

RECORD IMPOUNDED

**NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION**

This opinion shall not "constitute precedent or be binding upon any court." Although it is posted on the internet, this opinion is binding only on the parties in the case and its use in other cases is limited. R. 1:36-3.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-2834-21

B.B.,

Plaintiff-Respondent,

v.

K.K.C.,

Defendant-Appellant.

Submitted March 20, 2023 – Decided March 31, 2023

Before Judges Mawla and Marczyk.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Morris County,
Docket No. FV-14-0431-22.

Dulinski Law, LLC, attorneys for appellant (Laurie J.
Madziar, on the brief).

Respondent has not filed a brief.

PER CURIAM

Defendant K.K.C.¹ appeals from an April 6, 2022 final restraining order (FRO) entered in favor of plaintiff B.B. pursuant to the Prevention of Domestic Violence Act (PDVA), N.J.S.A. 2C:25-17 to -35. We affirm.

On November 30, 2021, plaintiff obtained a temporary restraining order (TRO), which was subsequently amended when she retained counsel, alleging assault, harassment, and contempt of a domestic violence order. Plaintiff alleged the assault and harassment occurred several months earlier on April 13, 2021. The trial judge heard four days of testimony. Plaintiff and her mother testified in plaintiff's case and defendant testified on his own behalf.

The parties dated from approximately October 2020 until March 2021. Plaintiff was pregnant with the parties' child and spent the night in defendant's home when the April 13 incident occurred. She testified the dispute arose because she refused to have an abortion. Defendant verbally abused plaintiff because he wanted her out of his house. He began to threaten her and break her belongings. She claimed he grabbed her by both arms, banged her head against a concrete wall in the garage, and tried to throw her down the stairs. Plaintiff testified her head and arms were bruised and an arm "was really hurting" her. She adduced a photo showing bruising to her right arm. Plaintiff

¹ We use initials pursuant to Rule 1:38-3(d) (9) and (10).

called the police and during the twenty minutes before their arrival defendant was threatening her "the entire time." She did not tell the police about the physical abuse because of defendant's threats, and she lied to them to protect defendant. Plaintiff remained in the home while defendant spent the night out of the house. The following morning, plaintiff left the house because she was afraid and texted defendant to tell him she was out.

Plaintiff alleged a prior history of domestic violence. She claimed on January 30, 2021, defendant told her he knew where she was all the time because he hired a private investigator to follow her. Defendant relayed details of plaintiff's whereabouts that led her to believe he was tracking her.

On February 14, 2021, defendant locked plaintiff out of his house and placed her belongings outside in the rain. Plaintiff testified she stayed with defendant because he apologized the following day, and she wanted to give him another chance. She tried to make the relationship work because she had low self-esteem. Between March 7 and March 15, 2021, plaintiff returned to her mother's home in Florida to "reset." When she returned to defendant's home, he told her to get an abortion.

On April 3, 2021, defendant grabbed plaintiff's cell phone, ran upstairs, locked himself in a room, broke her phone, and returned it to her after

approximately six hours. Plaintiff explained she did not call the police because she "didn't want him in any trouble. [She] just kind of wanted to leave." After defendant returned plaintiff's phone, she remained in the home for another week because her doctor was across the street.

On June 12, 2021, plaintiff claimed defendant sent her threatening text messages that: She did not know what he was capable of; he was a "fucking savage[;]" and he did not "have limits when disrespected." Defendant sent plaintiff a middle finger meme. She explained the text messages upset her and made her nervous and emotional, and she "wanted it to just stop." On November 30, 2021, defendant sent plaintiff an email stating: "Are you still not talking to me? You know what I'll start doing if I don't hear from you." She testified "not knowing what he will start doing is what had me nervous."

Plaintiff adduced evidence of tweets from a Twitter account associated with defendant. One tweet stated: "If you're terrible toward me then you should fear me because I'm a fucking savage beyond what you could ever imagine." She testified the tweet scared her because she felt it was directed at her as it was the same day and used similar language as the email. A second tweet stated: "Ladies, y'all ever have a man break your phone who couldn't afford to replace it?" The tweet was followed by several laughing emojis.

Plaintiff explained the tweet was related to her because defendant had broken her phone.

