

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0338-23

D.K.,¹

Defendant-Respondent,

v.

J.N.,

Plaintiff-Appellant.

Argued May 22, 2024 – Decided June 6, 2024

Before Judges Vernoia and Gummer.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Gloucester County,
Docket No. FV-08-0226-24.

Lisa G. Nolan argued the cause for appellant
(Klineburger and Nussey, attorneys; D. Ryan Nussey
and Lisa G. Nolan, on the brief).

Respondent has not filed a brief.

¹ We use initials and pseudonyms to identify the parties, their family members, and others named during this matter so as not to disclose the names of the victims and alleged victims of domestic violence. R. 1:38-3(d)(10).

PER CURIAM

Defendant J.N. appeals from an August 31, 2023 final restraining order (FRO) entered against her in favor of plaintiff, D.K., pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. Because the court's finding an FRO is necessary to protect plaintiff from future acts of domestic violence is not supported by sufficient credible evidence, we reverse.

I.

Defendant and plaintiff had a dating relationship and are the parents of a young child. On July 31, 2023, defendant filed a domestic-violence civil complaint against plaintiff. In the complaint she alleged that on July 15, 2023, plaintiff committed the predicate act of assault under the PDVA by grabbing defendant by the throat, "smacking" her on the head, "headbutting" her, "spitting all over her," "stomping on her foot[,] "grabbing" her by the hair, and dragging her by the hair while in defendant's home following a verbal argument. The court issued a temporary restraining order (TRO) against plaintiff.

One week later, on August 7, 2023, plaintiff filed a domestic-violence civil complaint against defendant. In the complaint he alleged that during the July 15, 2023 incident, defendant had assaulted and harassed plaintiff by: blocking plaintiff's attempts to leave the home; throwing a candle, a plastic cup

of water, and a car seat at plaintiff; grabbing plaintiff by the collar and breaking his necklace; punching plaintiff in the back three times; and jumping on plaintiff's back as he attempted to leave the residence. He further asserted he had grabbed defendant in an effort to prevent her from spitting on him. On August 7, 2023, the court issued a TRO against defendant.

The court conducted an evidentiary hearing on the parties' cross-complaints. The court required defendant to first present her evidence because she had filed her complaint first. In response to questioning from her counsel, defendant testified plaintiff was her ex-fiancé and they had a prior dating relationship.

Defendant explained that on July 15, 2023, while she and plaintiff were at a friend's home for a barbeque, plaintiff had taken her cell phone from her hand and used it to speak with a man (Gus) with whom defendant had a prior relationship. According to defendant, after plaintiff had spoken with Gus about his relationship with defendant, plaintiff became angry, yelled and cursed at defendant, and told her she "was worthless and . . . an awful person."

Defendant testified plaintiff had "smacked" her on the head while at the barbeque and later sent text messages to her threatening to kick down the door

of her residence and burn it down. Defendant testified plaintiff's text messages "[s]cared" her.

Defendant explained that later, at her residence, plaintiff "started kicking the door in" and "caused the metal bracket in the door jamb to fall off." Defendant also explained that after plaintiff had gained entry to her residence, he grabbed defendant "by [her] throat to move [her] out of the way," and he "picked up the [television] and slammed it on the ground." Defendant testified that plaintiff also pushed defendant into a wagon and the wagon made a hole in the wall. She further testified plaintiff had become angrier and angrier about the details Gus had shared with plaintiff about Gus's prior relationship with defendant.

Defendant testified she had suffered injuries, including scratch marks and bruises, as a result of plaintiff's actions. Defendant also stated her face had become swollen after plaintiff had "smacked" her. Defendant presented photographs showing her swollen face and redness around her neck. Defendant testified that during the incident at her home, plaintiff had placed his hands around her throat and she "could not breath[e]."

Defendant testified she needed the FRO because she is required to co-parent with plaintiff, and he would therefore have "many more

opportunities . . . to put his hands on [her] again" and abuse her in the presence of the parties' child and outside of the child's presence. Defendant testified plaintiff had previously threatened her in front of their child, in one instance stating he "would send [defendant] where [her] mom's dead dog is."

At the conclusion of the direct examination of defendant, her counsel moved to amend the complaint to allege the predicate acts of harassment and criminal mischief based on the testimony presented. Plaintiff did not object to the request, which the court granted. Plaintiff, who appeared pro se, did not cross-examine defendant.

