

RECORD IMPOUNDED

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APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-0269-05T5

CONSTANCE CORNISH,

Plaintiff-Respondent,

v.

BRUCE CORNISH,

Defendant-Appellant.

Submitted September 13, 2006 – Decided September 26, 2006

Before Judges Fuentes and Messano.

On appeal from Superior Court of New
Jersey, Chancery Division, Family Part,
Cumberland County, Docket No. FV-06-0138-06.

Loccke & Correia, attorneys for appellant
(Merick H. Limsky, of counsel and on the
brief; Marcia J. Tapia, on the brief).

D'Arrigo & D'Arrigo, attorneys for respondent
(JoAnn C. D'Arrigo, on the brief).

PER CURIAM

Defendant Bruce Cornish appeals from a final domestic
violence restraining order (FRO) issued by the Family Part.
Defendant raises three arguments in support of this appeal: (I)
the acts attributable to him by plaintiff Constance Cornish, do
not rise to domestic violence within the meaning of N.J.S.A.

2C:25-17; (II) the trial court should not have permitted him to proceed without counsel, and should have afforded him additional time to prepare and present his defense; and (III) the trial court should have precluded plaintiff from testifying about prior alleged incidents of domestic violence under the doctrines of either res judicata or collateral estoppel.

After reviewing the record before us, and applying prevailing legal standards, we reject defendant's arguments as to points (II) and (III). We are satisfied that the arguments raised in these two points lack sufficient merit to warrant discussion in a written opinion. R. 2:11-3(e)(E). As to the argument raised in point (I), we are satisfied that the trial court failed to make the necessary findings to support its conclusion that defendant committed the act of harassment, as that term is defined in N.J.S.A. 2C:33-4. We are therefore compelled to reverse the court's ruling and vacate the restraints entered.

We gather the following facts from the evidence presented at trial. Defendant and plaintiff are husband and wife. They were married in 2001, and have one child together. Plaintiff has a daughter, age thirteen, from a prior relationship. Defendant is a fulltime police officer employed by the City of

Millville. He has held this position for the past fourteen years.

Prior to the incident that gave rise to this appeal, both parties characterized their marital relationship as tense and problematic. Although at the time of this incident they had been married for three years, they had lived together for a total of eight years. They separated at least on three separate occasions during these tumultuous years.

The incident at issue here occurred on July 26, 2005. According to plaintiff, at approximately 3 a.m. on this day, defendant awoke her for no apparent reason. She initially surmised that he wanted to talk to her about their marital problems. The situation quickly deteriorated into a full blown argument. According to plaintiff, the argument soon escalated into a menacing confrontation in which she felt threatened by defendant's demeanor. She left the marital residence and immediately filed a domestic violence complaint, giving the following description of the event that prompted her to seek judicial assistance:

My husband has an anger issue that I have been dealing with for some time. About 3:00 AM we had a problem and he began to get angry, I thought he might hit me. He has my children and all my belongings and I feel he just wants me to come pick up my things just to maybe jump on me. I'm very afraid of him and just can not trust to be around him. I

want my children with me and he has them and is kicking me out of the house.

This matter next came before the Family Part for a final hearing on August 4, 2005. Plaintiff was represented by counsel. Defendant appeared pro se. In response to her attorney's questions, plaintiff testified that the argument of July 26 started when defendant became angry as a result of her rejecting his attempts to engage in sexual intimacy. According to plaintiff, defendant began "kicking his legs, tossing the covers, telling me I can't stand you." She then "eased out of the bed and went downstairs to get out of his way."

At some point thereafter, defendant ran down the stairs where he found plaintiff seated on the couch. Plaintiff gave the following description of what transpired next:

A. He started yelling and screaming and cussing, you know, telling me how much he hates me, I'm sick of you, you're getting the f- out of my house.

Q. Okay, and how far was he from you?

A. At that point about three feet.

Q. And did he threaten you at all?

A. Not at that point, no.

Q. Not at that point. What happened next?

A. He ran back up the steps and I just heard this noise, like a drawer slam. I didn't know what it was. He came down, ran down the steps again and threw my work

clothes that I had set out, you know, for the next day and threw them at me and he said, "You're getting the f- out of my house."

Q. Threw them at you, they hit you?

A. No, they landed on the side of my feet.

Q. Okay, and he said, "You're getting the f- out of my house?"

[(Emphasis added).]

