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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1616**

In re the Matter of:
Sara J. Barona, petitioner,
Respondent,

vs.

Carlos Alfonso Barona-Ayala,
Appellant.

**Filed September 9, 2008
Affirmed
Johnson, Judge**

Dakota County District Court
File No. FX-07-14461

Sara J. Barona, 12900 Penn Avenue South, Apt. 366, Burnsville, MN 55337 (pro se respondent)

Carlos Alfonso Barona-Ayala, 12900 Penn Avenue South, Apt. 153, Burnsville, MN 55337 (pro se appellant)

Considered and decided by Johnson, Presiding Judge; Toussaint, Chief Judge; and Halbrooks, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

In July 2007, Carlos Alfonso Barona-Ayala had a heated argument with his wife, Sara J. Barona. At a hearing on her petition for an order for protection (OFP), she testified that he pushed her into their bedroom, locked the door, verbally abused her, and

slapped her. The district court found that Barona-Ayala's conduct put Barona in reasonable fear of imminent harm and, accordingly, issued an OFP. Barona-Ayala appeals, arguing that the district court erred in certain evidentiary rulings and in granting the OFP. We conclude that the district court did not abuse its discretion and, therefore, affirm.

FACTS

On the evening of Saturday, July 21, 2007, Barona informed her husband, Barona-Ayala, that she had had an affair with another man and no longer wanted to be with Barona-Ayala. A heated argument ensued, and the parties' interactions became the subject of a petition for an OFP that Barona subsequently filed on July 31, 2007.

On August 8, 2007, the district court held an evidentiary hearing on Barona's petition. Barona testified that, upon learning of her infidelity, Barona-Ayala "exploded into a rage," shouted at her, slapped her face, pushed her into the bedroom they shared, locked both of them inside, and threatened to take their three-year-old daughter away from her. In addition, Barona testified that the July 21 incident was not the first time that Barona-Ayala had pushed her or intimidated her. She testified that she had tried to leave him on prior occasions but that he had coerced her to stay by telling her that he would take their daughter away if she left him. Barona-Ayala testified in response that he did not hit, push, or slap Barona.

At the conclusion of the hearing, the district court noted that each party's testimony contradicted the other's but that "balancing everything . . . Ms. Barona's version of the incident was more plausible than Mr. Barona-Ayala's." In written findings

issued after the hearing, the district court found that Barona's testimony was more credible than Barona-Ayala's testimony on the critical issues and that Barona-Ayala's conduct put Barona "in reasonable fear of imminent bodily harm." Accordingly, the district court granted the petition and issued an OFP prohibiting Barona-Ayala from committing acts of domestic abuse against Barona or entering her residence or place of employment. Barona-Ayala appeals.

D E C I S I O N

I. Evidentiary Rulings

Barona-Ayala first argues that the district court erred in admitting hearsay evidence offered by Barona. Questions concerning the admissibility of evidence are committed to a district court's discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997); *Green v. City of Coon Rapids*, 485 N.W.2d 712, 717 (Minn. App. 1992), *review denied* (Minn. June 30, 1992).

In his brief, Barona-Ayala makes a very general argument that the district court erred by admitting hearsay statements, but he does not identify the particular evidence at issue. We have reviewed the record and found three instances in which the district court overruled Barona-Ayala's hearsay objections: (1) when Barona testified about Barona-Ayala's telephone call to the police to report the confrontation, (2) when Barona testified about the police officers' suggestion that she file a petition for a restraining order, and (3) when Barona's brother testified about statements Barona-Ayala made to members of Barona's family in which he berated them and threatened suicide if they did not tell him the whereabouts of Barona and their daughter.

Hearsay is “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Minn. R. Evid. 801(c). Hearsay evidence is inadmissible unless an exception applies. Minn. R. Evid. 802. The district court did not state reasons for overruling Barona-Ayala’s hearsay objections. It appears from the transcript that the statements at issue are non-hearsay statements to which the hearsay rule does not apply. The first and third statements are not hearsay because they are statements of a party-opponent. *See* Minn. R. Evid. 801(d)(2)(A); *Thurman v. Pepsi-Cola Bottling Co.*, 289 N.W.2d 141, 144 (Minn. 1980) (holding that plaintiff’s statement to ambulance driver was not hearsay but admission of party-opponent). The second statement is not hearsay because it was not “offered in evidence to prove the truth of the matter asserted,” Minn. R. Evid. 801(c), but, rather, was offered to explain the reason Barona sought the OFP. *See State v. Stillday*, 646 N.W.2d 557, 563-64 (Minn. App. 2002) (holding that testimony of victim’s neighbor concerning victim’s call for help was offered to show why neighbor contacted police, not to prove truth of matter asserted). Thus, the district court did not abuse its discretion by overruling Barona-Ayala’s hearsay objections.