Plaintiff testified that he and defendant had lived together in defendant's residence, but that in December 2022, he had moved out because he "had cheated on . . . defendant" and "felt like [he] had no part in the relationship." Defendant then changed the locks to the house, and plaintiff did not have a key to the house thereafter.

Plaintiff testified he took defendant to the July 15, 2023 barbeque for a "date night." According to plaintiff, after he had consumed a few beers, defendant gave him her cell phone and he saw that she had been communicating with Gus. Plaintiff explained defendant had told him that she had not been in

contact with Gus for a few months, but the information on her phone showed that was not true and that she had an "ongoing" relationship with him.

Plaintiff testified he then told defendant to leave the barbeque and she refused. Plaintiff explained that defendant sat in the front of the home at which the barbeque was being held while he remained in the back of the home. Plaintiff later went to the front of the home to check on defendant but found her sitting at his car. Plaintiff testified he had entered the car but did not start it because he had been drinking. He testified defendant had jumped on the car and hit its windows. According to plaintiff, he told defendant to get off his car or someone would call the police. Plaintiff testified he had given defendant her things from the car, and then his sister (Kay) arrived and picked up defendant. Plaintiff stated he then returned to the barbeque.

Plaintiff further testified he later went to defendant's home after receiving numerous text messages from her inviting him to do so. When he arrived at the home, the door was locked, and defendant refused to unlock it. Plaintiff testified he then "kicked the door twice," causing it to crack. He texted defendant, explained the door had cracked and he would have Kay's husband Sal "come over and fix it for [her]," and that plaintiff would "just stay [there] until that point."

Plaintiff explained that he "proceeded to get into the house," but defendant had "tried to block [him]" from "grabbing" items—a PlayStation and other things—he said were his. Plaintiff acknowledged he "got mad," punched the television, put a hole in it, and then "slammed it on the ground." Plaintiff denied throwing things or "swing[ing]" at defendant.

Plaintiff testified defendant then blocked the front door to prevent him from leaving, and he stepped on her toe because he did not want to "forcefully move her." According to plaintiff, he then sat on a chair, defendant sat on a couch, and they continued arguing. At that point, Gus called plaintiff and spoke to plaintiff again about his relationship with defendant.

Plaintiff explained he "had gotten aggravated" and "grabbed" defendant "from the side of her neck" and "spit on her." Plaintiff denied applying pressure as he had his hands on her neck. He testified he went into the kitchen and defendant then hit him with a glass candle, punched him in the back three or four times, and threw "things" at him.

Gus again called and told plaintiff "all the details of everything that ha[d] been going on between" defendant and him. According to plaintiff, he attempted to leave the house with the PlayStation, and defendant blocked the door. Plaintiff acknowledged he got "mad again" and "grabbed [defendant] from the

side the same way." Plaintiff denied pushing or applying pressure to defendant as he grabbed her. Plaintiff exited the house, and defendant threw a car seat at him, striking his shoulder area. Plaintiff further testified that defendant had fallen outside the house, and he tried to pick her up by "grabb[ing]" her hair, and she "snatched" his necklace. Plaintiff also acknowledged that he had earlier taken defendant's cell phone and had thrown the phone without damaging it after exiting the house.

Kay and Sal had arrived at the house. Sal repaired the front door after determining plaintiff had "cracked" the door jamb earlier when he had kicked the door. Plaintiff also acknowledged that he had earlier taken defendant's cell phone and had thrown the phone without damaging it after exiting the house.

Plaintiff further testified that while he stood in the house as Sal fixed the door, defendant "crept up behind [him,]" "grabbed [him] by [his] throat with her forearm," and tried to jump on his back "to push [him] out of the house." Plaintiff explained they both fell to the ground, and defendant continued to jump on his back, "trying to push [him] out the door." Plaintiff left the home when the front door was fixed.

Following the completion of plaintiff's testimony on defendant's complaint, which included cross-examination by defendant's counsel, the court

proceeded with the presentation of evidence on plaintiff's complaint against defendant. Plaintiff reiterated the version of the events to which he had previously testified. During his testimony, he explained that he had learned that following the issuance of the TRO against defendant, she viewed pictures he had posted on his social media Snapchat account.

During defense counsel's cross-examination, plaintiff admitted to kicking the door of house because he was annoyed—and then enraged—because he wanted to retrieve his items. Plaintiff also admitted to punching and then smashing the television, spitting at defendant, grabbing her by the hair to lift her up from the ground, and grabbing her by the neck. Plaintiff also testified he was "not afraid of [defendant] at the moment."

