SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0728-21

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

AHMED M. RAGAB,

Defendant-Appellant.

Argued March 28, 2023 – Decided April 11, 2023

Before Judges Geiger and Susswein.

On appeal from the Superior Court of New Jersey, Chancery Division, Family Part, Bergen County, Docket No. FO-02-0345-21.

Caitlin M. Kenny argued the cause for appellant (Law Offices of Brian J. Neary, attorneys; Brian J. Neary, of counsel and on the brief; Caitlin M. Kenny, on the brief).

Deepa S.Y. Jacobs, Assistant Prosecutor, argued the cause for respondent (Mark Musella, Bergen County Prosecutor, attorney; Deepa S.Y. Jacobs, of counsel and on the brief).

PER CURIAM

Defendant Ahmed M. Ragab appeals from a Family Part order convicting him of harassment, N.J.S.A. 2C:33-4(a), and violating the provisions of a temporary restraining order (TRO), N.J.S.A. 2C:29-9(b), entered pursuant to the Prevention of Domestic Violence Act (the Act), N.J.S.A. 2C:25-17 to -35. We affirm.

We take the following facts from the record. On December 10, 2020, L.M. (Lindy)[1] met with her ex-boyfriend at a hair salon in Englewood where her brother worked, for a parenting time exchange of their four-year-old daughter. During the exchange, defendant allegedly cornered her "in a back room alone, grabbed her by her arms and repeatedly commented about getting back together." When Lindy's daughter walked into the room, defendant released his grip and walked away. Defendant then followed Lindy to her vehicle, opened the driver's door, reached inside the vehicle, grabbed a police shield from the front dashboard, and yelled at her. Defendant's sister arrived on scene and pulled defendant away to avoid further incident.

[1] To protect the identity of the victim, we refer to her by initials or pseudonym and certain witnesses by initials. See R. 1:38-3(c)(12).

Based on defendant's alleged conduct, Lindy applied for and was granted a TRO against defendant on December 14, 2020. The police officer reported observing bruising on Lindy's arm. Photographs of Lindy's bruising were taken. However, Lindy did not wish to pursue an assault charge against defendant. The TRO prohibited defendant from having any contact or communication with Lindy or her two children, ordered defendant would have no parenting time with their four-year-old daughter, and awarded Lindy emergent child support. Lindy blocked defendant's phone number due to his repeated alarming and annoying phone calls to her phone.

Englewood Police Department (EPD) Sergeant Carlos Marte testified that he served the defendant with the TRO telephonically on December 15, 2020. Marte testified that his practice for serving restraining orders is to make two attempts with his officers to personally serve the restrained party, followed by a telephonic third attempt. Marte testified that during the phone call he introduces himself, explains why he is calling, asks if the person on the phone is the restrained individual named in the TRO, and if he is, Marte tells him that he is being telephonically served with a TRO, reviews the restraint provisions of the restraining order with the person, and arranges a time for the defendant to come into the police station and pick up a tangible copy.

Marte testified that the phone call he makes to the defendants of restraining orders is "a quick[] phone call. I don't go through the specifics, that's why we tell them, it's better for them to come and pick up a tangible copy because as a tour commander I'm not going to have the time to go through the whole restraining order." Marte clarified his statement, indicating that he provides some of the terms in the restraining order to the restrained party, specifically what the defendant cannot do as specified on page 3 of the TRO, such as prohibitions of contact and communication with the plaintiff. However, Marte acknowledged that he did not read the entire TRO to defendant.

On January 4, 2021, Lindy called defendant, whose sister was in the car with him at the time. Defendant put his phone on speaker so that his sister could listen to the conversation and record it on her phone. During the call, Lindy told defendant that if he signed a document allowing her to take their daughter to Columbia, she would dismiss the restraining order she had against him.

On January 21, 2021, Lindy was home with her boyfriend R.Y. The next morning, Lindy was sleeping when her cell phone started ringing and vibrating at 4:08 a.m. due to a call from a "No Caller ID" unknown number, which woke her up. Lindy answered her phone and "immediately recognized [defendant's] voice" and hung up the phone. Lindy's cell phone then received two other calls

from a "No Caller ID" unknown number at 4:15 a.m. and 4:17 a.m., which she did not answer. Lindy received a fourth phone call from a "No Caller ID" unknown number at 4:20 a.m., which she answered on speaker mode. R.Y. recorded the call on his own cell phone. Lindy and defendant then had a conversation.

