RECORD IMPOUNDED

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3273-22

S.G.G.,[1]

Plaintiff-Appellant,

v.

J.D.M.,

Defendant-Respondent.

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Submitted May 6, 2024 – Decided June 11, 2024

Before Judges Berdote Byrne and Bishop-Thompson.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Ocean County, Docket No. FV-15-1656-23.

Lederberger Law, attorneys for appellant (Leah Lederberger, on the brief).

Respondent has not filed a brief.

PER CURIAM

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[1] We use initials and pseudonyms to protect the parties' privacy and preserve the confidentiality of these proceedings. R. 1:38-3(d)(9) and (10).

Plaintiff S.G.G. appeals from a May 22, 2023 order dismissing her temporary restraining order (TRO) against defendant J.D.M. pursuant to the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35. Following our review of the record and applicable legal principles, we vacate and remand for further proceedings consistent with this opinion.

I.

S.G.G. and J.D.M. were in a relationship beginning in 2008 and share one child, who was age four at the time of the final restraining order (FRO) hearing. The parties ended the relationship prior to plaintiff giving birth. After the birth of their child, continued co-parenting issues led the parties to appear before the Family Part on matters related to custody and parenting time.

S.G.G. obtained a TRO and subsequently an amended TRO on March 23, 2023. The original TRO alleged J.D.M. sent S.G.G. a text message indicating he had knowledge of her location in real time, which prompted S.G.G. to investigate her car, where she discovered a device she believed was a tracking device. She reported the matter to police. The TRO also referenced a history of domestic violence, including J.D.M. forcing his way into her home and making general threats during their relationship.

During the FRO hearing, S.G.G. recounted the events in the TRO. Importantly, for purposes of this appeal, she testified she went to a mechanic to have her car inspected for tracking devices. The mechanic located a device from a company called LandAirSea Systems, Inc. Plaintiff's counsel attempted to introduce documents subpoenaed from LandAirSea by the Lakewood Police Department. The records allegedly contained the name, username, email address, phone number, and credit card information regarding the device, that signified ownership, and GPS tracking information. To support the admissibility of those documents as records of regularly conducted activity (business records) pursuant to N.J.R.E. 803(c)(6), counsel submitted a certification by LandAirSea's custodian of records or an employee "otherwise qualified to administer the records" for the company. The certification stated the records were "true and correct copies[;]" "made at or near the time" by, or from information provided by, "a person with knowledge of th[o]se matters; and . . . made and kept by the regularly conducted business activity as a regular practice."

The court found the documents inadmissible. It determined a custodian of record must be physically present to certify the records were kept in the ordinary course of business. It also questioned the origin of the documents

because they came from a private company and not a government agency. Regarding the certification, the court commented the document was a photocopy without an official seal, although there was a notary seal, and it had "no way of know[ing] who [the signatory] is." The court noted there was no person "to authenticate the fact that a subpoena was sent and by whom and under what circumstances and for what purpose." Although plaintiff's counsel offered to produce the Lakewood detective that issued and obtained the subpoena and the documents, plaintiff ultimately proceeded to trial, preserving her continued objection to the court's ruling.

Without the benefit of the records from LandAirSea, S.G.G. testified to three incidents in a two-month span she believed demonstrated J.D.M. had knowledge of her location he would not have otherwise had unless he was tracking her. J.D.M. did not testify.

The trial court ultimately did not grant the FRO and dismissed plaintiff's complaint. As to the first prong of Silver,[2] it explained that S.G.G. had not established J.D.M. committed the predicate act of stalking.[3] The court instead found the parties' relationship amounted to "ongoing domestic contretemps"

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[2] Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006).

[3] N.J.S.A. 2C:12-10.

between two parents. It concluded there was nothing in evidence suggesting defendant was tracking plaintiff's location. This appeal followed.

II.

A trial court's determinations regarding the admissibility of evidence are reviewed for abuse of discretion. State v. R.Y., 242 N.J. 48, 64 (2020). An abuse of discretion "arises when a decision is 'made without a rational explanation, inexplicably departed from established policies, or rested on an impermissible basis.'" Id. at 65 (quoting Flagg v. Essex Cnty. Prosecutor, 171 N.J. 561, 571 (2002)). However, we review an evidentiary decision de novo "where the trial court fails to apply the proper legal standard in evaluating the admissibility of evidence." State v. Trinidad, 241 N.J. 425, 448 (2020).

