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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0935-08T1

E.O.,

Plaintiff-Respondent,

v.

K.H.,

Defendant-Appellant.

Submitted November 18, 2009 - Decided December 7, 2009

Before Judges Graves and J.N. Harris.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Passaic County, Docket No. FV-16-000646-09.

Law Offices of Kelly Berton Rocco, attorneys for appellant (Kelly Berton Rocco, on the brief).

Law Offices of Charles F. Ryan, attorneys for respondent (Charles F. Ryan, on the brief).

PER CURIAM

Defendant K.H. appeals a final restraining order (FRO) dated October 2, 2008, granted to his former wife, plaintiff E.O., pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. We affirm.

I.

The parties — parents of two young children — were married for six years and seven months, divorcing on December 5, 2007. The judgment of divorce incorporated the parties' Marital Settlement Agreement (Agreement), which provided:

> The Wife agrees that she shall, upon the completion of her schooling and licensing, seek employment. In the event the Wife does not seek employment, earnings shall be attributed to her for purposes of child support calculations of at (sic) $50,000 per annum. Child support shall be revisited upon the Wife's completion of her present schooling and obtaining employment on a full-time basis but no later than one (1) year, based upon her actual earnings or imputed income of $50,000 if actual earnings don't occur and the Husband's assumed earnings of $100,000 per annum and calculated pursuant to the Child Support Guidelines of each of the parties at that time.
>
> [(Emphasis added.)]

Before the expiration of the one-year period contemplated by the Agreement, defendant became suspicious that plaintiff had already completed her schooling and licensure, or otherwise had obtained full-time employment. On September 23, 2008, in a misguided effort to learn for himself whether plaintiff was gainfully employed on a full-time basis, he followed plaintiff to the Clara Maass Medical Center in Belleville. Plaintiff testified that around 8:00 a.m., as she drove into a parking

space in a parking garage, "a dark blue SUV pulled up behind me." Claiming that her car was now blocked in, she stated:

> I get out of my car. The window rolls down and — and it's [K.H.] with a camera in his hand, a phone in his other hand saying, Hi, [E.]. Oh, you're going to work? I got you now. I know everything about you. I know your every move and everything. He starts taking pictures.
>
> I was so shaken up I dropped my keys. Because he's saying every — reporting every move on the phone to whoever he was speaking with. Oh, she dropped her keys now. Oh, she spilled her coffee now. Every move. I didn't know what to do. I was so shaken up.
>
> Finally, he pulled away, started screaming out his window, laughing. Ha, ha, ha, yeah baby, I got you now. Drove away. I went into work very shaken.

After her workday ended, plaintiff applied for and was granted an ex parte temporary restraining order (TRO) against defendant.

The next day, September 24, 2008, presumably before defendant was served with a copy of the TRO, plaintiff claimed that the following occurred:

> I drove to my boyfriend's work, which is Bloomfield College. And I went down the street, parked my car behind the office building, got out of my car, and I noticed Mr. [H.]'s vehicle — which is not the dark blue SUV. I don't know whose vehicle he was using that day. His vehicle is a — it's like an orange pickup truck.
>
> . . . .
>
> I went into my boyfriend's office building, shaken up again because I didn't know why he was coming down the street following me. My boyfriend came outside. And he — Mr. [H.] drove down the street and just

> slowed down, stared inside. I was right at the door, he stared at me and then proceeded on.

Plaintiff recounted yet another unnerving episode with defendant. She testified that on September 22, 2008, the day before the parking garage incident, as she was leaving her daughter's soccer practice:

> I turned down one street where there are three lanes. I was in the middle lane. He pulled up next to me on the right-hand side, stopped. There were no cars in front of him, but stopped right there. Turned his head to the passenger side window of the car I was driving and looked at me and just screamed, haaaaaaaaaaaa, like as loud as he could.

Finally, plaintiff testified about recurring contacts that occurred between her and defendant about a week before the parking garage incident. Plaintiff claimed that defendant pestered her with several text messages about scheduling issues relating to their children, and told her, "if I [E.O.] don't text him back that he was going to keep texting me until I do respond to him."

