

RECORD IMPOUNDED

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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-1105-21

M.W.,

Plaintiff-Respondent,

v.

M.B.W.,

Defendant-Appellant.

Submitted November 16, 2022 – Decided January 11, 2023

Before Judges Haas and DeAlmeida.

On appeal from the Superior Court of New Jersey,
Chancery Division, Family Part, Burlington County,
Docket No. FV-03-0475-22.

Mario J. Persiano, attorney for appellant.

Respondent has not filed a brief.

PER CURIAM

Defendant M.B.W.¹ appeals from the October 27, 2021 final restraining order (FRO) entered against him by the Family Part pursuant to the Prevention of Domestic Violence Act (the Act), N.J.S.A. 2C:25-17 to -35. We affirm.

I.

After a hearing at which plaintiff M.W. testified, the trial court made the following findings of fact in an oral opinion. The parties were involved in a romantic relationship that produced one child. They resided together for a little more than a year.

In August 2021, the parties no longer shared a home. M.B.W. texted M.W. stating that he needed to come to her house, which adjoined his mother's home, to retrieve tools to repair his mother's bathroom. M.W. did not answer the message because she believed it to be a pretext to allow M.B.W. to enter her home to attempt to engage in sexual relations, which he had done before.

Later that evening, M.W. was on her front porch when she saw M.B.W. in a truck parked near his mother's home next door. She observed a woman in the passenger seat. M.W. then responded to M.B.W.'s message. The two exchanged unpleasantries via text messages. Ultimately, M.B.W. sent M.W. a

¹ We use initials to preserve the confidentiality of court records concerning domestic violence. R. 1:38-3(d)(9).

text stating "talk some shit right now and I'll do that dumb shit you've already accused me of." This was reference to M.B.W.'s belief that M.W. had previously accused him of rape. These messages followed:

M.W.: Whatever that is, go ahead, can't do nothing more than what you done. Good night.

M.B.W.: I F'ing dare you to talk that dumb shit to me right now. Got a John with me right now that will beat the breaks off of you.

M.W.: You all both mad. Come back. Should have let her out when you was here.

M.W.: I don't do threesome. You can't F the hole right now, you gonna right me right weirdo say what I so-called accuse you of. Come back with her. Let her touch me. Enough jackass.

The court found that it appears that at that point M.B.W. called M.W. by telephone. It is not clear if M.W. answered the call. This exchange of text messages followed:

M.W.: Come back. Don't call me. Let her come touch me. Let you come wrongfully rape you all done up. I pity you. Pull up with her.

M.B.W.: You're about to meet her right now. I'll stay in the truck. Good night. You're just about to be forcefully put to sleep.

M.W.: Yep, LOL, keep talking. She fighting for that disappointment of a dick. I get it, girl, you want to

get hit bitches but don't want to stay for the show, how manly of you.²

At that time, M.B.W. pulled up in a truck in front of M.W.'s home. M.W. was standing on the sidewalk. A woman opened the passenger door and began to get out of the truck. M.W. yelled, "you touch me, I will press charges." M.B.W. then tapped the woman on the shoulder and signaled for her to get back into the vehicle.

After the encounter, M.W. went to a nearby police department to file a domestic violence complaint. She obtained a temporary restraining order (TRO). M.B.W. subsequently sent a text message to M.W. stating that she "bought the ass whooping coming to you."

The court found that M.B.W. made a terroristic threat within the meaning of N.J.S.A. 2C:12-3(b), by threatening to kill M.W. with the intent to terrorize her. The court concluded that a reasonable person would interpret the statement "about to be forcefully put to sleep" as a threat of death. In addition, the court concluded that the circumstances in which the threat was made reasonably caused M.W. to believe the threat would be carried out.

² Printed versions of the parties' text messages were admitted at trial. M.B.W., however, did not include copies of that evidence in his appendix. See R. 2:6-1(a)(1). We recite the contents of the text messages, which are not in dispute, as stated in the trial court's opinion.

