

# RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY  
APPELLATE DIVISION  
DOCKET NO. A-3388-21

S.Y.R.,

Plaintiff-Respondent,

v.

R.R.,

Defendant-Appellant.

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Submitted August 29, 2023 – Decided September 15, 2023

Before Judges Gooden Brown and Berdote Byrne.

On appeal from the Superior Court of New Jersey,  
Chancery Division, Family Part, Ocean County, Docket  
No. FV-15-1685-22.

Bailey & Toraya, LLP, attorneys for appellant (Adam  
W. Toraya, on the brief).

Keith, Winters, Wenning & Harris, attorneys for  
respondent (Brian D. Winters, on the brief).

PER CURIAM

Defendant appeals from the trial court's entry of a final restraining order (FRO), claiming the trial court erred in determining plaintiff proved the predicate act of harassment pursuant to the Prevention of Domestic Violence Act of 1991 (PDVA), N.J.S.A. 2C:25-17 to -35, and failed to prove the threat of risk of future abuse pursuant to Silver v. Silver, 387 N.J. Super. 112 (App. Div. 2006). We conclude the trial court failed to make adequate findings with respect to whether harassment occurred and whether imminent future harm or risk of future abuse required a FRO to issue pursuant to the second prong of Silver. We reverse the order granting the FRO, reinstate the temporary restraining order (TRO), and remand for a new FRO hearing before a different judge.

#### I.

We glean the following facts from the record. The parties have been married for approximately thirteen years and share three children, born in 2016, 2019, and 2022. On December 22, 2021, plaintiff filed a complaint for divorce, which is currently pending. On March 22, 2022, plaintiff sent defendant a text message asking him to move out of the house. Defendant did not move out, and instead filed an answer to the complaint on April 5, 2022. At ten o'clock that evening, plaintiff filed for a TRO, which was granted, requiring defendant to move out of the marital home.

The TRO claimed defendant harassed plaintiff on two occasions: one in May 2021, and another in October 2021, because he repeatedly asked her to have sexual relations with him, and because of a series of unrelated incidents between the parties. She claimed one of the sexual incidents resulted in the conception of the parties' third child, which plaintiff did not want. After a final hearing where both parties were represented by counsel, the court denied defendant's motion for a directed verdict and granted a FRO on May 26, 2022. This appeal followed.

## II.

Our review of a FRO is generally limited. C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020). In matters involving domestic violence, the Supreme Court has held the findings of a trial court "are binding on appeal when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998).

Our review of questions of law "are not entitled to that same degree of deference if they are based upon a misunderstanding of the applicable legal principles." R.G. v. R.G., 449 N.J. Super. 208, 218 (App. Div. 2017) (quoting N.T.B. v. D.D.B., 442 N.J. Super. 205, 215-16 (App. Div. 2015)); see also H.E.S. v. J.C.S., 175 N.J. 309, 329-31 (2003) (remanding to the trial court

because it failed to "consider the totality of the circumstances surrounding the complaint . . . ."); D.M.R. v. M.K.G., 467 N.J. Super. 308, 325 (App. Div. 2021) (reversing the trial court's entry of a FRO due to lack of findings, no prior history of domestic abuse existing between the parties, and plaintiff's lack of fear). We review conclusions of law de novo. C.C., 463 N.J. Super. at 428.

When determining whether to issue a FRO pursuant to the PDVA, a trial court must make two distinct determinations. Silver, 387 N.J. Super. at 125-27. 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.

If a court finds a predicate act occurred pursuant to N.J.S.A. 2C:25-19(a), "the judge must determine whether a restraining order is necessary to protect the plaintiff from future danger or threats of violence." D.M.R., 467 N.J. Super. at 322. "Although this second determination—whether a domestic violence restraining order should be issued—is most often perfunctory and self-evident, the guiding standard is 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. N.J.S.A. 2C:25-29(a) provides "[t]he court shall consider

but not be limited to" six factors, including the previous history of domestic violence between the parties. "[W]hether the victim fears the defendant" is an additional factor the trial court may consider. G.M. v. C.V., 453 N.J. Super. 1, 13 (App. Div. 2018) (quoting Carfagno v. Carfagno, 288 N.J. Super. 424, 435 (Ch. Div. 1995)). The court must determine, pursuant to the totality of the circumstances, whether the FRO is necessary "to protect the victim from an immediate danger or to prevent further abuse." Silver, 387 N.J. Super. at 127; C.C., 463 N.J. Super. at 436; see also N.J.S.A. 2C:25-29(b) ("[T]he court shall grant any relief necessary to prevent further abuse."). The inquiry is necessarily fact specific. Silver, 387 N.J. Super. at 127-28 (remanding for further fact finding).

With respect to the predicate act of harassment, N.J.S.A. 2C:33-4 requires the perpetrator act "with [the] purpose to harass another." Such a finding "may be inferred from the evidence presented" and "[c]ommon sense and experience may inform that determination." State v. Hoffman, 149 N.J. 564, 577 (1997). It may also be inferred from the parties' history. J.D. v. M.D.F., 207 N.J. 458, 487 (2011).

During the FRO hearing, plaintiff repeatedly referred to the two incidents as "sexual assaults," although the TRO alleged only harassment and she admitted

she acquiesced to sexual relations on both occasions. She testified on those two occasions she "just gave in." Plaintiff testified no physical force was used and defendant did not restrain her in any way. She testified this conduct had gone on during their approximately thirteen-year marriage but did not testify the conduct had continued after she filed for divorce in December 2021.

