

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3149-20

E.S.,¹

Plaintiff-Respondent,

v.

J.Y.S.,

Defendant-Appellant.

Submitted March 28, 2022 – Decided April 7, 2022

Before Judges Summers and Vernoia.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Ocean County, Docket
No. FV-15-1644-21.

Leah Lederberger, attorney for appellant.

Respondent has not filed a brief.

PER CURIAM

¹ We use initials because the names of victims and alleged victims of domestic violence are excluded from public access under Rule 1:38-3(c)(12).

Defendant J.Y.S. appeals from a final restraining order (FRO) entered pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, in favor of his twenty-one-year-old daughter, plaintiff E.S. Because the evidence presented at the trial does not support the court's finding defendant committed a predicate act of domestic violence under N.J.S.A. 2C:25-19(a), we reverse.

In her complaint seeking a temporary restraining order under the PDVA, plaintiff alleged defendant committed the predicate act of harassment, N.J.S.A. 2C:33-4, by sending her multiple packages after she ended all communications and contact with him. The complaint also alleged a prior history of physical and mental abuse by defendant against plaintiff.

At the trial on the complaint, plaintiff testified she left home at the age of fifteen, and she told defendant at that time she never wanted to see or speak with him again, and she never wanted him to touch her again. Over the ensuing six years prior to the filing of her complaint under the PDVA, plaintiff did not have any direct contact with defendant. During those years, she asked her mother, who is divorced from defendant, and her uncle to inform defendant not to contact her or communicate with her. Plaintiff testified defendant had made efforts to

contact her through third parties, but she never responded. When she got married, plaintiff hired security to ensure defendant did not attend her wedding.²

Plaintiff testified that during the years prior to her departure from home at fifteen, defendant was "physically, emotionally, . . . and sexually abusive" to her. She explained defendant came into her bedroom in the middle of the night, tried to give her melatonin by placing it in food and drinks, and offered to pay her money if she took it. Plaintiff testified that during one incident, after defendant gave her melatonin she woke up at 3:00 a.m., her pants and underwear were down, and defendant stood over her and told her to go back to sleep.

Plaintiff also testified that on a few occasions when she was in the bathroom or shower, defendant "walked in" on her. She also explained defendant picked her up and spun her around in the kitchen "whack[ing] into all the cabinets." According to plaintiff, defendant also hid under the blankets on her bed and would scare her, and he drove in a car in a "scary" way.

In 2021, after six years of no direct contact with her father, plaintiff received a series of approximately six packages delivered to her home over a six-week period. The packages included pictures of defendant's wife M.Y.,

² The date of plaintiff's wedding is not included in the record. Her testimony reflects that she was married following her departure from home at fifteen and prior to the filing of her complaint under the PDVA at age twenty-one.

holiday greetings, food, letters, and photos of plaintiff and defendant prior to plaintiff's departure from home six years earlier. Plaintiff testified the letters were signed using M.Y.'s and defendant's names, and the packages included photographs plaintiff knew belonged to defendant.

Plaintiff feels threatened and unsafe by any contact with, or communications from, defendant. She explained she is "old enough" to decide she does not want any contact with him, and defendant should understand she does not want him to force himself into her life. Plaintiff testified she would feel safe at work and home only with an order in place directing that defendant not contact or leave packages for her. She said an FRO is necessary because she fears defendant.

Defendant testified that plaintiff never told him she did not want anything to do with him. He explained he does not know plaintiff's address, he respects her privacy, and he has no intention of contacting her unless she "initiates something." He denied sending plaintiff any of the packages, explaining his wife M.Y. sent them even though he discouraged her from doing so. He also denied that any of the letters, including those that bore his name, were authored, signed, or sent by him. According to defendant, his wife did not show him the

packages and she had her own independent relationships with each of his seven children, including plaintiff.

M.Y. testified she married defendant in 2019 and it was her idea to send the packages to plaintiff as a means of establishing a relationship with her stepdaughter. M.Y. testified she knew plaintiff and defendant were "not on speaking terms," but it was her idea to send the packages to convey she wanted a relationship with plaintiff and defendant still loved plaintiff.

M.Y. said she made the packages, obtained plaintiff's address from a friend, and dropped off some of the packages directly at plaintiff's home. According to M.Y., on one occasion while delivering a package, she spoke to plaintiff who made it clear she did not want any "connection with" defendant. M.Y. testified she told plaintiff she wanted a relationship with her, and she understood plaintiff had said that would be acceptable. M.Y. stated she would have stopped sending the packages if plaintiff indicated she did not want them.

In a succinct opinion from the bench, the court found there is a "rift" between plaintiff and defendant, and plaintiff has made it clear she does not want any contact with him. The court also found plaintiff did not want any letters, food, books, pictures, or anything else from defendant.

The court did not make any credibility findings other than stating it "accept[ed]" M.Y.'s testimony she sent the packages and "wanted to do it on [her] own" because she sought a relationship with her stepdaughter. The court found M.Y. knew plaintiff did not want any contact with defendant but M.Y. was "extremely tone deaf" and sent the packages anyway. The court further found that "while . . . defendant himself didn't send these packages, . . . he was well aware [they] were being sent."

