SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0849-08T1

L.B.,

Plaintiff-Respondent,

v.

M.P.,

Defendant-Appellant.

Submitted November 4, 2009 - Decided January 5, 2010

Before Judges Lihotz and Ashrafi.

On appeal from Superior Court of New Jersey, Chancery Division, Family Part, Essex County, Docket No. FV-07-626-09.

Dell'Italia, Affinito & Santola, attorneys for appellant (John P. Dell'Italia, on the brief).

Law Offices of Michael A. DeMiro, Jr., attorneys for respondent (Michael A. DeMiro, Jr., on the brief).

PER CURIAM

Defendant appeals from a final restraining order under the Prevention of Domestic Violence Act, N.J.S.A. 2C:25-17 to -35, entered on August 27, 2008, after trial. He contends that his Sixth Amendment rights were violated because he did not voluntarily waive his right to counsel and that plaintiff's

evidence failed to establish a predicate act of domestic violence. We affirm.

Plaintiff and defendant had a dating relationship for about fifteen months. According to plaintiff's testimony at trial, she ended the relationship on June 30, 2008. During the next several days, they spoke on the phone, and plaintiff allowed defendant to come to her condominium to talk in an effort to part peacefully. On July 5, 2008, however, plaintiff told defendant she did not want any further contact with him. Later that day, he repeatedly tried to talk to her in person or over the telephone. She resisted and finally told him that she felt scared by his pursuit and she would call the police if he did not stop. The next day, she changed the locks on her condominium.

A few days later, defendant called the dental office where plaintiff worked, but she did not want to speak with him. When he called a second time, she spoke to him, declined his invitation to lunch, and told him she did not want to speak with him again. His contacts persisted by phone and in person outside her home. She again told him that he was scaring her and she had no choice but to call the police if he continued.

Over the next several days, she spoke about the incidents to her parents, who lived outside New Jersey, and to other

family members. On July 15, her father came to New Jersey and accompanied her to the police station, where she filed a domestic violence complaint and obtained a temporary restraining order.

Plaintiff and defendant appeared in the Superior Court on July 24, 2008, for a hearing on her complaint. Plaintiff did not have a lawyer but had discussed the matter with a family lawyer and was accompanied to court by her father. Attorney Anthony Alfano represented defendant for the hearing. Alfano spoke to plaintiff and her father and also spoke on the phone to their family attorney. On behalf of his client, Alfano promised that defendant would have no further contact of any kind with her. Plaintiff agreed to drop her complaint with that understanding.

The parties appeared before a Family Part judge to dismiss the complaint and to vacate the temporary restraining order. Alfano assured the judge and plaintiff that defendant understood that if he "shows his face anywhere, 'anywhere,' anyplace within the vicinity of [plaintiff], she will not hesitate, obviously, to file a new restraining order . . . ." He also said:

> I'm also putting on the record that he has no reason to be anywhere near her. He doesn't have a place of employment or anything which is within close proximity to where she lives or where she works. So there's no reason for her — for my client to

have any contact or to be anywhere near her.

Relying on these representations, plaintiff voluntarily dismissed her domestic violence complaint and the temporary restraining order. In accepting the dismissal, the judge explained to plaintiff that in the future she would not be able to re-instate the same complaint if defendant failed to abide by his promises. He also said that the prior acts would be considered in determining whether she is entitled to a restraining order if any new acts of domestic violence were to occur. Plaintiff said she understood. When the judge asked defendant whether he had any questions, he answered no.

Fifteen days after dismissal of the first complaint, on August 8, 2008, defendant contacted plaintiff. He called and left a message on her home phone that a package had arrived for her at his residence and he wanted instructions about what he should do with it. She did not respond to the message. She testified at trial that she had never lived at his residence or used his address. She was not expecting anything at his address, and, if a package had in fact arrived for her at defendant's address, she did not care what he did with it.

On August 19, defendant called her dental office and spoke to the receptionist, who testified at trial. He said he was driving by the office and noticed that plaintiff's car was not

in the parking lot. He wanted to know if she was ill or otherwise had a misfortune. The receptionist confirmed that plaintiff was all right. Defendant then asked the receptionist for her personal cell phone number so that he could call again at a different number to discuss plaintiff further. The receptionist refused to give him another number.

The next day, August 20, defendant left a message on plaintiff's cell phone. He said he wanted to give her the package that had arrived and some additional things. He also spoke about not seeing her car at the office. The following day, plaintiff went to the police and filed another domestic violence complaint alleging harassment. She obtained a new temporary restraining order.

At trial, defendant did not deny the contacts on August 8, 19, and 20, but testified that a gift package had arrived for plaintiff at his residence and he was only trying to get it to her. He testified that his driving by her office was inadvertent; he had gone to the area for another purpose and happened to see that her car was not at her office and became worried about her well-being.

The trial judge concluded that the facts established harassment and granted plaintiff a final restraining order.