"Hearsay [documents are typically] not admissible except as provided by [the New Jersey Rules of Evidence] or by other law." N.J.R.E. 802. One such exception is the records of regularly conducted activity (the business record exception), N.J.R.E. 803(c)(6), which permits:

> [a] statement contained in a writing or other record of acts, events, conditions, and, subject to Rule 808, opinions or diagnoses, made at or near the time of observation by a person with actual knowledge or from information supplied by such a person, if the writing or other record was made in the regular course of business and it was the regular practice of that business to make such writing or other record.

"To qualify as a business record under N.J.R.E. 803(c)(6), a writing must meet three conditions: it must be made in the regular course of business, within a short time of the events described in it, and under circumstances that indicate its trustworthiness." State v. Kuropchak, 221 N.J. 368, 387-88 (2015).

S.G.G. argues the trial court erred in finding the documents subpoenaed from LandAirSea, which purportedly demonstrate ownership and usage of the device by defendant, were inadmissible. She contends the court's decision is in contravention of our case law, which explicitly allows the admission of business records, N.J.R.E. 803(c)(6), if accompanied by sufficient certification, even in the absence of testimony from a custodian of records. S.G.G. further argues the court improperly "discounted the [c]ertification of [r]ecords out of hand" instead of making findings about the reliability of the evidence.

We agree. Although we decline to address the merits of whether the proffered documents are admissible, we conclude the trial court abused its discretion by rejecting the proposed evidence for failure to have a testifying witness, and in failing to conduct a Rule 104 hearing regarding the reliability of the proposed evidence and its admissibility. Despite the records being accompanied by a notarized certification outlining compliance with the

business exception rule, the court refused to consider their admission, or any testimony regarding the facts contained therein, because the custodian of the records was not present in court and subject to cross-examination.

N.J.R.E. 803(c)(6) does not require a custodian or other qualified witness to testify that the records were (1) made in the regular course of business; (2) prepared contemporaneously or close in time to the act; and (3) collected reliably. A certification is sufficient.

"Before a writing offered as a business record may be admitted, the proponent must authenticate the record" which "requires only a prima facie showing of authenticity of the proffered record." State v. Berry, 471 N.J. Super. 76, 128 (App. Div. 2022) (first citing State v. Marrocelli, 448 N.J. Super. 349, 364 (App. Div. 2017), and then citing State v. Tormasi, 443 N.J. Super. 146, 156–157 (App. Div. 2015)), aff'd in part as modified, rev'd in part on other grounds, 254 N.J. 129 (2023). "The record may be authenticated by direct or circumstantial proof" and the requirements are flexible. Ibid. It is sufficient to present a certification from the records "custodian or other qualified witness" for authenticity purposes. N.J.R.E. 803(c)(6), 1991 Supreme Court Committee Comment; see Berry, 471 N.J. Super. at 127-28; see also Liptak v. Rite Aid, Inc., 289 N.J. Super. 199, 219 (App. Div. 1996)

(While the unavailability of the recorder of a business record was a requirement under the common law, there is no such requirement pursuant to N.J.R.E. 803(c)(6)).

The trial court was rightfully concerned with whether the documents were copies and not "the original writing" in accordance with N.J.R.E. 1002. However, because the record before us does not provide sufficient information from which we may assess whether the records were offered in accordance with N.J.R.E. 1002, we leave that issue to be addressed on remand.

Accordingly, we reverse and remand for a R. 104 hearing regarding the potential admissibility of the LandAirSea records and a new trial. We vacate the May 22, 2023 order and reinstate the March 8, 2023 TRO pending the outcome of the remand proceedings. Because we have ordered a new trial and the judge who presided over the initial trial made credibility determinations, the retrial on remand shall be assigned to a different judge. See Entress v. Entress, 376 N.J. Super. 125, 133 (App. Div. 2005) (determining that "[i]n an abundance of caution" a matter remanded should be assigned to "a different judge for the plenary hearing to avoid the appearance of bias or prejudice based on the judge's prior involvement with the matter and his expressions" of

doubt as to plaintiff's credibility). We express no opinion regarding the outcome of the final restraining order hearing.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.