Barona-Ayala’s brief makes only a fleeting reference to the district court’s exclusion of an audio recording that he offered into evidence. The issue is mentioned only in the statement of the issues but is not mentioned in the argument section of the brief. The argument section of an appellate brief “shall include the contentions of the party with respect to the issues presented, the analyses, and the citations to the authorities.” Minn. R. Civ. App. P. 128.02, subd. 1(d). Because the issue was not

adequately presented, we do not consider it. We note that a district court has broad discretion whether to admit a tape recording into evidence, and this is especially so when the audio recording is inaudible, as appears to be true in this case. *See In re Gonzalez*, 456 N.W.2d 724, 728 (Minn. App. 1990).

II. Sufficiency of the Evidence

Barona-Ayala argues that the district court abused its discretion in granting the OFP because the evidence does not support the district court's findings. The decision whether to grant an OFP is within the district court's discretion. *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005). A district court abuses its discretion when its findings are unsupported by the record or when it misapplies the law. *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 927 (Minn. App. 2006). This court reviews the record in the light most favorable to the district court's findings and reverses only if it has a "definite and firm conviction that a mistake has been made" in reaching those findings. *Id.* (quotation omitted). If the evidence is in conflict, this court defers to the district court's credibility determinations. Minn. R. Civ. P. 52.01; *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988); *see also State v. Miller*, 659 N.W.2d 275, 279 (Minn. App. 2003) (stating that "the weight and believability of witness testimony is an issue for the district court"), *review denied* (Minn. July 15, 2003).

A petitioner seeking an OFP under chapter 518B must allege and prove domestic abuse. Minn. Stat. § 518B.01, subd. 4(b) (2006). The Minnesota Domestic Abuse Act defines "domestic abuse" as:

- (1) physical harm, bodily injury, or assault;
- (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or
- (3) terroristic threats, within the meaning of section 609.713, subdivision 1; criminal sexual conduct, within the meaning of section 609.342, 609.343, 609.344, 609.345, or 609.3451; or interference with an emergency call within the meaning of section 609.78, subdivision 2.

Minn. Stat. § 518B.01, subd. 2(a) (2006). This statutory language requires “either a showing of present harm, or an intention on the part of appellant to do present harm.” *Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. App. 1984). The intent to inflict fear may be inferred from conduct. *Boniek v. Boniek*, 443 N.W.2d 196, 198 (Minn. App. 1989).

The district court found that Barona-Ayala put Barona “in reasonable fear of imminent bodily harm.” The district court’s finding of domestic abuse is supported by the evidence. Barona testified, without contradiction by Barona-Ayala, that he “got in [her] face” and called her names (such as “whore”). Barona also testified that Barona-Ayala forced her into the bedroom with him, locked the door, threatened to take their daughter away from her, and slapped her. The district court found that Barona’s testimony about Barona-Ayala’s conduct was “highly credible” and that Barona-Ayala’s denials were “less credible.” This court must defer to those credibility determinations. *See* Minn. R. Civ. P. 52.01; *Sefkow*, 427 N.W.2d at 210. Thus, considering the evidentiary record as a whole, the evidence supports the district court’s finding that Barona-Ayala’s conduct inflicted “fear of imminent bodily harm,” which constitutes domestic abuse. Minn. Stat. § 518B.01, subd. 2(a)(2); *see Kass*, 355 N.W.2d at 337

(holding that domestic abuse act requires either present harm or intention to do present harm). In addition, Barona testified that “this [was] not the first time he pushed me and intimidated me,” and her testimony further supports the district court’s finding. *See Boniek*, 443 N.W.2d at 198 (holding that past abusive behavior, although not dispositive, is factor in determining cause for OFP).

Barona-Ayala challenges Barona’s testimony that he slapped her. Such conduct, if proved, clearly would constitute “physical harm, bodily injury, or assault,” and, therefore, would satisfy the statutory definition of domestic abuse. *See* Minn. Stat. § 518B.01, subd. 2(a)(1). Barona-Ayala points out that Barona did not say anything to the investigating police officers about being slapped, that she did not seek out medical attention, and that there were no photographs of marks on her face. If the district court had relied on Barona’s evidence and found that Barona-Ayala had slapped Barona, we likely would affirm due to our deferential standard of review with respect to credibility determinations. But the district court did not rest its decision on those grounds, so Barona-Ayala’s argument is not pertinent to a disputed issue.

In sum, the district court’s findings were supported by the evidence, and its decision to grant the OFP was not an abuse of its discretion.

Affirmed.