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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3569-21

T.D.,[1]

Plaintiff-Appellant,

v.

A.L.,

Defendant-Respondent.

Submitted June 20, 2023 – Decided July 20, 2023

Before Judges Rose and Messano.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Gloucester County, Docket No. FV-08-0371-22.

Legal Services of New Jersey, attorneys for appellant (Shoshana Gross, of counsel and on the brief).

Respondent has not filed a brief.

PER CURIAM

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[1] We use initials to protect the identity of alleged victims of sexual offenses. See R. 1:38-3(d)(10).

Plaintiff T.D. appeals from a June 10, 2022 order denying her request for a final protective order (FPO) and dismissing a temporary protective order (TPO) entered in her favor against defendant A.L. pursuant to the Sexual Assault Survivor Protection Act (SASPA), N.J.S.A. 2C:14-13 to -21. Plaintiff argues the trial court erroneously applied both prongs of the SASPA set forth in N.J.S.A. 2C:14-16(a), which requires courts "consider but not be limited to the following factors: (1) the occurrence of one or more acts of nonconsensual sexual contact, sexual penetration, or lewdness, or any attempt at such conduct, against the alleged victim; and (2) the possibility of future risk to the safety or well-being of the alleged victim."

Plaintiff raises the following points for our consideration:

POINT I

THE TRIAL COURT ERRED WHEN IT FAILED TO APPLY THE CORRECT STANDARD FOR CONSENT AND THUS FAILED TO FIND THE SEXUAL ACTS PERPETRATED BY DEFENDANT WERE NONCONSENSUAL.

POINT II

THE TRIAL COURT ERRED WHEN IT FOUND [PLAINTIFF] DID NOT MEET HER BURDEN TO PROVE THE POSSIBILITY OF FUTURE RISK TO HER SAFETY AND WELL-BEING.

POINT III

THE APPELLATE DIVISION SHOULD EXERCISE ORIGINAL JURISDICTION AND REVERSE FOR THE ENTRY OF A[N] F[PO].
(Not raised below).

Having considered the trial court's findings in view of the governing law, we are persuaded by plaintiff's argument raised in point I. However, because plaintiff failed to satisfy her burden under the second SASPA prong, we reject the contentions raised in points II and III. Accordingly, we affirm.

I.

Both parties were represented by counsel at trial. Plaintiff was the only witness to testify. Neither party introduced any documents into evidence. We summarize the pertinent facts from plaintiff's trial testimony.

The parties attended high school together and lost contact after plaintiff graduated in 2011. They reconnected via social media nearly a decade later in 2020. Plaintiff explained that because "barber shops were shut down" at that stage of the COVID-19 pandemic, she asked defendant, a barber, "to give [her] a shape up twice before this incident happened." Defendant cut plaintiff's hair in her apartment. Defendant also helped plaintiff move into and paint her current apartment. At the time of trial, the parties lived about ten minutes apart via car. They were not romantically involved.

Sometime before August 30, 2021, plaintiff contacted defendant through Instagram to arrange for a facial treatment at her home. Defendant changed the location to his barbershop in Berlin, where he had scheduled another client on that day. Defendant drove plaintiff to his shop, gave his first customer a haircut, then began plaintiff's facial. Plaintiff described the events that unfolded as follows:

> He asked . . . if he could massage my shoulders. I told him, "Yes." Then he asked me can he massage over my shirt. I said, "Yes. Fine." Then he went under my shirt, pulled my shirt up and my bra up and started like . . . touchin' my nipples. And then after that . . . I, like, shook my shoulders to let him know, like, to stop. He stopped. And then after that, I was textin' on my phone to let my sister know exactly where I was at. So, by the time that happened – before I sent the text message out – he took my phone and then put it in a chair.

After questioning by the court, plaintiff continued: "So, after that, he proceeded to keep touching me, like keep massaging me. And then, I guess like two minutes afterwards, he went to grope me. He went in my shorts and groped me." Plaintiff clarified that defendant placed his finger "slightly" into her vagina. She asked defendant what he was doing. He responded, "My bad, I'm sorry." Plaintiff "tried to get up" but defendant "wrapped his arms around [her] neck from behind." She told the court she did not give defendant consent to touch her nipples or vagina.

At some point, plaintiff retrieved her phone and went to the bathroom. She first tried to call her girlfriend and her sister for a ride home but neither answered. Plaintiff was driven home by defendant. She said she "was uncomfortable" but had no other way to return to her apartment. When she got home, plaintiff woke up her girlfriend "and let her know what was goin' on." That same day, at her girlfriend's suggestion, plaintiff reported the incident to law enforcement. However, a local detective told plaintiff she did not need a protective order. On September 16, 2021, plaintiff sought and obtained a TPO from a Family Part judge.