Lindy's cell phone received a fifth call from "No Caller ID" unknown number at 4:58 a.m. R.Y. answered the call and used his cell phone to record it. During this call, R.Y. instructed defendant that "you're not allow to call [Lindy]. You . . . understand that you have a restraining order and you're hiding from the cops. Stop calling. Do you get that?" R.Y. mentioned the restraining order a second time during the conversation and said that defendant "went out of [his] way to find [Lindy's] number" and told defendant that him calling her was "a bad idea." Defendant did not argue about the restraining order but stated Lindy was the one who gave him her number.

EPD Officer Brandon Terrizzi responded to Lindy's residence regarding the phone calls. Lindy played a voicemail on her cell phone for Terrizzi of a man requesting that she drop the restraining order. Based on the messages he heard, Terrizzi provided Lindy with an affidavit to complete. Lindy returned the completed affidavit to police headquarters. Terrizzi then signed a complaint

charging defendant with contempt of the TRO and harassment, and forwarded it to the on-call judge who issued a warrant for defendant's arrest.

The contempt charge was administratively downgraded by the Prosecutor's Office to a disorderly persons offense and both charges were transferred to the Family Part. The TRO was dismissed on March 17, 2021. The case proceeded to a four-day trial.

The judge stated: "[o]n the contempt charge, the state must prove first that there was a restraining order in effect at the time of the contact communication. Secondly, that the defendant knew of the restraining order, and third, that the defendant purposely or knowingly violated the restraining order." As to the harassment charge, the State must prove "defendant intended to harass the alleged victim and that the defendant made . . . communications anonymously or at extremely inconvenient hours, or in offensively course language, or any other manner likely to cause annoyance or alarm."

The judge noted defendant did not dispute calling Lindy. Rather the issues were "whether [he] knowingly or purposely violated the [TRO], that is whether he knew there was a restraining order in effect when he made the calls, and exactly when he made those calls."

The judge found that during defendant's phone conversation with R.Y.: "Never once during the entire back and forth [between defendant and R.Y.] did [defendant] deny or even question that there was a restraining order." The judge considered the lack of any denial by defendant of the existence of the TRO during the seven-minute conversation with R.Y., in which the TRO came up twice, to be an adoptive admission as defined by N.J.R.E. 803(b)(2).

The judge further found that Sergeant Marte attempted to serve the defendant with the TRO twice in person, and upon being unsuccessful, Marte served defendant telephonically on December 15, 2020. The judge found that Marte's usual practice was to review the restraint provisions of the TRO with the defendant, and to advise them to come to the police station for personal service, which Marte did with defendant. The judge found such evidence of habit admissible under N.J.R.E. 406. The judge noted it has "long been settled that a contempt action may proceed against a defendant who has actual knowledge of the restraint imposed" even though defendant was not personally served with the TRO. The judge also found Officer Terrizzi's testimony credible.

The judge found Lindy's testimony was at times "strained," however, "when it came to the pivotal testimony[,] her testimony was believable and

consistent with other credible testimony and evidence, specifically the screen shots, while not dated, were consistent with the initial report made to . . . Terrizzi and the recording played to . . . Terrizzi." The judge found that "[Lindy's] testimony [was] corroborated when it comes to the material issues, including the date on which the calls to her were made by [defendant]."

During the January 4 phone call, the judge noted that Lindy "can be heard attempting to strike a deal with [defendant], telling him that she would dismiss the [TRO] if he signs a consent allowing her to take their child to Columbia." The judge found this was evidence defendant was aware of the TRO when he made calls made to Lindy on January 22. The judge further found that aside from L.M. advising defendant of the TRO during the January 4 recorded call, there was ample other evidence to prove the charges beyond a reasonable doubt. Based on the totality of the evidence and assessing the credibility of the witnesses, the judge found the State proved beyond a reasonable doubt there was a TRO in effect on January 22, that defendant knew of the TRO on that date, and that he purposely or knowingly violated the restraining order by calling Lindy. The judge reasoned:

> The fact that the defendant did not deny the existence of the [TRO] during a conversation with . . . [R.Y.], combined with the testimony of . . . Marte that it's his routine to advise the defendant of the prohibited

> conduct during the telephone service, combined with the testimony of . . . Terrizzi that he heard the voicemail played wherein the caller requested that [Lindy] drop the restraining order on January 22nd, 2021, when that restraining order was in effect from December 14, 2020 until March 17, 2021, according to [the TRO and the dismissal order which] makes it clear to this [c]ourt defendant was well aware of the restraints. [Defendant] knew he was calling [Lindy] in violation of the [TRO].

