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**SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1429-21**

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

ADRIAN L. BIRCH,

Defendant-Appellant.

Argued November 1, 2022 – Decided January 4, 2023

Before Judges Gilson and Gummer.

On appeal from the Superior Court of New Jersey, Law Division, Monmouth County, Municipal Appeal No. 21-011.

Keith G. Oliver argued the cause for appellant (Law Offices of Proetta, Oliver & Fay, attorneys; Jeff Thakker, of counsel; Keith G. Oliver, on the brief).

Alecia N. Woodard, Special Deputy Attorney General/Acting Assistant Prosecutor, argued the cause for respondent (Raymond S. Santiago, Acting Monmouth County Prosecutor, attorney; Monica do Outeiro, Special Deputy Attorney General/Acting

Assistant Prosecutor, of counsel; Christopher J. Ammon, Legal Assistant, on the brief).

PER CURIAM

Defendant Adrian Birch and his then-wife got into an argument that progressed into a physical altercation. The municipal court convicted defendant of petty disorderly persons simple assault, N.J.S.A. 2C:12-1(a)(1), and sentenced defendant to pay fines, costs, and penalties. Following a de novo review, the Law Division entered an order finding defendant "guilty of N.J.S.A. 2C:12-1(a)(1)" and imposing the same sentence as the municipal court. In its written opinion, however, the Law Division stated that defendant was "guilty of disorderly-persons simple assault, contrary to N.J.S.A. 2C:12-1(a)(1)."

Defendant appeals from the Law Division conviction, arguing that it violated his double-jeopardy and due process rights because the Law Division found defendant guilty of a more serious offense than the municipal court. Defendant also argues that there was insufficient evidence to sustain his conviction. Finally, defendant contends that his conviction should be vacated because the municipal judge should have recused herself. We reject all of defendant's arguments. Although there is some ambiguity in its written opinion, the Law Division found facts supporting defendant's conviction for petty disorderly persons simple assault. We remand and instruct the Law Division to

enter a new judgment of conviction clarifying that defendant was convicted of a petty disorderly persons offense of simple assault.

I.

By June 8, 2019, defendant's forty-eight-year marriage had been deteriorating for some time. On that day, defendant and his then-wife commemorated their forty-eighth anniversary by purchasing a necklace and matching bracelet for the wife and later going out to dinner.

After returning home from dinner, the wife took the necklace off, but thereafter could not find it. She accused defendant of taking the necklace to give it to his alleged mistress, and the couple began to argue. The argument progressed into a physical altercation, and eventually the wife called the police.

After officers spoke with defendant and his then-wife, defendant was charged with third-degree terroristic threats, N.J.S.A. 2C:12-3(a); fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); and disorderly-persons simple assault. In charging simple assault, the complaint warrant cited to N.J.S.A. 2C:12-1(a)(3) and N.J.S.A. 2C:12-1(a)(1). The narrative of the complaint stated:

WITHIN THE JURISDICTION OF THIS COURT,
COMMIT ASSAULT BY ATTEMPTING BY
PHYSICAL MENACE PURPOSELY TO PUT [THE
WIFE] IN FEAR OF IMMINENT BODILY INJURY,

SPECIFICALLY BY PUSHING [THE WIFE]
MULTIPLE TIMES RESULTING IN A BACK
INJURY IN VIOLATION OF N.J.S. 2C:12-1A(3).

The complaint, however, listed the charge as N.J.S.A. "2C:12-1A(1)."

Defendant also sought to bring charges against his wife and have a criminal complaint filed in municipal court. A municipal judge, however, found that defendant's claims were not supported by probable cause and, therefore, the complaint was not filed.

Thereafter, a grand jury indicted defendant for three crimes: third-degree terroristic threats, N.J.S.A. 2C:12-3; fourth-degree unlawful possession of a weapon, N.J.S.A. 2C:39-5(d); and third-degree possession of a weapon for unlawful purposes, N.J.S.A. 2C:39-4(d). On January 10, 2020, the indictment was dismissed without prejudice to the State's right to re-present the charges to a grand jury.

