IN THE COURT OF APPEALS OF IOWA

No. 8-030 / 07-1074
Filed April 9, 2008

KARINA KLUG,
Petitioner-Appellee,

vs.

MARVIN KAJESE,
Respondent-Appellant.

Appeal from the Iowa District Court for Winneshiek County, Lawrence H. Fautsch, Judge.

Marvin Kajese appeals from a final domestic abuse protective order entered under Iowa Code section 236.5 (2007). **REVERSED.**

Andrew P. Nelson of Meyer, Lorentzen & Nelson, Decorah, for appellant.

Dale L. Putnam, Decorah, for appellee.

Heard by Huitink, P.J., and Zimmer and Miller, J.J.

MILLER, J.

Marvin Kajese appeals from a final domestic abuse protective order entered under Iowa Code section 236.5 (2007), finding that he committed domestic abuse assault against Karina Klug. We reverse.

I. BACKGROUND FACTS AND PROCEEDINGS.

Kajese and Klug are the parents of Kundayi Kajese, who in May 2007 was fifteen months of age. The parties were never married, but they resided with one another and their son for approximately a year and a half in a house they jointly leased in Decorah, Iowa.

On May 4, 2007, Klug filed a petition for relief from domestic abuse, alleging Kajese threatened her and she feared for her physical safety. In her petition, she claimed she left the parties' residence that morning

> after being yelled at – he took my cell phone and held it like he was going to break it he said do you want your phone? I said is that a threat? he said I don't make threats I do and preceded to snap the phone in half. . . . I walked out the door w/ my son & ran.

She further claimed that Kajese "hurt or threatened" her on other occasions through his body language, "[e]scalating yelling and 'indirect' threats: ie: 'I keep quiet & smile people don't know what I can do.'" Finally, she claimed, "He has threatened on numerous occasions to take our child [to] Zimbabwe w/o me."[1] A temporary protective order was issued on May 4, and a hearing on Klug's petition was held on May 15, 2007.

At the hearing, Klug testified Kajese came home smelling of alcohol at "about 6:40 a.m." on May 4 after being out all night. She testified he was very angry at her when he came home, and he was "shouting at me and pounding his

[1] Kajese is from Zimbabwe.

chest." At some point, Kajese asked Klug if he could use her cell phone, which he testified they jointly owned, to call his mother in Zimbabwe. Klug initially refused to give him the phone, and they continued to argue. She eventually gave him the phone, and he unsuccessfully attempted to call his mother.

Klug testified that after Kajese was unable to speak to his mother, he "continued to yell" and began "getting really scary," so she called a domestic abuse advocate from her cell phone. She testified she erased the advocate's number from the phone after she called her, "and he started yelling at me, 'Whose number did you erase?'" She testified that he "grabbed the phone. . . . and said, . . . 'Do you want your phone?' And I said, 'Is that a threat?' And he said, 'I don't make threats, I do' . . . and snapped the phone."

Kajese testified that he was sitting on the couch about five feet away from Klug with the couch in between them when they were arguing about the number she deleted. He testified he was holding the phone open when he asked her if she wanted her phone. He further testified that after she asked him if that was a threat, he said, "I do not threaten, . . . I do what I say." At that point, according to Kajese, the phone accidentally snapped in his hand.

Klug testified she left the parties' residence with their son after the cell phone broke because she "feared for [her] life severely." She testified that in the weeks prior to the incident, "he had gotten more physical in terms of throwing - - he threw his wallet down on the floor. . . . He always shook his finger at me and stood above me" yelling. She further testified that "he's made threats. He's told me he's taking Kundayi back to Africa." Klug stated "[a] lot of the threats" he made to her in the past "are with his body language and his eyes, the way he

looks at me and what he says." She testified his threats seem vague but "when he's saying it, . . . it's scary." Kajese denied ever threatening Klug, testifying "I've never said anything that would . . . even likely mean that I'm going to hurt her or anything."

The district court found by a preponderance of the evidence that Kajese committed domestic abuse assault. The court entered a final protective order prohibiting Kajese from having any contact with Klug and granted her temporary custody of the parties' child.

Kajese appeals. He claims the district court erred in entering the final protective order, because the "act of merely snapping a cell phone at the hinge does not call for a finding of" domestic abuse assault.

II. SCOPE AND STANDARDS OF REVIEW.

Both parties contend we should review this matter for the correction of errors at law. Because the record suggests the district court tried this case as a law action and ruled on objections as they were made, we agree.[2] *See Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997) (reviewing appeal from final protective order for the correction of errors at law where the case was tried as a law action). Thus, the court's findings of fact are binding upon us if those facts are supported by substantial evidence. *Id.* The district court's legal conclusions, however, are not. *Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996). Evidence is substantial if reasonable minds could accept it as adequate to reach the same findings. *Bacon*, 567 N.W.2d at 417.

