

IN THE COURT OF APPEALS OF IOWA

No. 1-377 / 10-1257
Filed June 29, 2011

DANA WOLFE,
Plaintiff-Appellee,

vs.

THOMAS L. WOLFE,
Defendant-Appellant.

Appeal from the Iowa District Court for Linn County, Thomas Horan,
Judge.

Husband appeals the court's entry of a final domestic abuse protective
order. **AFFIRMED.**

Stephen B. Jackson, Cedar Rapids, for appellant.

Kara L. McFadden, Cedar Rapids, for appellee.

Considered by Eisenhauer, P.J., and Potterfield and Tabor, JJ.

EISENHAUER, P.J.

Thomas and Dana Wolfe married in October 2007 and are the parents of a two-year-old daughter. In early June 2010, the couple lived with Thomas's parents. Dana testified on June 12, 2010, Thomas pushed her and grabbed their daughter from her as Dana was attempting to put the child in a car seat. Dana called the police. The police officer testified Dana did not "prove or show any marks of physical abuse," and he did not file criminal charges. Dana testified that after the police left, Thomas was physically intimidating and made threatening statements.

On June 17, 2010, Dana's attorney notarized Dana's petition for relief from domestic abuse; it was subsequently filed, and a temporary protective order was entered on June 21. See Iowa Code § 236.3 (2009). Dana's petition acknowledged Thomas had filed for divorce on June 14, alleged Thomas physically abused and threatened her, and stated she feared for her physical safety.

On July 1, 2010, the court conducted a hearing on Dana's petition. Thomas testified and directly contradicted Dana's testimony: (1) he did not assault Dana and (2) he did not argue with and threaten Dana after the police officer left. Thomas's parents and the police officer testified, but none of them saw the incident at the car.

The court found, by a preponderance of the evidence, Thomas committed a domestic abuse assault against Dana, and Thomas "represents a credible threat to the physical safety of [Dana]." The court entered a final domestic abuse

protective order prohibiting Thomas from having any contact with Dana, effective until July 1, 2011. See *id.* § 236.5(2).

Thomas appeals the court's order arguing: "The trial court erred in finding, by a preponderance of the evidence, that Thomas committed a domestic abuse assault against Dana." We review civil domestic abuse cases de novo. *Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001). "Respectful consideration is given to the trial court's factual findings and credibility determinations, but not to the extent where those holdings are binding upon us." *Id.*

Because this is a civil proceeding, Dana's burden is to prove the occurrence of domestic abuse by a preponderance of the evidence. See *id.* at 596. "In order to prove domestic abuse, sufficient facts of assault must be alleged." *Id.* See Iowa Code § 708.1. After our de novo review of the record and after giving weight to the trial court's ability to see the witnesses and determine credibility, we conclude there is sufficient evidence to establish by a preponderance of the evidence an assault occurred. The issue can only be resolved by evaluating the credibility of the testimony of Dana and Thomas. She says he shoved her; he says he did not. The trial court found he did. We defer to the trial court. Accordingly, we affirm.

Thomas also argues this court should modify the protective order to permit the district court, in the dissolution of marriage action, to enter orders regarding the custody of the parties' child. We note the supreme court on December 10, 2010, entered an order stating the issues relating to child custody are collateral to this appeal and the district court retained jurisdiction.

Dana requests \$3000 in appellate attorney fees, which are discretionary. See Iowa Code § 236.5(3). We decline to award attorney fees. Costs are taxed to Thomas.

AFFIRMED.

Tabor, J., concurs; Potterfield, J., dissents.

POTTERFIELD, J. (dissenting)

I respectfully dissent and would reverse the finding of domestic abuse. In so doing, I appreciate that an experienced district court judge heard the testimony and evaluated the credibility of the witnesses. I acknowledge this court is to give “respectful consideration” to the findings of fact and credibility determinations of the district court. *Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001). However, the form orders used by the district court supply only a bare minimum finding of fact (“Respondent committed a domestic abuse assault”) and a quasi-determination of credibility (“Respondent represents a credible threat”), leaving this court with very little to which we can defer. The form orders do not allow for meaningful findings, and the order on appeal does not reveal which of the disputed facts were persuasive or which of the witnesses were credible. After a de novo review of the record, including the sequence of events emphasized by the respondent, I am convinced the evidence is insufficient to support a finding of domestic abuse.

The police officer who spoke to Dana, Thomas, and Thomas’s mother immediately after the incident testified he saw no basis for filing a criminal charge that evening, primarily because he saw “no physical marks of reddening” resulting from the “violent push” described by Dana. He testified he believed Thomas when he said he did not push Dana.

Thomas’s father testified he witnessed the event from the kitchen door. He saw Thomas and Dana on opposite sides of the open car door and saw Thomas turn around with Maya in his arms. He did not see an assault, but he did see the two parents at the car where Dana said the assault occurred. Thomas’s

father testified that he and Dana sat on the porch and talked “at length” after Thomas took the child into the house. Dana did not mention any shove or physical assault to her father-in-law immediately after Thomas removed Maya from the car.

Dana returned to the house and spoke with her mother-in-law, who testified that although Dana “tells [her] everything,” Dana did not mention she had been pushed. Dana remained in the home the rest of the night and waited to file her petition for relief from domestic abuse until after she was served with Thomas’s divorce petition and the order setting the matter of temporary orders for hearing.

Because I do not think Dana met her burden of proving by a preponderance of the evidence that Thomas committed a domestic abuse assault, I would reverse.