RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1180-21

A.P.C.,[1]

Plaintiff-Respondent,

v.

S.B.,

Defendant-Appellant.

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Submitted October 17, 2022 – Decided November 7, 2022

Before Judges Mayer and Enright.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Monmouth County, FV-13-1692-21.

Wronko Loewen Benucci, attorneys for appellant (James R. Wronko, of counsel and on the brief).

A.P.C., respondent pro se.

PER CURIAM

[1] We use initials to refer to the parties in accordance with Rule 1:38-3(d)(10).

Defendant S.B. appeals from an August 27, 2021 final restraining order (FRO) entered in favor of plaintiff A.P.C. pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. The Family Part judge found defendant committed the predicate acts of harassment, N.J.S.A. 2C:33-4, and criminal mischief, N.J.S.A. 2C:17-3, and that the FRO was necessary to protect plaintiff against future threats or acts of domestic violence. We affirm.

The facts are taken from the testimony presented during the two-day trial. Plaintiff and defendant dated from December 2020 to June 2021. On June 25, 2021, plaintiff applied for, and received, a temporary restraining order (TRO) against defendant. In the TRO, plaintiff accused defendant of criminal mischief and harassment. She did not list any prior incidents of domestic violence in her TRO application.

On July 26, 2021, plaintiff received an amended TRO which included a prior history of domestic violence by defendant. According to the amended TRO, between June 22 and June 25, 2021, while in Miami for work, defendant displayed "paranoid, argumentative, accusatory, [and] cruel" behaviors reflected in "hundreds of text messages [and] calls" to plaintiff. The text messages and

telephone calls were placed at all hours of the night and continued despite plaintiff's request that defendant cease his communications.

The judge noted there was "no long history of violence between [the] parties . . . because they weren't together that long." Notwithstanding the short duration of the relationship, the judge explained "one sufficiently egregious act can be enough to establish a claim of harassment."

On June 25, 2021, plaintiff testified defendant showed up at her home unannounced and uninvited. Although plaintiff let defendant into the house, she asked him not to touch her and he became angry. Plaintiff stated defendant's eyes were "popping out" and his pupils were "dilated," leading plaintiff to ask if defendant was on drugs.

Plaintiff and defendant then agreed to look back through the text messages on their cellphones "to try and found out when [they] started not getting along." Plaintiff saw a picture of another woman along with some text messages on defendant's cellphone. Because she believe defendant was involved with another woman, and based on the prior hurtful and demeaning text messages sent by defendant while he was in Miami, plaintiff testified she calmly told defendant their relationship was over.

Defendant responded by grabbing plaintiff's cell phone. When plaintiff struggled to retrieve her cell phone, defendant tried to run outside with her phone. While defendant attempted to open a locked sliding glass door, plaintiff was able to take back her cellphone and ran out the front door. Defendant then chased plaintiff outside the house, screaming she was a "whore." Plaintiff reentered her home and locked defendant outside.

Defendant attempted to reenter plaintiff's house through the locked sliding glass door and pounded on the glass. Defendant returned to the front door and kicked the door and the stairs, causing the stairs to break. A neighbor who witnessed the incident called the police.

Because the parties disputed the events of June 25, 2021, the judge addressed the witnesses' credibility. The judge found "plaintiff to be very, very credible" and "very, very convincing in her testimony." The judge stated plaintiff "was very detailed in her explanation and matter of fact" and "very strong" when she faced tough questions on cross-examination.

The judge also found plaintiff's neighbor "to be extremely convincing as a witness." Because plaintiff's neighbor had "no relationship with either party" and "no particular prior relationship with [plaintiff] other than the fact that they

are neighbors," the judge concluded the neighbor had "no reason to lie to [the] court and there was no suggestion made otherwise."

On the other hand, the judge "did not find the defendant to be equally convincing" or "credible at all." She noted defendant "had a very smug look on his face" during the Zoom trial. Further, the judge found defendant "made a number of statements during his own testimony that [were] just completely and utterly belied by the evidence." The judge referred to several text messages marked as evidence during the trial that contradicted defendant's sworn trial testimony. Additionally, based on the physical stature of plaintiff, who was thinner and slight, as compared to defendant, who was fitter and muscular, the judge disbelieved defendant's testimony that plaintiff shoved him with such force as to cause the exterior stairs to break.

The judge referred to a police report used to cross-examine defendant but acknowledged the report was "not in evidence." Instead, the judge considered defendant's answers during cross-examination regarding the statements in the police report "as to [defendant's] physical state at the time [the police] arrived." After considering defendant's responses on cross-examination and the testimony of plaintiff and plaintiff's neighbor, the judge disbelieved defendant's statement

that he was "calm, cool and collect[ed]" when he was at plaintiff's home on June 25.

