

IN THE COURT OF APPEALS OF IOWA

No. 2-1126 / 12-1037
Filed March 27, 2013

Upon the Petition of

SHELLI ANN WILSON,
Petitioner-Appellee,

And Concerning

GREG EDWARD WILSON,
Respondent-Appellant.

Appeal from the Iowa District Court for Story County, Dale E. Ruigh,
Judge.

Greg Wilson appeals from the district court order granting Shelli Wilson's
petition for relief from domestic abuse. **AFFIRMED.**

Gerald A.L. Moothart of Moothart Law Office, Ames, for appellant.

Nicole S. Facio of Newbrough Law Firm, L.L.P., Ames, for appellee.

Considered by Doyle, P.J., and Mullins and Bower, JJ.

BOWER, J.

Greg Wilson appeals from the district court order granting Shelli Wilson's petition for relief from domestic abuse. He contends the district court erred in finding Shelli proved by a preponderance of the evidence that he committed an act of domestic abuse. Shelli requests an award of her appellate attorney fees.

Because Shelli met her burden of proving Greg committed an act of domestic abuse, we affirm the district court's order.

I. Background Facts and Proceedings.

Greg and Shelli are married with four children. They share a home together in Ames. Greg works as an advanced software developer, and Shelli is a stay-at-home mom.

On April 17, 2012, Shelli filed a petition for relief from domestic abuse. It alleged that Greg had physically abused the children, hitting one child on the face and slapping another on the hand. It also alleged Greg had verbally abused her, he had verbally abused the children, and Shelli feared for her safety. The district court dismissed the petition without a hearing.

The following day, Shelli filed a second petition for relief from domestic abuse. This time Shelli alleged Greg had sexually abused her. She also alleged Greg had threatened her, and she feared for her physical safety. When asked to list the most recent injury and/or nonconsensual sexual experience, Shelli wrote:

April 1, 2012 I found broken antique glass in my tub. Greg yelled at me for my surprised reaction. Later he decided to pour a bath for me. I asked if glass was out. He assured me that it was clean. I got in & felt glass chips all over the bottom of the tub. After I sat down, I realized I had glass in my buttocks & found large

chunks of glass still in [the] tub. Later, he wanted sex while [I was] in pain.

When asked to describe other injuries or threats received from Greg, Shelli wrote:

Greg badgers me to have sex and won't stop until he gets it and rubs himself on me when I say no.

Greg grabs my breast or touches my vagina even when asked not to multiple times.

Greg plays with his switchblade in front of us and has guns in our bedroom.

Shelli was granted a temporary protective order, and the case was scheduled for hearing on April 30, 2012.

At the hearing Shelli testified Greg has been verbally abusive during the marriage, getting in her face and yelling loudly or calling her "stupid" or "a liar." However, after Greg suffered a brain injury when hit by a drunk driver in 2010, things became worse. Shelli testified regarding a specific incident that occurred in October 2010. Shelli claims Greg hit her and then threw something that struck the wall, putting a hole in it. She was scared for her safety. Greg called the police and was hospitalized following the incident due to concerns about his physical health.

Shelli also testified that in December 2010, she and Greg were taking a bath together when she became scared Greg was going to hit her. She claims he raised his hand as though he was going to strike her and she ducked under the water. Once she realized she was not going to be hit, Shelli got out of the tub, ran to another room, locked the door, and called her friend Sarah Stevenson.

At the hearing, Shelli relayed an incident that occurred on July 2, 2011. She and a friend were butchering chickens in the kitchen when Greg discovered Shelli had thrown away some milk jugs he had been saving. Shelli stated she heard yelling outside before Greg came into the house, slammed the door, and “got in [Shelli’s] face.” Shelli testified he was screaming at her so loudly that her friend got in between them to prevent Greg from striking Shelli. Because the butchering knives were out, Shelli testified she was fearful Greg was going to pick one up and “do something because he was enraged.” After that incident, Shelli and the children left the home for approximately five to six weeks.

Shelli and Greg attended counseling for a time, and things improved. But Shelli testified that once they stopped going to counseling, Greg went back to being abusive. He hit their eight-year-old daughter on the hand hard enough to leave a red mark, and hit their three-year-old son across the face, leaving a bruise. The Department of Human Services was contacted regarding the latter incident and was in the process of conducting a child abuse assessment at the time of the hearing.