On appeal, defendant argues first that his Sixth Amendment rights were violated when the trial judge refused to grant his request for adjournment of the trial so that his attorney could attend. The simple answer to this contention is that assistance of counsel guaranteed by the Sixth Amendment for criminal matters does not apply to a civil matter. See Lassiter v. Dep't of Social Servs., 452 U.S. 18, 25, 101 S. Ct. 2153, 2158, 68 L. Ed. 2d 640, 648 (1981) (right to appointed counsel "has been recognized to exist only where the litigant may lose his physical liberty if he loses the litigation"); Pasqua v. Council, 186 N.J. 127, 143 (2006) (right to counsel exists in civil child support matter if defendant may be incarcerated for non-payment). A domestic violence complaint under N.J.S.A. 2C:25-28 and -29 is a civil matter that does not entail incarceration. Only if a defendant violates a restraining order is he subject to incarceration for contempt under N.J.S.A. 2C:25-30 and 2C:29-9 and, at that time, is entitled to counsel. See State v. Ashford, 374 N.J. Super. 332, 337 (App. Div. 2004).

Nevertheless, a civil litigant has rights to a fair hearing protected by the due process clause of the Fourteenth Amendment. See A.B. v. Y.Z., 184 N.J. 599, 604 (2004); H.E.S. v. J.C.S., 175 N.J. 309, 321 (2003). Defendant's argument would more aptly be stated as a due process challenge to the trial court's denial

of adjournment because his attorney could not attend the hearing.

A trial court has discretion to grant or deny adjournments. State v. D'Orsi, 113 N.J. Super. 527, 532 (App. Div. 1970), certif. denied, 58 N.J. 335 (1971). We reverse for failure to grant an adjournment only if the court has abused its discretion "causing defendant a 'manifest wrong or injury'." State v. McLaughlin, 310 N.J. Super. 242, 259 (App. Div.) (quoting State v. Furguson, 198 N.J. Super. 395, 402 (App. Div.), certif. denied, 101 N.J. 266 (1985)), certif. denied, 156 N.J. 381 (1989).

On the trial date, August 27, 2008, plaintiff appeared for trial with an attorney. At about noon, the judge called the case to inquire whether counsel wished to return at 1:30 for trial or adjourn to another date. Plaintiff's attorney said he was ready for trial, he and his client had been waiting, and they wished to return at 1:30. Defendant had noted his presence but did not request an adjournment or say anything else.

At 1:30, before another judge, defendant asked for an adjournment because his attorney was occupied elsewhere and could not be present for the trial. Counsel for plaintiff objected to an adjournment and informed the judge that defendant had not asked for an adjournment earlier when he had the

opportunity. He said that delay would unfairly cost his client the expense of his attendance that day, which he said would be $1,600. Before denying defendant's request for an adjournment, the judge asked him whether he was willing to pay plaintiff's expenses in the amount of $2,000. Defendant responded that he would go ahead with the trial without his attorney.

Although the trial judge did not explain the difference between plaintiff's expenses and the amount of reimbursement that he demanded from defendant in exchange for adjournment, we discern no abuse of discretion or violation of due process in denial of defendant's belated adjournment request. Defendant gave no indication that he was willing to reimburse plaintiff any amount for causing her wasted attorney expenses on that day. Also, defendant knew that he could have an attorney to represent him. He had appeared for the July 24, 2008 hearing with an attorney to answer the first complaint. The court received no request before the hearing date for an adjournment to accommodate his attorney's schedule. At the initial call for trial, defendant did not tell the court that his attorney was occupied and could not be ready for trial at 1:30. Denial of an adjournment under these circumstances was not an abuse of the trial court's discretion and did not violate defendant's due process rights.

Defendant contends next that plaintiff did not prove a predicate act of domestic violence to permit entry of a final restraining order.

On appeal of a domestic violence case, we grant substantial deference to the trial court's findings of fact and the conclusions of law based on those findings. In Cesare v. Cesare, 154 N.J. 394, 413, 416 (1998), the Supreme Court placed trust in the "expertise" of Family Part judges to assess evidence of domestic violence and the need for a restraining order. Regarding the function of the appellate court, the Supreme Court held:

> [A]n appellate court should not disturb the "factual findings and legal conclusions of the trial judge unless [it is] convinced that they are so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice."
>
> [Id. at 412 (quoting Rova Farms Resort, Inc. v. Investors Ins. Co., 65 N.J. 474, 484 (1974)).]

Here, the trial court concluded that defendant's attempts to contact plaintiff in August were harassment, in violation of N.J.S.A. 2C:33-4. The court placed particular weight on the fact that defendant had been warned through his own attorney's words at the July 24 hearing, and he had agreed not to have any contact with plaintiff whatsoever.

The harassment statute, N.J.S.A. 2C:33-4, states in relevant part:

> [A] person commits a petty disorderly persons offense if, with purpose to harass another, he:
>
> a. Makes, or causes to be made, a communication or communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm;
>
> . . . .
>
> c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

Defendant argues that his three attempts to contact plaintiff in August cannot be deemed a violation of this statute. He contends that dismissal of the first complaint was not conditional and his July conduct could not be the basis for finding a predicate act of domestic violence.