As further support for her findings regarding defendant's demeanor during the incident, the judge relied on a cellphone picture taken by plaintiff on June 25 as "proof positive" that defendant was "out of control" while he stood outside plaintiff's home. According to the judge, the photograph showed "defendant standing at the plaintiff's sliding glass door with what can only be described as a maniacal look on his face." The judge found the image of defendant in the photograph to be "frightening," showing defendant "clearly screaming and his eyes [were] popping out of his head." The picture correlated with plaintiff's trial testimony describing defendant's behavior on June 25.

In her findings of fact, the judge found the parties argued while defendant was in Florida and plaintiff was in New Jersey. During the argument, the judge explained defendant made "a very nasty comment about the plaintiff and plaintiff's nose." Plaintiff then stated she did not want to talk or text with defendant.

Thereafter, the judge found defendant "start[ed] to repeatedly and incessantly" text plaintiff. Although the judge noted "the words in the text messages, themselves, [were] not threatening or offensive," the "incessant

nature" of the text messages constituted harassment. The judge highlighted "the volume" of the messages, "[t]he hours at which [the] text messages were sent," and the continued barrage of text messages from defendant throughout the evening after plaintiff failed to respond. The judge concluded "the incessant nature of [the text messages] bec[ame] alarming and certainly annoying to the plaintiff sufficient to rise to the level of harassment." During the trial, defendant admitted his text messages showed his "spiraling" conduct.

The judge further explained that defendant's escalating conduct did not stop with the text messages because defendant then showed up at plaintiff's home uninvited. Plaintiff's neighbor saw defendant "pounding" on plaintiff's front door and "yelling" at plaintiff through the door. The neighbor followed defendant as he moved to the sliding glass door at plaintiff's house and began "pounding on the sliding glass door and kicking the steps." When shown a photograph of the broken steps during the trial, the neighbor explained the steps broke "because the defendant kicked them and caused that damage." The neighbor confirmed the stairs were intact prior to defendant's arrival at plaintiff's home.

According to the neighbor, defendant's behavior led her to believe defendant might be having a mental health issue. After observing defendant's

behavior, the neighbor asked if plaintiff was okay. When plaintiff responded no, the neighbor called the police.

The judge determined plaintiff initially allowed defendant into her home but then plaintiff found something upsetting on defendant's phone. The judge explained "there was a tussle over the phone after he took [plaintiff's] phone in response to what [plaintiff] saw on [defendant's phone]." The judge found plaintiff became "scared" and ran out of her house. Defendant loudly called plaintiff a "whore" as he chased her outside.

In analyzing the requirements under the harassment statute, the judge found defendant made communications at extremely inconvenient hours and in a manner likely to cause annoyance or alarm. The judge also concluded defendant engaged in harassing conduct by chasing plaintiff around the yard, causing plaintiff to believe that defendant was going to hurt her. Plaintiff's fear that defendant would strike her caused plaintiff to run outside so someone might witness defendant's conduct. The judge further found defendant's "text messages, the phone calls, the nasty comments, the offensive nature of some of the text messages, leading to this event on June 25th, where [defendant] shows up at [plaintiff's] house, becomes violent, is banging on her door, kicking[,] that all is a course of alarming conduct sufficient to satisfy the [harassment] statute."

Based on the text messages, the judge concluded plaintiff did not want to see defendant, "he knew she did not want to see him . . . and he showed up, nevertheless, and it is clear he was doing it to harass her."

Additionally, the judge found defendant's conduct constituted criminal mischief. The judge determined defendant "kicked [plaintiff's] stairs to the point that they [were damaged] and that constitutes criminal mischief." She further held defendant "intentionally caused [the damage] by kicking those steps repeatedly in a fit of rage."

Having concluded that defendant committed the predicate acts of harassment and criminal mischief, the judge then assessed plaintiff's need for a restraining order to protect her from future threats or acts of domestic violence. The judge found defendant's

> showing up at [plaintiff's] house, acting erratically, banging on the front and back door repeatedly, so loudly that the neighbors hear, so loudly that the neighbors call the police; then chasing the plaintiff around the yard, and kicking her stairs, . . . all of that is behavior of someone who is unstable and it is understandable that [plaintiff] is in fear for her safety and feels she needs the protection of a restraining order.

Based on these findings, the judge determined plaintiff satisfied the requirements for an FRO under Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006).

On appeal, defendant contends the judge erred in allowing plaintiff's counsel to read a police report into the record and then relying on hearsay in the police report for her fact findings. Defendant further asserts there was insufficient evidence upon which to find he committed the predicate act of harassment. He also argues that plaintiff failed to meet her burden of proving the need for an FRO. We disagree.

In a domestic violence case, we owe substantial deference to a family judge's findings, which "are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998) (citing Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). This is particularly true where the evidence is testimonial and implicates credibility determinations. Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). We will not overturn a judge's factual findings and legal conclusions 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." Ibid. (quoting Rova Farms Resort, Inc., 65 N.J. at 484).

