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**STATE OF MINNESOTA
IN COURT OF APPEALS
A09-1367**

In the Matter of: Diana Lynn DeFatte, petitioner,
Respondent,

vs.

John Wesley DeFatte, Sr.,
Appellant.

**Filed May 18, 2010
Affirmed
Larkin, Judge**

Hubbard County District Court
File No. 29-FA-09-625

George L. Duranske III, Duranske Law Firm, Bemidji, Minnesota (for respondent)

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Considered and decided by Halbrooks, Presiding Judge; Johnson, Judge; and
Larkin, Judge.

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's issuance of an order for protection (OFP).
Because the district court did not abuse its discretion, we affirm.

DECISION

“The decision to grant an OFP under the Minnesota Domestic Abuse Act, Minn. Stat. § 518B.01 [(2008)], is within the district court’s discretion, so we will not reverse absent an abuse of that discretion.” *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 926-27 (Minn. App. 2006) (citation omitted). A district court abuses its discretion if its findings are unsupported by the record or it misapplies the law. *Id.* at 927. On review, we view the record in the light most favorable to the district court’s findings, and we will reverse those findings only if we are “left with the definite and firm conviction that a mistake has been made.” *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005).

Generally, a petitioner seeking an OFP under chapter 518B must allege and prove domestic abuse. Minn. Stat. § 518B.01, subd. 4(b). The Minnesota Domestic Abuse Act defines domestic abuse as “(1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) terroristic threats . . . ; criminal sexual conduct . . . ; or interference with an emergency call.” *Id.*, subd. 2(a). This statutory language requires “either a showing of present harm, or an intention on the part of appellant to do present harm.” *Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. App. 1984). An OFP is justified if a person manifests a present intent to inflict fear of imminent physical harm, bodily injury, or assault on the person’s spouse. *Boniek v. Boniek*, 443 N.W.2d 196, 198 (Minn. App. 1989).

The district court based the OFP in this case, in part, on its finding that domestic abuse had occurred. The district court found that appellant John Wesley DeFatte Sr.

grabbed respondent Diana Lynn DeFatte around the neck and screamed at her in January 2009, interfered with respondent's attempts to make an emergency phone call, and threw items at respondent, causing her to fear physical harm.

Appellant contends there is no evidence that he physically harmed respondent. He cites respondent's testimony in support of this contention. When asked if appellant physically harmed her within the previous six months, respondent testified: "No, other than grabbing me. Emotionally, mentally, yes. Physically, no." But when describing the January 2009 incident, respondent testified that "[appellant] scarred up [her] neck . . . he goes for the throat or the neck, that's what he does." And when asked if appellant had caused her physical injury, respondent answered: "There were marks on my neck, yes." The evidence supports the district court's finding that domestic abuse occurred in the form of "physical harm, bodily injury, or assault." *See* Minn. Stat. § 518B.01, subd. 2(a)(1) (defining domestic abuse to include physical harm, bodily injury, or assault).

Appellant also argues that there was insufficient evidence to establish appellant's present intent to inflict fear of imminent physical harm, bodily injury, or assault. But intent may be inferred from the totality of the circumstances, including a history of past abusive behavior. *Boniek*, 443 N.W.2d at 198. The district court heard testimony that appellant grabbed respondent, yelled and screamed at her, pulled a telephone off the wall when respondent tried to use it, threw his lunchbox and other items toward her, came up behind her and hit a wall near her head with a pair of pliers, brought knives into the home, and beat respondent's son with a pipe. This evidence is sufficient to establish, based on the totality of the circumstances, appellant's present intent to inflict fear of

physical harm, bodily injury, or assault. The evidence also supports the district court's finding of domestic abuse based on appellant's infliction of fear of imminent physical harm.