In accordance with T.M. v. J.C., 348 N.J. Super. 101 (App. Div.), certif. denied, 175 N.J. 78 (2002), the July 24 dismissal of the first complaint was unconditional. Defendant is mistaken, however, in arguing that the judge at the August 27 trial could not take the July events into consideration in determining whether harassment had occurred in August. The domestic violence statute and the cases applying it require that the history of past acts of domestic violence, including

harassment, be considered in determining whether a final restraining order should be entered. N.J.S.A. 2C:25-29a(1); Cesare, supra, 154 N.J. at 401-02; Corrente v. Corrente, 281 N.J. Super. 243, 248 (App. Div. 1995); Peranio v. Peranio, 280 N.J. Super. 47, 54 (App. Div. 1995). Our holding in T.M., supra, 348 N.J. Super. at 106, is not to the contrary. The trial court correctly heard testimony about the events of July 2008 and took that history into account in determining to grant a final restraining order.

In its decision, the court said:

> Under Subsection A of the statute, the Court finds that the defendant engaged in a course of conduct that was likely under the circumstances of this case, likely to cause annoyance and alarm; that he did so repeatedly; and that this conduct continued after a complaint had been filed in the Prevention of Domestic Violence Act and withdrawn by the victim.
>
> The Court reviews the history of this matter as a prior act or acts referencing conduct likely to cause annoyance or alarm. The Court notes that the plaintiff has testified that on repeated occasions, to wit, June 30th, July 5, July 6, July 8, July 10, July 11, July 12, July 15, and continuing upon the withdrawal of the complaint and on July 24, continued communications on August 8, August 19, August 20, all of which the defendant was advised that the victim did not wish to have continuing communication. The pattern of behavior persisted, notwithstanding the requests of the plaintiff. They clearly

> constitute a pattern of activity calculated to cause annoyance and/or alarm.
>
> Accordingly, the Court has made its finding that harassment has been established.

Although the court referred to subsection (a) of the harassment statute, the court's findings used language more consistent with subsection (c), a "course of conduct," "repeatedly," and "pattern of behavior."

In State v. Hoffman, 149 N.J. 564, 575-84 (1997), the Supreme Court discussed the differences between subsections (a) and (c) of the harassment statute. The Court said that "[i]n contrast to subsection (a), which targets a single communication, subsection (c) targets a course of conduct." Id. at 580. Defendant's three attempts to contact plaintiff in August could be viewed as a "course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy" her within the terms of N.J.S.A. 2C:33-4c. We need not decide whether the three attempts in August would have been sufficient evidence of harassment if there had been no prior history of similar conduct. There was a prior history of conduct in July that put the August events into the context of the relationship of these two particular people.

In addition, defendant's unequivocal assurances in court on July 24 that he had "no reason . . . to have any contact or to

be anywhere near her," although not enforceable in the same way as a restraining order, established a heightened standard of conduct for him in relation to plaintiff that was not a factor in the first instances of discord after the break-up. By making those promises, he made a record of his understanding that plaintiff wanted no contact whatsoever with him under any circumstances. The possibility of misunderstanding about the changed boundaries of the relationship was eliminated by the promises defendant made in open court. Considering the history of the break-up, namely, defendant's persistence and refusal to accept plaintiff's repeated declinations and resistance to his efforts during July, the trial judge could reasonably infer from the evidence that, during August, defendant was again engaged in a pattern of alarming conduct or repeated acts likely to alarm or seriously annoy plaintiff.

Relying on Corrente, supra, 281 N.J. Super. at 249, defendant also argues that the record contains no evidence of a purpose to harass on his part, that his purpose was only to forward a package to plaintiff. The trial court could discount defendant's explanations for calling plaintiff and driving past her place of employment in light of his attorney's representations at the July 24 hearing that he had no reason to be anywhere near her or to contact her and that he understood

that "show[ing] his face anywhere . . . within the vicinity of" plaintiff would result in her filing another domestic violence complaint.

Because a defendant is unlikely to admit he had a purpose to harass, that element of a harassment offense is seldom shown through direct evidence. It is usually proven circumstantially. See Hoffman, supra, 149 N.J. at 577 ("A finding of purpose to harass may be inferred from the evidence presented."). Here, a clear understanding of restrictions on his conduct, voluntarily undertaken in exchange for the prior dismissal, provided a significant circumstance tending to prove that defendant's continued efforts to contact plaintiff were done knowing that she would be alarmed and frightened. When a person continues communications, without a legitimate purpose and with knowledge that the communications will have an alarming or annoying effect on the recipient, the person can be said to act with a purpose to harass.

We conclude that the evidence permitted a reasonable inference that the August communications constituted harassment under the statute. The trial court did not abuse its discretion in granting a final restraining order against defendant.

Affirmed.