When determining whether to grant an FRO under the PDVA, a judge must undertake a two-part analysis. Silver, 387 N.J. Super. at 125-27. "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. Second, the judge must determine whether a restraining order is necessary to protect the plaintiff from immediate danger or to prevent further acts or threats of violence. Id. at 127.

Under the first Silver prong, the judge found defendant's conduct constituted harassment and criminal mischief under the PDVA. On appeal, defendant only challenges the judge's finding that he harassed plaintiff. Because defendant does not challenge the judge's criminal mischief finding, we need not address that issue. Even though the predicate act of criminal mischief satisfied the first prong of the Silver analysis, we nevertheless briefly address defendant's contentions regarding the finding of harassment.

A person is guilty of harassment where, "with [the] purpose to harass another," they:

> [e]ngage[] 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(c).]

Harassment requires the defendant to act with the purpose of harassing the victim. See J.D. v. M.D.F., 207 N.J. 458, 486 (2011). A judge may use

"[c]ommon sense and experience" when determining a defendant's intent. State v. Hoffman, 149 N.J. 564, 577 (1997) (citing State v. Richards, 155 N.J. Super. 106, 118 (App. Div. 1978)).

Having reviewed the record, we are satisfied there was sufficient evidence supporting the judge's determination that defendant intended to harass plaintiff consistent with N.J.S.A. 2C:33-4(c). Harassment includes acts of alarming conduct, done with the purpose to alarm or seriously annoy, such as "repeated communications directed at a person that reasonably put that person in fear for his [or her] safety or security or that intolerably interfere with that person's reasonable expectation of privacy." State v. Burkert, 231 N.J. 257, 284-85 (2017).

The judge found defendant's evident purpose was to harass plaintiff by texting and calling her throughout the night on June 25 despite plaintiff stating she did not wish to communicate with him. Defendant's text messages contained hurtful and demeaning comments about plaintiff and escalated when plaintiff did not respond. Defendant then went to plaintiff's home where, as the judge found, he became "violent" and engaged in harassing conduct by chasing plaintiff around her yard and kicking the stairs, causing plaintiff to believe that defendant was going to hurt her. Based on the foregoing findings, the judge

correctly concluded defendant's conduct was intended to seriously annoy plaintiff.

Since this case turned almost exclusively on the testimony of the witnesses, we defer to the Family Part judge's credibility findings as she had the opportunity to listen to the witnesses, observe their demeanor, and explain why she found the testimony of plaintiff and plaintiff's neighbor more credible than defendant's testimony. See Gnall v. Gnall, 222 N.J. 414, 428 (2015). We discern no basis on this record to question the judge's detailed credibility determinations.

We next consider defendant's claim the judge erred in finding that plaintiff required an FRO to protect her from future threats or acts of domestic violence. In determining whether a restraining order is necessary, a judge must evaluate the factors set forth in N.J.S.A. 2C:25-29(a)(1) to -29(a)(6) and, applying those factors, decide whether an FRO is required "to protect the victim from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127.

A judge is "not obligated to find a past history of abuse before determining that an act of domestic violence has been committed." Cesare, 154 N.J. at 402. "A single act can constitute domestic violence for the purpose of the issuance of an FRO . . . ." McGowan v. O'Rourke, 391 N.J. Super. 502, 506 (App. Div.

2007) (citing Cesare, 154 N.J. at 402). Consistent with our case law, and contrary to defendant's argument, the lack of a domestic violence history between the parties did not preclude the entry of an FRO.

Here, based on plaintiff's credible testimony, the judge held plaintiff required an FRO to protect her from future threats or acts of domestic violence. The judge found plaintiff, a single mother who lived with her three children, feared defendant would cause her harm after showing up at her home uninvited, pounding on plaintiff's door, chasing plaintiff outside the house, and violently kicking the stairs at plaintiff's home. There was sufficient credible evidence in the record to support the judge's findings under both Silver prongs.

We also reject defendant's claim that the judge relied on impermissible hearsay contained in the police report used by plaintiff's counsel during cross-examination. We review a judge's evidentiary decisions for abuse of discretion. Rodriguez v. Wal-Mart Stores, Inc., 237 N.J. 36, 57 (2019).

Having reviewed the record, we are satisfied the judge did not rely on hearsay statements contained in the police report and, therefore, did not abuse her discretion. To the contrary, the judge considered and properly relied on admissible evidence in support of the issuance of the FRO. The judge cited the neighbor's credible testimony that defendant appeared to be suffering some type

of mental health issue when he pounded on plaintiff's door. The judge also considered a photograph of defendant taken while he was standing outside plaintiff's sliding glass door. The judge described defendant's appearance in that photograph as "maniacal" and "out of control." Thus, we are satisfied the judge did not rely on hearsay statements in the police report regarding defendant's behavior on June 25.

Affirmed.