No subsequent indictment was ever issued. Instead, in February 2020, the disorderly-persons charge of simple assault was remanded to the municipal court.¹

¹ The State represents that the matter was re-presented to a grand jury, but the grand jury did not issue a new indictment. The record does not include any evidence of the matter being re-presented to a grand jury. Nevertheless, the

In the municipal court, the matter was assigned to be tried by the same judge who had found insufficient probable cause to support defendant's complaint against his wife. Defendant moved to recuse that judge, but the judge denied that request.²

The municipal court trial was conducted on May 10, 2021, and June 28, 2021. At the start of the trial, the judge made it clear that defendant was being tried for simple assault in violation of N.J.S.A. 2C:12-1(a)(1). Three witnesses testified at trial: a police officer, the wife, and defendant. The parties also submitted recordings of the wife's 911 call and video footage from body cameras worn by officers who had responded to defendant's home on the night of the incident.

The testimony by the wife and defendant differed as to what happened during the physical altercation. The wife testified that she had confronted defendant about the missing necklace and, thereafter, the parties got into a verbal argument that progressed into a physical assault. According to the wife, after

record is clear that the charge of simple assault in violation of N.J.S.A. 2C:12-1(a)(1) was remanded for disposition in the municipal court.

² Apparently, the municipal judge did not enter an order denying the recusal motion. The judge heard the motion and, on the record, stated that she was inclined to deny it but wanted to confer with the presiding municipal judge. Thereafter, the judge conducted the trial.

the parties initially argued, she went upstairs to the master bedroom and found defendant searching for the necklace. The two continued arguing, and she went down the hall to another bedroom to get away from defendant. Defendant followed her and pushed her, causing her to fall on top of a luggage rack. When the wife stood back up, defendant threw her down onto a bed, grabbed an iron from a nearby ironing board, and held the iron over her head.

The wife went on to explain that defendant left the room and went downstairs to his office. The wife then grabbed a stick from the broken luggage rack and went downstairs to the kitchen to retrieve her cell phone and call the police. Defendant confronted her in the kitchen, and the couple continued to argue. The wife testified that during the argument defendant had picked up a large knife and had threatened her by saying "this is a big one, this is a nice big one." Thereafter, defendant returned to his office, and the wife called the police.

Defendant's version of the altercation differed from the wife's version. According to defendant, he was watching television when his wife came down in an extremely agitated state because she could not find the necklace. She accused defendant of having an affair and stealing the necklace to give to his mistress. When defendant went upstairs to try to find the necklace, his wife followed him and began pushing him. Defendant testified that his wife went on

to threaten or attempt to hit him with a coat hanger, iron, lamp, piece of wood, putter, and kitchen knife.

The police officer testified, explaining that he had responded to a 911 call initiated by the wife. When he arrived, he met defendant at the door and noticed some superficial lacerations on defendant's left arm. Defendant could not recall the cause of those injuries, which according to the officer, appeared to be self-inflicted. The officer also testified that defendant had appeared to be under the influence of alcohol because he had the odor of alcohol on his breath, his eyes were glassy, and he looked "disheveled."

After hearing the testimony, the municipal judge found the wife to be mostly credible, although the court noted some inconsistencies in her testimony. The municipal judge determined that defendant's testimony and version of the altercation was incredible. Based on all the evidence presented at trial, the municipal judge determined that both parties had engaged in a physical fight during which defendant had recklessly caused injury to his wife. Accordingly, the municipal judge found defendant guilty of petty disorderly persons simple assault. The judge sentenced defendant to pay a fine of \$50 and imposed additional penalties and costs of \$258.

Defendant appealed his conviction and sought a de novo review in the Law Division. On December 13, 2021, the Law Division heard arguments and, thereafter, conducted a de novo review of the record developed in the municipal court. On January 5, 2022, the Law Division issued a written opinion and order finding defendant guilty of simple assault in violation of N.J.S.A. 2C:12-1(a)(1) and imposed the same sentence as the municipal court.

In its written opinion, the Law Division stated that defendant was seeking a de novo review of the municipal court conviction for "the petty disorderly persons offense of recklessly causing injury to his wife." The Law Division then analyzed the municipal-court record, and the arguments defendant was making on de novo review.

The Law Division rejected defendant's contention that he had not had clear notice that he was being charged with violating N.J.S.A. 2C:12-1(a)(1). The Law Division also rejected defendant's argument that the municipal judge should have recused herself. The court noted that there was no law supporting defendant's position because the basis for the recusal was the municipal judge's determination that defendant's municipal complaint lacked probable cause.