On cross-examination, defense counsel questioned plaintiff as to whether she "attempt[ed] to contact [defendant] afterwards with regard to a party to go to." Plaintiff acknowledged defendant was sent a message from her "Facebook page." Plaintiff denied sending the message, suggesting it could have been sent by her girlfriend or cousin. No further details were elicited about the communication or the party. When questioned by the court, plaintiff disclosed she had "an intimate relationship with [her girlfriend]," who had access to all her social media accounts.

Plaintiff further acknowledged defendant "didn't respond to the party request" or contact her since the incident. However, plaintiff stated that the

parties live "in the same neighborhood" and they share a mutual friend, who "lives down the street from" defendant. Plaintiff said she "order[s] cake and food from [that friend] for parties all the time." When asked by counsel whether there were "other circumstances that [she] might . . . come across [defendant] in [her] daily activities," plaintiff responded that she "work[ed] at Walmart in Somerdale."

Defense counsel declined to make a closing argument. Following plaintiff's summation, the trial court reserved decision.

On June 10, 2022, the trial court issued an order and written decision, denying plaintiff's application. The trial court accurately summarized plaintiff's testimony and the standard for obtaining an FPO under the SASPA.

The court was not convinced plaintiff met her burden in this case. The court discredited plaintiff's testimony based on its assessment that she was less than forthcoming on direct examination about the nature of the parties' relationship. Considering that relationship, the court found "a reasonable person in similar circumstances as . . . [d]efendant would have believed that . . . [p]laintiff had affirmatively and freely given authorization to act." The court found: "While [d]efendant believed that [p]laintiff was consenting, it was clear from th[e] moment [that she asked defendant what he was doing when he

inserted his finger into her vagina] that the act was not authorized. As soon as [p]laintiff questioned [d]efendant, he stopped."

The court further questioned plaintiff's credibility in view of her "post-sexual[-]act activity." Acknowledging plaintiff made a fresh complaint to her girlfriend, the court nonetheless commented that plaintiff "did not call the police" and "accepted a ride from . . . [d]efendant back home." The court further found plaintiff's assertion that either her girlfriend or cousin sent the Facebook message from her account "lack[ed] credibility." The court concluded plaintiff failed to establish by preponderance of the evidence that defendant committed a nonconsensual sexual act under the first SASPA prong.

For the sake of completeness, the court considered plaintiff's testimony concerning the second SASPA prong and found she failed to meet her burden of proving the possibility of a future risk to her safety or well-being:

> According to . . . [p]laintiff, the[parties] may have some friends in common and they may come into contact with each other. However, they live ten minutes from each other. Plaintiff works at a local Walmart. However, the court notes that since the order was entered . . . [d]efendant has made no contact with . . . [p]laintiff, either through mutual friends or at her place of employment.

The court thus dismissed the TPO and thereafter denied plaintiff's application for a stay pending her anticipated appeal.

II.

Our scope of review of Family Part orders is limited. Cesare v. Cesare, 154 N.J. 394, 411 (1998). Because of its special expertise in family matters, we owe substantial deference to the family court's findings of fact. Id. at 413. We ordinarily defer to those findings "when the evidence is largely testimonial and involves questions of credibility." Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). We do so "because the trial court has the 'opportunity to hear and see the witnesses and to have the "feel" of the case, which a reviewing court cannot enjoy.'" C.R. v. M.T., 248 N.J. 428, 440 (2021) (quoting State v. Elders, 192 N.J. 224, 244 (2007)). "The general rule is that findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare, 154 N.J. at 411-12; see also Gnall v. Gnall, 222 N.J. 414, 428 (2015). We, of course, owe no special deference to the trial court's legal conclusions, which we review de novo. C.R., 248 N.J. at 440.

In C.R., the Court reversed and remanded our decision that had remanded for further findings on the first SASPA prong. 248 N.J. at 431. Pertinent to this appeal, the Court held that although the SASPA does not define consent, "[t]he standard for consent for an alleged victim in a SASPA case should be no different than the standard for consent for an alleged victim in a criminal sexual

assault case," "which is applied from the perspective of the alleged victim." Id. at 431 (citing State in Interest of M.T.S., 129 N.J. 422, 444-45 (1992)). That standard "requires a showing that sexual activity occurred without the alleged victim's freely and affirmatively given permission to engage in that activity." Ibid.

The Court further noted that permission "may be inferred either from acts or statements reasonably viewed in light of the surrounding circumstances." Ibid. (quoting M.T.S., 129 N.J. at 444). "Permission is demonstrated when the evidence, in whatever form, is sufficient to demonstrate that a reasonable person would have believed that the alleged victim had affirmatively and freely given authorization to the act." Ibid. (quoting M.T.S., 129 N.J. at 445).

