STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0896

In re the Matter of:
Kimberly Rose Wangsness and on Behalf of Minor Children, petitioner,
Respondent,

vs.

Brian Penkert,
Appellant.

Filed January 31, 2022
Affirmed
Smith, John, Judge[*]

Freeborn County District Court
File No. 24-FA-21-271

Kimberly Rose Wangsness (confidential address) (pro se respondent)

Jacob M. Birkholz, Michelle K. Olsen, Birkholz & Associates, LLC, Mankato, Minnesota (for appellant)

Considered and decided by Cochran, Presiding Judge; Connolly, Judge; and Smith, John, Judge.

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

NONPRECEDENTIAL OPINION

SMITH, JOHN, Judge

We affirm the district court's issuance of an order for protection (OFP) against appellant because the preponderance of the evidence in the record supports the allegations of domestic abuse against his minor children.

FACTS

Appellant Brian Penkert and respondent Kimberly Wangsness lived together from July 2010 to February 16, 2021. They have a six-year-old son and an eight-year-old daughter. Following several incidents in February 2021, Wangsness petitioned the district court for an OFP for herself and the children against Penkert. The district court granted Wangsness's petition and issued an emergency (ex parte) OFP for Wangsness and the children against Penkert. Penkert requested a hearing to contest the OFP.

Regarding their son, Wangsness testified she had seen Penkert slam him down onto the hardwood floor, hold his hands over his head, and straddle him on multiple occasions. When Penkert did so on February 10, 2021, he told their son, "I need you to be stronger." Their son complained to Wangsness of a head injury after this encounter. On cross-examination, Wangsness testified that their son likes to wrestle and roughhouse with Penkert at times, and both she and Penkert have physically restrained their son before to avoid being bitten by him. Penkert testified that their son is "intense, high energy" and loves to roughhouse with Penkert. He stated that on February 10, 2021, he physically restrained his son on the floor after he jumped on Penkert's head from behind while Penkert

was sitting on the floor. Penkert stated he held him in a "bear hug" but did not straddle him.

Regarding their daughter, Wangsness testified that on February 15, 2021, she went into her and Penkert's bedroom three hours after the children's bedtime. Upon entering her bedroom, Wangsness noticed that their daughter was in the couple's bedroom and still awake; Penkert jumped out from under the covers of the bed, and he was naked and erect. Wangsness said, "Things smell like sex in here." Penkert "got aggressive" with her before she fell asleep. Penkert would always sleep in the same bedroom as their daughter when the family went on vacation while he told Wangsness to sleep in the same bedroom as their son. In June 2017, the family went camping. Penkert refused to sleep with Wangsness and instead slept with their daughter. During the night, Wangsness heard "what sounded like sex sounds" and their daughter saying, "No, no, no, no, no." The parties' daughter told Wangsness the next morning that it hurt to urinate. Wangsness recalled nights when their daughter was awake and Penkert was sleeping near their daughter, naked and erect.

Penkert testified that everything Wangsness said was untrue. He described the family's sleeping arrangements, stating the children went back and forth between the open closet where they slept adjoining Wangsness's and Penkert's bedroom, and next to their parents' bed. When the family all slept in the same room, son and daughter slept on mattresses on the floor. On occasion, daughter would come into bed with Penkert and Wangsness would come to bed later, but Penkert stated that he would never "just go to bed" with daughter. He testified the vacation sleeping habits were a result of Wangsness

breastfeeding son, so it made sense for those two to sleep in the same room and Penkert and daughter to sleep in a different room.

After the hearing, the district court issued an OFP based on findings of domestic abuse by Penkert against Wangsness and the children. The district court found Wangsness's testimony credible. It found Penkert physically assaulted son. The district court further found Penkert committed domestic assault against daughter because he displayed his genitalia to her. Penkert then moved to amend the findings of the OFP. The district court amended its findings to remove Wangsness as a protected individual and otherwise reissued the OFP based on findings that Penkert committed domestic abuse against both children.

DECISION

A district court may issue an OFP upon a finding of domestic abuse. Minn. Stat. § 518B.01, subds. 4, 6 (2020). Domestic abuse includes: "(1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) . . . criminal sexual conduct." *Id.*, subd. 2(a) (2020). To establish domestic abuse, a party must show "present harm or an intention on the part of the [alleged abuser] to do present harm." *Andrasko v. Andrasko*, 443 N.W.2d 228, 230 (Minn. App. 1989). An "overt physical act" is not required and intention to do present or imminent harm may "be inferred from the totality of the circumstances, including a history of past abusive behavior." *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009). A person requesting an OFP has the burden of proving that domestic abuse occurred by a

preponderance of the evidence. *Oberg ex rel. Minor Child v. Bradley*, 868 N.W.2d 62, 64 (Minn. App. 2015).

