STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0250

In the Matter of:

Marissa Jean Newton-Denila,
on behalf of minor children, petitioner,
Respondent,

vs.

Ejiro Elqanah Newton-Denila,
Appellant.

Filed September 11, 2017
Affirmed
Reilly, Judge

Stearns County District Court
File No. 73-FA-16-11553

Cynthia J. Vermeulen, Vermeulen Law Office, P.A., St. Cloud, Minnesota (for respondent)

Russell R. Cherne, Pennington, Cherne & Gaarder, PLLC, St. Cloud, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Stauber, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

U N P U B L I S H E D O P I N I O N

REILLY, Judge

Appellant Ejiro Elqanah Newton-Denila challenges an order for protection prohibiting his contact with his wife and three children, arguing that the evidence does not support the requisite findings for the issuance of an order for protection. We affirm.

FACTS

Respondent Marissa Newton-Denila and appellant Ejiro Elqanah Newton-Denila married in November 2009 and have three children in common. In December 2016, respondent and appellant agreed to separate and decided that appellant would move out of the family home.

On December 18, 2016, appellant returned to the family home to watch the children while respondent visited a coworker and a former acquaintance. In the early morning hours on December 19, 2016, appellant sent respondent a text message in which he stated that he was leaving the family home to go to the hospital. When respondent returned home, she discovered that appellant had not left to go to the hospital and had instead waited for her to return. Upon her arrival, appellant started to yell at respondent and asked her repeatedly where she had been and with whom she had been. He grabbed her cellphone and pushed her into a chair in the living room, telling her that she needed to answer the questions before he would let her get up. While he attempted to look through her phone, appellant continued to push and "shoulder" respondent in an effort to "corner[]" her in the living room. Respondent repeatedly told appellant that she did not feel safe, but appellant continued to

respond, "I'm not hitting you," while pushing respondent into the chair and telling her that she could leave only after she answered his questions.

Respondent eventually left the house, but appellant followed her; he refused to give her back her cellphone, and begged her not to call the police. When she went back into the house, appellant pushed her against a wall and continued to push her down onto a couch until she collapsed because she was unable to breathe. As she attempted to crawl away from appellant, he yelled to their oldest child, who was sleeping, and woke the child to ask her to "beg" respondent not to call the police, explaining that if respondent called the police he would "get in trouble." The child started crying and begged respondent not to call the police. Because respondent did not want the children to witness the incident, she again asked appellant if she could leave. Appellant responded that he would leave and returned respondent's cellphone to her on the condition that she "promise to the kids that she wouldn't call the police." When he went downstairs to "get [his] things," respondent went into their daughter's bedroom, closed the door, and called 911. The police arrived within several minutes of the phone call and placed appellant under arrest.

Respondent petitioned for an order for protection (OFP) on December 21, 2016, and filed an affidavit in support of her petition. Respondent described the December 19 incident and stated that appellant's "behavior is unpredictable," explaining that she "fear[ed] retaliation because [she] called the police" and "was very afraid and terrified for her life." The district court granted respondent's request for an ex parte OFP and scheduled an evidentiary hearing. The district court also granted a domestic abuse no contact order (DANCO) against appellant the following day.

After the OFP hearing on January 3, 2017, at which the district court found that appellant "shouldered" respondent and "push[ed] her around the living room and into a chair," the district court determined that respondent feared for her own safety, credited the testimony of respondent, found that appellant's testimony was not credible, and concluded that clear and convincing evidence established "domestic abuse occurred with respect to [respondent] and her children." That same day, the district court granted an order for protection, in which the district court found that the following acts of domestic abuse occurred: "[appellant] pushed [respondent] into a chair, kept pushing [respondent] into a chair and then into a wall and threatened to kill [her]. Events occurred in front of at least one of the children who [appellant] encouraged . . . to tell mom not to call 911." The order restrained appellant from committing acts of domestic abuse against the protected parties and prohibited appellant from contacting respondent and the children for two years, with the exception of supervised parenting time as provided in the DANCO.

This appeal follows.