Turning to the merits, the Law Division agreed with the credibility findings made by the municipal judge. In that regard, the Law Division found

the wife's testimony to be "mostly" credible and defendant's testimony to be incredible. The Law Division rejected defendant's self-defense argument. Instead, the Law Division found that although the wife had initially picked up the iron, "defendant forcibly took it from her, placed it back on the ironing board, and pushed her with sufficient force that she fell back on to the clothing rack sustaining injury to her lower back. Defendant was not engaged in self-defense and was the primary aggressor in this confrontation." The Law Division concluded "that defendant [was] guilty of disorderly-persons simple assault, contrary to N.J.S.A. 2C:12-1(a)(1)." The Law Division imposed the same fines, costs, and penalties imposed by the municipal court.

II.

Defendant now appeals from his conviction by the Law Division. He makes four arguments, which he articulates as follows:

- I. THE MUNICIPAL COURT CONVICTED [DEFENDANT] OF PETTY (MUTUAL-FIGHT) DISORDERLY PERSONS ASSAULT; THE CONVICTION FOR DISORDERLY PERSONS ASSAULT IN THE LAW DIVISION IS CONTRARY TO PRINCIPLES OF DOUBLE JEOPARDY AND FUNDAMENTAL FAIRNESS.

- II. [THE WIFE] GRABBED THE IRON WHILE THE TWO WERE INSIDE [DEFENDANT'S] HOME; THE CONVICTION UNDER REVIEW

IS NOT SUSTAINABLE AS A MATTER OF LAW.

III. THE CHARGING INSTRUMENT DID NOT CHARGE AN OFFENSE UNDER N.J.S.A. 2C:12-1(a)(3), AND THE 'AMENDMENT' VIOLATED [DEFENDANT'S] RIGHT TO DUE PROCESS.

IV. [THE MUNICIPAL JUDGE] SHOULD HAVE RECUSED HERSELF; HER CREDIBILITY FINDINGS INFECTED THE TRIAL DE NOVO RECORD IN VIOLATION OF [DEFENDANT'S] RIGHT TO A FAIR TRIAL.

A. Our Standard of Review.

Our review of a Law Division's determination following a trial de novo is limited. State v. Clarksburg Inn, 375 N.J. Super. 624, 639 (App. Div. 2005). On an appeal of a municipal conviction to the Law Division, the Law Division must decide the matter de novo based on the record developed in the municipal court. State v. Aduato, 420 N.J. Super. 167, 176 (App. Div. 2011) (citing R. 3:23-8(a)). By contrast, when we review the Law Division's decision, we decide whether the factual findings were supported by sufficient credible evidence. State v. Locurto, 157 N.J. 463, 470-71 (1999) (quoting State v. Johnson, 42 N.J. 146, 161 (1964)). When both the municipal judge and the Law Division judge have made consistent credibility findings, we owe a particularly strong deference to those dual credibility determinations. Id. at 474. We review the

Law Division judge's legal conclusions de novo. See State v. Rivera, 411 N.J. Super. 492, 497 (App. Div. 2010).

B. Defendant's Conviction of Simple Assault.

A person is guilty of simple assault under N.J.S.A. 2C:12-1(a) if the person:

- (1) [a]ttempts to cause or purposely, knowingly, or recklessly causes bodily injury to another; or
- (2) [n]egligently causes bodily injury to another with a deadly weapon; or
- (3) [a]ttempts by physical menace to put another in fear of imminent serious bodily injury.

The statute goes on to provide that "[s]imple assault is a disorderly persons offense unless committed in a fight or scuffle entered into by mutual consent, in which case it is a petty disorderly persons offense." N.J.S.A. 2C:12-1(a).

In the municipal court, defendant was found guilty of petty disorderly persons simple assault. Defendant argues that the Law Division impermissibly convicted him of the higher offense of disorderly persons simple assault. We reject that argument because it is not supported by the record.