Plaintiff also called Kay as a witness. Kay testified that after she and Sal arrived at defendant's home, and as Sal was repairing the front door, plaintiff had obtained his belongings from the home and was "waiting until the door was fixed." Kay explained that defendant had "decided she was going to try to shove [plaintiff] out the door." Kay testified defendant "wanted" plaintiff "to leave" and had "grabbed" plaintiff by the arm "to kind of shove . . . him out the door" while telling "him to leave." Plaintiff then "shove[d] defendant off," causing them both to fall to the floor.

Kay further explained that after plaintiff and defendant were separated, plaintiff changed his shirt and defendant "grabbed him to shove him again," causing them to fall a second time. According to Kay, "[a]fter everything was done," she, Sal, and plaintiff left, and defendant "locked the door behind [them]."

During cross-examination, Kay explained defendant wanted plaintiff to leave her home, but plaintiff said he would not leave until the door was fixed. Kay testified both times defendant had told plaintiff to leave her home "she grabbed him by the arm" and each time, plaintiff refused to leave.

Following the presentation of the evidence, the court rendered its decision from the bench. The court found plaintiff and defendant were equally credible witnesses. The court determined that following the argument at the barbeque, defendant had asked plaintiff to come to her home, but when plaintiff arrived, defendant "did not willingly let him in."

The court further found plaintiff kicked the door and caused it to break, and defendant then let plaintiff into the house. The court also detailed plaintiff's admissions that he had grabbed defendant by the neck, stomped on her foot, and spit on her because he was angry about what he had learned about her relationship with Gus. Additionally, the court found credible plaintiff's

testimony that defendant had assaulted him by throwing objects at him and by twice "jump[ing] on his back in an effort to have him leave the residence."

The court concluded that each party had committed the predicate act of assault on the other. The court found defendant had committed an assault by grabbing plaintiff, throwing things at him, and spitting on him. The court determined plaintiff had assaulted defendant by grabbing her by the neck, stomping on her foot and causing injury, and spitting on her. The court also determined plaintiff had committed the predicate act of criminal mischief by kicking and causing damage to the door.

The court also concluded that each party needed an ongoing restraining order against the other. The court reasoned that defendant needed an FRO because the gravity of plaintiff's actions "would leave a reasonable person in fear of ongoing contact" with him.

The court found plaintiff required an FRO against defendant because "there's a strong likelihood that [defendant] would continue to reach out." The court found that defendant had "sought to engage [plaintiff] through social media" following the issuance of the TRO against her, and therefore defendant had demonstrated "an effort on her part to communicate going forward."

The court entered FROs against plaintiff and defendant. Defendant appealed from the court's order imposing the FRO on her.

Following the filing of defendant's appeal, the trial court issued a written amplification of its decision pursuant to Rule 2:5-1. In a somewhat confounding expansion of its prior bench opinion, the court contradicted its prior determination defendant had been a credible witness and instead found defendant had "lacked candor and transparency during her testimony" because defendant had failed to disclose she had invited plaintiff to her home and had not admitted during her testimony that she had physically engaged with plaintiff during the incident.

Despite its initial factual finding defendant had engaged physically with plaintiff "in an effort to have him leave the residence," plaintiff's admission he did not intend to leave defendant's home until the door was fixed, and plaintiff's and Kay's testimony defendant had grabbed plaintiff by the arm to force him out of the door of the home, the court determined for the first time in its amplification that defendant had assaulted plaintiff by "continu[ing] to aggress towards plaintiff" as he "was trying to exit and separate himself from her."

Moreover, the court abandoned its initial conclusion that plaintiff needed an FRO because defendant might continue to attempt to communicate with

plaintiff and found for the first time that plaintiff needed an FRO because of defendant's "demonstrated lack of self-control, the degree of volatility amongst the parties," and because their child rendered them "inextricably intertwined."

Plaintiff did not appeal from the FRO entered against him and did not participate in this appeal. We therefore limit our analysis to the arguments presented on defendant's behalf.

II.

Generally, "findings by a trial court are binding on appeal when supported by adequate, substantial, credible evidence." Gnall v. Gnall, 222 N.J. 414, 428 (2015) (citing Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). "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.'" C.C. v. J.A.H., 463 N.J. Super. 419, 428 (App. Div. 2020) (quoting J.D. v. M.D.F., 207 N.J. 458, 482 (2011)). "[D]eference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" MacKinnon v. MacKinnon, 191 N.J. 240, 254 (2007) (quoting Cesare, 154 N.J. at 412).