ANALYSIS

Appellant challenges the OFP prohibiting his contact with his wife and three children, arguing that the evidence does not support the district court's findings that (1) the altercation between appellant and respondent occurred in front of at least one of the parties' children, and (2) appellant threatened to kill respondent.

The Minnesota Domestic Abuse Act provides for the issuance of an OFP "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); *see also* Minn. Stat. § 518B.01 (2016) (identifying acts that constitute domestic abuse). Domestic abuse, when committed against a family or household member by a family or household member, includes:

> (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; . . . 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 "the existence of domestic abuse" by a preponderance of the evidence. *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."); *see also Oberg v. Bradley*, 868 N.W.2d 62, 64 (Minn. App. 2015) ("[A] petitioner must meet the . . . preponderance-of-the-evidence standard to obtain an OFP."). Evidence of past domestic abuse is generally insufficient to establish "the existence of domestic abuse" within the meaning of Minn. Stat. § 518B.01, subd. 4(b); instead, the petitioner must demonstrate 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 Bjergum v. Bjergum*, 392 N.W.2d 604, 605-06 (Minn. App. 1986) (holding that evidence of domestic abuse that occurred about two years earlier is too remote to support the grant of an OFP).

The decision to grant an OFP is within the discretion of the district court, *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009), and we generally will not reverse a grant of an OFP 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). When determining whether a district court abused its discretion, this court reviews the record "in the light most favorable to the district court's findings," and will reverse those findings only when this court is "left with the definite and firm conviction that a mistake has been made." *Id.* at 99 (quotations and citations omitted).

The district court first granted respondent's petition for an OFP at the hearing, at which the district court orally made findings of fact, including: (1) appellant was "shouldering" respondent, (2) appellant pushed respondent around the living room and into a chair, and (3) appellant's statements to respondent show controlling behavior of which respondent is right to be "fearful." The district court also credited the testimony of respondent and determined that respondent established that "domestic abuse occurred with respect to [respondent] and her children, because they were drawn into the event and engaged to the extent that they were asked, begging their mother—one of them anyway—not to call the police." In its written order, the district court similarly found that the following acts of domestic abuse occurred: "[appellant] pushed [respondent] into a chair, kept pushing [respondent] into a chair and then into a wall" and found that these "events occurred in front of at least one of the children [when] respondent encouraged [the] child

to tell mom not to call 911." The district court, however, also included in its written order the finding that appellant "threatened to kill" respondent.

Appellant argues that the record is devoid of evidence that he committed these acts in front of at least one of the parties' children. We disagree. At the hearing, respondent testified that appellant woke up the parties' oldest daughter, who was seven years old at the time of the incident, and told her to beg her mother not to call the police. She also testified that the other children woke up after the oldest child started to cry and came into the living room where they witnessed the parties fighting. And the district court determined that respondent's testimony was credible. We conclude that the district court did not err by finding that the domestic abuse occurred with respect to respondent and her children because at least one of the children was drawn into the event.

Appellant also argues that the record does not support the district court's finding that he "threatened to kill" respondent and that any evidence contained in the record that supports this finding is too remote to warrant the grant of an OFP. Appellant correctly points out that the evidence does not support this finding. The only evidence that suggests appellant threatened to kill respondent is contained in respondent's affidavit, which states:

> On Sunday, February 2nd, [2014], [appellant] was very violent against me, including in front of our children, and he threatened he would kill me (and said this more than once), took my phone, my computer router and my keys so that I could not ask for help. On that day, I was very afraid he would hurt me or worse and afraid for the emotional and physical safety of my children. I managed to reach the neighbor's house to get help and ask that they call the police.

At the hearing, the district court excluded this evidence as "too remote" to support an OFP.

This additional finding amounts, at most, to harmless error. *See* Minn. R. Civ. P. 61 ("[N]o error or defect in any ruling or order . . . is ground for . . . disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."). There is ample evidence in the record to support the district court's findings of domestic abuse against respondent and the parties' children. The record clearly shows that (1) appellant "shouldered" and "pushed" respondent around the living room and into the chair until she collapsed because she was unable to breathe, and (2) appellant woke up the parties' seven-year-old daughter around 1:30 a.m. to tell her to beg her mother not to call the police.

Affirmed.