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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0046**

Jamie Ann Sullivan, petitioner,
Respondent,

vs.

John McLean Sullivan,
Appellant.

**Filed October 1, 2012
Affirmed
Kalitowski, Judge**

Hennepin County District Court
File No. A12-0046

Valerie Ann Downing Arnold, Scott Michael Rodman, Arnold Rodman & Pletcher,
Bloomington, Minnesota (for respondent)

Christopher J. Kuhlman, Kuhlman Law, PLLC, Minneapolis, Minnesota (for appellant)

Considered and decided by Kalitowski, Presiding Judge; Hudson, Judge; and
Collins, Judge.*

UNPUBLISHED OPINION

KALITOWSKI, Judge

Appellant John McLean Sullivan challenges the district court's granting of respondent Jamie Ann Sullivan's petition for an order for protection (OFP), arguing that:

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

(1) the record fails to support a finding that he presently intended to inflict fear of imminent physical harm or bodily injury on respondent; and (2) the district court erred by admitting evidence as to allegations of abuse prior to October 17, 2011. We affirm.

DECISION

I.

It is within the discretion of the district court to grant an OFP. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009). The district court abuses its discretion if it makes findings unsupported by the record or misapplies the law. *Id.* On appeal, we view the record in the light most favorable to the district court’s findings, and we will not overturn the findings unless clearly erroneous. *McIntosh v. McIntosh*, 740 N.W.2d 1, 10 (Minn. App. 2007). “[W]e neither reconcile conflicting evidence nor decide issues of witness credibility,” because these issues “are exclusively the province of the factfinder.” *Pechovnik*, 765 N.W.2d at 99.

The Minnesota Domestic Abuse Act authorizes a district court to issue an OFP to “restrain the abusing party from committing acts of domestic abuse.” Minn. Stat. § 518B.01, subd. 6(a)(1) (2010). “Domestic abuse” is defined as “physical harm, bodily injury, or assault; . . . the infliction of fear of imminent physical harm, bodily injury, or assault; or . . . terroristic threats” committed by one family or household member against another. Minn. Stat. § 518B.01, subd. 2(a)(1)-(2) (2010). The statutory definition of domestic abuse “require[s] either a showing of present harm, or an intention on the part of [the abusing party] to do present harm.” *Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. App. 1984). Therefore, the district court may issue an OFP if the abusing party

“manifests a present intention to inflict fear of imminent physical harm, bodily injury, or assault.” *Pechovnik*, 765 N.W.2d at 99. Such present intent may be inferred from the totality of the circumstances. *Id.*

The parties married in 2005 and have two minor children. In June 2011, respondent filed for legal separation and appellant filed for dissolution. Along with her legal-separation filing, on June 22, 2011, respondent filed a petition for an OFP, which described alleged incidents of abuse inflicted by appellant in July 2007 and between January and June 2011. The district court dismissed the petition on jurisdictional grounds. On October 18, 2011, respondent filed a second petition that included one additional incident of alleged abusive conduct.

At a November 3, 2011 evidentiary hearing, respondent testified that, in May 2011, appellant forcefully pushed her into a wall, causing her to fall to the floor. She also testified that, in January 2011, appellant pulled sunglasses off her head, threw them on the ground, and stepped on them. And she testified that, in April 2011, appellant intimidated her by backing her into a corner of their kitchen with his body and spitting into her face. Respondent averred in her petition that the January and April incidents placed her in fear of imminent physical harm. The district court found that respondent had established that domestic abuse occurred in January, March, April, and May 2011, and issued an OFP on November 7, 2011.

As an initial matter, appellant contended at oral argument before this court that the district court did not make a finding that he presently intended to inflict harm or fear of harm on respondent. We disagree. The district court explicitly found that respondent

made “a sufficient showing of ‘domestic abuse’ as defined by Minnesota Statute[s] [section] 518B.01, subdivision [two]” to support the issuance of an OFP. As noted above, the statutory definition of domestic abuse “require[s] either a showing of present harm, or an intention . . . to do present harm.” *Kass*, 355 N.W.2d at 337. Therefore, because the district court found that the statutory criteria were satisfied, the court implicitly found that appellant presently intended to inflict harm or fear of harm. *See Prahl v. Prahl*, 627 N.W.2d 698, 703 (Minn. App. 2001) (“We may treat statutory factors as addressed when they are implicit in the findings . . .”).

Appellant argues that even if the district court found present intent, this finding is not supported by the record, because the May 2011 incident of domestic abuse was too remote in time to support the issuance of an OFP on November 7, 2011. We disagree.

First, we reject appellant’s contention that only a “recent act of” domestic abuse may establish present intent. Rather, a finding of present intent to inflict harm or fear of harm may be supported by the totality of the circumstances. *See Pechovnik*, 765 N.W.2d at 99-100 (affirming finding of present intent based on abusing party’s gestures, persistent questioning, aggressive conversation, and controlling behavior in light of abusing party’s history of threatening behavior); *Boniek v. Boniek*, 443 N.W.2d 196, 198 (Minn. App. 1989) (affirming finding of present intent where abusing party delivered a mutilated marriage certificate to abused party’s doorstep and was physically violent to a third party in abused party’s presence).

The district court’s finding of appellant’s present intent is supported by its findings that respondent’s testimony was credible, and that appellant’s testimony was not. The

court considered the May 2011 incident of abuse in light of its finding that appellant placed respondent in fear of imminent physical harm previously in January and April 2011. The court's findings that appellant had a pattern of abusive conduct supports its present-intent finding under a totality-of-the-circumstances analysis.