We will not disturb a trial court's factual findings unless "'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. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). We do not accord such deference to legal conclusions, which we review de novo. Thieme v. Aucoin-Thieme, 227 N.J. 269, 283 (2016).

The purpose of the PDVA is to "'assure the victims of domestic violence the maximum protection from abuse the law can provide.'" G.M. v. C.V., 453 N.J. Super. 1, 12 (App. Div. 2018) (quoting State v. Brown, 394 N.J. Super. 492, 504 (App. Div. 2007)); see also N.J.S.A. 2C:25-18. Consequently, "[o]ur law is particularly solicitous of victims of domestic violence," J.D., 207 N.J. at 473 (alteration in original) (quoting State v. Hoffman, 149 N.J. 564, 584 (1997)), and we "liberally construe[] [the PDVA] to achieve its salutary purposes," Cesare, 154 N.J. at 400.

When determining whether to grant an FRO pursuant to the PDVA, the judge must make two determinations. See Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). Under the first Silver prong, "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:25-19[(a)] has occurred." Id. at 125 (citing N.J.S.A. 2C:25-29(a)).

If the court finds the defendant committed a predicate act of domestic violence, then the second inquiry "is whether the court should enter a restraining order that provides protection for the victim." Id. at 126. Although the second inquiry "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:25-29[(a)](1) to -29[(a)](6), to protect the victim from an immediate danger or to prevent further abuse." Id. at 127.

"[T]he Legislature did not intend that the commission of one of the enumerated predicate acts of domestic violence automatically mandates the entry of a domestic violence restraining order." Id. at 126-27. In determining whether an FRO is necessary, the factors the court should consider include, but are not limited to:

- (1) The previous history of domestic violence between the plaintiff and defendant, including threats, harassment and physical abuse;
- (2) The existence of immediate danger to person or property;
- (3) The financial circumstances of the plaintiff and defendant;

- (4) The best interests of the victim and any child;
- (5) In determining custody and parenting time the protection of the victim's safety; and
- (6) The existence of a verifiable order of protection from another jurisdiction.

[N.J.S.A. 2C:25-29(a).]

Although the court is not required to incorporate all the factors in its findings, "the [PDVA] does require that 'acts claimed by a plaintiff to be domestic violence . . . be evaluated in light of the previous history of violence between the parties.'" Cesare, 154 N.J. at 401-02 (quoting Peranio v. Peranio, 280 N.J. Super. 47, 54 (App. Div. 1995)). Whether a restraining order should be issued depends on the seriousness of the predicate offense, on "the previous history of domestic violence between the plaintiff and defendant including previous threats, harassment and physical abuse," and on "whether immediate danger to the person or property is present." Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. 1995).

The court also must exercise care to "distinguish between ordinary disputes and disagreements between family members and those acts that cross the line into domestic violence." R.G. v. R.G., 449 N.J. Super. 208, 225 (App. Div. 2017). The PDVA is not intended to encompass "ordinary domestic contretemps." Corrente, 281 N.J. Super. at 250 (emphasis added). Rather, "the

[PDVA] is intended to assist those who are truly the victims of domestic violence.'" Silver, 387 N.J. Super. at 124 (quoting Kamen v. Egan, 322 N.J. Super. 222, 229 (App. Div. 1999)). The second Silver prong "requires the conduct must [be] imbued by a desire to abuse or control the victim." R.G., 449 N.J. Super. at 228 (citing Silver, 387 N.J. Super. at 126-27).

Defendant argues the court erred by finding she committed the predicate act of assault against plaintiff. She does not dispute there is sufficient credible evidence supporting the court's finding she spit at plaintiff, threw things at him, placed him in a chokehold, and pushed him. She ignores that the evidence—plaintiff's testimony—the court found credible also established defendant threw a glass candle at plaintiff and punched him in the back three or four times, and later, after he had exited the home, threw a car seat at plaintiff, which hit his shoulder area.

An assault is a predicate act of domestic violence under the PDVA. N.J.S.A. 2C:25-19(a)(2). Pertinent here, an assault is committed where a person, "[a]ttempts to cause or purposely, knowingly, or recklessly causes bodily injury to another." N.J.S.A. 2C:12-1(a)(1). "Bodily injury" is defined as "physical pain, illness or any impairment of physical condition." N.J.S.A. 2C:11-1(a).