With respect to the delay in seeking a TRO, plaintiff testified she waited so long, from May and October 2021, until April 2022 because she did not have anyone to help with the children if defendant moved out of the marital home, and because she did not know somebody requesting sexual relations several times would qualify as sexual assault. She denied her filing was related to defendant's filing of an answer to the divorce complaint, despite seeking a TRO hours after the answer was filed.

Plaintiff also testified to a series of unrelated incidents, none of which were proximate in time to the filing for a TRO. She testified as to a disagreement over a box she tried to open and defendant asked her to hand to him; an incident where defendant took her cell phone from her briefly; an incident where she and the children were watching television, and defendant came into the room and changed the channel although the children were watching the program; an incident where defendant followed plaintiff in his car to a shopping center, then

gave her their son and told her she needed to take him; and an incident where one of the children had fallen asleep in the car, causing plaintiff to continue driving, and causing defendant to call her to ask where she was and whether she was well. She also testified during the course of their marriage defendant had taken a few photographs of her while she was sleeping in bed. Finally, plaintiff testified as to an incident between defendant's mother and one of the children resulting in a mark on the child's arm. Although she stated she did not believe defendant had anything to do with the child being scratched, she stated this made her angry because it happened on defendant's "watch." Plaintiff testified this was the triggering event for her that caused her to believe a restraining order was necessary.

Defendant testified the parties were discussing divorce in 2021, and attended marital counseling, where they were counseled to engage in intimate relations to repair their marriage. He admitted he requested sex from plaintiff on numerous occasions but testified he never proceeded unless she consented.

The trial court found plaintiff established the predicate act of harassment and concluded plaintiff relented and acceded to defendant's multiple requests for sex to stop the harassment. It found plaintiff credible, although extremely emotional, and accepted her testimony that her delay in filing for a restraining

order was caused by her lack of awareness of her rights. Although terming defendant's conduct as "requests," and without addressing defendant's purpose in asking plaintiff for sex, the trial court found the predicate act of harassment because it believed plaintiff's testimony that she did not want to conceive.

Importantly, the trial court did not address the distinction between harassment and marital contretemps, see R.G., 449 N.J. Super. at 224 (noting the "Supreme Court has emphasized the care a trial court must exercise to distinguish between ordinary disputes and disagreements between family members and those acts that cross the line into domestic violence" and there must be evidence of an improper motive); see also, Murray v. Murray, 267 N.J. Super. 406, 410 (App. Div. 1993) ("We are concerned, too, with the serious policy implications of permitting allegations of this nature [sexual rejection] to be branded as domestic violence and used by either spouse to secure rulings on critical issues such as . . . exclusion from the marital residence . . . particularly when aware that a matrimonial action is pending or about to begin."). The trial court's failure to make findings distinguishing the evidence presented from marital contretemps requires remand, particularly given the pending matrimonial action.



Additionally, after acknowledging that a finding of a predicate act does not automatically lead to the entry of an FRO, and the court was required to make specific findings pursuant to the second prong of Silver, it failed to make those requisite findings. It stated:

... Under the second prong, even if the predicate act of harassment has . . . occurred, the [c]ourt then has to decide as to whether or not there's an immediate danger to person or property warranting the entry of the FRO. . . . Id. at 126.

While this determination in some cases is self-evidence, the guiding standard is whether a restraining order is necessary to protect the . . . victim from immediate danger or prevent further abuse. And that's Id., quoting N.J.S.A. 2C:25-29b, stating that the [c]ourt shall grant any relief necessary to prevent further abuse.

In order to enter an FRO, the [c]ourt must generally make applicable findings under both prongs, not just one prong, as held by the Appellate [c]ourt in Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. 1995).

It is clear that the drafters of the Domestic Violence Act did not intend that the commission of any of the acts automatically warrants the issuance of a domestic violence order. The law mandates that . . . acts claimed to be domestic violence must be evaluated . . . in light of previous history, in light of whether immediate danger to the person and property . . . is present.

Based upon the testimony and based upon all the proofs that have been provided and the credibility


standard, as well as the review of the testimony under the harassment standard and the preponderance of the evidence, this [c]ourt is going to issue a Final Restraining Order in that . . . there is a reasonable prospect of continued harassment and harm done to the plaintiff, and at this time the [c]ourt is granting the same....

A general reference to the testimony and to prior findings made with respect to prong one is insufficient to satisfy this exacting standard. The trial court failed to state the reasons a FRO was necessary pursuant to the totality of the circumstances to prevent imminent future harm or risk of future abuse, including whether a FRO was necessary when the conduct alleged was distant in time.

We conclude the trial court failed to make sufficient findings with respect to both prongs of Silver. The final restraining order is vacated. The TRO is reinstated and shall remain in place until a new order is entered following the trial on remand. Because the trial court made credibility determinations, we remand for a new trial before a different judge. See Freedman v. Freedman, 474 N.J. Super. 291, 308 (App. Div. 2023) (citing P.T. v. M.S., 325 N.J. Super. 193, 220-21 (App. Div. 1999)). We take no position regarding whether an FRO should issue.

Reversed and remanded. We do not retain jurisdiction.

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

  
CLERK OF THE APPELLATE DIVISION