

RECORD IMPOUNDED

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SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2337-22

F.K.,¹

Plaintiff-Respondent,

v.

C.B.,

Defendant-Appellant.

Submitted April 17, 2024 – Decided June 4, 2024

Before Judges Currier and Firko.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Camden County,
Docket No. FV-04-1986-23.

David T. Garnes, LLC, attorneys for appellant (David
Thornton Garnes, on the brief).

Respondent has not filed a brief.

PER CURIAM

¹ We use initials to protect the privacy of the parties in these proceedings. R. 1:38-3(d)(10).

Defendant appeals from the March 15, 2023 final restraining order (FRO) entered against him under the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35, after a trial. On appeal, defendant contends the evidence does not support the court's finding of a predicate act of domestic violence to support the entry of an FRO. We agree. In addition, the court failed to make any findings whether plaintiff needed an FRO for her safety as required under Silver v. Silver, 387 N.J. Super. 112, 126-27 (App. Div. 2006). Therefore, we reverse and vacate the FRO.

We derive the following facts from the trial testimony. The parties were self-represented. Although there was a discussion of whether plaintiff wanted a Creole interpreter, she stated she wanted to proceed with the hearing. The record does not reflect plaintiff had any difficulty understanding the judge's questions and the judge did not pursue the issue further.

Plaintiff testified the parties were married in 2018 and had three small children. She stated after defendant came home from work on December 12, 2022, he pushed her in the hall. She was not injured. She also said he "pulled" her.

According to plaintiff, defendant had made statements at an undefined time asking her not to leave him and that he would kill her. The court permitted

plaintiff to play a one-minute video to support her allegation. The only discernible words on the video were plaintiff saying, "[K]ill me or shoot me." Defendant was not speaking English in the video. Nevertheless, the court accepted plaintiff's representation of what defendant was saying. Plaintiff also stated she had more evidence on another phone, but defendant had taken that phone from her.

After the court asked plaintiff why she "file[d] for a restraining order," she said, "Because he abandoned me with the kids; leave me in the house." Plaintiff later stated she and defendant were both working and continued to both pay the mortgage on the home.

During the hearing, the court asked plaintiff: "So you've been assaulted by . . . defendant on numerous occasions?" She replied: "Yes, sir." When plaintiff said defendant was out of the house, the court asked: "You just want him to stay out of the house?" Plaintiff responded "Yes."

During defendant's testimony, he stated the parties were never married. They were engaged, had children, and lived together but did not get married. Defendant denied ever physically abusing plaintiff. He said plaintiff was mad because defendant's mother was living in the house with them and plaintiff

wanted the mother to leave. After plaintiff called the police about the mother, defendant moved out of the house with his parents.

When the court asked defendant about the video, he said he was sitting in his living room talking to his uncle when plaintiff began the recording and said, "[O]h, you want to kill me? You want to kill me, right?" Defendant said he left the house the same day plaintiff called the police about his mother, which was several weeks before plaintiff applied for the temporary restraining order (TRO). He also denied ever taking plaintiff's phone.

In its oral decision issued at the close of the thirty-five-minute hearing, the court stated:

The question is one of credibility. Whether there's continuing annoying conduct, whether there is assaultive behavior. I find that there was assaultive behavior. I find that the plaintiff is a very credible witness. She described the situation adequately, appropriately, in a credible fashion. I find that she's been assaulted, that the defendant took her cell phone. . . . [B]ut clearly I find that there was . . . abusive behavior, the abusive behavior continues, and that . . . plaintiff is entitled to a[n FRO].

The court did not discuss the final order in any respect with defendant. The court told defendant to speak with his father who would talk to plaintiff about making arrangements to see the children.

On appeal, defendant asserts the record does not support the court's finding of an act of domestic violence and the court did not make any findings as to whether plaintiff needed the protection of an FRO.

In reviewing a court's decision to grant or deny an FRO, "we accord great deference to discretionary decisions of Family Part judges," Milne v. Goldenberg, 428 N.J. Super. 184, 197 (App. Div. 2012), in recognition "of the family courts' special jurisdiction and expertise in family matters." N.J. Div. of Youth & Fam. Servs. v. M.C. III, 201 N.J. 328, 343 (2010) (quoting Cesare v. Cesare, 154 N.J. 394, 413 (1998)). "[F]indings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Cesare, 154 N.J. at 411-12 (citing Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974)). However, "[a] trial court's interpretation of the law and the legal consequences that flow from established facts are not entitled to any special deference." Hitesman v. Bridgeway, Inc., 218 N.J. 8, 26 (2014) (quoting Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

The entry of a domestic violence restraining order requires a trial court to make certain findings. See Silver, 387 N.J. Super. at 125-27. 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; see, e.g., N.J.S.A. 2C:25-29(a). If a trial court finds a defendant has committed a predicate act of domestic violence, it next must determine if a restraining order is needed for the victim's protection. Silver, 387 N.J. Super. at 126.

The record does not include the TRO. Therefore, we do not know what predicate acts of domestic violence were alleged or what the entry of the TRO was based on.

The court found there was "assaultive behavior." That is not an enumerated predicate act under the PDVA. The court then stated it found plaintiff was assaulted and defendant took her cell phone. If defendant took plaintiff's cell phone, that is not evidence of assault which is the only articulated finding of a domestic violence act. In addition, plaintiff played a video on her phone for the court. So, there is inconsistency regarding her inability to present any further proof supporting her allegations.

We consider then whether plaintiff presented sufficient proofs for the court to find defendant assaulted her. Under N.J.S.A. 2C:12-1(a), "[a] person is guilty of assault if" they "(1) [a]ttempt[] to cause or purposely, knowingly or recklessly cause[] bodily injury to another; or (2) [n]egligently cause[] bodily

injury to another with a deadly weapon; or (3) [a]tttempt[] by physical menace to put another in fear of imminent serious bodily injury." Plaintiff's only testimony about a predicate act was defendant pushed her. She was not injured. There was no further testimony demonstrating defendant intended to cause her any bodily injury in any manner. In fact, her testimony was only about the one push. It was the court who asked plaintiff if she was assaulted numerous times. She said, "Yes." There was no other testimony or details. In addition, there was no evidential support for the court's finding that "the abusive behavior continues." To the contrary, the parties had not seen one another or been in contact for months prior to the FRO hearing.

Plaintiff has not shown, by a preponderance of the credible evidence, a predicate act under the PDVA to establish the first Silver prong. She told the court she just wanted defendant out of the house. That is not a basis for a FRO and the serious ramifications of the order.

Moreover, the court did not explain why an FRO was necessary "to protect the victim from an immediate danger or to prevent further abuse" following an assessment "of the factors set forth in [N.J.S.A. 2C:25-29(a)(1) to (6)]." Silver, 387 N.J. Super. at 127.

We reverse and vacate the March 15, 2023 FRO.