Defendant argues the court erred by finding she had committed an assault because of the context in which her assaultive actions were taken. Based on review of the record, we reject defendant's argument because there is sufficient credible evidence supporting the court's finding defendant committed the predicate act of assault.

It may be reasonably inferred defendant threw the glass candle and multiple punches—which plaintiff explained landed on his back—and the car seat in an attempt to cause bodily injury. The evidence also established defendant grabbed plaintiff multiple times and shoved him causing them both to fall to the ground. See, e.g., R.G., 449 N.J. Super. at 228 (finding evidence showing a party repeatedly shoved another during a "mutual, heated exchange" was sufficient to prove an assault and finding the intent to cause bodily injury where the evidence allows an inference that the "conduct was purposeful."); see also N.J. v. Bazin, 912 F. Supp. 106, 115 (D.N.J. 1995) ("Even the slightest physical contact, if done intentionally, is considered a simple assault under New Jersey law."). Thus, the evidence supports the court's determination defendant committed the predicate act of assault during the July 15, 2023 incident at her home. See Silver, 387 N.J. Super. at 125-26.

Defendant also argues the court erred by finding plaintiff had presented sufficient evidence establishing an FRO "is necessary to protect plaintiff from immediate danger or further acts of domestic violence." Id. at 128. Defendant argues the court's finding an FRO is necessary is unsupported by the evidence and otherwise contravenes the applicable legal principles.

Defendant correctly notes that in its initial decision, the court based its determination an FRO was necessary to protect plaintiff based solely on its finding that defendant had "sought to engage [plaintiff] through social media" following the issuance of the TRO against her, and therefore, defendant had demonstrated "an effort on her part to communicate going forward."

Although the court did not make any factual findings supporting that conclusion, the only evidence presented concerning social media was plaintiff's testimony that defendant had looked at his social media page on Snapchat following the issuance of the TRO. Plaintiff did not explain how many times defendant had allegedly done so, and he did not provide any evidence that in doing so, defendant had communicated or attempted to communicate with him, or had violated the TRO. Thus, the court's finding defendant "sought to engage" and therefore might continue to attempt to communicate with plaintiff in the

future is wholly unsupported by the record and did not support its determination under Silver's second prong that an FRO is necessary to protect plaintiff.

In its amplification, the court abandoned its reliance on the limited evidence concerning defendant's viewing of plaintiff's Snapchat postings and instead more generally determined an FRO was necessary to protect plaintiff because defendant "lack[ed] self-control" and the parties' lives were intertwined because they had a child together. The court did not make a single finding of fact supporting its determination defendant lacked self-control beyond the actions she took during the incident in which plaintiff had kicked and damaged defendant's front door, angrily entered defendant's home, punched and smashed the television, grabbed defendant by the neck multiple times, and insisted on staying in defendant's home even though she had physically attempted to push him out the door.

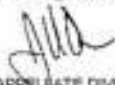
The court did not make any findings supporting its determination defendant lacked self-control such that she posed a threat to commit future acts of domestic violence against plaintiff. The court merely found defendant committed the predicate act of simple assault without making any findings, or citing to any evidence, supporting its conclusory determination defendant's purported lack of self-control necessitated entry of an FRO against her. See

R.G., 449 N.J. Super. at 228 ("Commission of a predicate act is necessary, but alone insufficient, to trigger relief provided by the [PDVA].").

The court did not consider or make any findings under the statutory factors, see N.J.S.A. 2C:25-29(a), pertinent to a determination of whether an FRO was necessary, see C.C., 463 N.J. Super. at 434. Plaintiff also did not present any evidence defendant had committed any prior acts of domestic violence. And, plaintiff testified during the FRO hearing, he had no fear of defendant at that time.

The court's conclusory findings supporting its determination an FRO is necessary to protect plaintiff from future acts of domestic violence are not supported by sufficient credible evidence. See Gnall, 222 N.J. at 428. To be sure, defendant committed the predicate act of assault during the incident, but the court's vague, contradictory, and conclusory findings, and the mere fact that the parties have a child together, do not support the issuance of an FRO against defendant under Silver's second prong. 387 N.J. Super. at 127. We therefore reverse the FRO entered against defendant.

Reversed.

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

CLERK OF THE APPELLATE DIVISION