When it came time for defendant to testify, he did not deny the essential elements of plaintiff's version of the parking garage encounter. He admitted that he suspected she was working and not telling him, and was frustrated when she refused to respond to his persistent inquiries about her employment status. He testified, "[s]o I said to myself I'm paying well enough

money to know whether she's working, or not. So I decided to follow the one day. And, fair enough, I followed her." Further bolstering plaintiff's version of events, defendant admitted:

> I pulled up behind her, I says got ya (sic). I said I knew you were working. That's it. I drove off. I was — I was talking on the phone with my sister and my lawyer.

Defendant further explained that the reason he was at Bloomfield College the next day was to identify plaintiff's boyfriend so that defendant could confidently go to the Bloomfield police department "to file charges against [E.O.'s] boyfriend for striking my daughter. This is the second time." However, defendant adamantly denied seeing plaintiff[1] on that day and stated, "I didn't follow her."

Defendant explained that his pestering of plaintiff with sending multiple text messages was to try to work out a schedule change to allow their daughter to attend a performance of The Little Mermaid. He admitted that until he received a response from plaintiff, he was going to continue to keep texting her. He claimed, "I just wanted a simple answer."

As for the screaming incident after soccer practice, defendant asserted that although he did raise his voice, it was

[1] Defendant testified, "I drove around to make myself certain it was him. I passed — after I filed the papers and also before, I saw him standing there, I stopped, I looked at him. He seen me. I did not see [E.], at all."

just a playful yell to his children who were in the car with plaintiff:

> When I approached her vehicle, the two windows in the back were down, which is by my kids. They yelled to me Daddy. I yelled [Brooke], [Kelly].[2]

Only the parties testified at trial. They each represented themselves pro se without the assistance of counsel. The trial judge facilitated the presentation of evidence by asking questions during each party's direct examination. At the conclusion of defendant's presentation, and after receiving an affirmative response from defendant to the court's question, "[h]ave you told me everything you want to tell me," the trial judge expressed findings and conclusions, culminating in the issuance of the FRO. Thereafter, the trial judge orally supplemented his determinations on the record.

The court recognized, "[a]s it [is] often the case, it is a classic he said, she said in some respects, but not in others. Because the defendant confirms much of the conduct, he just has a different reason which he puts forth for what he has done." Expressly viewing the dispute through the lens of the PDVA and the harassment statute, N.J.S.A. 2C:33-4, the judge noted the following:

[2] In order to ensure the privacy of the parties and their children, we have replaced the children's names with pseudonyms.

> 1. "[K.H.] pulled into where she was working and blocked her car with his car and had a conversation with her where in effect, in my view, he was taunting her about the fact that he knew she was working where she was working."
>
> 2. "He was gleefully telling someone on the phone exactly what was going on and that she became so unnerved by his conduct that she dropped her coffee and her car keys."
>
> 3. "On September 24th, I find . . . that he followed her on that day . . . [a]nd I believe, frankly, that he did that as part of a course of conduct where he wants to let the plaintiff know that he knows where she is, can find her anytime he wants to."
>
> 4. "[H]e was just going to keep up that texting until it was such an annoyance to her that she had to respond."

The court concluded that harassment of plaintiff was defendant's "game plan." After reciting the elements of harassment that were applicable:[3] "engages in any course of alarming conduct or repeatedly committed acts with purpose to alarm or seriously annoy such other person," the court entered the FRO.

On December 30, 2008, the trial judge amplified his decision pursuant to Rule 2:5-1(b) by orally stating more elaborate findings on the record. The court noted that it considered "[d]efendant's conduct in this matter under appeal as a matter of true consequence." Notwithstanding that defendant's

[3] N.J.S.A. 2C:33-4(c).

purpose in following plaintiff on September 23, 2008, may initially have been valid, the trial court found that "his methods and his actions were in the Court's view harassing, annoying, and alarming." Particularly troubling to the judge was the "blocking her into a parking space with his vehicle. And then both photographing her and verbally taunting her."

Regarding the evidence of defendant's conduct at Bloomfield College on September 24, 2008, the court explained why it was particularly relevant:

> And the court permitted testimony as [to] that event not to show a violation of the order, but to help the Court determine whether the incident of September 23rd, the parking lot incident, was an isolated incident of "following to harass" or was it done with a legitimate purpose.

The court employed the Bloomfield College evidence as part of its credibility evaluation of the parties and to fortify its view "regarding the extent of [d]efendant's conduct vis a vis the [p]laintiff and his ongoing involvement in her life."

