SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2831-16T3

B.T.,[1]

Plaintiff-Respondent,

v.

S.J.L.,

Defendant-Appellant.

Argued March 6, 2018 – Decided April 4, 2018

Before Judges Mawla and DeAlmeida.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Union County, Docket No. FV-20-0923-17.

Dennis M. Mahoney argued the cause for appellant.

Respondent has not filed a brief.

PER CURIAM

Defendant S.J.L. appeals the entry of a final restraining order (FRO) against him pursuant to the Prevention of Domestic

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[1] Pursuant to Rule 1:38-3(d)(9), we use initials to protect the parties' confidentiality.

Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. The FRO was issued after the trial judge found that defendant committed the predicate act of harassment, N.J.S.A. 2C:33-4, and that plaintiff was in need of protection from future acts of harassment by defendant. Defendant argues that the trial judge's findings are not supported by the evidence. We affirm.

I.

The following facts are taken from the record. Plaintiff and defendant were in a romantic relationship for approximately a year. In November 2016, plaintiff began to distance herself from defendant by ceasing communications with him. In response, defendant sent plaintiff a series of text messages and voicemail messages requesting that she speak with him.

The first text messages in the record were sent by defendant to plaintiff on the evening of November 12, 2016, asking why plaintiff was ignoring him. Plaintiff responded that she did not "feel like talking to anyone," that defendant was "being annoying," and, ultimately, "Good bye (sic)." Over the next four days, defendant sent numerous text messages to plaintiff imploring her to respond, including a message in which he implied he was waiting for her outside her home. Plaintiff's first response to defendant, on November 16, 2016, was "[l]eave me alone."

Despite the clarity of that request, defendant immediately thereafter sent plaintiff numerous additional text messages, which caused plaintiff to respond, "I have asked you multiple times to leave me alone and you consistently keep blowing up my phone" and "[y]ou have been texting me every day. Leave me alone." When this failed to deter defendant from sending additional text messages, plaintiff responded "[d]on't make me get the cops involved. Because I have asked you multiple times to leave me alone."

Defendant immediately thereafter sent plaintiff numerous additional text messages, including one denying that he had been outside her home earlier that evening, followed by this exchange:

> [Defendant:] and for real this time
>
> [I]'m getting in my car
>
> and coming to see you
>
> because this is honestly so stupid
>
> [I] will see you at 8[:]30
>
> [Plaintiff:] Leave me alone. No.
>
> [Defendant:] [i]'m either coming or you're talking to me
>
> Pick one

Plaintiff responded with a text message calling defendant "controlling." She again threatened to call the police:

[Defendant:] [I]'m coming to your work and we're talking after

[Plaintiff:] No you're not

I literally will call the cops.

[Defendant:] then you need to talk to me after

[Plaintiff:] I'm not playing games just leave me alone

[Defendant:] no tell me you will talk to me

[Plaintiff:] No

[Defendant:] [I]'m not scared of cops [B.]

lol

[I]'m not doing anything

tell me why right now u want me gone

[Plaintiff:] I'm telling you to leave me alone and you won't.

After numerous additional text messages from defendant, plaintiff responded as follows:

> Listen . . . . . This obsessive infatuation you have with me has made me extremely uncomfortable. I've asked you repeatedly to stop and you aren't listening. You keep asking why when I've already told you why. I don't like you, I don't love you, I don't care for you, I don't have feelings for you period. What other way can I possibly say it for you to move on already, because I have. At this point you are harassing me and I have no problem filing a report and getting a restraining order against you if I have to.

> I'm done with you! D O N E!! How many other ways can you tell someone to f[]k off already like seriously!!? LEAVE ME ALONE!!!!!

Defendant responded to this message by questioning whether plaintiff was serious and stating that he was coming to her home "now" to retrieve his laptop computer. Plaintiff responded, "I'm not home and no you aren't." At that point the parties exchanged numerous text messages in which plaintiff repeatedly asked defendant to leave her alone. After a series of unanswered text messages, defendant declared, "[I] will see you in the next 24 hours . . . whether [] you want it or not . . . it's happening[.]"

At 3:26 a.m. on November 17, 2016, defendant sent several text messages and four voicemail messages to plaintiff. Later that morning, the parties exchanged text messages in which plaintiff repeated she was ending her relationship with defendant and asked him to leave her alone. Defendant appeared to accept plaintiff's request stating, "[I] will leave you alone. [I] will allow time to see if we can at least be civil again."

However, just seven days later, on November 24, 2016, defendant sent plaintiff a text message stating "let me know when [I] can see you". This was followed by a series of text messages from defendant to which plaintiff did not respond.

On either November 26, 2016, or November 27, 2016, plaintiff and defendant met at plaintiff's home. They had an approximately one-hour conversation in defendant's car.

On November 28, 2016, plaintiff sent defendant a text message informing him she would have her friend drop defendant's belongings at his home and that plaintiff intended to block his phone number from sending any additional communications to plaintiff. She thereafter blocked defendant's phone number.