Plaintiff testified she left New Jersey and began residing in Florida. In May 2021, defendant emailed plaintiff asking to see her. She requested that plaintiff leave her alone. Defendant traveled to Florida and asked to see plaintiff. After four weeks of asking, plaintiff agreed to meet him in a public location "to hear him out." Plaintiff had no other personal contact with defendant until after the child was born and defendant traveled to Florida in September 2021. Plaintiff agreed to meet him on three occasions because she was "nervous. He was sending threats to family[,] . . . reaching out to [plaintiff] constantly, and . . . was calling [her] several times" asking to speak to her. She met defendant at the child's doctor's appointment, "where he was staying at[,]" and at a public plaza to "try to keep the peace, . . . [b]ecause he wouldn't leave [her] alone"

Plaintiff explained her seven-month delay in seeking the TRO was because of the pregnancy. She attempted to obtain a TRO in September 2021, but her health prevented her from doing so. She sought the TRO after giving birth and receiving medical clearance from her doctor on November 7, 2021. She testified she wanted an FRO because defendant "mentioned that he knows

people[,] she was "constantly watching over [her] shoulder[,] felt "sick a lot of the time" and was fearful. Plaintiff had also seen guns defendant owned.

After plaintiff provided this testimony and in the days before the matter returned to trial, she viewed a tweet on defendant's Twitter account dated March 20, 2022, stating: "Them lawyer fees gonna eat up that little McDonald's salary. We just getting started." The tweet was followed by a devil face emoji. Plaintiff felt threatened because she believed the tweet was directed at her because she earned less income than defendant.

Plaintiff's mother testified regarding a telephone call she received from defendant in May 2021. She stated:

[I]t wasn't a good conversation . . . he was being very, as he worded it, street. . . . [I]t was just very intense . . . he was angry. . . . He told me he was a drug dealer. . . .

. . . He . . . basically threatened that he would come here with his boys with his guns and that there wasn't enough security to keep him . . . from being here

She perceived defendant's comment as a threat. He was "[v]ery loud, very angry[, and] . . . just enjoy[ed] upsetting [her]" During the call, defendant told plaintiff's mother "step your game up, bitch." Even though plaintiff's mother was upset, defendant laughed during the conversation. She

took defendant's threat seriously, gave her community security gate defendant's photo, and requested they not let him into the neighborhood.

Plaintiff's mother also testified plaintiff would cry "after every text, every phone call . . . [and defendant] would just go out of his way to contact her to intentionally . . . make her cry[,] . . . suffer[,] or miscarry." She noted plaintiff told her she was afraid of defendant. Plaintiff's mother accompanied her on walks because "[s]he was always . . . looking over her back. She [wouldn't] even go to the store without being fearful."

Defendant denied stalking, controlling, or threatening plaintiff for trying to leave his apartment. On February 13, 2021, he claimed plaintiff was aggravated because he told her he wanted to see his children from a prior relationship for Valentine's Day and left the house at midnight. He claimed he put plaintiff's belongings outside of the residence because she asked him to do so. Defendant denied destroying plaintiff's phone.

Defendant said plaintiff became angry when he told her he wanted to be with his daughter for her birthday on April 12, 2021. He claimed the relationship failed because plaintiff cursed at him, his children, and his wife, and he told her he "wouldn't put up with that kind of disrespect" He denied banging plaintiff's head against the wall, attempting to throw her down

the stairs, or threatening her if she left the home. He claimed he encouraged plaintiff to call police, but she dialed them and then hung up, only to dial them again at his urging. He denied attacking her before the police arrived.

Defendant testified the parties spoke every day during April and May because they were having a child together. He denied telling plaintiff to seek an abortion and claimed he supported her and paid for her medical expenses. He asserted plaintiff and her mother threatened him, and he never threatened to travel to Florida with a gun or send anyone to her mother's residence.

Defendant traveled to Florida in May and had dinner with plaintiff the day after her birthday. He wired plaintiff money to go to a spa for Mother's Day and offered to pay for a doula. However, defendant had filed a paternity suit in Florida. As a result, he claimed plaintiff wanted him to have no role in the child's life. He denied communicating with plaintiff to purposefully harass her and claimed his intent was to communicate about the child.

Defendant denied his tweets were for purposes of harassing plaintiff. He testified the Twitter account was shared by him and three brothers, and the tweets were posted publicly and not sent to plaintiff. He denied making the tweet about the McDonald's pay. He conceded the Twitter account page bore a picture of him.

Defendant "recall[ed]" having a conversation with plaintiff's mother but stated: "I do not recall a conversation with me going down there with guns." Defendant denied owning weapons, but conceded police executed a search warrant for weapons at his wife's home.² On cross-examination, defendant also conceded he had a conviction for possession, manufacturing, and distribution of drugs, which corroborated plaintiff's mother's testimony that defendant told her he was a drug dealer.

