

IN THE COURT OF APPEALS OF IOWA

No. 1-972 / 11-1151
Filed January 19, 2012

SHERRI S. ABARR,
Petitioner-Appellee,

And Concerning

MICHAEL L. ABARR,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Carla T. Schemmel,
Judge.

A defendant appeals from a domestic abuse protective order entered
under Iowa Code section 236.5 (2001). **AFFIRMED.**

Jessica A. Millage of Sporer & Flanagan, P.L.L.C., Des Moines, for
appellant.

Stacey N. Warren of Babich & Goldman, P.C., Des Moines, for appellee.

Considered by Vaitheswaran, P.J., Doyle, J., and Miller, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

MILLER, S.J.

Michael Abarr appeals from the district court's final domestic abuse protective order, entered under Iowa Code section 236.5 (2011), finding he committed domestic abuse against his wife, Sheri Abarr. He contends:

THE DISTRICT COURT ERRED IN FINDING THAT AN ASSAULT OCCURRED AND THEREFORE IN ENTERING THE FINAL PROTECTIVE ORDER.

I. SCOPE OF REVIEW.

Citing *Knight v. Knight*, 525 N.W.2d 841, 843 (Iowa 1994), Michael asserts our review is de novo. Also citing *Knight*, Sheri points out that our review is determined by the how the matter was tried in the district court, asserts the court ruled on objections, and concludes our review is thus for correction of errors at law.

Our review of those portions of the hearing transcript included in the appendix shows that on two occasions early in the domestic abuse hearing the trial court reserved ruling on objections by stating that the proposed answers would be received "subject to the objection." These two rulings are consistent with a trial in equity. However, those same portions of the transcript show that on three prior occasions and twelve subsequent occasions the trial court sustained or overruled objections, consistent with trial as a law action. As the overwhelming majority of the trial court's evidentiary rulings are consistent with trial as a special action at law, we conclude our review is for correction of errors at law. See, e.g., *Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997) ("This

[domestic abuse] case was tried in the district court as a law action. The court ruled on objections as they were made. Our review is therefore at law.”).

II. MERITS.

Sheri filed a petition for relief from domestic abuse, alleging Michael slapped her on June 5, 2011.¹ At trial Sheri testified that Michael had “struck” her on June 5. She also testified, however, that she had told the police officer² exactly what had occurred.

The officer testified Sheri had stated that Michael had “poked her in the shoulder a couple of times.” The officer further testified that Michael had admitted to having physical contact with Sheri, having poked her in the shoulder, and had stated when doing so, “See, I can touch you too.”³

In his testimony Michael admitted to having “poked [Sheri] with my right index finger.”

“*Domestic abuse*’ means committing assault as defined in section 708.1 under any of [certain relationship] circumstances.” Iowa Code § 236.2(2). Those relationships are not at issue in this appeal. Subject to two exceptions which have no application to the facts in this case, assault is defined as follows:

¹ In her petition Sheri also alleged two other incidents, occurring on or about June 6, 2011. These incidents, if proved, might or might not be seen as constituting domestic abuse. The trial court made no finding that these alleged incidents did or did not occur. We therefore focus only on the one incident which the court found to have occurred and to constitute domestic abuse, the incident of June 5.

² In response to a call from the parties’ seventeen-year-old daughter, a police officer had come to the parties’ home shortly after the June 5 incident.

³ The incident between the parties grew out of an incident in which Michael is alleged to have grabbed the parties’ daughter’s hand when she was opening a sliding door, apparently intending to leave the home.

A person commits an assault when, without justification,⁴ the person does any of the following:

1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting or offensive, coupled with the apparent ability to execute the act.
3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1.

The trial court found that the testimony proved Michael had engaged in domestic abuse of Sheri. In this case, tried as a law action, the trial court's findings of fact are binding on us if supported by substantial evidence. Iowa Rs. App. P. 6.904(3), 6.907.

Michael argues that Sheri did not prove by a preponderance of the evidence that he had the intent required for an assault. He suggests that his only intent was to demonstrate to Sheri the contact he had had with their daughter. He also argues that the evidence does not show that the admitted poking was or should have been offensive to Sheri.

Michael's own testimony shows that for the period of about a year prior to June 5, 2011, Michael and Sheri had not been getting along well together. Tension had been high between them. One matter of contention between Michael on the one hand, and Sheri and the parties' daughter on the other hand, concerned the daughter's schooling. The daughter had a confrontational attitude towards Michael. Sheri and Michael had not talked much in the past few months.

⁴ No issue concerning justification has been raised in this case.

Sometime before June 5, Sheri had filed for dissolution of marriage and had a hearing on temporary matters scheduled for June 6.

Michael's intent in poking Sheri may be inferred from the foregoing circumstances leading up to and surround the poking. Michael apparently felt, perhaps with some justification, that Sheri had undermined his relationship with the parties' daughter. The parties communicated poorly, if at all. The atmosphere between the parties appears to have degenerated to the point where it bordered on the toxic.

We conclude that under the circumstances shown, substantial evidence supports the trial court's finding that Michael did an act intended to result in physical contact which would be insulting or offensive to Sheri, coupled with the apparent ability to execute the act. See Iowa Code § 708.1(1). We therefore further conclude the trial court did not err in determining Michael had engaged in domestic abuse of Sheri and issuing the challenged protective order.

III. APPELLATE ATTORNEY FEES AND COSTS.

Sheri requests an award of appellate attorney fees. This court may award appellate attorney fees. Iowa Code § 236.5(4); *Schaffer v. Frank Moyer Constr., Inc.*, 628 N.W.2d 11, 23 (Iowa 2001) (holding that a statute allowing an award of trial attorney fees permits an award of appellate attorney fees as well). When an award is made, the amount of the award is within the court's discretion. See, e.g., *Baumhoefener Nursery, Inc. v. A & D P'ship, II*, 618 N.W.2d 363, 368 (Iowa 2000) (holding that when a district court awards attorney fees the amount is

vested in that court's broad, but not unlimited, discretion). We award Sheri \$750 in appellate attorney fees.

Costs on appeal are taxed to Michael.

AFFIRMED.