The court explained plaintiff's testimony "could not be more clear that she doesn't want to have contact," including with M.Y. The court further explained M.Y. sent the packages with defendant's knowledge and wrote "letters as if they were from defendant saying he loved his daughter" with the "purpose to harass . . . plaintiff because it was well known [plaintiff] did not want this relationship."

The court did not find as a fact that defendant committed any of the alleged prior physical, emotional, and sexual abuse plaintiff described during her testimony. Instead, the court found only that plaintiff "recited a history of what she says is domestic violence." The court concluded an FRO was necessary because without it, defendant "would continue to [make] efforts . . . to try to get

[plaintiff] back in [his] life." The court entered the FRO, and this appeal followed.

The scope of our review of an FRO issued after a bench trial is limited. C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020). "We accord substantial deference to Family Part judges, who routinely hear domestic violence cases and are 'specially trained to detect the difference between domestic violence and more ordinary differences that arise between couples.'" Ibid. (quoting J.D. v. M.D.F., 207 N.J. 458, 482 (2011)). "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998); see also Gnall v. Gnall, 222 N.J. 414, 428 (2015). However, we do not defer to a trial court's factual findings if 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; see also C.C., 463 N.J. Super. at 428. We review a trial court's legal conclusions de novo. C.C., 463 N.J. Super. at 429.

Entry of an FRO requires that the trial court make findings in accordance with the two-prong analysis established in Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). First, 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:25-19(a) has occurred." Id. at 125. The trial court should make this determination "in light of the previous history of violence between the parties." Ibid. (quoting Cesare, 154 N.J. at 402). Second, the court must determine "whether a restraining order is necessary, upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29[(a)](1) to -29[(a)](6), to protect the victim from an immediate danger or to prevent further abuse." Id. at 127; see also N.J.S.A. 2C:25-29(b) ("In proceedings in which complaints for restraining orders have been filed, the court shall grant any relief necessary to prevent further abuse.").

Plaintiff alleged defendant committed the predicate act of harassment, N.J.S.A. 2C:33-4, under the PDVA. See N.J.S.A. 2C:25-19(a)(13) (providing harassment under N.J.S.A. 2C:33-4 is a predicate act of domestic violence under the PDVA). A person commits harassment "if, with purpose to harass another," he or she: (a) "[m]akes, or causes to be made, one or more communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;" (b) "[s]ubjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so;" or (c) "[e]ngages 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(a) to (c).

"A finding of a purpose to harass may be inferred from the evidence presented' and from common sense and experience." H.E.S. v. J.C.S., 175 N.J. 309, 327 (2003) (quoting State v. Hoffman, 149 N.J. 564, 577 (1997)). To determine whether a defendant acted with the purpose to harass, a court may look at the "history between the parties." J.D., 207 N.J. at 487 (citing Hoffman, 149 N.J. at 577). The "finding 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." Ibid. (citing State v. Fuchs, 230 N.J. Super. 420, 428 (App. Div. 1989)).

Here, the court did not make express findings supporting its implicit determination defendant committed the predicate act of harassment alleged in plaintiff's complaint. The court did not identify which subsection of the harassment statute it determined defendant violated, and the court did not make any factual findings as to the actions of defendant it determined constituted prohibited harassment under the statute. In fact, the court did not make any reference to the harassment statute or render any findings defendant violated the statute in its decision.

We note that factual finding supporting a determination a defendant committed a predicate act of domestic violence supporting the issuance of an FRO are required, R. 1:7-4, and a failure to make factual findings "constitutes a disservice to the litigants, the attorneys and the appellate court." Curtis v. Finneran, 83 N.J. 563, 569-70 (1980) (quoting Kenwood Assocs. v. Bd. of Adj. Englewood, 141 N.J. Super. 1, 4 (App. Div. 1976)). Even in the absence of the requisite findings, our review of the record compels the conclusion there is insufficient evidence establishing defendant committed the predicate act of harassment alleged in the complaint.

The alleged acts of harassment supporting plaintiff's request for the FRO consist solely of the delivery of packages to plaintiff's home. Plaintiff did not allege or prove defendant violated subsection (b) of N.J.S.A. 2C:33-4 by subjecting her to striking, kicking, shoving, or other offensive touching, or threatening to do so. Thus, there is no basis in the evidence supporting a finding defendant violated that provision of the statute.

To the extent the complaint may be properly read to allege defendant violated subsection (a) of the statute, plaintiff was required to prove defendant made or caused to be made a communication to plaintiff; defendant made or caused to be made the communication with a purpose of harassing plaintiff, and

defendant made or caused the communication to be made in a manner likely to cause plaintiff annoyance or alarm.³ Hoffman, 149 N.J. at 576. Plaintiff failed to sustain her burden because the record lacks any evidence defendant delivered the packages or caused them to be delivered to plaintiff. In fact, the court accepted M.Y.'s testimony that she decided on her own, and acted on her own, to send and deliver the packages. Although the court found defendant was aware of M.Y.'s decision to send the packages, there is no evidence, and the court did not find, defendant participated in M.Y.'s decision or actions, defendant "caused" M.Y. to send the packages, or defendant is otherwise culpable for M.Y.'s actions. See N.J.S.A. 2C:2-6 (providing bases for a defendant's criminal liability of the conduct of another). The court therefore lacked any basis in the record to conclude defendant violated subsection (a) of N.J.S.A. 2C:33-4.

