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STATE OF MINNESOTA
IN COURT OF APPEALS
A11-335

In the Matter of: Amber Lynn Danner, petitioner,
Respondent,

vs.

Charles Nestor Danner,
Appellant.

Filed December 19, 2011
Reversed
Minge, Judge

Blue Earth County District Court
File No. 07-FA-10-4756

Elizabeth L. Weinandt, Betters Weinandt Attorneys at Law, Ltd., Mankato, Minnesota (for respondent)

Athena R. Elias, Ryan B. Magnus, Jones and Magnus, Mankato, Minnesota (for appellant)

Considered and decided by Ross, Presiding Judge; Minge, Judge; and Hudson, Judge.

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

MINGE, Judge

On appeal from the district court's order for protection (OFP) to respondent-wife Amber Lynn Danner, appellant-husband Charles Nestor Danner argues that (1) the district court denied him a full hearing; and that (2) there was insufficient evidence to

support the grant of the OFP. We conclude that although appellant received a full hearing, the findings of domestic abuse by appellant against respondent do not support the issuance of an order for protection. We therefore reverse.

FACTS

The parties are married. After an assault incident, appellant was living apart from respondent and prohibited from contacting her by the terms of a domestic-abuse no-contact order (DANCO). On December 15, 2010, respondent was using a vehicle owned by appellant to go to work and transport the parties' children. Appellant, who felt financial pressure to deal with a loan on that vehicle, had a third party pick up the vehicle at respondent's place of work, and appellant then sold it. As a result of the missing car and believing appellant had taken it, on December 17, respondent filed an affidavit and petition for an OFP requiring appellant to stay at least 100 yards away from her, prohibiting appellant from calling or visiting her at work, and awarding her temporary use and possession of the car. The petition described the December 15 incident and a prior assault which had occurred on October 13, 2010, and was accompanied by the police reports of that incident. At the time she prepared the petition, respondent not only believed that appellant had taken the car, but also that he still had it.

The district court issued an emergency ex parte OFP on December 17. A hearing was scheduled for December 27. The emergency order instructed both parties that they must be prepared for the hearing on the scheduled date, that they might be asked to testify, and that they were to bring any exhibits and witnesses with them to the hearing. At the hearing, the parties told the district court that they were ready to proceed to trial on

the merits, did not need any witnesses, and would represent themselves. After swearing in the parties, the district court said that it would receive respondent's notarized OFP petition as testimony.

The district court then asked appellant why the petition should not be granted. Appellant explained that he owned the car in question, that he could not afford to keep up the payments, that he had asked a friend to retrieve the car from respondent's workplace, and that he had sold the car to resolve the debt issue. He added that he did not "understand how taking a vehicle or having somebody remove the vehicle off the premises shows any immediate danger of domestic abuse which is the sole purpose of this whole [proceeding]."

After affording the parties an opportunity to respond to each other's statements and confirming that the parties were done testifying, the district court announced that it was granting the OFP. As a part of issuing the OFP, the district court stated on the record that "ignoring for the moment the car issue, there is still quite enough left in the police report to justify the issuance of an [OFP]." In the written OFP issued the next day, the only finding of domestic abuse was that appellant had assaulted respondent on October 13, 2010. This appeal follows.

DECISION

I. CROSS-EXAMINATION ADVISORY

The first issue raised in this appeal is whether appellant was denied the right to an adequate hearing because the court did not inform him of his right to cross-examine respondent or invite him to do so. Originally, the Minnesota Domestic Abuse Act

("Act") provided for a "full hearing." Minn. Stat. § 518B.01, subd. 7 (Supp. 1979). This included "the right to present and cross-examine witnesses, to produce documents, and to have the case decided on the merits." *El Nashaar v. El Nashaar*, 529 N.W.2d 13, 14 (Minn. App. 1995). In 2002, the statute was revised so that the "full hearing" requirement became simply a "hearing" requirement. *See* 2002 Minn. Laws ch. 304, § 10, at 442. Accordingly, the question before this court on appeal is whether in the context of the district court's December 27 proceeding, the statutory right to a hearing required that appellant be advised that he could cross-examine respondent.

Appellant offers no authority in support of the proposition that the district court was required to advise him of his right to cross-examine witnesses. Appellant makes no constitutional, due-process claim, nor does he claim that such a requirement exists in the statutes or the court rules governing orders for protection. *Cf.* Minn. R. Crim. P. 15.01, subd. 1 (requiring court to inform defendant pleading not guilty of the right to examine witnesses). In *El Nashaar*, we found that the mere appearance of counsel, without acceptance of any evidence, did not satisfy the former requirement of a "full hearing" under the Act. 529 N.W.2d at 14; *see also Anderson v. Lake*, 536 N.W.2d 909, 911 (Minn. App. 1995) (finding that the hearing was not sufficient when the parties were not sworn and were not given the right to examine witnesses). In *Mechtel v. Mechtel*, 528 N.W.2d 916, 920 (Minn. App. 1995), we held that a full hearing had not occurred when no testimony was taken and the district court did not inquire as to whether the allegations of domestic abuse were true.