Having concluded that M.B.W. committed an act of domestic violence, N.J.S.A. 2C:25-19(a)(3), the court considered whether entry of an FRO was warranted. With respect to the parties' history of domestic violence, the court found credible M.W.'s testimony that M.B.W. choked her in December 2020 and that this act was the basis for entry of a prior TRO against M.B.W. The court found that the choking incident was "extreme" and "very physical." The court also found that M.W. dismissed the complaint underlying that TRO in January 2021.³

The court found that M.W. feared future acts of violence by M.B.W. and, based on the the December 2020 choking incident, the August 2021 terroristic threat, and M.B.W.'s follow-up text message threatening a whooping, there was good cause for such fear. Thus, the court concluded, entry of an FRO was needed to protect M.W. from immediate danger or to prevent further abuse. An October 27, 2021 FRO memorializes the court's decision.

This appeal followed. M.B.W. raises the following arguments.

POINT I

THE TRIAL COURT[] COMMITTED LEGAL ERROR BY FINDING THAT PLAINTIFF

³ Although the court initially found that an FRO had been issued with respect to the December 2020 choking, it later issued a correction to its opinion to clarify that M.W. withdrew her complaint before a hearing on the FRO was held.

ESTABLISHED THE PREDICATE ACT OF TERRORISTIC THREATS.

POINT II

THE TRIAL COURT VIOLATED DEFENDANT'S DUE PROCESS RIGHTS BY ALLOWING PLAINTIFF TO TESTIFY ABOUT INCIDENTS NOT IN THE DOMESTIC VIOLENCE COMPLAINT.

POINT III

THE COURT COMMITTED AN ABUSE OF DISCRETION DURING ITS SILVER V. SILVER ANALYSIS BY NOT CONSIDERING ALL THE FACTORS OF N.J.S.A. 2C:25-29(a)(1) THROUGH (6) AND BY CONSIDERING EVIDENCE NOT IN THE RECORD.

II.

"In our review of a trial court's order entered following trial in a domestic violence matter, we grant substantial deference to the trial court's findings of fact and legal conclusions based upon those findings." D.N. v. K.M., 429 N.J. Super. 592, 596 (App. Div. 2013) (citing Cesare v. Cesare, 154 N.J. 394, 411-12 (1998)). 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." Cesare, 154 N.J. at 412 (quoting Rova Farms Resort, Inc. v. Inv'rs Ins. Co., 65 N.J. 474, 484 (1974)).

Deference is particularly appropriate when the evidence is testimonial and involves credibility issues because the judge who observes the witnesses and hears the testimony has a perspective the reviewing court does not enjoy. Pascale v. Pascale, 113 N.J. 20, 33 (1988) (citing Gallo v. Gallo, 66 N.J. Super. 1, 5 (App. Div. 1961)).

The entry of an FRO requires the trial court to make certain findings. See Silver v. Silver, 387 N.J. Super. 112, 125-27 (App. Div. 2006). The court "must determine whether the plaintiff has proven, by a preponderance of the credible evidence, that one or more of the predicate acts set forth in N.J.S.A. 2C:25-19[(a)] has occurred." Id. at 125. The court should make this determination "'in light of the previous history of violence between the parties.'" Ibid. (quoting Cesare, 154 N.J. at 402). Next, the court must determine "whether a restraining order is necessary, upon an evaluation of the factors set forth in N.J.S.A. 2C:25-29[(a)](1) to -29[(a)](6), to protect the victim from an immediate danger or to prevent further abuse." Id. at 127 (citing N.J.S.A. 2C:25-29(b)); see also J.D. v. M.D.F., 207 N.J. 458, 476 (2011). This determination requires evaluation of:

- (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;
- (4) The best interest of the victim and any child;
- (5) In determining custody and parenting time the protection of the victim's safety; and
- (6) The existence of a verifiable order of protection from another jurisdiction.

[N.J.S.A. 2C:25-29(a); see also Cesare, 154 N.J. at 401.]