For the same reasons, the record does not support a finding defendant violated subsection (c) of the statute by engaging in a course of alarming conduct or repeated acts with purpose to alarm or seriously annoy plaintiff. See N.J.S.A. 2C:33-4(c); see also State v. Burkert, 231 N.J. 257, 272-74 (2017) (explaining elements of an offense under N.J.S.A. 2C:33-4(c)). Again, there is no evidence

³ Plaintiff did not allege or present any evidence the packages were delivered "anonymously or at extremely inconvenient hours, or [included] offensively coarse language." See N.J.S.A. 2C:33-4(a).

defendant engaged in any conduct related to the delivery of the packages that supports a finding he violated subsection (c). Rather, the unrefuted evidence established M.Y. unilaterally, and without any participation, encouragement, aid, or assistance of defendant, sent the packages as a means of establishing a relationship with her stepdaughter.

M.Y.'s conduct alone does not support the issuance of the FRO. Plaintiff did not prove she shares a current or prior relationship with M.Y. such that she is entitled to the PDVA's protection as a putative victim of domestic violence. See N.J.S.A. 2C:25-19(d) (defining "[v]ictim[s] of domestic violence" entitled to protection under the PDVA). Thus, despite its finding M.Y. was "tone deaf" in her efforts to establish a relationship with plaintiff, the court could not properly issue an FRO under the PDVA against defendant as a means of preventing M.Y. from her unwelcome entreaties to plaintiff.⁴

We also note the lack of any evidence the packages were sent with the purpose to harass plaintiff. See N.J.S.A. 2C:33-4; see also D.M.R. v. M.K.G.,

⁴ We do not suggest M.Y. is free to resume delivery of packages to plaintiff or to contact or communicate with plaintiff in any manner. The trial record makes clear plaintiff does not want any contact or communications with M.Y. and defendant, and our reversal of the FRO is without prejudice to plaintiff's right to pursue and all available remedies under the PDVA or otherwise if they directly or indirectly contact or communicate with plaintiff in the future.

467 N.J. Super. 308, 323 (App. Div. 2021) (explaining harassment under N.J.S.A. 2C:33-4 "requires the defendant to act with the purpose of harassing the victim"). "[A] purpose to harass may be inferred from the evidence presented," and "[c]ommon sense and experience may inform that determination." Hoffman, 149 N.J. at 577. Here, no intent to harass can be imputed to defendant because there is no evidence he participated in M.Y.'s delivery of the packages to plaintiff, and, as noted, the record does not establish a basis for concluding he is otherwise legally culpable for M.Y.'s actions. See N.J.S.A. 2C:2-6. Lacking any evidence defendant acted with a purpose to harass, and without making a finding defendant acted with a purpose to harass, the court could not properly conclude he committed the predicate act of harassment. See Corrente v. Corrente, 281 N.J. Super. 243, 249 (App. Div. 1995) (explaining a purpose to harass is "[i]ntegral to a finding of harassment").

Plaintiff failed to sustain her burden of proving by a preponderance of the evidence defendant committed the only predicate act of domestic violence alleged in her complaint—harassment under N.J.S.A. 2C:33-4. That failure

requires a reversal of the FRO issued by the court.⁵ Silver, 387 N.J. Super. at 125.

Reversed.

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



CLERK OF THE APPELLATE DIVISION

⁵ Our determination plaintiff failed to sustain her burden of proving defendant committed the predicate act of harassment renders it unnecessary to consider whether plaintiff also failed to establish she needs an FRO under the second prong of the Silver standard—whether an FRO is necessary "to protect the victim from an immediate danger to prevent further abuse." 387 N.J. Super. at 127. "Whether [an FRO] should be issued depends on the seriousness of the predicate offense, 'the previous history of domestic violence between the plaintiff and defendant including previous threats [and] harassment[,] and 'whether immediate danger to the person or property is present.'" D.M.R., 467 N.J. Super. at 324 (second and third alteration in original) (quoting Corrente, 281 N.J. Super. at 248). The court did not make any findings of fact concerning plaintiff's testimony concerning the alleged prior acts of domestic violence consisting of the events she described occurred while she resided at home with defendant prior to leaving at age fifteen. That is, the court did not find as fact that the events occurred. Instead, the court stated only plaintiff "recited a history of what she says is domestic violence." Thus, even if plaintiff presented sufficient evidence establishing defendant committed the predicate act of harassment, in the absence of credibility determinations and fact findings as to the plaintiff's testimony about the alleged prior acts of domestic violence, we would be unable to determine whether an FRO is necessary "to protect the victim from an immediate danger to prevent further abuse." Silver, 387 N.J. Super. at 127.