Note: In the case title, an asterisk (*) indicates an appellant and a double asterisk (**) indicates a cross-appellant. Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2018-170

NOVEMBER TERM, 2018

Breanna Girard v. Daniel Brochu*	}	APPEALED FROM:
	}	
	}	Superior Court, Orleans Unit,
	}	Family Division
	}	
	}	DOCKET NO. 48-4-18 Osfa
		Trial Judge: Howard Kalfus, Acting Superior Judge, Specially Assigned

In the above-entitled cause, the Clerk will enter:

Defendant appeals a final relief-from-abuse (RFA) order issued by the family division of the superior court. We affirm.

Plaintiff and defendant were involved in an intimate relationship from December 2015 until April 2018. A child from the relationship was born in December 2017. On April 13, 2018, plaintiff filed an RFA petition. In her affidavit in support of the petition, she cited primarily an incident that had occurred earlier that day when defendant allegedly bruised her ribs while trying to take the parties' child with him in his car. Plaintiff also described in the affidavit two other incidents that occurred in December 2017 and February 2018.

At the final RFA hearing held on May 8, 2018, plaintiff, plaintiff's mother, and defendant testified. Plaintiff testified about four incidents, including a road-rage incident when the parties were traveling to Maine. After the evidence was closed, the family division made oral findings from the bench. The court concluded that the road-rage incident constituted abuse and that the other three incidents, while not necessarily abuse, contributed to the court's determination that there was a risk of abuse in the future. Regarding the road-rage incident, the court found that defendant's wielding of a gun during the incident created a significant risk of physical harm to plaintiff and caused her to reasonably fear that she was at risk of imminent serious harm. The court acknowledged that the parties' infant daughter was too young to be aware of what was going on, but it concluded that defendant's actions also constituted abuse as to her because it placed her at substantial risk of harm. The court ordered defendant to refrain from abusing plaintiff or the parties' child and to communicate with plaintiff regarding parent-child contact only through a third party.

On appeal, defendant first argues that the family division lacked subject matter jurisdiction to issue its RFA final order because the only incident of abuse found by the court occurred in Maine, rather than Vermont. Analogizing to criminal law principles derived from the common law, defendant argues that the family division lacked subject matter jurisdiction in this civil RFA proceeding to adjudicate alleged abuse occurring outside of Vermont—notwithstanding the fact

that both parties reside in Vermont. Cf. Fox v. Fox, 2014 VT 100, ¶ 19, 197 Vt. 466 (holding "that a court cannot issue a final abuse prevention order without personal jurisdiction over a defendant").

Defendant's proffered analogy is highly questionable. Cf. State v. Doyen, 165 Vt. 43, 53 (1996) (rejecting defendant's claim that state lacked jurisdiction to prosecute him for custodial inference when he removed subject child to another state, and noting that initiative to pursue matter could only come from state where custodial parent resided). "In contrast to criminal or tort actions, abuse-prevention proceedings did not exist at common law, but are based entirely in statute." Raynes v. Rogers, 2008 VT 52, ¶ 13, 183 Vt. 513. Moreover, abuse-prevention actions, which are remedial in nature, "focus solely on the plaintiff's need for immediate and prospective protection from the defendant rather than the defendant's liability for abusing the plaintiff." Id. ("The critical question in such proceedings . . . is not who was at fault, but who, if anyone, is in need of protection."). Thus, "[a]buse-prevention orders are unique in that they are intended to provide immediate relief from intrafamily violence as well as to protect victims from future abuse, rather than to hold perpetrators liable for past acts of violence." Id. ¶ 8.

In any event, we need not reach the merits of this argument. Defendant did not object to the court considering the incident—on the basis that it occurred outside of Vermont—in determining whether he had abused plaintiff. On appeal, defendant acknowledges that this issue was not raised before the family court, but he asserts that subject matter jurisdiction can be raised at any time. See V.R.C.P. 12(h)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action."). This Court, however, has required preservation of jurisdictional challenges that do not concern core subject matter jurisdiction. For example, in State v. Thompson, we reversed the superior court's decision to dismiss on jurisdictional grounds a motion that it had granted in a previous order—in part, because there had been no objection to the motion on jurisdictional grounds. 2011 VT 98, ¶¶ 3-5, 9, 190 Vt. 605 (mem.). We reasoned that even if "the court improperly exercised its jurisdiction in [the earlier] order, that erroneous exercise of jurisdiction is not the type of fundamental jurisdictional defect that would compel this Court, absent a timely objection on jurisdictional grounds, to vacate any order pursuant to the exercise of that jurisdiction." Id. ¶ 9; see In re B.C., 169 Vt. 1, 7 (1999) (citing case for proposition that "purported lack of subject matter jurisdiction based on territorial considerations under UCCJA and PKPA are analytically similar to venue and do not go to power of court to adjudicate type of controversy"); see also Restatement (Second) of Judgments § 11 cmt. b (1982) (contrasting core subject matter jurisdiction, which refers to court's authority to adjudicate type of controversy, with territorial jurisdiction, which allows court to exercise its jurisdiction based on the court's "relationship to a thing or status"). Accordingly, we decline to address the merits of this issue, given the fact that the issue is raised for the first time on appeal.