Here, the trial court determined that M.B.W. made a terrorist threat pursuant to N.J.S.A. 2C:12-3(b), a predicate act of domestic violence. N.J.S.A. 2C:25-19(a)(3). A person commits terroristic threats if he or she "threatens to kill another with the purpose to put him [or her] in imminent fear of death under circumstances reasonably causing the victim to believe the immediacy of the threat and the likelihood that it will be carried out." N.J.S.A. 2C:12-3(b).

Proof of terroristic threats under N.J.S.A. 2C:12-3(b) is measured by an objective standard. State v. Smith, 262 N.J. Super. 487, 515 (App. Div. 1993). The requisite proofs are that: "(1) the defendant in fact threatened the plaintiff; (2) the defendant intended to so threaten the plaintiff; and (3) a reasonable person would have believed the threat." Cesare, 154 N.J. at 402. Proof "that the victim actually feared death or was under the apprehension that he was about

to be killed" is not necessary. State v. Nolan, 205 N.J. Super. 1, 4 (App. Div. 1985). As we explained,

[s]ome people are braver than others and less likely to be subject to intimidation. The criminality of the perpetrator's conduct should not depend on the courage or timidity of the intended victim. In our view, the statute merely requires that the threat be made under circumstances under which it carries the serious promise of death. Stated somewhat differently, the words or conduct must be of such a nature as would reasonably convey the menace or fear of death to the ordinary hearer.

[Ibid. (footnote omitted).]

Despite the objective standard, "courts must still consider a plaintiff's individual circumstances and background in determining whether a reasonable person in that situation would have believed the defendant's threat." Cesare, 154 N.J. at 403. "[I]n a domestic violence context, a court should regard any past history of abuse by a defendant as part of a plaintiff's individual circumstances and, in turn, factor that history into its reasonable person determination." Ibid.

Our careful review of the record revealed sufficient support for the trial court's conclusion that M.B.W. threatened M.W. with death at the hands of the woman she had previously seen in the passenger seat of his truck and that he intended to terrorize M.W. when he made that threat. Given M.W.'s recent experience being strangled by M.B.W., and the presence of a stranger who was

approaching her from M.B.W.'s truck, M.B.W.'s threat to kill M.W. was objectively immediate and made in circumstances suggesting it was likely to be carried out.

We are not persuaded by M.B.W.'s argument that he cannot be found to have made a terroristic threat without evidence that the woman he used to further his threat also intended to terrorize M.W. Whether or not the woman was aware of M.B.W.'s intention to terrorize M.W., her presence in M.B.W.'s truck and attempt to exit the vehicle in close proximity to M.W. were orchestrated by M.B.W. to heighten M.W.'s terror by giving his threat the air of imminency and likelihood. This is true even if the woman was an unwitting tool for M.B.W.'s act of domestic violence.

In addition, our review of the record reveals sufficient support for the trial court's conclusion that an FRO is necessary to protect M.W. from immediate danger or further abuse. The record contains sufficient evidence supporting the trial court's finding that M.B.W. choked M.W. less than a year prior to his issuance of a terroristic threat and that he threatened her with further violence after making the terroristic threat. We note also that the parties have a child in common. While M.B.W. denies paternity, there exists the possibility that the

parties will again cross paths with respect to the child, particularly if M.W. elects in the future to pursue child support from M.B.W.

M.B.W.'s due process arguments are unavailing. M.W.'s testimony and closing statement addressed allegations of domestic violence and other matters not alleged in the complaint. M.B.W., however, did not ask for an adjournment to gather evidence to meet those allegations. In addition, the trial court did not rely on any of those facts when reaching its decision to issue the FRO. The only prior act of domestic violence relied on by the court when making its finding that the FRO was warranted was the December 2020 choking, which was referenced in the domestic violence complaint.⁴ We are satisfied that M.B.W.'s due process rights were not violated.

Affirmed.

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



CLERK OF THE APPELLATE DIVISION

⁴ The court noted that M.W. testified with respect to a February 2021 argument with M.B.W. It did not, however, rely on that event when determining that an FRO was warranted.