The trial judge found plaintiff credible when she testified defendant attacked her in the garage. Plaintiff's failure to tell the police about defendant's abuse on April 13, 2021 did not impact her credibility because defendant had assaulted and threatened her if she spoke to police. According to the judge, plaintiff's testimony was detailed, straightforward, and corroborated by the picture of the bruise on her right arm. The judge

² Notwithstanding defendant's denial that he did not own weapons, the record is unclear whether police found weapons belonging to him in his wife's home because defendant's counsel objected to the court questioning about the matter. Although the judge overruled the objection and found her questions were relevant because they were related to plaintiff's allegations defendant threatened to bring a gun to Florida, the judge did not obtain an answer to the question following her ruling.

concluded plaintiff proved harassment, pursuant to N.J.S.A. 2C:33-4(b), and assault, under N.J.S.A. 2C:12-1(a)(1).³

The judge addressed the history of domestic violence. She concluded plaintiff did not prove defendant was tracking her on January 30, 2021, because there was insufficient evidence defendant had someone follow plaintiff. The February 14, 2021 incident did not qualify as a prior act because defendant had not broken plaintiff's things, and the incident was akin to *contretemps*.

The April 3, 2021 incident qualified as a prior act of domestic violence because "defendant held . . . plaintiff hostage . . . by taking her cell phone . . . and locking himself in [a room] while she was [twelve]-weeks pregnant" Plaintiff's testimony was credible because she did not embellish the incident. The judge credited plaintiff's testimony that defendant broke her phone, which constituted harassment and criminal mischief.

The judge found plaintiff's mother testified credibly, in detail and without embellishment about the May 22, 2021 incident and defendant's threat

³ The judge found plaintiff did not prove the predicate act of contempt of a domestic violence order, N.J.S.A. 2C:29-9(a), because there was no indication the tweets were made by defendant and directed at plaintiff, the tweets were public postings, and plaintiff learned about them by searching for them.

to come to Florida with his associates and guns. She concluded defendant's threat coupled with his remark about being a drug dealer "serve[d] no legitimate purpose other than to harass There certainly . . . is an[] expectation that . . . plaintiff's mother is going to relay that information to . . . plaintiff." Furthermore, "[p]articularly striking . . . is . . . defendant's testimony . . . [defendant] didn't deny that the comments were made[, which] . . . lends further credibility to the fact that those comments were . . . made" Plaintiff's mother's testimony was corroborated by defendant's conviction for drug offenses and "c[a]me from . . . defendant in the context of trying to assert some control over the situation in a threatening manner through . . . plaintiff's mother to . . . plaintiff."

The judge also found defendant's texts to plaintiff constituted harassment because they "served no . . . purpose other than to harass by intimidation of . . . plaintiff." She concluded the texts constituted a history of domestic violence because they met the definition of harassment under N.J.S.A. 2C:33-4(a) and (c).

Given the history of domestic violence, the judge rejected defendant's argument plaintiff sought a TRO in response to his paternity suit. The judge concluded

given the nature of the assault, the continued threats that were made to . . . plaintiff and . . . through . . . plaintiff's mother to . . . plaintiff about threats of violence, the [c]ourt does find that there is still a need to issue a[n FRO] in this matter despite the delay in the filing of it.

I do accept that there was some delay due to . . . plaintiff being pregnant and in Florida, and perhaps she felt in Florida with some distance that that gave her some zone of comfort. But with the birth of the child, it's clear that the parties will have continual contact at a continued length and that . . . there would certainly be an opportunity for interaction between the parties.

On appeal, defendant reprises many of the arguments he made to the trial judge. He argues there was no domestic violence because plaintiff filed the complaint in retaliation for, and to gain advantage in, the paternity suit. Defendant claims plaintiff neither testified nor provided evidence to establish he intended to harass her, and there was no evidence supporting a finding of harassment by physical contact. He points out the parties continued to see each other after the alleged assault and harassment took place. Defendant argues there was no proof he intended to threaten plaintiff, and the only evidence of a threat was one directed at her mother.

Additionally, defendant asserts the judge did not analyze the assault statute. He argues she erred finding there was a need for an FRO because the

evidence demonstrated domestic contemps. Moreover, because plaintiff resides in Florida and he remains in New Jersey, plaintiff did not prove she was in immediate danger requiring entry for an FRO.

