STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0583

In the Matter of:
Jason Edward Gilberts o/b/o C. A. G., petitioner,
Respondent,

vs.

Stacy Jean Gilberts,
Appellant.

Filed December 23, 2013
Affirmed
Ross, Judge

Kandiyohi County District Court
File No. 34-FA-13-33

Jason Edward Gilberts, Willmar, Minnesota (pro se respondent)

Gregory R. Anderson, Anderson, Larson, Hanson & Saunders, PLLP, Willmar, Minnesota (for appellant)

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

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

ROSS, Judge

This appeal questions the sufficiency of evidence supporting an order for protection from domestic abuse. Jason Gilberts noticed bruising on his five-year-old son, C.A.G., after C.A.G. returned from a stay with his mother, Stacy Gilberts. Jason alleged

that Stacy had committed domestic abuse, and he sought an order for protection. The district court found that domestic abuse had occurred and issued the order, which also modified the parties' custody arrangement. Stacy contests that decision. Because the evidence supports the district court's conclusion that domestic abuse occurred, we affirm.

FACTS

Stacy Gilberts and Jason Gilberts were married for nearly seven years until their divorce in March 2011. They had one child together, C.A.G., born in 2006, and Stacy had a daughter from a previous relationship. After the divorce, the parties agreed to a joint physical custody arrangement in which C.A.G. would spend roughly seven of every fourteen days with each parent. One day in December 2012, C.A.G. returned from Stacy's house with what appeared to be pinch marks on his right arm. C.A.G. returned from another stay with Stacy in January 2013 with a "little goose egg" bump on the back of his head, which lasted a few days.

About a month after the second wound appeared, Jason filed a petition for an order for protection on behalf of C.A.G. The petition cited these incidents as evidence of domestic abuse. The district court granted an ex parte order for protection, pending a full hearing, and it appointed a guardian ad litem to investigate and to report on the best interests of the child. The guardian ad litem met with each parent and with C.A.G. but did not visit either home.

The district court held a hearing on Jason's petition in February 2013. Jason testified about C.A.G.'s injuries, said that he had witnessed Stacy restraining the children during their marriage, and explained that he sought a protective order because C.A.G. had

become reluctant to spend time with Stacy and because he feared for C.A.G.'s safety. He explained that he had not filed the petition immediately after the first injury because he "gave [Stacy the] benefit of the doubt," and he denied filing it because he was dissatisfied with their custody arrangement. A friend of Jason's testified that he had also seen the pinch marks on C.A.G.'s arm.

The guardian ad litem, Murlene Gruis, testified that she had spoken to C.A.G. and concluded that he was uncomfortable staying with his mother for extended periods. She also indicated that Stacy had acknowledged the incident that led to C.A.G.'s head injury. According to her, C.A.G.'s best interests favored restricting his time with Stacy. Gruis acknowledged that she had little time to get to know the parties during the brief investigatory period before making her recommendations.

The district court found that domestic abuse had occurred, granted an order for protection against Stacy, and granted Jason sole physical custody of C.A.G. It also modified the parenting-time schedule, leaving Stacy to care for C.A.G. only every other weekend. The order also required her to complete anger management therapy if she wanted to restore the prior custody arrangement. Stacy appeals.

D E C I S I O N

I

Stacy Gilberts's primary argument is that the district court erroneously found that the acts of alleged domestic abuse occurred. (She does not argue that her alleged conduct does not constitute abuse, and we therefore do not consider that issue and offer no opinion about it.) If there is insufficient evidence to support the district court's decision

to grant an order for protection, we will reverse it. *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004). We review findings of fact in the light most favorable to the decision and will set them aside only if they are clearly erroneous. *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005) (citing Minn. R. Civ. P. 52.01). Reversal is appropriate if the district court's finding is manifestly contrary to or not reasonably supported by the evidence. *Ekman v. Miller*, 812 N.W.2d 892, 895 (Minn. App. 2012).

The district court may grant an order for protection to prevent a party "from committing acts of domestic abuse." Minn. Stat. § 518B.01, subd. 6(a)(1) (2012). Domestic abuse occurs when one family member commits "physical harm, bodily injury, or assault" or inflicts "fear of imminent physical harm, bodily injury, or assault." *Id.*, subd. 2(a)(1)–(2). The record must establish that the accused has a present intent to abuse, either by inflicting harm or fear of harm. *Bjergum v. Bjergum*, 392 N.W.2d 604, 606 (Minn. App. 1986). The court may infer present intent to commit abuse from the totality of the circumstances. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009).