Despite plaintiff's statement implying that defendant actually threatened her at some point during this argument, there is no evidence in the record to support this allegation. Although plaintiff answered "yes" to her counsel's direct question: "Does he threaten you then," there is no description of any gesture, action, or statement attributable to defendant that corroborates plaintiff's conclusory response. Giving plaintiff all favorable inferences, the record only portrays an emotional verbal exchange between a husband and wife. Accepting as true plaintiff's account of events, defendant demanded, in a loud and angry voice, punctuated by profanity, that she leave the marital residence immediately. Without more, these events alone do not rise to the level of harassment.

With respect to prior incidents of domestic violence, the court specifically found that there had not been any prior domestic violence complaints filed by plaintiff against

defendant.¹ The search revealed one prior municipal court complaint which had been dismissed, however, the record does not reflect the nature of the charge alleged in this complaint.

At the FRO trial, plaintiff testified that the 1997 injury, which prompted her to go the hospital, was a "swollen jaw," caused when defendant tackled her: "the way he tackled me, I guess there was [sic] things around me and I had bruises all over." By contrast, defendant denied intentionally striking his wife at this or any other time. As to the incident in 1997, he asserted that plaintiff's only injuries were to her back, caused when they both fell to the floor. Despite the involvement of the police, which resulted in the subsequently dismissed municipal court complaint, neither party produced any record to substantiate their version of these events.

Under N.J.S.A. 2C:33-4, a person commits the offense of harassment if, "with purpose to harass" he:

- a. Makes, 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;

- b. Subjects another to striking, kicking, shoving, or other offensive touching, or threatens to do so; or

¹ This conclusion was based on a records-search conducted using the Family Part Automated Case Tracking System.

c. Engages in any other course of alarming conduct or of repeatedly committed acts with purpose to alarm or seriously annoy such other person.

Thus, "integral to a finding of harassment under either section is the establishment of the purpose to harass" Corrente v. Corrente, 281 N.J. Super. 243, 249 (App. Div. 1995). Here, as the following passage illustrates, the trial judge failed to make this indispensable finding:

I believe that what happened on July 26th is that . . . a dispute arose where the plaintiff went downstairs and defendant followed her down. I believe that she testified he threw her clothes at her. I believe that she left the house in fear of her safety. She left without her children. I believe that she sought protection (indiscernible) because there is a history of I'll call it bullying. I'll call it using one's size or advantage, getting in another person's face.

Hearing that someone is a disobedient wife gives me some pause for concern.² And I heard those words and it was asked if that was the case and the defendant made reference to some biblical reference, but indicating yes, he has said she is a disobedient wife. That's an issue of control, I think.

² The reference to "disobedient wife" stems from a statement made by defendant during cross-examination. Defendant actually admitted to calling plaintiff "unsubmissive." His attempt to explain this by referring to the Bible was cutoff by plaintiff's counsel. The record does not contain any other reference to this word or this issue.

I believe that the plaintiff has established by a preponderance of the more credible evidence before this court that there is a history of domestic violence that caused her to seek shelter in the past and the defendant did not object to that being notwithstanding any due process issues concerns that the Court had.

As this clearly reveals, the court's findings do not even mention the statutorily required element of intent to harass. Without such a finding, the predicate offense of harassment cannot stand as a matter of law. As we emphasized in Corrente, it is not sufficient that plaintiff feel alarmed or threatened. Id. at 249. Plaintiff's subjective feelings are not a substitute for the required judicial finding of intent to harass by the defendant.

Without such a finding, the record only shows two individuals involved in what appears to be a deeply dysfunctional marriage. Under these circumstances, it is not uncommon for emotions to boil over, and for angry words to be hurled about, often peppered with profanities. Under similar circumstances, we have held that a husband's statement that he would bury his wife, uttered after she announced her intention to obtain a divorce, did not constitute harassment. Peranio v. Peranio, 280 N.J. Super. 47, 56 (App. Div. 1995). Even the exchange of vulgarities on numerous occasions and inappropriate expressions of anger, including kicking a garbage can in the

presence of the parties' young children, is not harassment. J.N.S. v. D.B.S., 302 N.J. Super. 525, 527 (App. Div. 1997).

Finding a party guilty of having committed an act of domestic violence is a serious matter. We have repeatedly held that domestic violence restraining orders have serious consequences to a defendant,³ and therefore should not be entered without an adequate factual basis. Chernesky v. Fedorczyk, 346 N.J. Super. 34, 41 (App. Div. 2001). Here, the absence of the statutorily required judicial finding compels us to vacate the restraints imposed by the court.

Reversed.

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


CLERK OF THE APPELLATE DIVISION

³ A defendant who violates a domestic violence restraining order may be charged with contempt pursuant to N.J.S.A. 2C:29-9b, a crime of the fourth degree. A second conviction requires a minimum term of incarceration of not less than thirty days. N.J.S.A. 2C:25-30.