Our "review of a trial court's fact-finding function is limited." Cesare v. Cesare, 154 N.J. 394, 411 (1998). This is because "findings by the trial court are binding on appeal when supported by adequate, substantial, credible evidence." Id. at 411-12 (citing Rova Farms Resort, Inc. v. Invs. Ins. Co., 65 N.J. 474, 484 (1974)). "Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Id. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). We "should 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.'" Ibid. (quoting Rova Farms, 65 N.J. at 484). We review a trial court's conclusions of law de novo. T.M.S. v. W.C.P., 450 N.J. Super. 499, 502 (App. Div. 2017) (citing S.D. v. M.J.R., 415 N.J. Super. 417, 430 (App. Div. 2010)).

Pursuant to these principles and our review of the record, we affirm substantially for the reasons expressed in the trial judge's opinion. We add the following comments.

We decline to second-guess the trial judge's findings regarding plaintiff's motive for seeking a TRO. That plaintiff did not immediately tell police defendant assaulted and harassed her and seek a TRO after the April 2021 incident does not convince us she had an improper motive. Domestic violence "describes a pattern of abusive and controlling behavior" Corrente v. Corrente, 281 N.J. Super. 243, 246 (App. Div. 1995). Moreover, it is characterized as a cycle of abuse, apology and reconciliation, a return to normalcy, "until tension builds and the cycle starts again." United States v. Dingwall, 6 F.4th 744, 757 (7th Cir. 2021). Because all relationships are different, we cannot expect all victims of domestic violence to behave alike and resort to the court on the same timeline. Some do, but others, particularly those dealing with a difficult pregnancy like plaintiff here, experience a longer cycle of abuse, and may attempt to resolve their problems through different means before resorting to a restraining order. For these reasons, the trial judge's findings regarding plaintiff's motives are unassailable.

N.J.S.A. 2C:33-4 states a person commits purposeful harassment if they:
"a. Make[], or cause[] to be made, one or more communications anonymously or at extremely inconvenient hours, or in offensively coarse language, or any other manner likely to cause annoyance or alarm; b. Subject[] another to striking, kicking, shoving, or other offensive touching, or threaten[] to do so" Our Supreme Court has stated "[a] finding of a purpose to harass may be inferred from the evidence presented [based on c]ommon sense and experience" State v. Hoffman, 149 N.J. 564, 577 (1997) (citations omitted). The Court also stated: "Subsection (b) . . . deals with touchings or threats to touch, and it does not require the intended victim to be annoyed or alarmed." Id. at 580. Harassment through a third-person is proven by showing it was the defendant's

conscious object to use [the third-person] as an instrument of harassment.

. . . .

. . . There is rarely direct proof of intent, and purpose may and often must be inferred from what is said and done and the surrounding circumstances. . . . Prior conduct and statements may be relevant to and support an inference of purpose.

[State v. Castagna, 387 N.J. Super. 598, 605-06 (App. Div. 2006).]

Assault occurs when 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' means physical pain, illness or any impairment of physical condition" N.J.S.A. 2C:11-1(a). "When the predicate act is an offense that inherently involves the use of physical force and violence, the decision to issue an FRO 'is most often perfunctory and self-evident.'" A.M.C. v. P.B., 447 N.J. Super. 402, 417 (App. Div. 2016) (quoting Silver v. Silver, 387 N.J. Super. 112, 127 (App. Div. 2006)).

The trial judge correctly concluded there was no reason for defendant's telephone call to plaintiff's mother, other than to harass plaintiff and put her in fear. It is not difficult to infer from this record defendant's "conscious object" was to cause plaintiff's mother to deliver to plaintiff an alarming message from him.

There was ample basis for the trial judge to conclude defendant assaulted and harassed plaintiff by physically harming her. Not only are the judge's credibility findings supported by the record, but the photograph of plaintiff's arm corroborated her testimony describing the assault and offensive touching. Because the record established defendant used physical violence, the need for an FRO was perfunctory and self-evident.

Even if the need for an FRO was not so plainly evident, we are unpersuaded by defendant's argument the geographic distance between the parties would keep plaintiff safe. In order to decide whether the protection of an FRO is needed, N.J.S.A. 2C:25-29(a) requires the court to consider, among other factors: "(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; [and] (4) The best interests of the victim and any child" The testimony showed these statutory factors were met because: defendant traveled to Florida when he wanted; he initiated court proceedings there; he could reach plaintiff by electronic means; he threatened to send his associates to her; and the parties have a child in common.

"At its core, the [PDVA] effectuates the notion that the victim of domestic violence is entitled to be left alone. To be left alone is, in essence, the basic protection the law seeks to assure these victims." Hoffman, 149 N.J. at 584. The entry of an FRO in this case achieved this goal.

Affirmed.

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


CLERK OF THE APPELLATE DIVISION