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Minn. Stat. § 480A.08, subd. 3 (2016).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1812**

In re the Matter of:

Amanda Jean Vail, petitioner,
Respondent,

vs.

Ryan Joseph Vail,
Appellant.

**Filed May 15, 2017
Affirmed
Schellhas, Judge**

Hennepin County District Court
File No. 27-DA-FA-16-6151

Jon G Sarff, Sarff Law Office, Shorewood, Minnesota (for respondent)

Mallory K. Stoll, Blahnik Law Office, PLLC, Prior Lake, Minnesota (for appellant)

Considered and decided by Bratvold, Presiding Judge; Schellhas, Judge; and Jesson,
Judge.

UNPUBLISHED OPINION

SCHELLHAS, Judge

Appellant asks us to reverse an order for protection against him, arguing that the evidence does not support requisite findings for the issuance of an order for protection. We affirm.

FACTS

Appellant Ryan Joseph Vail and respondent Amanda Jean Vail married in November 2007 and have two children in common.¹ In early March 2016, Amanda asked Ryan to move out of the marital home because she believed that he was using drugs. Ryan moved out, and the parties co-parented the children during their separation. On the evening of June 30, Ryan returned the children to the marital home after dinner. Outside the children's presence, Ryan moved toward Amanda, tightly grabbed her arm, and refused to let go. While wrenching her arm away from Ryan's grasp, Amanda experienced pain.

On August 2, 2016, Amanda petitioned the district court for marriage dissolution. On September 1, she petitioned for an order for protection (OFP) against Ryan for herself and the children and filed an affidavit in support of her petition. Amanda described the June 30, 2016 incident and stated that "Ryan is engaged in the use, distribution and sale of cocaine" and that she feared for her and the children's safety. The district court denied Amanda's request for an ex parte OFP and scheduled an evidentiary hearing.

The evidentiary hearing began on September 8, 2016, before a district court referee. Amanda appeared with counsel; Ryan appeared pro se. Amanda testified and introduced four exhibits, mostly focusing on Ryan's alleged involvement with drugs and association with dangerous people. Ryan asked for time to confer with an attorney, and the referee continued the hearing to September 12.

¹ Because the parties have the same last name, we refer to them by their first names in this opinion.

When the hearing continued, both parties appeared with counsel. Ryan's counsel cross-examined Amanda, and Ryan testified and introduced three exhibits. Ryan admitted to past use of cocaine but denied grabbing Amanda's arm on June 30, 2016. At the close of the evidence, the referee stated:

[U]se and abuse of cocaine in and of itself . . . is not domestic abuse. However, Petitioner did testify, I think credibly, about the incident on the 30th; and she indicated that Mr. Vail grabbed her arm, and she had to wrench it away. That certainly could be domestic abuse. And I understand, Mr. Vail, that your story is very different than that. So, I'm going to issue an Order for Protection; however, I am not finding that his contact with Ms. Vail is dangerous at this time. . . . [S]o, the Order is going to allow some contact, . . . but you will be ordered not to commit . . . any acts of domestic violence. . . . [T]here will be some provision for parenting time and contact only with regard to the children. There is absolutely nothing to indicate that he has committed domestic abuse against the children; so, the children are removed.

Based on the referee's recommendation, the district court dismissed the children from the action and issued a one-year OFP against Ryan in favor of Amanda. The OFP states that Amanda "established that domestic abuse as defined by [statute] was committed against her" by Ryan, orders Ryan "not [to] commit acts of domestic abuse" against Amanda, states that Ryan is not "restrain[ed]" from contacting Amanda, and grants temporary supervised parenting time to Ryan.² This appeal follows.

² On November 18, 2016, the district court amended the OFP to eliminate its parenting-time provisions, replacing those provisions with a note that "[t]emporary parenting time has been addressed in [the dissolution action]."

DECISION

The Minnesota Domestic Abuse Act, Minn. Stat. § 518B.01 (2016), provides for the issuance of an OFP “in cases of domestic abuse.” Minn. Stat. § 518B.01, subds. 1, 4. “[A]n OFP is available only if the petitioner shows the respondent committed domestic abuse against the petitioner or the person on whose behalf the petition is brought.” *Schmidt ex rel. P.M.S. v. Coons*, 818 N.W.2d 523, 527 (Minn. 2012) (footnote omitted).

“Domestic abuse” means the following, if committed against a family or household member by a family or household member:

- (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).

An OFP petitioner must prove by a preponderance of the evidence “the existence of domestic abuse.” *See id.*, subd. 4(b) (“A petition for relief shall allege the existence of domestic abuse, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought.”); *Oberg v. Bradley*, 868 N.W.2d 62, 64 (Minn. App. 2015) (holding that “a petitioner must meet the . . . preponderance of the evidence standard to obtain an OFP”). Evidence of past domestic abuse may be insufficient to prove “the existence of domestic abuse,” within the meaning of Minn. Stat. § 518B.01, subd. 4(b); the petitioner also must show either “present harm, or an intention on the part of the responding party to do present harm.” *Rew ex rel. T.C.B.*

v. Bergstrom, 812 N.W.2d 832, 844 (Minn. App. 2011), *aff'd in part, rev'd in part on other grounds sub nom. Rew v. Bergstrom*, 845 N.W.2d 764 (Minn. 2014); *see also Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005) (“In order to establish domestic abuse, [the petitioner] must show present harm or an intention on the part of the [respondent] to do present harm.” (quotation omitted)); *Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. App. 1984) (“[W]e construe the definition of ‘domestic abuse’ under Minnesota’s Domestic Abuse Act to require either a showing of present harm, or an intention on the part of [the respondent] to do present harm.”).