The crux of Stacy's argument is that because the district court used the phrase "probable cause," it found only that domestic abuse *probably* occurred, not that it *actually* occurred. The argument overemphasizes the words "probable cause" by overlooking the district court's other words. The district court checked a box on a pre-printed form, in the section specifically headed "Findings of Fact and Conclusions of Law," indicating that it found that "[a]cts of domestic abuse *have* occurred." (Emphasis

added.) It made this finding after it reviewed evidence presented through three different witnesses. Two witnesses testified that they had seen the pinch marks on C.A.G.'s arm, and Jason testified that the marks had not been present before C.A.G. went to Stacy's house. Jason saw the "goose egg" bump on C.A.G.'s head and attributed it to Stacy's attempted discipline. C.A.G. had become uneasy about staying with his mother. And C.A.G.'s guardian ad litem said that Stacy would sometimes grab C.A.G. by the arms and legs and that Stacy acknowledged the incident leading to the bump on C.A.G.'s head.

Viewing this evidence in the light most favorable to the district court's decision, we hold that sufficient evidence justifies the court's finding that Stacy committed the acts of alleged domestic abuse. It may not constitute overwhelming proof, but overwhelming proof is not required. *Pechovnik*, 765 N.W.2d at 99 (declining to reverse the district court's finding that domestic abuse occurred despite it being a close question). Stacy's contention that the district court's finding is flawed due to the absence of eyewitness evidence does not alter our holding because eyewitness evidence is not necessary. The record contains enough evidence to justify the district court's finding that domestic abuse occurred.

II

Stacy next contends that, even if the findings were not erroneous, the district court abused its discretion by issuing the order for protection because Jason allegedly sought the order for protection as a pretext to change the parties' custody arrangement. The district court did not find that Jason's motion was a pretext to modify custody, and we do not find facts on appeal. *See Gada*, 684 N.W.2d at 514.

And such a finding could not be compelled on the record. The one-month delay between the incidents and Jason's motion to seek an order for protection or his statement that he had to "bribe [C.A.G.] to go [to his mother's house]" does not prove pretext. The passage of time between alleged incidents of domestic abuse and the decision to seek an order for protection is one factor in our analysis, but it is not dispositive. *See Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. App. 1984) (denying the petitioner's request for an order for protection because abuse occurred four years before request and there was no showing of a present intent to harm). Most important, the district court found that domestic abuse actually occurred. Stacy provides no authority for the proposition that the district court cannot issue an otherwise defensible order for protection because the petitioner harbors an unspoken intent to rely on the order to modify custody. We recognize that parents disputing custody have been known to fabricate evidence of abuse to gain illegitimate leverage in litigation. But we are confident that the district court is aware of this unseemly practice, and this is not the allegation here (and the evidence would not support it). Our focus is on whether the elements for the order were met, and we analyze this issue the same regardless of Jason's motive. Because his petition and proven allegations are sufficient to support the district court's findings, granting the order was not an abuse of the court's discretion.

III

Stacy argues finally that the district court erred by allowing the court-appointed guardian ad litem to testify about the child's best interests. She seems to contend that the district court admitted improper hearsay statements from the guardian ad litem. Her

argument fails. The district court acknowledged that any testimony by the guardian ad litem as to statements by C.A.G. were hearsay and specified that her testimony was important only to determining C.A.G.'s best interests. Because the district court took care not to base its findings regarding abuse on any hearsay statements by the guardian ad litem, at most the challenge identifies a harmless error (if there was error at all). We will not reverse on the basis of a harmless error. Minn. R. Civ. P. 61.

Stacy's argument regarding the guardian ad litem also seems to be that it would be proper for the district court to consider the child's best interests only after issuing an order for protection on the merits. Under this reasoning, the preexisting custody arrangement should be presumed to represent the best interests of the child until the protection order issues. But she offers no legal support for this argument, and the Domestic Abuse Act suggests that her reasoning is mistaken. In cases dealing with children who face domestic abuse, the court may "award temporary custody or establish temporary parenting time . . . . In addition to the primary safety considerations, the court may consider particular best interest factors that are found to be relevant." Minn. Stat. § 518B.01, subd. 6(a)(4). Most damaging to Stacy's argument, "[t]he court's decision on custody and parenting time shall in no way delay the issuance of an order for protection." *Id.* The act therefore permits the district court to consider the best interests of the child when addressing the custody arrangement and to issue the order for protection without delay. We hold that the district court did not abuse its discretion by appointing a guardian ad litem and allowing her to testify.

Affirmed.