The order entered by the Law Division found defendant "guilty of N.J.S.A. 2C:12-1(a)(1)." It did not state whether that conviction was a petty-disorderly-persons conviction or a disorderly-persons conviction. In its written

opinion, the Law Division stated that "defendant is guilty of disorderly-persons simple assault, contrary to N.J.S.A. 2C:12-1(a)(1)." Nevertheless, in its factual findings, the Law Division clearly found that defendant and his wife had been engaged in a mutual fight. In that regard, the Law Division found that the wife had "initially picked up the iron" but, thereafter, "defendant forcibly took it from her, placed it back on the ironing board and pushed her with sufficient force that she fell back onto the clothing rack sustaining injury to her lower back." Those factual findings support a conviction for petty disorderly persons simple assault. Accordingly, we affirm defendant's conviction and remand with the instruction that the Law Division enter a new judgment of conviction clarifying that the conviction is for petty disorderly persons simple assault in violation of N.J.S.A. 2C:12-1(a)(1).

We reject defendant's arguments concerning double-jeopardy and due process. Defendant was never tried on the simple assault charge before the remand to municipal court. Accordingly, there is no double-jeopardy. See State v. Miles, 229 N.J. 83, 92 (2017).

Defendant's arguments about due process are not supported by the record. Due process requires a defendant to receive "reasonable notice and information of the specific charge." State v. Mello, 297 N.J. Super. 452, 461 (App. Div.

1997) (quoting Paterno v. Lyons, 334 U.S. 314, 322 (1948)). Defendant contends that he did not receive notice of the charges brought against him because he was charged in the complaint warrant with violating N.J.S.A. 2C:12-1(a)(3). As we have already noted, the complaint included a reference to that statute, as well as N.J.S.A. 2C:12-1(a)(1). More importantly, when the matter was remanded to municipal court, the municipal judge made it clear that defendant was charged with and being tried for a violation of N.J.S.A. 2C:12-1(a)(1). Defendant never objected. Just as importantly, defendant presented a defense to the charge of simple assault under N.J.S.A. 2C:12-1(a)(1).

We also reject defendant's substantive argument that his conviction was not supported by sufficient credible evidence. Defendant argues that the Law Division's finding that the wife initially picked up the iron is inconsistent with its finding that the two were engaged in a "mutual fight" because defendant would be entitled to defend himself. That argument is not supported by the facts or the law. The Law Division did not find that the wife had been the initial aggressor. Instead, the Law Division found that defendant had been an active participant in a mutual fight and that defendant had already taken the iron from her and had placed it down before he recklessly pushed his wife with enough force that she fell back and sustained injury to her lower back. That finding is

sufficient to sustain a conviction for petty disorderly persons simple assault. See N.J.S.A. 2C:12-1(a).

C. Defendant's Motion to Recuse the Municipal Judge.

Defendant also argues that the municipal judge should have recused herself because she had previously found a lack of probable cause on his complaint against his wife. We reject this argument for several reasons.

First, the order on appeal to us is the order from the Law Division. The Law Division judge conducted a de novo determination and, therefore, we do not directly consider the municipal-court conviction.

Second, there was no basis to recuse the municipal judge. New Jersey Court Rules state that a judge shall be disqualified if that judge "has given an opinion upon a matter in question in the action" or "when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so." R. 1:12-1(b) and (g). The Rules do not require recusal when a judge has previously decided probable cause. State v. Pointer, 135 N.J. Super. 472 (App. Div. 1975); State v. Smith, 113 N.J. Super. 120, 137-38 (App. Div. 1971). Defendant acknowledges this law but argues that existing case law should be modified to mandate recusal when a judge has previously made a probable-cause determination against a

simple assault defendant who sought to file a cross-complaint. We reject that argument for a change in the law.

No reasonable person would question the municipal judge's impartiality because she had previously decided that defendant's claim against his wife lacked probable cause. That determination was made based on defendant's submission and in the normal course of how municipal-court complaints are approved for prosecution. The record in the municipal court demonstrates that the municipal judge made independent and unbiased credibility findings after hearing the testimony of defendant and his wife at trial.

In short, we affirm defendant's conviction. We remand and instruct the Law Division to enter a new judgment of conviction clarifying that defendant was convicted of a petty disorderly persons offense of simple assault.

Affirmed and remanded to enter a new judgment of conviction.

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



CLERK OF THE APPELLATE DIVISION