In addition, the district court found that, in March 2011, appellant insulted respondent, spit in her face, and physically intimidated her as she backed away from him. Respondent testified that this incident placed her in fear because she did not know "what [appellant] was going to do after that[,] if he was going to come at [her] physically other than just spitting." And the record establishes that, in June 2011, appellant kicked a patio chair during an argument with respondent. Although the district court found that the March and June incidents did not constitute domestic abuse, the aggressive nature of appellant's conduct, in light of his history of abuse, supports the court's finding of present intent.

Moreover, appellant cites no authority establishing that an incident of domestic abuse cannot support the issuance of an OFP approximately six months later. *Bjergum v. Bjergum* and *Kass*, on which appellant relies, are distinguishable. The incidents of domestic abuse in those cases occurred two years and four years, respectively, before the petitions were filed, and no other evidence established the abusing party's present intent. *See Bjergum v. Bjergum*, 392 N.W.2d 604, 606 (Minn. App. 1986) (reversing OFP because abuse occurring nearly two years prior to the petition was too remote to establish abusing party's present intent to inflict harm or fear of harm); *Kass*, 355 N.W.2d at 337 (reversing OFP because there was a four-year gap between the incident of abuse and the

petition, concluding that “the record is devoid of any showing of [the abusing party]’s present intention to do harm or inflict fear of harm”).

Here, by contrast, respondent established a pattern of abusive conduct from January through May 2011. And she first sought an OFP on June 22, 2011, which was only one month after the most-recent incident of domestic abuse. In addition, as noted above, the record contains other evidence that supports the district court’s finding of present intent.

Appellant points out that two district court judges who reviewed respondent’s petitions prior to the November 3 evidentiary hearing indicated that respondent’s allegations as to January through June 2011 were too remote in time to support the issuance of an OFP. And appellant suggests that respondent’s motivation for seeking an OFP is to advance her position in the parties’ ongoing custody dispute. But the district court that issued the OFP reviewed respondent’s petitions and heard the testimony at the evidentiary hearing. The duty to reconcile conflicting evidence and decide issues of witness credibility is the exclusive province of the fact-finder, and we decline to reweigh the evidence or make credibility determinations on appeal. *See Pechovnik*, 765 N.W.2d at 99.

We conclude that appellant has failed to establish that the district court clearly erred by finding that appellant presently intended to inflict harm or fear of harm on respondent. Therefore, the district court did not abuse its discretion in issuing the OFP.

II.

Appellant argues that the district court erred by admitting evidence at the evidentiary hearing as to allegations of abuse that occurred prior to October 17, 2011. A district court has broad discretion to control courtroom proceedings. *Rice Park Props. v. Robins, Kaplan, Miller & Ciresi*, 532 N.W.2d 556, 556 (Minn. 1995). Reversible error may not be predicated upon the admission of evidence unless a substantial right of the party is affected by the error and the party timely objected. Minn. R. Evid. 103(a)(1). A district court's decision to admit evidence will not be disturbed unless the district court abused its discretion. *Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997).

Appellant asserts that the district court judge before whom the parties appeared on October 26, 2011, indicated that only respondent's October 17 allegation would be considered at the evidentiary hearing. At the October 26 hearing, the district court judge observed, "[M]y understanding is [respondent] brought a case and made a number of the allegations . . . [,] other than the October 17 issue[,] in a petition that was before [the first district court judge,] and which was dismissed."

When the parties appeared for the November 3 evidentiary hearing, appellant stated to the district court that the second district court judge "seemed to indicate that the only matter she'd be considering . . . today would be the October 17 . . . allegations because the other allegations [have] already been dismissed in a previous [OFP]." But the parties agreed that no order had been issued limiting the scope of the hearing. And the district court concluded that, because the first petition was dismissed on jurisdictional

grounds, it would consider respondent's petition in its entirety on the merits. Appellant then indicated that he only brought a witness to testify about the October 17 allegation and, if all of the allegations in the petition were to be considered at the hearing, he wanted to present one or two additional witnesses to testify about the July 2007 allegation. Appellant also stated that, because the additional witnesses lived in Illinois, he "might be requesting a continuance." The court then suggested that the parties could proceed with the hearing if respondent withdrew the July 2007 allegation, and respondent agreed. Appellant made no further objections and did not request a continuance.

On appeal, appellant contends that he was prejudiced when the district court admitted evidence as to the 2011 allegations in respondent's petition, and that this court should reverse the OFP and remand for a new hearing. But we conclude that appellant waived this argument by failing to make and preserve an objection. After the district court proposed that the July 2007 allegation be withdrawn, appellant did not object to the admission of evidence as to the 2011 allegations. And although appellant indicated that he might seek a continuance, he did not do so.

Moreover, appellant fails to establish that the admission of evidence affected his substantial rights. Appellant argues that he was prejudiced because he could not present the testimony of one or two potential witnesses who lived in Illinois. But the district court explicitly did not consider the July 2007 allegation, which appellant's proffered witness testimony would have addressed. And appellant has failed to identify any other witnesses he would have called to refute the allegations the district court did rely on in

issuing the OFP. Thus, appellant has not established that his proffered witness testimony would have altered the result of the proceeding.

Appellant also suggests that he was not on notice of the issues to be addressed at the evidentiary hearing. Procedural due process guarantees reasonable notice and a meaningful opportunity to be heard. *Nexus v. Swift*, 785 N.W.2d 771, 779 (Minn. App. 2010). But appellant conceded that the district court did not issue an order limiting the scope of the evidentiary hearing, and appellant was on notice of the allegations addressed at the hearing because the allegations were included in respondent's petitions. Moreover, the district court granted appellant a continuance on October 26, 2011, to adequately prepare for the November 3 evidentiary hearing. And at the hearing, he testified, presented witness testimony, and was permitted to cross-examine respondent and her witness. We conclude that appellant was afforded reasonable notice and a meaningful opportunity to be heard, and we deny appellant's request to reverse and remand the OFP.

Affirmed.