[2] We note our resolution of this matter would be the same under a de novo scope of review. *See Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001) ("Civil domestic abuse cases are . . . heard in equity and, thus, deserve a de novo review.").

III. MERITS.

In a chapter 236 domestic abuse proceeding, the plaintiff must prove the allegation of domestic abuse by a preponderance of the evidence. Iowa Code § 236.4(1). Proof of domestic abuse requires proof of an assault as defined in section 708.1. Iowa Code § 236.2(2). "Assault can be committed in several ways." *Bacon*, 567 N.W.2d at 417; *see also* Iowa Code § 708.1(1)-(3). The applicable alternative in this case provides:

> A person commits assault when, without justification, the person does any of the following:
> . . .
> (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.

Iowa Code § 708.1(2).

The district court found Kajese committed domestic abuse assault "when [he] stated to [Klug], 'I don't make threats – I do this' and then proceeded to break the cellular phone." We first note the evidence in the record does not support a portion of the court's finding regarding Kajese's statement. Klug testified Kajese stated, "I don't make threats, I do" before breaking the phone. Kajese, on the other hand, testified that before the phone accidentally broke, he stated, "I do not threaten, . . . I do what I say." In any event, we do not believe that substantial evidence in the record supports a finding that Kajese committed domestic abuse assault.

Assault requires "an overt act" intended "to make the [victim] fear immediate painful, injurious, insulting or offensive physical contact." *State v. Keeton*, 710 N.W.2d 531, 534-35 (Iowa 2006). Thus, "[a] mere threat, without more, is not necessarily an assault by placing another in fear." *State v. Law*, 306

N.W.2d 756, 759 (Iowa 1981), *overruled on other ground by State v. Wales*, 325 N.W.2d 87, 89 (Iowa 1982). The focus is on the actor's intent, not the alleged victim's expectations. *Bacon*, 567 N.W.2d at 418. The fact that the victim may or may not have been afraid is not dispositive. *Keeton*, 710 N.W.2d at 535. Intent may be inferred from the circumstances surrounding the alleged assault. *State v. Taylor*, 689 N.W.2d 116, 132 (Iowa 2004).

Klug argues that Kajese's statement, "I don't make threats, I do," "when coupled with the act of snapping a cellular phone" was intended to and did place her in fear of immediate physical contact. We conclude otherwise. Kajese testified he was sitting on a couch approximately five feet away from Klug when he made the aforementioned statement and the cell phone broke; Klug was standing on the other side of the couch near the door of the parties' residence; and when the phone "snapped, the front piece went forward," away from Klug. Klug neither refuted nor challenged this testimony. In light of the foregoing, we conclude the evidence was insufficient to support the district court's finding that Kajese's statement and act were intended to place Klug "in fear of *immediate* physical contact." Iowa Code § 708.1(2) (emphasis added).

Klug additionally argues Kajese's behavior in the months preceding the incident on May 4, 2007, supports the court's finding that he "represent[ed] a credible threat to [her] physical safety." Our supreme court has acknowledged that "a defendant's history of threatening or violent conduct involving the same victim can be especially probative" and can "establish the justifiable inference that a defendant's charged conduct was in fact intended to engender fear on the part of the victim and that defendant knew that it was likely to do so." *Taylor*, 689

N.W.2d at 128. However, there is no history of domestic abuse between the parties in this case. Nor did Klug claim in her petition or at the hearing that Kajese had ever threatened her with physical harm or actually physically harmed her during their relationship of two years or more.

Rather, Klug testified that in the final months of their relationship, she was afraid that Kajese was going to "harm" or "kill" her because "he would yell a lot at me, very intense," and he would stand over her "shaking his finger at me." She further testified he would "be smiling and laughing" when other people were around, but "then when they'd leave, he would be very cold to me." Klug claimed in her petition that Kajese's threats to her were "indirect." She explained at the hearing that he would threaten her "with his body language and his eyes." We do not believe this evidence is sufficient to support an inference that Kajese intended to place Klug in fear of immediate physical contact on May 4, 2007. *Cf. id.* at 132 (relying in part on evidence wife had been assaulted by husband in the recent past and had obtained a temporary protective order against him in inferring his intent to commit an assault).

IV. CONCLUSION.

We conclude the district court erred in finding Kajese committed domestic abuse assault "when [he] stated to [Klug] 'I don't make threats – I do this' and then proceeded to break the cellular phone." There was not substantial evidence in the record supporting the court's finding that Kajese's statement and act were intended to place Klug in fear of immediate physical contact. We therefore reverse the court's determination that domestic abuse occurred.

REVERSED.