Next, defendant argues that the family division did not follow the applicable preponderance-of-the-evidence burden of proof. See Coates v. Coates, 171 Vt. 519, 520 (2000) (mem.). Defendant acknowledges that the court explicitly stated that plaintiff had the burden of proving that there had been abuse and that there was a risk of abuse in the future, but he contends that the court's failure to define the standard or apply it in making its conclusions was equivalent to withholding its discretion entirely. We find no merit to this argument. There is no heightened burden of proof to support civil RFA orders. See Relation v. Vt. Parole Bd., 163 Vt. 534, 541 (1995) (Morse, J., dissenting) (distinguishing preponderance-of-the-evidence burden of proof, which means "evidence supports one outcome more than another," from higher burdens of proof, such as clear and convincing evidence or beyond reasonable doubt). After identifying plaintiff as the party having the burden to prove past abuse and the risk of future abuse, the court cited the largely undisputed testimony in finding that abuse had occurred and that there was a risk of future

abuse. We find no abuse of discretion. See Raynes, 2008 VT 52, ¶ 9 ("[W]e review the family court's decision to grant or deny a protective order only for an abuse of discretion, upholding its findings if supported by the evidence and its conclusions if supported by the findings.").

Defendant further argues that the evidence presented at the final RFA hearing did not support the family division's conclusion that he had abused plaintiff. Specifically, he contends that plaintiff's testimony did support a finding that his actions reasonably placed her in danger of imminent serious harm. See 15 V.S.A. § 1101(1)(B) (defining abuse, in relevant part, as "[p]lacing another in fear of imminent serious physical harm"). We disagree. Plaintiff testified, with respect to the road rage incident, that defendant became angry, began speeding, and eventually rolled down his window and flashed a firearm out the car window at the other driver. She testified that she was terrified at the time and that she did not want the parties' daughter to be in a car with defendant. Notwithstanding the fact that plaintiff did not explicitly state that she was "in fear of imminent serious physical harm," her testimony that she was terrified, given the circumstances she described, was sufficient to support the court's determination that defendant's actions caused her to be in fear of imminent serious physical harm. The court's remark in making its oral findings that the other driver could have taken drastic measures in response to defendant's actions does not demonstrate that plaintiff's fear was based solely on speculation as to how the other driver would react, as opposed to defendant's actions. Plaintiff testified that she refused to hand defendant his gun when he asked for it and that she did not want the parties' child in a car with defendant. Plainly, plaintiff was fearful of harm resulting from defendant's actions, and the evidence was sufficient to support the court's finding of abuse. See Raynes, 2008 VT 52, ¶ 9 (stating that "the family court is in a unique position to assess the credibility of witnesses and weigh the strength of evidence at hearing").

Defendant also argues that the family division's conclusion that he abused the parties' infant daughter cannot be upheld because the court did not apply the full definition of abuse relating to children and because the evidence did not support the court's conclusion. Again, we disagree. For purposes of RFA proceedings, abuse can mean abuse to children as defined in 33 V.S.A. § 4912(1). See 15 V.S.A. § 1101(1)(C). Here, in finding that defendant had abused the parties' child, the family division explicitly noted the language of the definition of abuse contained in § 4912(1). We reject defendant's argument that the court abused its discretion by failing to cite to the supplemental definitions of "Physical injury" and "Risk of harm" to explain how the child was abused. Given the testimony at the final RFA hearing, the court plainly found abuse based on its determination that defendant's actions placed the parties' child at substantial risk of physical injury. Moreover, that evidence fully supported the court's determination.

Finally, defendant argues that the evidence does not support the family division's conclusion that there is a risk of future abuse. See Raynes, 2008 VT 52, ¶ 8 (stating that to obtain relief under RFA statute, plaintiff must prove abuse and danger of future abuse). According to defendant, the court's determination as to the risk of future abuse cannot stand because it was based on incidents that the court concluded did not constitute abuse and on speculative concerns about defendant's mental health. Although unwilling to determine that the other incidents related by plaintiff constituted abuse in and of themselves, the court found those incidents to be concerning in terms of defendant not being able to control his anger. Plaintiff also testified that after the parties separated defendant continued to say and do things that suggested he did not understand that they could not be together. A danger of future abuse may be reasonably inferred based on a

single instance of abuse and/or other aspects of the parties' relationship that may not, in and of themselves, constitute abuse.

Affirmed.

BY THE COURT:

Paul L. Reiber, Chief Justice

Marilyn S. Skoglund, Associate Justice

Harold E. Eaton, Jr., Associate Justice