The judge likewise found the State proved beyond a reasonable doubt that defendant intended to harass the victim, finding his calls were made anonymously or at extremely inconvenient hours, or in offensively course language or any other manner likely to cause annoyance or alarm. The judge reasoned that defendant called Lindy multiple times between four and five a.m., even though there was no emergency. The judge found that "[t]here was no valid reason proffered for the phone calls to be made at four or five in the morning." The judge "infer[red] that the only reason for such calls at such hours of the morning was to harass [Lindy] who testified she'd been sleeping at the time and was awakened by the calls."

Based on these findings, the judge found defendant guilty of both offenses and sentenced him to a twenty-four-month term of non-custodial probation, and ordered him to complete the Batterer's Intervention Program and the Alternatives to Domestic Violence Program. The judge also imposed a $500

fine and an appropriate monetary penalty, surcharge, and assessment. The judge ordered that defendant have "[n]o contact with the victim except as permitted under [the] court ordered parenting time order/consent agreement." She further ordered that "defendant is prohibited from purchasing, owning, possessing or controlling a firearm . . . and from receiving or retaining a firearms purchaser identification card or permit to purchase a handgun." This appeal followed.

Defendant raises the following points for our consideration:

> I. THE COURT BELOW ERRED IN FINDING THAT THE STATE PROVED BEYOND A REASONABLE DOUBT THAT DEFENDANT KNEW OF THE EXISTENCE OF THE RESTRAINING ORDER; ACCORDINGLY, THE CONVICTION SHOULD BE VACATED.
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> II. THE COURT BELOW IMPROPERLY RELIED ON DEFENDANT'S ADOPTIVE ADMISSION BECAUSE THERE WAS NO N.J.R.E. 104 HEARING PRIOR TO TRIAL.
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> III. THE COURT BELOW ERRED IN FINDING THAT THE STATE PROVED BEYOND A REASONABLE DOUBT THAT DEFENDANT PURPOSELY OR KNOWINGLY VIOLATED A CONDITION OF THE TEMPORARY RESTRAINING ORDER.
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> IV. THE COURT BELOW ERRED IN FINDING DEFENDANT GUILTY BEYOND A REASONABLE DOUBT OF HARASSMENT.

We affirm substantially for the reasons expressed by Judge Nina C. Remson in her cogent oral decision. We add the following comments.

When reviewing a non-jury trial, we defer to a trial judge's factfinding "when supported by adequate, substantial, credible evidence." Cesare v. Cesare, 154 N.J. 394, 411-12 (1998). We consider the Family Part's "special jurisdiction and expertise in family matters." Id. at 413. "[W]e do not weigh the evidence, assess the credibility of witnesses, or make conclusions about the evidence." Mountain Hill, LLC v. Twp. of Middletown, 399 N.J. Super. 486, 498 (App. Div. 2008) (quoting State v. Barone, 147 N.J. 599, 615 (1997)). Consequently, if there is satisfactory evidentiary support for the trial court's findings we "should not disturb the result." Beck v. Beck, 86 N.J. 480, 496 (1981) (quoting State v. Johnson, 42 N.J. 146, 161-62 (1964)).

"Deference is especially appropriate 'when the evidence is largely testimonial and involves questions of credibility.'" Cesare, 154 N.J. at 412 (quoting In re Return of Weapons to J.W.D., 149 N.J. 108, 117 (1997)). A trial judge who observes witnesses and listens to their testimony, develops a "feel of the case" and is in the best position to "make first-hand credibility judgments about the witnesses who appear on the stand." N.J. Div. of Youth & Fam. Servs.

v. E.P., 196 N.J. 88, 104 (2008) (quoting N.J. Div. of Youth & Fam. Servs. v. M.M., 189 N.J. 261, 293 (2007)).

Reversal is warranted only when the trial court's factual findings are "so manifestly unsupported by or inconsistent with the competent, relevant and reasonably credible evidence as to offend the interests of justice." Rova Farms Resort, Inc. v. Invs. Ins. Co. of Am., 65 N.J. 474, 484 (1974) (quoting Fagliarone v. Twp. of N. Bergen, 78 N.J. Super. 154, 155 (App. Div. 1963)). On the other hand, "legal conclusions, and the application of those conclusions to the facts, are subject to our plenary review." Reese v. Weis, 430 N.J. Super. 552, 568 (App. Div. 2013).