In her first point on appeal, plaintiff contends the trial court failed to "articulate any specific verbal or non-verbal communication" that could be construed as her "affirmative and freely-given permission" to defendant's sexual advances. Plaintiff also claims the court's focus on consent failed to comport with M.T.S., and minimized defendant's behavior. Finally, plaintiff contends the court erroneously relied on two "prohibited factors," i.e., that she "'did not call the police'" from the barbershop, and she "accepted a ride home

from defendant, presumably implying that she should have called the police or left the premises."

Having considered the trial court's decision in view of the governing law, we are persuaded the court impermissibly considered whether plaintiff consented to defendant's sexual advances from the perspective of defendant – rather than plaintiff – contrary to the Court's holdings in C.R. and M.T.S. On the one hand, the court seemingly found "it was clear" plaintiff did not consent "at that moment" she asked defendant "what [he] was doing" when he digitally penetrated her. Nonetheless, the court found "[d]efendant believed" plaintiff had consented to that act. In view of plaintiff's testimony, and the court's conclusion that the act was not authorized by her, we disagree with the court's determination that plaintiff failed to prove the allegations by a preponderance of the evidence under N.J.S.A. 2C:14-16(a). We conclude plaintiff's unrefuted testimony demonstrated she did not "freely and affirmatively give[defendant] permission to engage in that activity." C.R., 248 N.J. at 431; M.T.S. 129 N.J. at 444.

Moreover, in assessing plaintiff's credibility, we are persuaded that the court improperly considered plaintiff's failure to call the police from the barbershop and her decision to accept a ride home from defendant. See N.J.S.A.

2C:14-16(2)(b) (providing, in pertinent part, that "[t]he court shall not deny relief under this section due to . . . the alleged victim's failure to report the incident to law enforcement").

We reach a different conclusion regarding the second SASPA prong. Plaintiff argues the court failed to consider that the parties were acquainted for years prior to the incident; have mutual friends; plaintiff lives and works in close proximity to defendant's home; and defendant knows where she resides and works. Contending "defendant stayed away" to avoid arrest while the TPO was pending, plaintiff further asserts the court misconstrued defendant's lack of contact prior to trial. Although we agree that defendant's compliance with the temporary restraints does not necessarily forecast his future conduct, we nonetheless conclude plaintiff failed to demonstrate "the possibility of future risk to [her] safety or well-being."

Unlike the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, the SASPA does not provide factors for evaluating the second prong. Cf. State v. Silver, 387 N.J. Super. 112, 127 (App. Div. 2006) (recognizing in all cases under the PDVA, "the guiding standard is whether a restraining order is necessary, upon an evaluation of the factors included 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"). In C.R., however, the Court briefly discussed the SASPA's second prong because its remand decision "encompass[ed] a reconsideration of that prong as well" as the first prong.[2] 248 N.J. at 447. The Court noted the trial court briefly addressed the prong and essentially relied on the assumption that the "defendant was 'subjected to legal fees and may harbor a grudge against the plaintiff'" in view of the legal proceedings. Id. at 448. The Court thus reasoned:

> It cannot be that simply filing for a protective order is sufficient to create 'the possibility of future risk to the safety or well-being of the alleged victim' noted in prong two. If that were so, prong two would be met in every single SASPA case. That could not have been the Legislature's intention.
>
> [Ibid. (quoting N.J.S.A. 2C:14-16(a)(2)).]

Similarly, under the PDVA, "the Legislature did not intend that the commission of one of the enumerated predicate acts of domestic violence automatically mandates the entry of" a final restraining order. Silver, 387 N.J. Super. at 126-27.

Moreover, the entry of an FPO will always provide a victim with a feeling of safety and security against future contact by a defendant who has violated the

[2] In an unpublished opinion, we affirmed the trial court's ensuing entry of the FPO following the Court's remand. C.R. v. M.T., No. A-2158-21 (App. Div. Jan. 20, 2023) (slip op. at 2). The Court recently granted certification, limited to the application of the second SASPA prong. 254 N.J. 183 (2023).

first SASPA prong. Here, however, plaintiff failed to explain how an FPO was necessary for her safety and well-being, especially in view of the defendant's lack of response to the Facebook invitation after the incident – regardless of who sent it. Notwithstanding that the parties might have incidental contact in the future, there simply is no evidence in the record to demonstrate "the possibility of future risk to the safety or well-being of [plaintiff]" under the second prong.

Affirmed.

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

CLERK OF THE APPELLATE DIVISION