When the court amplified its discussion of the text messaging, it indicated that plaintiff had testified to receiving ten[4] text messages and reiterated defendant's

[4] Defendant makes much of the court's seeming factual error of ascribing ten text messages to plaintiff's testimony, instead of the "[h]e sent me about five that day," which she actually (continued)

willingness to keep calling plaintiff until she responded to him. The court noted that in response to its question about the possibility of continuing to text plaintiff fifty times until she responded, defendant affirmatively indicated that he would continue his actions until he received a response.

Lastly, the court found that the credible account of the yelling incident was provided by plaintiff, not defendant. It viewed the incident as important in helping the court,

> "to decide whether the 'following' of the [p]laintiff on the day he confronted her at work to be an isolated incident with a legitimate purpose or part of a pattern of controlling conduct by following her to show her he is in the words he used to her on that day, 'aware of your every move.'"

A fair and balanced reading of the trial judge's amplification demonstrates his primary concentration upon the confrontation at the Clara Maass Medical Center. Secondarily, the court was concerned with the text messaging. He recognized that even if there were legitimate purposes in seeking a child support reduction, in filing a complaint against the former spouse's boyfriend, or in discussing parenting time, the "confrontational taunting display" that emblemized defendant's conduct was inappropriate. Thereafter, the court concluded that

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(continued)
described. We find that this apparent factual error is de minimis and harmless in the totality of the circumstances.

defendant's "actions fit the classic profile of abusive and controlling behavior," and accordingly found such harassment to violate the PDVA, ultimately requiring an FRO.

II.

Our review of a Family Part judge's findings is a narrow one. Cesare v. Cesare, 154 N.J. 394, 411 (1998). We will not "'engage in an independent assessment of the evidence as if [we] were the court of first instance,'" N.J. Div. of Youth & Family Servs. v. Z.P.R., 351 N.J. Super. 427, 433 (App. Div. 2002) (quoting State v. Locurto, 157 N.J. 463, 471 (1999)), and will "not disturb the 'factual findings and legal conclusions of the trial judge unless [we are] 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.'" Cesare, supra, 154 N.J. at 412 (quoting Rova Farms Resort, Inc. v. Investors Ins. Co. of Am., 65 N.J. 474, 484 (1974)). On the other hand, where our review addresses questions of law, a trial judge's findings "are not entitled to that same extent of deference if they are based upon a misunderstanding of the applicable legal principles." Z.P.R., supra, 351 N.J. Super. at 434 (citing Manalapan Realty, L.P. v. Twp. Comm. of Manalapan, 140 N.J. 366, 378 (1995)).

Defendant contends that the FRO must be vacated because the trial court surprised defendant and denied him due process of law when the uncharged incident at Bloomfield College was used against him. Furthermore, defendant argues that the trial court committed several factual errors regarding the text messaging and also erred as a matter of law when it concluded that defendant acted with the purpose to harass plaintiff. Last of all, defendant suggests that the finding of a violation of the PDVA trivializes the lofty purposes of the statutory framework intended by the Legislature. We disagree with all of these contentions and, except for the comments that follow, find them to be of insufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(1)(E).

The Family Part is mandated by statute to proceed in a summary manner in domestic violence cases within ten days of the filing of a complaint. N.J.S.A. 2C:25-29(a). The PDVA "'was enacted with the expressed intent that courts . . . promptly and appropriately offer protection to victims of domestic violence.'" Depos v. Depos, 307 N.J. Super. 396, 399 (Ch. Div. 1997) (quoting Sperling v. Teplitsky, 294 N.J. Super. 312, 318 (Ch. Div. 1996)). The legislative intent for such mandates is to provide the victim with the maximum protection from abuse that the law can provide. N.J.S.A. 2C:25-18. To assure such

protection, the court's response must be deliberate and prompt, because any delay could potentially pose serious and irreversible consequences to the victim. Thus, domestic violence proceedings are speedily convened and swiftly resolved. However, "the ten-day provision does not preclude a continuance where fundamental fairness dictates allowing a defendant additional time[,]" such as when the defendant did not receive meaningful notice and an opportunity to respond to the charges. H.E.S. v. J.C.S., 175 N.J. 309, 323 (2003) (quoting H.E.S. v. J.C.S., 349 N.J. Super. 332, 342-43 (App. Div. 2002)).