We review the decision to grant an OFP for an abuse of discretion. *Thompson v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Id.* (quotation omitted). On appeal, we view the facts in the record in the light most favorable to the district court's findings and will reverse those findings only if we are left with the definite and firm conviction that a mistake has been made. *Pechovnik*, 765 N.W.2d at 99 (quotation omitted). "We neither reconcile conflicting evidence nor decide issues of witness credibility, which are exclusively the province of the [district court]." *Id.* (quotation omitted). We conclude the district court did not abuse its discretion in concluding Penkert committed domestic abuse against both son and daughter.

I. The district court did not abuse its discretion in concluding Penkert committed domestic abuse against son.

The record contains sufficient evidence to conclude by a preponderance of the evidence that Penkert committed domestic abuse against his son. Wangsness testified generally about their son's "head injuries" and specifically testified about at least two incidents when Penkert slammed their son's head into the floor. She also testified that she had "seen Mr. Penkert strike or injure [son] out of anger" "three to four times" "[w]ithin the last two weeks" of her and the children living in the same house as Penkert. This testimony shows "physical harm, bodily injury," and "assault" by Penkert against son. *See Pechovnik*, 765 N.W.2d at 99. Thus, we are not left with the definite and firm conviction

that the district court was mistaken to conclude Penkert committed domestic abuse against son.[1]

Penkert's arguments to the contrary are unavailing. First, and foremost, the district court found Wangsness to be more credible than Penkert at the initial OFP hearing and again in the amended OFP. Penkert generally disputes the district court's findings because they contradict his testimony. But "we neither reconcile conflicting evidence nor decide issues of witness credibility" on appeal. *Pechovnik*, 765 N.W.2d at 99 (quotation omitted).

Second, Penkert argues the district court abused its discretion by not making a specific finding that he committed domestic abuse against their son. Penkert is correct that the district court's amended OFP does not expressly state, for example: "I find Penkert committed domestic abuse against son." Instead, as Penkert argues was error, the district court concluded Penkert's actions were not "reasonable force" allowable by a parent under Minn. Stat. § 609.06, subd. 1(6) (2020). But, as discussed above, the district court's findings that Penkert slammed his son's head on the floor on multiple occasions and struck and injured his son three or four times are supported by sufficient evidence in the record. And the district court stated at the first OFP hearing: "I do find that [son] suffered an assault by Mr. Penkert." *See* Minn. R. Civ. P. 52.01 (noting that findings of fact may be "stated

[1] In all, only one of the district court's findings that Penkert challenges is unsupported by sufficient evidence in the record: that Penkert acknowledged he used a "heavy hand" with the children. The hearing transcript confirms that Penkert did not acknowledge he did as much. But the district court's remaining findings are supported by sufficient evidence in the record, and they satisfy the legal requirements of domestic abuse under Minn. Stat. § 518B.01, subd. 2(a), because they show "physical harm, bodily injury," and "assault" by Penkert against his son. *See Pechovnik*, 765 N.W.2d at 99; *Oberg*, 868 N.W.2d at 64.

orally and recorded in open court following the close of the evidence"). These findings constitute a finding of domestic abuse for which an OFP can be issued. *See Pechovnik*, 765 N.W.2d at 99 (affirming the district court's grant of an OFP where the record contained evidence of a history of threatening behavior by the defendant); *Oberg*, 868 N.W.2d at 64 (affirming the district court's grant of an OFP where there was testimony supporting the allegations that the defendant abused or excessively punished his son). Also, in concluding these findings show unreasonable force by Penkert, the district court was responding to Penkert's own argument to the contrary. Given this context, we are not left with the definite and firm conviction that the district court was mistaken.

Third, and relatedly, Penkert also argues the district court abused its discretion by concluding his actions were not reasonable force under Minn. Stat. § 609.06, subd. 1(6), which allows the use of "reasonable force" "when used by a parent . . . of a child . . . in the exercise of lawful authority, to restrain or correct" the child. We are unpersuaded.

Penkert fails to provide any precedential caselaw examples of a court concluding a person used reasonable force under subdivision 1(6), and we have found none. *Cf. Often v. Dornquast*, No. A20-0217, 2020 WL 4432264 (Minn. App. Aug. 3, 2020) (concluding that the district court's finding that the defendant's use of force was unreasonable was supported by the record). The case Penkert cites as support for the conclusion that his actions were reasonable, *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487 (Minn. App. 2005), neither cites nor discusses Minn. Stat. § 609.06 (2020). In fact, *Chosa* cuts against Penkert's argument because there we concluded the parent's actions were not domestic abuse supporting an OFP when "there [was] no evidence of actual physical harm, bodily

injury, or assault" and "intent to inflict fear of imminent bodily harm" was missing. *Id.* at 490. Here, there is evidence Penkert caused physical harm to his son.

