

This opinion will be unpublished and may not be cited except as provided by Minn. Stat. § 480A.08, subd. 3 (2010).

**STATE OF MINNESOTA
IN COURT OF APPEALS
A10-771**

In the Matter of:
Jean Roberts, petitioner,
Respondent,

vs.

Gabriel Roberts,
Appellant.

**Filed January 18, 2011
Affirmed
Worke, Judge**

Ramsey County District Court
File Nos. 62-DA-FA-09-1479, 62-FA-10-550

Silas F. Mayberry, Brooklyn Park, Minnesota (for respondent)

Anna Scholl, David Wilson, Wilson Law Group, Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Worke, Judge; and Crippen, Judge.*

UNPUBLISHED OPINION

WORKE, Judge

Appellant argues that the district court abused its discretion by issuing an order for protection (OFP). We affirm.

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

DECISION

Appellant Gabriel Roberts challenges the district court's decision to grant an OFP for his wife, respondent Jean Roberts. The decision to grant an OFP under the Minnesota Domestic Abuse Act, Minn. Stat. § 518B.01 (2010), is discretionary. *McIntosh v. McIntosh*, 740 N.W.2d 1, 9 (Minn. App. 2007). "A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 927 (Minn. App. 2006). "We review the record in the light most favorable to the district court's findings" and will reverse only if we "are left with the definite and firm conviction that a mistake has been made." *Id.* (quotation omitted); *see also* Minn. R. Civ. P. 52.01 (stating that findings of fact are reviewed for clear error). "We will not reverse merely because we view the evidence differently," and will "neither reconcile conflicting evidence nor decide issues of witness credibility, which are exclusively the province of the factfinder." *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004).

Generally, a petitioner seeking an OFP must allege and prove domestic abuse. Minn. Stat. § 518B.01, subd. 4(b). "Domestic abuse is defined to include several acts . . . committed against a family or household member by a family or household member." *Sperle v. Orth*, 763 N.W.2d 670, 673 (Minn. App. 2009) (quotation omitted). The acts include: (1) "physical harm, bodily injury, or assault"; (2) "the infliction of fear of imminent physical harm, bodily injury, or assault"; and (3) terroristic threats, criminal sexual conduct, or interference with an emergency call. Minn. Stat. § 518B.01, subd. 2(a). The acts must "manifest[] a present intention to inflict fear of imminent physical

harm, bodily injury or assault.” *Boniek v. Boniek*, 443 N.W.2d 196, 198 (Minn. App. 1989). But past abusive behavior is also a factor in determining cause for protection. *Id.*

Respondent petitioned for an OFP on December 29, 2009, alleging that appellant physically abused her during an altercation on December 12 and forced her to have sex with him several months earlier. Following a hearing, the district court granted respondent’s petition. The district court found that respondent’s testimony that appellant “hit and kicked her was credible.” The district court also found that respondent was credible regarding the allegation of forced sexual intercourse.

Appellant argues that the district court abused its discretion by finding that he struck respondent, claiming that he did not touch her during the December 12 altercation, that his version of the dispute was corroborated by a police report, and that respondent’s testimony was not credible. The parties agreed that they were arguing in their apartment on December 12, and simultaneously reached for a set of car keys. Respondent testified that they struggled over the keys and appellant hit and punched her. Thus, the district court was faced with two different versions of the December 12 altercation provided by both parties, and credited the version given by respondent. Credibility determinations are the exclusive province of the district court. *See Gada*, 684 N.W.2d at 514. The district court did not clearly err by finding that appellant struck respondent during the altercation.

Appellant also argues that the district court clearly erred by finding that he sexually abused respondent. Appellant claims that there is no evidence in the record to support this finding except respondent’s testimony, which was not credible. Respondent testified that appellant persisted with sexual advances despite being told to stop.

Respondent testified that appellant initiated a struggle, put his hand on her throat, forced her to the floor, and “that’s when it happened.” Although respondent could not recall the exact date, she testified that she believed it occurred sometime between April and July 2009. Thus, the district court’s finding that appellant forced sexual intercourse is supported by respondent’s testimony, which the district court determined to be credible.

Appellant alternatively asserts that the district court abused its discretion by relying on the sexual abuse in issuing the OFP because the incident was too remote in time to amount to a present intention warranting an OFP. Appellant cites to our decision in *Bjergum v. Bjergum*, in which we reversed an OFP granted by the district court based on allegations of physical abuse occurring approximately 20 months before the filing of the OFP petition. 392 N.W.2d 604, 606 (Minn. App. 1986). But *Bjergum* is inapposite for two reasons. First, the delay between the past abuse and the filing of the OFP petition was more than twice as long in *Bjergum* as the delay between appellant’s alleged sexual abuse and respondent seeking an OFP in this case. Second, and more importantly, respondent complained of physical abuse occurring during the December altercation in addition to the previous sexual assault; *Bjergum* was based *exclusively* on events occurring at least 20 months earlier. *See id.*; *Boniek*, 443 N.W.2d at 198 (stating that past abuse is a factor, rather than dispositive, in determining cause for protection). The district court, therefore, did not abuse its discretion by considering the past sexual assault when granting respondent’s OFP petition.

Affirmed.