Further, given the "'serious consequences to the personal and professional lives of those who are found guilty of what the Legislature has characterized as a serious crime against society[,]'" the court must ordinarily inform the defendant of these consequences and, where required, give defendant a fair opportunity to defend. Franklin v. Sloskey, 385 N.J. Super. 534, 541 (App. Div. 2006) (internal quote omitted) (quoting Bresocnik v. Gallegos, 367 N.J. Super. 178, 181 (App. Div. 2004)).

As we noted in Franklin, "[w]e understand that in a pro se trial a judge often has to focus the testimony and take over the questioning of the parties and witnesses. That should be done in an orderly and predictable fashion however, and not at the

expense of the parties' due process rights." Id. at 543. Although the conduct of the proceedings of the Family Part in this case did not exquisitely track the contours of a perfect trial, defendant received a robust process that fell squarely within the mainstream of fair adjudication.

In this case, when the parties stepped before the trial judge, they were minimally familiar with court processes. They had obtained their divorce less than one year before the FRO hearing. Defendant had filed, and was excited about, his post-judgment motion in the divorce proceeding alleging changed circumstances:

> Okay. the second I found out she was working, I went to the courthouse here, filed motions for — papers, which I'm sure she received already. And — stating that child support should be reevaluated.

Neither side was represented by an attorney, and each presented themselves as the sole witness. The trial court allowed defendant to cross-examine plaintiff, but he demurred. When it came time to address the Bloomfield College incident, defendant was given a full opportunity to explain his position. We find the litigational landscape in which this domestic violence matter was tried to have been entirely unlike the surprise attack that was recounted in Franklin, which defendant touts as dispositive.

In Franklin, among other things, the Family Part issued an FRO against Franklin, the putative victim, because he consented to one during the stress of the hearing, without there ever having been a complaint filed, or charges of domestic violence asserted against him. Id. at 540. That circumstance is fundamentally unlike the measured and two-sided process revealed by the record in this appeal.

We are unable to conclude that the trial court's consideration of the Bloomfield College incident was violative of either H.E.S. v. J.C.S., supra, 175 N.J. at 321 (requiring that a party in a judicial hearing receive notice defining the issues and an adequate opportunity to prepare and respond), or J.F. v. B.K., 308 N.J. Super. 387, 392 (App. Div. 1998) (concluding that defendant's due process rights were violated when the trial judge entered a final restraining order based on incidents alleged in an earlier complaint and not the incident alleged in the complaint before the court). Both of those cases involved the unfair use of uncharged domestic violence incidents to support the issuance of FROs. Here, the trial court used the day-later events of September 24, 2008, in Bloomfield, for a constricted purpose that did not trample the reasonable expectations of defendant when he arrived at the courthouse for the hearing. In the absence of even a hint of protest from

defendant as being caught unaware or suffering an unjust disadvantage at the trial, we cannot fault the trial court for addressing the fresh events that transpired within twenty-four hours of the primary domestic violence incident in Belleville.

A plaintiff seeking an FRO under the PDVA bears the burden of establishing that the defendant committed an act of domestic violence. The PDVA defines domestic violence as the commission of any one of the fourteen crimes and offenses enumerated in N.J.S.A. 2C:25-19(a). Harassment, N.J.S.A. 2C:33-4, is among those predicate offenses that, if proven by a preponderance of the evidence, entitles a plaintiff to the entry of an FRO. N.J.S.A. 2C:25-19(a)(13). The offense of harassment, which was the centerpiece of plaintiff's grievance, is committed when a person, "with purpose to harass another . . . [e]ngages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person." N.J.S.A. 2C:33-4(c). In order for a court to find that a defendant committed an act of harassment as proscribed by that statute, the court must find that the person had a "conscious objective" to harass the plaintiff. State v. Fuchs, 230 N.J. Super. 420, 428 (App. Div. 1989).

In this case, there was ample evidence that defendant had a purposeful, conscious objective to alarm or seriously annoy

plaintiff. After considering the ongoing conduct of defendant's text messaging and shadowing, the trial judge was permitted to conclude, as he did, that "the [d]efendant's purpose in these incidents was to harass the [plaintiff] by both communication and conduct, by following her, causing her annoyance or alarm. And that his conduct and the fear he engendered in [p]laintiff required the issuance of a Final Restraining Order to protect the [p]laintiff from further acts of domestic violence." We have no principled means by which to overturn these findings; accordingly, we will not undo the FRO.

Affirmed.