In the following days, defendant continued to attempt to reach out to plaintiff by sending messages to her sisters and her friends, sending plaintiff emails and messages through social media, and calling plaintiff from his father's telephone. In his message to plaintiff sent via social media, defendant admits that he has an alcohol problem and said when he drinks alcohol "it changes me."

On December 7, 2016, plaintiff awoke to find a voicemail message on her phone from an unfamiliar number. The message was from defendant, who had used his father's phone to avoid the block placed on his phone number by plaintiff. In the message, defendant stated that he intended to go to plaintiff's place of employment at closing time to wait in the parking lot so he could talk to her. The message was played aloud at the hearing:

[B.], before you get mad, please just calm down. (Indiscernible) talk. I don't — I don't know what you're doing. I mean, I know what you're doing, but I don't. I know this is crazy, calling you. But I don't have any other choice, [B.]

(Indiscernible) understand a situation like this. Have you not chosen to literally, like, mentally, like, kill me. (Indiscernible) decided to actually remove every aspect of me from your life. That's sad. Like, I could understand if I did something to you. I under — like, it's just — I know what you're doing, just don't do it this way.

If you don't want me to think about being with you, then just give me a — let me — let me still be in your life. Honestly. Like, what is the difference?

I promise you I'm not f[]king crazy. Although I'm acting crazy, it doesn't mean I am. It just means I care. Like, I care, [B.]. And I know you do care. 'Cause you said to me, like, f[]king three weeks ago. I know you care. All right.

I'll leave you alone. But I swear to God, [B.], if you don't unblock me and talk to me, I'm going to come to — I'm coming to [Plaintiff's place of employment]. I'm going to sit in the parking lot and I'm going to wait for you to come out and I'm going to talk to you.

Don't f[]king, like, (indiscernible), like, I have to. There's no way I'm letting this happen. Please, like, from the bottom of my heart, like, like, one more — one more chance, [B.], to be a friend. 'Cause I know you care about me and I don't know why you're bringing it to this extent. Not nice (indiscernible).

> I'm not evil. You know — you know I mean well. Please believe that.
>
> I don't know. I apologize for f[]king doing anything I can to get to you, but, like, like I said, I feel like I had to. I had to. You know, you talk to me or I show up at [Plaintiff's place of employment]. This is the last time I'll talk to you until then.
>
> I love you. Just please (indiscernible).

Plaintiff testified that defendant was aware that she was responsible for closing her place of employment at 10:00 p.m., and that she would be alone at closing time. Plaintiff was sufficiently alarmed by defendant's voicemail message that she reported it to her supervisor, who advised plaintiff to seek a temporary restraining order (TRO) against defendant, which plaintiff obtained on December 9, 2016.

Plaintiff testified to one prior act of violence against her by defendant. According to plaintiff, on June 4, 2016, at a time when she and defendant were romantically involved, they were out with friends at a bar. According to plaintiff, an intoxicated defendant, frustrated plaintiff was not paying sufficient attention to him, struck her in the arm.

Defendant testified and denied having a clear recollection of this incident, but recalled that both plaintiff and defendant were intoxicated. He testified he may have attempted to grab

plaintiff's arm to pull her closer to him, but denied an intent to hit or harm plaintiff.

In summation by his counsel, defendant did not contest the accuracy or authenticity of the text messages, voicemail messages, and social media messages admitted at trial. Instead, defendant argued that he did not intend to annoy or alarm plaintiff, did not threaten her with physical harm, and only intended to convince plaintiff to change her mind about refusing to communicate with him. Also, defendant noted plaintiff had not testified she was afraid for her physical safety or alarmed by defendant's conduct.

In her closing statement, plaintiff, appearing pro se, stated she was fearful of defendant, even though she may not have explicitly said so during her testimony. She noted defendant's alcohol use made him unpredictable, and said she was fearful he would appear at her place of employment at closing time intoxicated.

The trial judge placed his opinion on the record. The judge found that defendant intended to annoy or alarm plaintiff by: (1) sending her multiple text messages after having received repeated unequivocal demands from plaintiff to leave her alone; (2) contacting plaintiff's friends and family members in an attempt to send messages to plaintiff after she blocked incoming messages from defendant's phone number; and (3) leaving plaintiff a voice

mail message threatening to come to her place of employment at night to wait for her in the parking lot. The judge found defendant's claim he did not intend to annoy or alarm plaintiff to lack credibility, concluding defendant was aware his repeated communications with plaintiff would have the effect of annoying her or causing her alarm, and that he intended plaintiff to react in those ways.

Finding it was "not questionable" plaintiff "is in fear" of defendant, and defendant has "no filter" to stop his behavior, which ceased only upon the issuance of a TRO, the judge concluded plaintiff was in need of protection from further acts of harassment by defendant. As a result, the judge granted the FRO. This appeal followed.