To be guilty of the disorderly persons offense of contempt of a domestic violence restraining order under N.J.S.A. 2C:29-9(b), the State must prove beyond a reasonable doubt that defendant was served with the restraining order FRO and knowingly committed behavior that violated the order. State v. L.C., 283 N.J. Super. 441, 447-48 (App. Div. 1995); State v. Mernar, 345 N.J. Super. 591, 594 (App. Div. 2001).

"[W]hen there is an alleged violation of a restraining order the question becomes one of actual notice, not merely the manner of service." Mernar, 345 N.J. Super. at 594. "The law has long been settled that a contempt action may

proceed against a defendant who has actual knowledge of the restraints imposed, even though the injunction was not regularly served." Ibid. In Mernar, we emphasized that how the defendant learns of the order is not consequential. Ibid. If the defendant "has notice or knowledge of it, . . . he is liable to the consequences of its breach to the same extent as if it had been actually served upon him in writing." Ibid. (quoting Kempson v. Kempson, 61 N.J. Eq. 303, 311 (Ch. 1901)).

Defendant contends the judge improperly relied on the fact that defendant did not deny or question the existence of the TRO during his conversations with R.Y. as an adoptive admission under N.J.R.E. 803(b)(2) because the judge did not conduct a N.J.R.E. 104(c) hearing. We are unpersuaded.

We review a trial court's evidentiary rulings for abuse of discretion. State v. Jackson, 243 N.J. 52, 64-65 (2020). Because this was a bench trial, the judge was not required to hold a "hearing outside the presence of the jury." N.J.R.E. 104(c)(1). More fundamentally, the adoptive admission was not a statement by defendant. See N.J.R.E. 104(c)(1). We discern no abuse of discretion in considering it an adoptive admission. In any event, there was ample other evidence that defendant had actual knowledge of the TRO.

Marte testified regarding his practice to telephonically advise defendants of the existence of a TRO, read the operative terms of the TRO to them, and advise them of the consequences of violating the TRO, if two prior attempts to serve the defendant personally were unsuccessful. The judge found such evidence of habit admissible under N.J.R.E. 406. We concur. "Evidence, whether corroborated or not, of habit or routine practice is admissible to prove that on a specific occasion a person or organization acted in conformity with the habit or routine practice." N.J.R.E. 406(a).

Here, the evidence demonstrated that defendant was telephonically served with the TRO by Sergeant Marte, advised to pick up a copy of the TRO at police headquarters, and had actual knowledge of its existence before making multiple calls to Lindy in direct violation of TRO.

The judge also found defendant harassed Lindy. Pertinent to this appeal, a person commits the petty disorderly persons offense of harassment if, with purpose to harass another, he or she "[m]akes, 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." N.J.S.A. 2C:33-4(a). For a finding of harassment under N.J.S.A. 2C:33-4, the actor must have the purpose to harass. Corrente v.

Corrente, 281 N.J. Super. 243, 249 (App. Div. 1995). Finding a party had the purpose to harass must be supported by evidence the party's "conscious object was to alarm or annoy; mere awareness that someone might be alarmed or annoyed is insufficient." J.D. v. M.D.F., 207 N.J. 458, 487 (2011).

Here, defendant made repeated calls to Lindy between 4:00 a.m. and 5:00 a.m. "A finding of a purpose to harass may be inferred from the evidence presented." State v. Hoffman, 149 N.J. 564, 577 (1997). "[A]nnoyance means to disturb, irritate, or bother." Id. at 580. The calls were made "at extremely inconvenient hours" in a manner likely to cause annoyance or alarm. The judge found there was no emergency making the calls necessary so early in the morning. Considering the circumstances, the judge's inference that the calls were made to "disturb, irritate, or bother" Lindy was reasonable.

Defendant's reliance on In re Samay, 166 N.J. 25 (2001), is misplaced. The facts in Samay are clearly distinguishable.

During oral argument before this court, defendant's counsel contended that the judge's credibility findings should be given less weight because the trial was heard via Zoom rather than conducted in-person. The Family Part was authorized to conduct bench trials by zoom, including violation of restraining order cases. Defendant does not contend that there were technical problems with

the audio or video quality. We find no basis to question or give less weight to the judge's credibility findings because the trial was conducted remotely.

Our careful review of the record convinces us that Judge Remson's factual findings are supported by the credible evidence in the record and her legal conclusions were consonant with applicable legal principles. Applying our deferential standard of review, we discern no basis to overturn the judge's finding that the State proved defendant was guilty beyond a reasonable doubt of harassment and violating the TRO.

Affirmed.