Shelli testified that the most recent incident of abuse occurred on April 1, 2012. One of the children had dropped an antique glass into the bathtub, shattering it. Shelli was distraught because the antique had belonged to her great-grandmother. Shelli testified that Greg became angry, believing she blamed him for the broken glass. That night Greg offered to draw her a bath, reassuring her that he would clean out the glass first. When Shelli stepped into the bath, she could not see the bottom of the tub because there were bubbles.

When she sat down, she realized Greg had not cleaned out all of the glass. She picked up three large pieces of glass from the bottom of the tub and had glass “splinters” stuck in her legs and buttocks. She also cut her finger while trying to remove the glass. Shelli testified that Greg forced her to have sex with him that night, even though she was still in pain from the glass.

Over the course of the marriage, Shelli claims Greg forced her to have sex with him two or three times per week. If she said no, he would continue to touch her vagina and private areas. On occasion, she woke up to Greg having sex with her. He would continue even after she told him no.

Shelli’s friend, Sarah Stevenson, also testified at the hearing. She has known Greg and Shelli since the fall of 2010. She described Greg as “[s]hort tempered,” stating that from what she had witnessed, Greg has “a short fuse” and “gets irritated and short tempered fairly quickly.”

The couple’s pastor, Thomas Nesbitt, was subpoenaed to testify at the hearing. He has known Greg and Shelli for approximately seventeen years but had gotten to know them particularly well over the past nine years. Greg is a part of Nesbitt’s men’s group that meets weekly. Nesbitt described Greg as “a volatile fellow” even before his injury. He was unaware of any physical violence in the marriage.

Greg’s sister, Laurel Blodgett, testified at the hearing. She stated that while Greg would physically discipline the children, she had never seen him lose his temper. She testified that Greg’s anger or volatility had never been a concern for her family.

Kenneth Dodge, a licensed psychologist, testified that he began treating Greg in November 2010, trying to help Greg cope with the symptoms stemming from his brain injury. Dodge testified these symptoms include “cognitive fatigue” and “sensitivity to noises.” They devised specific strategies to help Greg deal with the demands of work and family life. Although Dodge testified he had no concerns about Shelli or the children’s safety or about Greg sexually abusing Shelli, he admitted that the only information he had came from Greg.

Greg’s testimony at the hearing portrayed a very different picture than Shelli’s testimony. He testified he never forced Shelli to have sex with him. He also testified that Shelli was often hysterical while he attempted to remain calm.

Specifically with regard to the incident where Shelli threw away the milk jugs, Greg testified that while Shelli became hysterical, he tried to remain as calm as he could. With regard to the incident involving glass in the bathtub, Greg denied leaving the glass in it to injury Shelli, testifying that he picked up the large pieces of glass and attempted to wash the rest down the drain with water.

Regarding the incident that occurred in October 2010, Greg testified he lost control of his body. He stated he could feel himself losing his ability to talk. He did not recall hitting Shelli but admits that he may have. When asked if he threw something as Shelli claimed, Greg testified: “After she left the room, somehow something flipped out of my hand and I did throw it into a wall or something. But I had no control over my body or my actions. And, you know, anything that happened was completely incidental.” Greg stated he eventually fell to the floor and called 911 for assistance.

Greg also denied attempting to strike Shelli while taking a bath together in December 2010. He testified he had no recollection of that occurring, but he flinches for a quarter second occasionally, and it could have looked like he was raising his hand to strike her when he flinched.

At the close of the hearing, the district court concluded Shelli had proved by a preponderance of the evidence that Greg had committed an act of domestic assault. The court stated:

Mr. Moothart is correct that simply presenting yourself, Mr. Wilson, as a volatile person, that doesn't constitute an assault. But when I heard the testimony from people who probably know you the best, that consistent description that I was provided was of a person who has a consistent pattern of being a very volatile person and when I coupled that description from people who I think know you best coupled with the allegations that have been made of physical things that occurred in your household and the general environment in which you and Mrs. Wilson have been living your life, I quickly concluded by a preponderance of the evidence that you have committed an act of domestic abuse against Mrs. Wilson in the recent past.

The court then entered a protective order to prohibit Greg from having contact with Shelli. It granted Shelli temporary physical care of the children subject to supervised visitation with Greg.

II. Scope and Standard of Review.

Because civil domestic abuse cases are heard in equity, our review is de novo. *Wilker v. Wilker*, 630 N.W.2d 590, 595 (Iowa 2001). We consult the entire record and formulate our own opinion. *Id.* While we give consideration to the trial court's factual findings and credibility assessments, we are not bound by them. *Id.*

III. Analysis.

A person may seek relief from domestic abuse by petitioning the district court. Iowa Code § 236.3(1) (2011). Upon a finding that a defendant has engaged in domestic abuse, the court may grant a protective order. *Id.* § 236.5(1)(b). The petitioner has the burden of proving by a preponderance of the evidence that an act of domestic abuse occurred. *Id.* § 236.3(2).