On appeal, defendant argues the evidence introduced at trial was insufficient to support a finding of harassment on his part because the messages he sent to plaintiff were not threatening, abusive, sent anonymously, or at inconvenient hours. In addition, defendant argues the trial judge improperly relied on the number of messages defendant sent to plaintiff, rather than on the content of those messages. In addition, defendant argues it was inappropriate for the judge to consider the text messages sent by defendant to plaintiff prior to the parties' meeting on November 26, 2016, or November 27, 2016. According to defendant, plaintiff

could not have been annoyed or alarmed by communications that took place prior to her agreeing to meet face-to-face with defendant.

II.

"In our review of a trial court's order entered following trial in a domestic violence matter, we grant substantial deference to the trial court's findings of fact and legal conclusions based upon those findings." D.N. v. K.M., 429 N.J. Super. 592, 596 (App. Div. 2013) (citing Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). We should 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.'" Cesare, 154 N.J. at 412 (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)). Deference is particularly appropriate when the evidence is testimonial and involves credibility issues because the judge who observes the witnesses and hears the testimony has a perspective the reviewing court does not enjoy. Pascale v. Pascale, 113 N.J. 20, 33 (1988) (citing Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)).

The entry of an FRO requires the trial court to make certain findings. See Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). The court "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. The court should make this determination "'in light of the previous history of violence between the parties.'" Ibid. (quoting Cesare, 154 N.J. at 402). Next, the court must determine "whether a restraining order is necessary, upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29a(1) to -29a(6), to protect the victim from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127 (citing N.J.S.A. 2C:25-29(b)); see also J.D. v. M.D.F., 207 N.J. 458, 476 (2011).

The trial judge determined that defendant committed harassment, one of the predicate acts set forth in the PDVA. N.J.S.A. 2C:25-19(a)(13). A person commits harassment if, "with purpose to harass another," he or she:

> (a) Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively course language, or any other manner likely to cause annoyance or alarm;
>
> (b) subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or
>
> (c) engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

[N.J.S.A. 2C:33-4.]

For a finding of harassment under N.J.S.A. 2C:33-4, the actor must have the purpose to harass. Corrente v. Corrente, 281 N.J. Super. 243, 249 (App. Div. 1995) (citing D.C. v. T.H., 269 N.J. Super. 458, 461-62 (App. Div. 1994); E.K. v. G.K., 241 N.J. Super. 567, 570 (App. Div. 1990)). Finding a party had the purpose to harass must be supported by "some evidence that the actor's conscious object was to alarm or annoy; mere awareness that someone might be alarmed or annoyed is insufficient." J.D., 207 N.J. at 487 (citing State v. Fuchs, 230 N.J. Super. 420, 428 (App. Div. 1989)). A purpose to harass may be inferred from the evidence. State v. McDougald, 120 N.J. 523, 566-67 (1990). Common sense and experience may also inform a determination or finding of purpose. State v. Hoffman, 149 N.J 564, 577 (1997) (citing State v. Richards, 155 N.J. Super. 106, 118 (App. Div. 1978)).

The record contains ample support for the trial judge's finding that defendant acted with the purpose of annoying or alarming plaintiff. Having been told more than a dozen times by plaintiff of her desire to be left alone, defendant persisted in sending plaintiff text messages questioning her reasons for ending their relationship and imploring her to speak to him. At least some of those messages were sent at 3:26 a.m. In addition, once plaintiff blocked text messages from defendant's phone number, he

made repeated efforts to circumvent plaintiff's desire to be left alone by attempting to send messages to plaintiff through her friends and family. He also called plaintiff from a phone number she would not recognize and left a message threatening to appear at her place of employment at closing time, fully aware plaintiff would be alone at 10:00 p.m. and that he would encounter her in a parking lot. In response to plaintiff's warning she was prepared to seek the assistance of the police, defendant responded that he was "not scared of cops." We see no reason to disturb the trial judge's determination that defendant's claim to have had no intent to annoy or alarm plaintiff lacked credibility.

Nor are we persuaded by defendant's argument the trial judge impermissibly relied on the number of text messages defendant sent to plaintiff, rather than on the content of those messages. Defendant's argument is contradicted by the record. While the judge noted the large number of text messages sent in a relatively short period of time, a fact indicative of defendant's inability to moderate his behavior toward plaintiff, it is plain the judge relied primarily on defendant's demands that plaintiff speak to him and his threats to appear at her workplace.

Defendant's argument plaintiff's willingness to meet face-to-face with him negates the evidentiary value of the text messages sent prior to the meeting is unavailing. The mere fact plaintiff

agreed to meet with defendant does not mean that she was not annoyed or alarmed by his communications. A party need not be in fear of immediate physical harm to justify a finding of harassment. Silver, 387 N.J. Super. at 138. Indeed, "[a]t its core, the [PDVA] effectuates the notion that the victim of domestic violence is entitled to be left alone. To be left alone is, in essence, the basic protection the law seeks to assure these victims." Hoffmann, 149 N.J. at 584. For the same reason, defendant's claim an act of harassment cannot be found in the absence of overt threats of violence in his text messages is unpersuasive. We also note that contrary to defendant's arguments, he sent one set of text messages at 3:26 a.m., an inconvenient time, and attempted to hide his identity by calling plaintiff from his father's telephone.

Affirmed.