the trial court credited C.T.'s testimony that M.T. slapped her face and struck her arms causing scratches. The trial court also relied on the photographs of the injuries to C.T.'s arms. Those findings are supported by substantial credible evidence in the record.

The harassment statute provides that a person commits harassment "if, with purpose to harass another, he . . . [s]ubjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so" N.J.S.A. 2C:33-4(b). There was substantial credible evidence that M.T. engaged in such striking and offensive touching.

M.T. argues that the trial court's findings that supported the FRO against him are inconsistent with the findings that supported the FRO against C.T. Specifically, M.T. contends that in granting an FRO in his favor and against C.T., the trial court found his and his niece's testimony credible. Thus, M.T. argues

that the trial court should not have found C.T. credible at her trial. The trial court's findings of credibility are not mutually exclusive. In granting an FRO in favor of M.T., the trial court found that C.T. threatened to poison him. That finding is consistent with crediting C.T.'s testimony that M.T. slapped and hit her.

M.T. also argues that his testimony should have been considered credible and C.T.'s testimony should have been considered incredible. Credibility findings are made by the trial court, which has the ability to listen to the parties and evaluate their demeanor. Gnall, 222 N.J. at 428. Here, we find no basis to question the trial court's credibility findings.

Finally, M.T. argues that the trial court erred in its ruling concerning the audio recording. In making that ruling, the trial court was evaluating evidence. We review evidentiary rulings for abuse of discretion. State v. Harris, 209 N.J. 431, 439 (2012). Here, we find no abuse of discretion because the trial court explained that the recording did not establish the time that it was made and, thus, did not prove that there was no domestic violence incident.

Affirmed.

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



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