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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0557**

In re the Matter of:
Patricia Kay Cusick, petitioner,
Respondent,

vs.

James Michael Cusick,
Appellant.

**Filed April 21, 2009
Affirmed
Poritsky, Judge***

Ramsey County District Court
File No. 62-DA-FA-08-136

Sharon L. Jones, Southern Minnesota Regional Legal Services, Inc., 166 East Fourth
Street, Suite 200, St. Paul, MN 55102 (for respondent)

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Considered and decided by Halbrooks, Presiding Judge; Ross, Judge; and
Poritsky, Judge.

UNPUBLISHED OPINION

PORITSKY, Judge

Patricia Kay Cusick sought an order for protection (OFP) against her then-
husband, James Michael Cusick, on the ground that Mr. Cusick had engaged in domestic

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

abuse against her, specifically alleging that he had made terroristic threats against her and pushed her. The district court granted the petition and issued an OFP of two years' duration. Mr. Cusick appeals, arguing that the evidence is insufficient to support the issuance of the OFP. We affirm.

FACTS

Appellant Mr. Cusick and respondent Ms. Cusick married on August 21, 1988, and have had a volatile, and sometimes violent, relationship. Prior to the incidents giving rise to the present proceeding, Ms. Cusick had obtained OFP's against Mr. Cusick on three occasions, but on each occasion she requested that the OFP be dismissed.

The present proceeding involves two incidents occurring on separate days. The first occurred on the morning of January 28, 2008, when Mr. Cusick became angry with Ms. Cusick, and, according to her testimony at the OFP hearing, he threatened her, saying, "Something's going to happen to you and your friend. You just wait and see." In doing so, Ms. Cusick testified, "He came up on me [and] shoved himself at me, and he was very angry and upset at me, very mad." He called her a "f-cking b-tch c-nt" and asked her, "You want me to call the police, b-tch?" Mr. Cusick telephoned 911 but hung up before speaking with an operator. The operator called back, and the police were dispatched to the Cusick residence. According to Ms. Cusick, the incident with Mr. Cusick lasted ten or 15 minutes, and it took about 15 minutes for the police to arrive. After the police arrived, the officer suggested that Ms. Cusick obtain an OFP. Mr. Cusick was not arrested, and according to his testimony, the officer told him to go to work or he would be arrested.

Mr. Cusick further testified that he was very angry at Ms. Cusick on the morning of January 28, 2008, because she had exceeded the number of paid minutes on her cellular telephone plan. He admitted that he “was loud.” He testified they were “face-to-face but not touching.” He denied that he threatened her or her friend.

The following day, January 29, 2008, another incident occurred between Ms. and Mr. Cusick. Mr. Cusick was again upset about bills. According to Ms. Cusick’s testimony, she was in the bathroom and closed the bathroom door, which Mr. Cusick then “slammed [] back open.” She testified that Mr. Cusick stood between her and the door and that to leave the bathroom, she would have had to get by him. She testified that she was scared of him. The incident lasted less than five minutes. Mr. Cusick did not touch her but stood in the doorway yelling at her.

Ms. Cusick filed an Affidavit and Petition for Order for Protection on January 30, 2008. The district court granted an emergency ex parte OFP the same day. A hearing on the petition for an OFP was held on February 4, 2008, before a family court referee. Both Mr. and Ms. Cusick testified. E. B., who identified himself as a neighbor and ex-brother-in-law of both parties, also testified.

At the conclusion of the hearing, the district court granted an OFP to be effective for two years, until February 4, 2010. The court made oral findings on the record. The court found that Mr. Cusick had made terroristic threats and that Ms. Cusick was in fear of imminent physical harm, bodily injury, or assault. The court also stated that an OFP was justified on the basis that it was a subsequent order, citing Minn. Stat. § 518B.01, subd. 6a (2008). In written findings, the court (1) found that Mr. Cusick had made

terroristic threats and (2) ruled that an OFP was justified on the basis that it was a subsequent order, supported by the previous OFPs. But the written findings do not specifically find that Ms. Cusick was in fear of imminent physical harm, bodily injury, or assault. Mr. Cusick appeals from the court's issuance of the OFP.

D E C I S I O N

Mr. Cusick argues that the evidence was insufficient to support the district court's grant of an OFP. The decision whether to grant an OFP is discretionary with the district court. *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005). A district court abuses its discretion when its findings are unsupported by the record or when it misapplies the law. *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 927 (Minn. App. 2006). This court reviews the record in the light most favorable to the district court's findings and reverses only if it has a "definite and firm conviction that a mistake has been made" in reaching those findings. *Id.* When there is conflicting evidence, this court defers to the district court's credibility determinations. Minn. R. Civ. P. 52.01; *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

A petitioner seeking an OFP under chapter 518B must allege and prove domestic abuse. Minn. Stat. § 518B.01, subd. 4(b) (2008). The Minnesota Domestic Abuse Act defines "domestic abuse" in relevant part as

the following, if committed against a family or household member by a family or household member:

- (1) physical harm, bodily injury, or assault;
- (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or
- (3) terroristic threats, within the meaning of section 609.713, subdivision 1

Minn. Stat. § 518B.01, subd. 2(a) (2008); *see also Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004).