Moreover, Penkert bases this argument on the conclusion that he did not slam his son's head into the ground and, instead, responded to his son's own aggressiveness with appropriate parental discipline. Because sufficient evidence in the record supports the district court's finding that Penkert slammed his son's head into the floor on multiple occasions, and because this court defers to the district court's credibility determinations, any argument based on Penkert's assertion to the contrary fails. Thus, it was not an abuse of discretion for the district court to conclude Penkert's actions were not reasonable force because that conclusion was not based on an erroneous view of the law and was against neither logic nor the facts. *See Thompson*, 906 N.W.2d at 500.

II. The district court did not abuse its discretion in concluding Penkert committed domestic abuse against his daughter.

The record also contains sufficient evidence to conclude by a preponderance of the evidence that Penkert committed domestic abuse against his daughter. Minn. Stat. §518B 01, subd. 2(a)(3), defines domestic abuse to include criminal sexual conduct as defined in Minn. Stat. § 609.3451 (2020). Criminal sexual conduct in the fifth degree occurs if a "person engages in masturbation or lewd exhibition of the genitals in the presence of a minor under the age of 16, knowing or having reason to know the minor is present." Minn. Stat. § 609.3451, subd. 1(2). The district court concluded Penkert committed domestic abuse against daughter because he committed criminal sexual conduct

under Minn. Stat. § 609.3451, subd. 1(2). We find Penkert's arguments to the contrary unavailing.

Penkert first argues the record does not support the district court's legal conclusion that his actions were "lewd exhibition of the genitals." We have determined "lewd . . . behavior" to be "synonymous with obscene behavior," *State v. Botsford*, 630 N.W.2d 11, 17 (Minn. App. 2001) (quotation omitted), *rev. denied* (Minn. Sept. 11, 2001), and have recognized "lewdness" as "the quality of being openly lustful or indecent," *City of Mankato v. Fetchenhier*, 363 N.W.2d 76, 79 (Minn. App. 1985). Here, Wangsness testified she recalled multiple nights when daughter was awake and Penkert was near her naked and erect. We conclude this is lewd conduct. *See id.* at 79 (concluding defendant's fondling of a woman's thigh and buttocks was lewd behavior); *see also State v. Decker*, 916 N.W.2d 387-88 (Minn. 2018) (treating defendant's sending of a photo of his erect penis to a minor as "lewd exhibition of the genitals" in violation of the fifth-degree criminal sexual conduct statute (quotation omitted)). Thus, the district court did not abuse its discretion by concluding Penkert's conduct was lewd for the purposes of Minn. Stat. § 609.3451, subd. 1(2).

Second, Penkert also argues the record does not support the district court's legal conclusion that his alleged actions occurred in the presence of the child. Penkert asserts there is no "testimony or evidence that the child actually ever saw Mr. Penkert naked or erect, nor that Mr. Penkert ever[] actually exposed himself to the child naked, or erect." This argument fails. A person engages in criminal sexual conduct "in the presence of a minor" when that conduct is "reasonably capable of being viewed by a minor." *State v.*

Stevenson, 656 N.W.2d 235, 239 (Minn. 2003). Here, there is evidence in the record that Penkert was naked and erect in the same room as his daughter and that she was awake at the time. Therefore, Penkert's conduct was "reasonably capable of being viewed by a minor." *See id.* at 239-40 (concluding defendant's conduct was reasonably capable of being viewed by a minor when defendant masturbated in his parked car near a playground, and it was possible for a child climbing the monkey bars or going up the slide to see defendant through his car's windshield). Thus, the district court did not abuse its discretion by concluding Penkert's conduct took place in the presence of daughter for the purposes of Minn. Stat. § 609.3451, subd. 1(2).

Third, Penkert argues Minn. Stat. § 609.3451 requires "sexual or aggressive intent" and cites to *State v. Austin*, 788 N.W.2d 788 (Minn. App. 2010), *rev. denied* (Minn. Dec. 14, 2010), to support that assertion. Penkert is wrong. In *Austin*, we observed that the definition of "sexual contact" within the second-degree criminal sexual conduct statute, Minn. Stat. § 609.343 (2006), was provided by Minn. Stat. § 609.341, subd. 11(a) (2006), which included certain enumerated acts committed with "sexual or aggressive intent." 788 N.W.2d at 791. Second-degree criminal sexual conduct under Minn. Stat. § 609.343 is not at issue in this case; the district court here concluded Penkert committed fifth-degree criminal sexual conduct under Minn. Stat § 609.3451, subd. 1(2). Like the second-degree criminal sexual conduct statute, subdivision 1(1) of the fifth-degree criminal sexual conduct statute defines "sexual contact" as having the meaning given in Minn. Stat § 609.341, subd. 11 (2020). But, here, Penkert violated subdivision 1(2) which does not

refer to "sexual contact" at all. Thus, the definition of sexual contact as clarified in *Austin* does not apply to this case. *Austin*, 788 N.W.2d at 791-92.

Affirmed.