Appellant next argues that the finding of domestic abuse was clearly erroneous because there was no evidence that an emergency existed when appellant allegedly interfered with respondent's attempt to make an "emergency call." Domestic abuse is defined to include interference with an emergency call "within the meaning of [Minn. Stat. §] 609.78, subd. 2 [(2008)]." Minn. Stat. § 518B.01, subd. 2(a)(3). Interference with an emergency call occurs when "[a] person . . . intentionally interrupts, disrupts, impedes, or interferes with an emergency call or . . . intentionally prevents or hinders another from placing an emergency call." Minn. Stat. § 609.78, subd. 2. The statute goes on to define an emergency call as "(1) a 911 call; (2) any call for emergency medical or ambulance service; or (3) any call for assistance from a police or fire department or for other assistance needed in an emergency to avoid serious harm to person or property, *and an emergency exists.*" Minn. Stat. § 609.78, subd. 3 (2008) (emphasis added). We have held that the existence of an emergency is an element of an offense under section 609.78, subd. 2. *State v. Hersi*, 763 N.W.2d 339, 343 (Minn. App. 2009).

Respondent testified that on one occasion, she walked toward a telephone to call "911, if necessary, [or her] daughter for help, if necessary" and that appellant reached the phone first "and tore it off the wall." But respondent failed to present evidence that an emergency existed when she attempted to place this call. Thus, the finding of domestic abuse based on interference with an emergency call is not supported by the record.

However, because the district court's finding of domestic abuse is supported by evidence of "physical harm, bodily injury, or assault" and "the infliction of fear of imminent physical harm, bodily injury, or assault," the district court did not abuse its discretion by issuing an OFP, any error in basing the OFP on alleged interference with an emergency call is harmless, and reversal is not warranted. *See* Minn. R. Civ. P. 61 (requiring errors to be ignored or disregarded if they do not affect the substantial rights of the parties).

In addition to basing the OFP on a finding that domestic abuse had occurred, the district court considered the request for the OFP in the context of Minn. Stat. § 518B.01, subd. 6a(a), which provides:

Upon application, notice to all parties, and hearing, the court may extend the relief granted in an existing order for protection or, if a petitioner's order for protection is no longer in effect when an application for subsequent relief is made, grant a new order. The court may extend the terms of an existing order or, if an order is no longer in effect, grant a new order upon a showing that:

- (1) the respondent has violated a prior or existing order for protection;
- (2) the petitioner is reasonably in fear of physical harm from the respondent;
- (3) the respondent has engaged in acts of harassment or stalking within the meaning of section 609.749, subdivision 2; or
- (4) the respondent is incarcerated and about to be released, or has recently been released from incarceration.

A petitioner does not need to show that physical harm is imminent to obtain an extension or a subsequent order under this subdivision.

Minn. Stat. § 518B.01, subd. 6a(a). "The plain language of the statute requires a showing of only one of these four alternatives." *Braend*, 721 N.W.2d at 927.

At the hearing, the district court noted it had heard undisputed testimony that respondent previously obtained an OFP against appellant, directed the parties' attention to section 518B.01, subdivision 6a, and found that the respondent was "reasonably in fear of physical harm from [appellant]." This finding is supported by evidence that in the months preceding the hearing, appellant grabbed respondent around her neck, yelled at her, threw items toward her, and hit a wall near her head with a pair of pliers. The issuance of the OFP was therefore proper under Minn. Stat. § 518B.01, subd. 6a(a).

Appellant's argument that the district court improperly granted an extension of the prior OFP misrepresents the record. The district court did not extend the prior OFP; it issued a new OFP as authorized by Minn. Stat. § 518B.01, subd. 6a(a). And appellant's argument that he did not have notice of the possibility of an OFP under section 518B.01, subd. 6a(a) is unavailing. *See* Minn. Stat. § 518B.01, subd. 6a(a) (requiring application and "notice to all parties"). Respondent's affidavit and petition for an OFP sought relief generally under section 518B.01, without limiting the basis for her request to any particular provision within section 518B.01. And, respondent's affidavit described her prior application for, and the district court's grant of, an OFP against appellant in 1998.

Because the district court's findings are supported by the record and it properly applied the law, its decision to issue the OFP was not an abuse of discretion.

Affirmed.

Dated:

Judge Michelle A. Larkin