In its oral findings, the district court found that Mr. Cusick made terroristic threats to Ms. Cusick, sufficient to meet the statutory requirement. *See* Minn. R. Civ. P. 52.01 (allowing a district court to make oral findings of fact). Specifically, the district court found

that [Mr. Cusick] did, in fact, make terroristic threats to [Ms. Cusick] when in anger you state to a person something's going to happen to you and your friend. You won't know when and you won't know where. That's a threat to a person's safety. The individual has every right to feel threatened under those circumstances. [Ms. Cusick] said she felt frightened because [Mr. Cusick] shoved his body at her, got in her face.

In addition, the district court found that Ms. Cusick was in fear of “imminent physical harm, bodily injury, or assault.” Minn. Stat. § 518B.01, subd. 2(a).

[T]he facts here support the conclusion that—that [Ms. Cusick] continues to be in fear of [Mr. Cusick] and what he might do to her. Under that portion of the statute she need not make any showing of any act of physical assault or physical threat. . . . I'm satisfied that [the prior affidavits and petitions for OFP's] is evidence that supports another reason for issuing this Order for Protection [on] behalf of [Ms. Cusick].

In its written order, the court reiterated its finding that Mr. Cusick made terroristic threats, but, as noted above, the findings did not mention inflicting fear of imminent harm, bodily injury, or assault. The order further stated that the OFP is supported under the subsequent-order standard, which allows for a district court to grant or extend an OFP after an earlier OFP has expired. *See* Minn. Stat. § 518B.01, subd. 6a.

Thus, both the district court's oral findings at the hearing and its written order support its conclusion that Mr. Cusick made terroristic threats, which is sufficient for granting an OFP. Mr. Cusick argues that the evidence is insufficient for the district court to have found that he made terroristic threats. The definition of domestic abuse in section 518B.01, subdivision 2(a), includes "terroristic threats, within the meaning of section 609.713, subdivision 1." Section 609.713, subdivision 1, provides:

Whoever threatens, directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror . . . [is guilty of terroristic threats].

Minn. Stat. § 609.713, subd. 1 (2008). Thus, the district court had to find that (1) Mr. Cusick made a threat, (2) to commit a crime of violence, and (3) did so either with specific intent to terrorize Ms. Cusick or with reckless disregard of the risk of causing such terror. *See State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975). The district court specifically found that Mr. Cusick threatened Ms. Cusick and that she felt frightened.

Mr. Cusick argues that he did not threaten Ms. Cusick, but Ms. Cusick testified that Mr. Cusick said that something would happen to her and her friend and that she would not know when that would occur. She said that she understood his remark to be a threat that Mr. Cusick was planning to hurt her and her friend. She testified that "It was scary. Scared me. He was very angry." Although Mr. Cusick testified that he did not make the threat, the district court was free to believe Ms. Cusick's testimony and

disbelieve Mr. Cusick's testimony. And this court must defer to the district court's credibility determinations. Minn. R. Civ. P. 52.01; *Sefkow*, 427 N.W.2d at 210.

In addition, E.B., a neighbor and ex-brother-in-law of both parties, also testified. He related that he often saw Mr. Cusick "hollering and swearing" at Ms. Cusick. This testimony lends weight to the district court's finding of fact that Mr. Cusick committed terroristic threats against Ms. Cusick.

Mr. Cusick argues that the district court erred by relying on prior proceedings, in which Ms. Cusick obtained ex parte OFP's, only to ask that they be dismissed. In none of those proceedings was an OFP granted after hearing. Mr. Cusick states that "a definite mistake was made by the trial court in finding that the three previous Domestic Abuse actions supported [Ms. Cusick's] claim of Domestic abuse." Apparently he is arguing that the court erred by relying on the three prior OFP's in determining that the current order is a subsequent order within the meaning of Minn. Stat. §518B.01, subd. 6a. But any such error would be harmless, because the court's finding of terroristic threats, which is supported by the evidence, provides an alternative basis for issuing the current OFP. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored). Moreover, the prior incidents are admissible under Minn. Stat. § 634.20 (2008) (allowing admission of evidence of similar acts of abuse by same person against same victim). In our view, those prior incidents are probative in two respects. First, they aided the district court in determining the credibility of the conflicting testimony concerning the events on the dates in question; and second, they supported Ms. Cusick's testimony that Mr. Cusick's threats on the dates in question caused her to become afraid.

Ms. Cusick’s testimony combined with the prior incidents between Ms. Cusick and Mr. Cusick, as well as the testimony of the Cusicks’ neighbor, all support the district court’s finding that Mr. Cusick made terroristic threats and do not leave a “definite and firm conviction that a mistake has been made” in reaching those findings. *Braend*, 721 N.W.2d at 927 (quotation omitted). Thus, despite the discrepancy between the oral findings and the written order, the evidence amply supports the finding that Mr. Cusick made terroristic threats sufficient to support an OFP. *See id.*

Affirmed.

Judge Bertrand Poritsky