The petitioner may prove present harm with evidence of temporally proximate domestic abuse; the petitioner may not prove present harm with evidence of temporally remote domestic abuse or evidence of harmful actions by the respondent that do not qualify as “domestic abuse,” within the meaning of Minn. Stat. § 518B.01, subd. 2(a). *See Chosa*, 693 N.W.2d at 489–90 (reversing OFP against mother in favor of her child, which OFP was based on district court’s findings of “inappropriate hygiene and inadequate medical care of the child, leaving the child unattended, active chemical dependency while caring for the child, and an ‘overall pattern of behavior endangering the physical well being of the child,’” where “there [wa]s no evidence of actual physical harm, bodily injury, or assault” resulting from mother’s actions and no evidence that mother had “intent to do present harm” to the child); *Bjergum v. Bjergum*, 392 N.W.2d 604, 605–06 (Minn. App. 1986) (agreeing that domestic abuse that occurred about 19 months prior to petition was “too remote to support” OFP and reversing OFP where petitioner “fail[ed] to establish [respondent]’s present intention to do harm or inflict fear of harm” (quotation omitted));

Kass, 355 N.W.2d at 336–37 (reversing OFP that was based on domestic abuse that occurred about four years prior to petition, although petitioner “fear[ed] for her safety and that of her children” after recently seeing respondent traveling in a car behind her own, where petitioner failed to make “any showing of [respondent]’s present intention to do harm or inflict fear of harm”).

“The decision to grant an OFP . . . is within the district court’s discretion,” *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009) (quotation omitted), “so we will not reverse absent an abuse of that discretion,” *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 927 (Minn. App. 2006). “A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law.” *Pechovnik*, 765 N.W.2d at 98 (quotation omitted).

[W]e review the record in the light most favorable to the district court’s findings, and we will reverse those findings only if we are left with the definite and firm conviction that a mistake has been made. We will not reverse merely because we view the evidence differently. And we neither reconcile conflicting evidence nor decide issues of witness credibility, which are exclusively the province of the factfinder.

Id. at 99 (quotations and citations omitted). We review the district court’s construction of the Domestic Abuse Act de novo, *Braend*, 721 N.W.2d at 927, giving the Act “liberal construction in favor of the injured party,” *Pechovnik*, 765 N.W.2d at 98–99 (quotation omitted).

In this case, the district court issued the OFP based on its finding of a “single incident” of domestic abuse of Amanda by Ryan: the June 30, 2016 incident in which Ryan grabbed Amanda’s arm and refused to let go until Amanda wrenched her arm away and

experienced pain. Ryan does not challenge the court’s domestic-violence finding. Instead, he argues that “[the June 30, 2016] incident alone is insufficient to support the issuance of an order for protection against [him].” Essentially, Ryan argues that Amanda failed to prove “the existence of domestic abuse,” within the meaning of Minn. Stat. § 518B.01, subd. 4(b), as construed by caselaw, because her evidence showed neither present harm nor intent to do present harm. *See* Minn. Stat. § 518B.01, subd. 4(b) (providing that OFP petitioner “shall allege the existence of domestic abuse”); *Chosa*, 693 N.W.2d at 489 (“In order to establish domestic abuse, [the petitioner] must show present harm or an intention on the part of the [respondent] to do present harm.” (quotation omitted)).

Ryan correctly points out that the record is devoid of evidence that he intends to do present harm to Amanda. Indeed, at the end of the evidentiary hearing, the district court referee stated, “I am not finding that [Mr. Vail’s] contact with Ms. Vail is dangerous at this time,” and the OFP does not prohibit Ryan from contacting Amanda. Ryan argues that the June 30, 2016 incident cannot constitute present harm for the purposes of Amanda’s OFP petition because the June 30, 2016 incident is both “singular” and “stale.” We must decide whether the June 30, 2016 incident constitutes present harm for the purposes of Amanda’s OFP petition.

We have concluded that a pattern of domestic abuse that ended about 19 months prior to an OFP petition was “too remote” to constitute present harm. *Bjergum*, 392 N.W.2d at 605–06; *see also Kass*, 335 N.W.2d at 337 (concluding that domestic abuse that occurred about four years prior to petition did not constitute present harm). But our research reveals no authority for the proposition that a shorter passage of time between a domestic-abuse

incident and an OFP petition negates the incident's present harm. We conclude that the district court did not err by concluding that the June 30, 2016 incident constitutes present harm for the purposes of Amanda's OFP petition and therefore did not abuse its discretion by issuing the OFP.

Amanda argues that the district court erred by not extending the OFP to the parties' children and asks us to "reverse and remand this case with instructions to extend the OFP to the children." We reject Amanda's argument for two reasons. First, Amanda did not file a notice of related appeal on the issue and therefore cannot raise it in this appeal. *See* Minn. R. Civ. App. P. 106 ("After an appeal has been filed, respondent may obtain review of a judgment or order entered in the same underlying action that may adversely affect respondent by filing a notice of related appeal"); *In re Estate of Barg*, 752 N.W.2d 52, 74 (Minn. 2008) ("A respondent who does not file a notice of review to challenge an adverse ruling of the district court waives that issue in the court of appeals." (citing Minn. R. Civ. App. P. 106)). Second, the district court did not find that the children are victims of domestic abuse, and the record does not support any such finding.

Affirmed.