Domestic abuse means committing assault as defined in section 708.1 when the assault is between family members who resided together at the time of the assault. *Id.* § 236.2(2)(a). There is no dispute that Greg and Shelli are family members who resided together at the time the alleged assault occurred. Greg disputes that Shelli met her burden of showing an assault took place. As defined in section 708.1, an assault occurs when a person, without justification, does any of the following:

1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Id. § 708.1.

Greg complains that the district court failed “to identify which act, if any, constituted an assault on which the final protective order could enter.” However, Greg failed to raise this complaint to the district court by way of a motion pursuant to Iowa Rule of Civil Procedure 1.904(2). Issues must be raised and

decided by the trial court before they may be raised and decided on appeal. *In re Estate of Day*, 521 N.W.2d 475, 479 (Iowa Ct. App. 1994). If a party finds the record insufficient, the rules of civil and appellate procedure set forth the avenues by which to alert the trial court of the problem and rectify it. *Id.* Failure to do so waives the issue on appeal. *Id.*; *Korsrud v. Korsrud*, 45 N.W.2d 848, 850-51 (Iowa 1951) (“Although formal findings of fact and conclusions of law were not filed as required by [rule 1.904(1)], plaintiff did not avail himself of the procedure provided by [rule 1.904(2)] and may not now complain of their omission.”).

Upon our de novo review, we find Shelli met her burden of proving Greg engaged in domestic violence. Shelli testified to the following acts that constitute an assault: (1) in October 2010, Greg slapped her and threw something at her that hit a wall; (2) in December 2010, Greg moved to strike her while they were taking a bath together; and (3) in April 2011, Greg left broken glass in the bathtub and drew her a bath, hiding the glass with bubbles. Greg does not dispute these incidents happened, although he does not recall whether the first two occurred. He disputes that he had the requisite intent to commit assault.

Assault is a specific intent crime. *State v. Fountain*, 786 N.W.2d 260, 263 (Iowa 2010). Specific intent is present when it is shown from the circumstances that the offender subjectively desired the prohibited result. *Id.* at 264. In order for there to be a criminal assault, it must be shown that the act was either “intended to cause pain or injury to, or . . . intended to result in physical contact which will be insulting or offensive to another,” or “intended to place another in

fear of immediate physical contact, which will be painful, injurious, insulting, or offensive.” *State v. Bedard*, 668 N.W.2d 598, 600 (Iowa 2003).

Did Shelli prove by a preponderance of the evidence that Greg intended to cause pain or injury or intended to place her in fear of immediate physical contact that would be painful? Based on the three aforementioned incidents, we find she has. Greg does not deny any of these incidents occurred; instead, he argues he did not intend to strike or harm Shelli. Greg blames the first two incidents on the effects of his traumatic brain injury and the third he attributes to simple oversight. Whether to believe his version requires a determination of Greg’s credibility. Greg testified it was Shelli—not him—who often acted hysterically. This claim is contradicted by the testimony of a friend of the couple and their pastor. Both witnesses know the parties well and have had frequent occasions to observe them. Given their claims that Greg is a volatile person who is prone to anger and frustration, the more credible evidence suggests Greg acted with the specific intent to injure or place Shelli in immediate fear of injury when the incidents occurred.

Because Shelli has shown it is more likely than not that Greg engaged in domestic abuse, we affirm the district court order granting her petition for domestic abuse.

Shelli requests an award of \$5000 in her appellate attorney fees. She cites Greg’s earnings of \$95,000 annually in comparison to her position as a stay-at-home mother in support of her request. She also notes she was obligated to defend the trial court’s decision.

We have the authority to award attorney fees under Iowa Code section 236.5(4). See also *Schaffer v. Frank Moyer Constr. Inc.*, 628 N.W.2d 11, 23 (Iowa 2001) (holding that a statute allowing an award of trial attorney fees permits an award of appellate attorney fees as well). An award of attorney fees is not a matter of right, but is within the discretion of the court. *In re Marriage Benson*, 545 N.W.2d 252, 258 (Iowa 1996). We award Shelli \$5000 in appellate attorney fees.

Costs on appeal are taxed to Greg.

AFFIRMED.