Appellant has not demonstrated that he was deprived of any basic hearing rights. The district court informed the parties of their right to delay the proceedings in order to prepare, to have counsel present, and to call witnesses. Both parties declined. The district court specifically reminded the parties that they had counsel (in connection with the October 13 incident and a dissolution proceeding) and cautioned appellant that his testimony in the OFP hearing could be used against him in other matters. The district court swore in the parties before taking their testimony and asked them each to respond to the other's testimony. Appellant does not contend that he sought or was denied the opportunity to exercise his right to cross-examine respondent or that he was in any way limited in presenting his case. Rather, he assigns as error the district court's failure to affirmatively advise him that he had the right to question respondent. It is commonplace in a trial setting for the district court to ask opposing legal counsel whether he or she wishes to cross-examine witnesses. Although a cross-examination advisory may be a good practice in promoting a more complete hearing, on this record we conclude that the lack of a cross-examination advisory or invitation was not reversible error.

II.

The second issue is whether the evidence produced at the hearing and the district court's findings of fact based on that evidence constituted a sufficient basis for issuance of the OFP. "The decision to grant an OFP under the [Act] . . . is within the district court's discretion. A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009) (quotations and citation omitted). We review the record in the light

most favorable to the district court's findings and will not reconcile conflicting evidence or decide issues of witness credibility, as those issues "are exclusively the province of the factfinder." *Id*. at 99 (quotation omitted). The district court's findings of fact will not be set aside unless they are shown to be clearly erroneous. Minn. R. Civ. P. 52.01.

The Act authorizes a district court to issue an order for protection to "restrain the abusing party from committing acts of domestic abuse." Minn. Stat. § 518B.01, subd. 6(a)(1) (2010). "Domestic abuse" includes the infliction of physical harm or fear of imminent physical harm by one family or household member against another. Minn. Stat. § 518B.01, subd. 2(a) (2010). In *Kass v. Kass*, we stated that "the definition of 'domestic abuse' under Minnesota's Domestic Abuse Act [] require[s] either a showing of present harm, or an intention on the part of appellant to do present harm." 355 N.W.2d 335, 337 (Minn. App. 1984). "Present intent to inflict fear of imminent physical harm, bodily injury, or assault can be inferred from the totality of the circumstances, including a history of past abusive behavior." *Pechovnik*, 765 N.W.2d at 99. But "[w]here the record fails to establish appellant's present intention to do harm or inflict fear of harm, [this court has] no alternative but to reverse the protection order." *Bjergum v. Bjergum*, 392 N.W.2d 604, 606 (Minn. App. 1986) (quotation omitted). Because of the substantial discretion accorded the district court when deciding whether to grant or deny a domestic-abuse protection order, the basis for the district court's decision must be set forth with particularity, including specific findings addressing domestic abuse that are sufficient to support the district court's decision. *Andrasko v. Andrasko*, 443 N.W.2d 228, 230 (Minn. App. 1989); *see also Wallin v. Wallin*, 290 Minn. 261, 267, 187 N.W.2d 627, 631 (1971).

Here, the OFP was sought because of the December 15 incident. A DANCO was already outstanding, and there was no claim that it was not adequate to address the matters arising out of the October 13 assault. Citing to *Kass*, appellant argues that the district court abused its discretion by granting the OFP against him where the record failed to establish his present intention to harm respondent or create fear of harm. He does not contest the domestic abuse that occurred on October 13 and the resulting DANCO. Rather, appellant contends that because the domestic abuse took place approximately eight weeks before respondent filed her petition and because respondent never alleged how, or whether, the December 15 car incident—which was the immediate cause of her decision to seek the OFP—evinced his present intention to harm respondent, there was no basis to issue the OFP here.

The only act of domestic abuse in the record and the sole act relied upon by the district court in granting the OFP was the October 13 incident of domestic abuse. However, the record is clear that the December 15 incident precipitated respondent's decision to seek the OFP. There is nothing in the record to indicate, and respondent never alleged prior to or at trial, that the October 13 incident was the reason she sought the OFP or that it should be a basis for the order. Furthermore, there is no claim that the December 15 incident related back to the October 13 incident or that the October 13 incident created a present (December) intention to inflict or cause respondent to fear imminent physical harm. The district court did not directly inquire of either party as to how, or whether, the December 15 incident was an act of domestic abuse; the district court presumably concluded that it was not, because it expressly discounted that event in

issuing the OFP. Thus, there is no finding that indicates a present intention by appellant to harm respondent or cause respondent to fear imminent harm.

Deferring to the district court's factual and credibility determinations, viewing the evidence in the light most favorable to the district court's findings, and carefully reading those findings, we conclude that the OFP cannot be sustained because it was not sought on the basis of the October 13 domestic abuse, but was precipitated by the December 15 incident, and because the record does not contain either an evidentiary basis or the findings of fact that appellant intended to or did inflict fear of imminent physical harm, bodily injury, or assault.

Reversed.

Dated: