

IN THE COURT OF APPEALS OF IOWA

No. 8-018 / 07-0638
Filed February 13, 2008

CATHERINE S. TORNBLOM,
Plaintiff-Appellee,

vs.

JAMES ROBERT TORNBLOM,
Defendant-Appellant.

Appeal from the Iowa District Court for Johnson County, David M. Remley,
Judge.

James Robert Tornblom appeals from the district court's grant of
Catherine Tornblom's petition for relief from domestic abuse. **AFFIRMED.**

Paul K. Waterman of Lynch, Greeneaf & Michael, L.L.P., Iowa City, for
appellant.

Noelle Murray of Cronk & Murray, L.L.P., Iowa City, for appellee.

Considered by Huitink, P.J., and Zimmer and Miller, JJ.

HUITINK, P.J.

James Robert Tornblom appeals from the district court's grant of Catherine Tornblom's petition for relief from domestic abuse. We affirm.

I. Background Facts and Prior Proceedings

Catherine and James have been married for eleven years and have two young children. In 1998 James was arrested for allegedly physically abusing Catherine. The charges were later dropped at Catherine's request.

On January 24, 2007, Catherine filed a pro se form petition for relief from domestic abuse pursuant to chapter 236 of the Iowa Code (2007). In this petition she described the "most recent" incident of domestic abuse in the following manner:

Jan. 23rd [James] came home to have lunch. Told me I'd better have a new attitude in 5 hours (when he came home). I asked him again, "What do you mean." Replied, "What my decision was boarded on the course of my life." Again in evening he said "this is a threat." Because of previous violence pattern I'm frightened for my safety.

The next question on the form directed Catherine to describe any other injuries or threats she had received from James. Catherine only listed the aforementioned 1998 incident.

The court granted her a temporary protective order. James hired an attorney and filed a resistance to the petition. Catherine eventually hired an attorney, and the matter proceeded to a hearing on February 7. Catherine described the January 23 incident that prompted her to file the report. She described how James told her "You had better have a new attitude in five hours or your life is going to change. Your life borders on what's going to happen in

five hours.” Catherine was frightened by these comments. She took both children and left their Iowa City home to stay with her parents in Des Moines. James called her and told her that she needed to come home. She refused, and he said “this is a threat.”

Catherine also went on to describe another recent incident that contributed to her decision to file the petition. Approximately three months prior, on Halloween, Catherine and James got into an argument. She testified that during the course of this argument, James “got up on me on top of me and was verbally calling me a fat pig.” She left the room and went to lie down on her bed. James followed her into the bedroom and proceeded to hit and kick her side of the bed while he yelled at her. This lasted for approximately ten minutes and only ended when she threatened to call 911. James testified that he did not mean to frighten her, but admitted his decision to kick the bed was “uncalled for.”

The district court concluded James had committed a domestic assault and entered a protective order that same day. The ruling stated James had committed a domestic abuse assault against Catherine “on Halloween, 2006, but not on January 23, 2007.” The protective order was amended shortly thereafter to allow for marriage counseling.

James filed a motion pursuant to Iowa Rule of Civil Procedure 1.904(2) to enlarge or amend the court’s order. In this motion James argued, for the first time, that the original petition did not provide him with notice that he was being accused of domestic abuse assault for his actions on Halloween. The district court denied the motion finding, among other things, that the matter had been tried by “consent” pursuant to Iowa Rule of Civil Procedure 1.457.

One week later, on March 15, James filed a “petition to dismiss” the protective order. This petition contained affidavits from family members stating that they did not believe James was a threat to Catherine’s safety. The district court denied this petition.

On April 4 Catherine filed an application to dismiss the protective order. Catherine informed the court that she had been attending marriage counseling with James for the past month, she no longer feared for her safety, and that she had agreed to allow James to move back into the family home. That same day, the court entered an order cancelling the protective order and dismissing the petition for relief from domestic abuse.

James now appeals, claiming the court erred when it entered the original domestic abuse order.¹ James contends a ruling based on the Halloween allegation was inappropriate because the incident was not listed in the petition for relief and therefore violated Iowa Rule of Civil Procedure 1.402. He also claims Catherine did not meet her burden of proving domestic abuse because he did not intend to place her in fear. Catherine did not respond to this appeal.

II. Standard of Review

Because this civil domestic abuse case was heard in equity, our review is *de novo*. *Knight v. Knight*, 525 N.W.2d 841, 843 (Iowa 1994). The allegations of domestic abuse must be proven by a preponderance of the evidence. *Id.* We give respectful consideration to the trial court’s factual findings and credibility

¹ Even though the final protective order was eventually dismissed, James filed this appeal because he claims the original adjudication of domestic abuse could have a negative impact on any potential dissolution proceedings. Because we find there is sufficient evidence to support the district court’s original decision, we choose to address this appeal on the merits, rather than determine whether the appeal is now moot.

determinations, but those findings and determinations are not binding on appeal. *Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001).

III. Merits

A. Rule 1.402 Violation

James contends rule 1.402 requires that the petition for relief from domestic abuse inform the respondent of the incident giving rise to the claim. See *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994) (noting a domestic abuse petition gives fair notice if it “informs the [respondent] of the incident giving rise to the claim and the claim’s general nature”). He argues the court’s decision to issue the order was erroneous because it was based on an incident not specifically listed in Catherine’s petition for relief. In essence, he claims that had he known he was being accused of assaulting Catherine on Halloween, he would have prepared his defense in a different manner.

The district court rejected this claim because it found the issue was tried by “consent” pursuant to rule 1.457. James does not challenge the court’s consent finding. Instead, he focuses his appeal on whether the court violated rule 1.402 when it ruled on an incident not specifically listed in the pro se petition.

Rule 1.402 outlines the general rules of pleading and procedures for amending a pleading. Rule 1.457, however, establishes that a party can consent, expressly or impliedly, to a trial on issues not directly raised in the pleadings. Rule 1.457 states, in pertinent part, that “[w]hen issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings.” It goes on to state that if a party objects that the evidence is not within the issues in the

pleadings, the court “may grant a continuance to enable the objecting party to meet such evidence.” Iowa R. Civ. P. 1.457.

When Catherine testified about the alleged Halloween assault, neither James nor his attorney objected to her testimony. When questioned about the incident on cross-examination, James described the incident in his own words, again without objection. Also, James did not ask for a continuance and did nothing to suggest he was surprised by the allegation.² Based upon the allegations in the petition of a “pattern” of abuse and James’s willingness to allow evidence on the alleged Halloween assault, we find the district court properly determined that James impliedly consented to a trial on the issue of whether the Halloween incident constituted an assault. Because we agree with the court’s conclusion that James consented to a trial on this issue, we find the court did not violate rule 1.402 when it entered judgment on the issue.

B. Sufficient Proof of Domestic Abuse

Under Iowa Code section 236.5(2), a court may grant a protective order “[u]pon a finding that the defendant has engaged in domestic abuse.” For the purposes of chapter 236, domestic abuse is defined as “committing assault as defined in section 708.1.” Iowa Code § 236.2(2). Section 708.1 states

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

. . . .

² In a post-ruling motion, James proffered affidavits from witnesses he claims he would have called to testify had he known that the Halloween incident could serve as the basis for the domestic abuse finding. None of these affiants claim they were present during the Halloween incident. At most, one affiant says she spoke with Catherine the day after Halloween and Catherine “never mentioned” she was afraid for her safety. As noted below, we find it was reasonable to infer that James intended to place Catherine in fear of immediate physical contact. The fact that Catherine did not tell the affiant that she was afraid of her own husband does not eliminate this reasonable inference.

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.

On appeal, James claims Catherine failed to prove that he intended to place her in fear for her immediate safety. James contends that his kicking of the bed was not sufficient evidence to prove he intended to put her in fear of physical contact. In his appellate brief, he admits that “kicking the bed may have caused [Catherine] to be fearful that [he] would batter her,” but argues that kicking the bed “could just as easily have been an attempt to prevent [her] from ignoring [him].”

The intent element required by the assault statute “may be inferred from the circumstances of the transaction and the actions of the defendant.” *State v. Keeton*, 710 N.W.2d 531, 534 (Iowa 2006) (quoting 21 Am. Jur. 2d *Criminal Law* § 128, at 214-15 (1998)); *State v. Taylor*, 689 N.W.2d 116, 132-33 (Iowa 2004). Catherine is assisted in meeting her burden of proof on this element “by the principle that an actor will ordinarily be viewed as intending the natural and probable consequences that usually follow from his or her voluntary act.” *Taylor*, 689 N.W.2d at 132.

As conceded in James’s appellate brief, his repeated kicking of the bed could have caused Catherine to be fearful that he would batter her. Indeed, Catherine testified that his actions did make her fear for her own immediate physical safety. We find this is a natural and probable consequence of someone acting in such a manner. Accordingly, we conclude the evidence supports the inference that James intended to make her fear immediate physical contact when he yelled and repeatedly hit and kicked the area she occupied on the bed.

Upon our de novo review of the record, we find a preponderance of the evidence supports the district court's conclusion that the incident that occurred on Halloween night, 2006, was an assault. Accordingly, we affirm the district court's conclusion that domestic abuse occurred and its original decision to enter a protective order.

AFFIRMED.