

IN THE COURT OF APPEALS OF IOWA

No. 9-070 / 08-1374
Filed March 11, 2009

CHARLOTTE OWENS,
Petitioner-Appellee,

vs.

JERRY OWENS,
Respondent-Appellant.

Appeal from the Iowa District Court for Pottawattamie County, Charles L. Smith, Judge.

Defendant appeals the district court's entry of a domestic abuse protective order. **REVERSED.**

Norman L. Springer Jr. of McGinn, McGinn, Springer & Noethe, Council Bluffs, for appellant.

Matthew V. Stierman of Stierman Law Office, P.C., Council Bluffs, for appellee.

Considered by Sackett, C.J., Mahan and Potterfield, JJ.

POTTERFIELD, J.**I. Background Facts & Proceedings**

On October 12, 2007, this court affirmed a final domestic abuse protective order involving these same parties. *Owens v. Owens*, No. 07-667 (Iowa Ct. App. Oct. 12, 2007). The order prohibited Jerry Owens from committing further acts of abuse or threats of abuse, and from having any contact with Charlotte Owens. That protective order granted a December 27, 2006 petition for relief from domestic abuse under Iowa Code chapter 236 (2005) in which Charlotte Owens alleged Jerry Owens had been physically abusive to her prior to the parties' separation in May 2006. Her petition stated Jerry had, in the past, assaulted her by hitting her with his fists, and had dragged her into a room and confined her there against her will. She further alleged Jerry had "thrown her around," blackened her eyes, and knocked out teeth. She alleged that on the morning of December 27, Jerry had followed her car on the interstate, and this was frightening to her.

In a hearing in the chapter 236 action on February 5, 2007, Charlotte was asked if Jerry had done anything to her in the "last several months," while the divorce was pending, to make her fear him. She testified Jerry got in her face and said, "Do you want to know what a real beatin' is like? Let me give it to you." During Jerry's testimony he was asked, "Have you ever threatened her physically since December of 2006?" He answered, "no," but in effect admitted to earlier assaultive behavior.

On appeal Jerry contended there was insufficient evidence that he had committed an assault, which would support a finding of domestic abuse. We

concluded there was substantial evidence in the record to support the district court's finding that Jerry committed domestic abuse, relying in part upon Charlotte's unrefuted testimony that Jerry had gone face to face with her and threatened to beat her. We found that Jerry did an act intended to place Charlotte in fear of immediate physical contact which would be painful or injurious, and there was apparent ability to execute the act. The first protective order expired on February 5, 2008. Charlotte did not seek an extension of the order. See Iowa Code § 236.5(2)(e).

On July 7, 2008, Charlotte again filed a petition for relief from domestic abuse under Iowa Code chapter 236 (2007). At the hearing Charlotte testified that since May 2007, when Jerry was found in contempt of the former restraining order, she had had no problems with him until July 2008.

Charlotte described the events of July 2008 that led to her request for a second protective order. She first testified that she received an early morning anonymous call on July 2, informing her that posters were hanging in her neighborhood containing personal information about Charlotte and her daughter from a marriage previous to her marriage to Jerry. Although she was not able to tell the court who made the call or posted the personal information, she testified that Jerry was the only person with motive and knowledge of the information.

Charlotte then turned to the day of July 4, when she drove from Underwood, Iowa, to Arlington, Nebraska, to see her sister and then returned by way of Blair, Nebraska. Jerry either followed her or coincidentally found himself on the same Nebraska road, driving toward Blair, Nebraska. During that drive, Jerry made three telephone calls to the Washington County Sheriff's department

falsely claiming Charlotte was driving erratically and throwing beer cans out of her window. Law enforcement officials stopped Charlotte's car and questioned her before letting her drive home. Charlotte presented a c.d. of the telephone calls to the district court, and testified that she recognized Jerry's voice on all three calls.

Jerry testified that he did not post the signs. He also denied that he followed Charlotte on the drive on July 4, 2008; it was only a coincidence that he was driving on the same road in Nebraska on the same day. He also first denied that he made the telephone calls to the sheriff's department, but later testified that he made one of the three calls and finally said his brother made all three of the telephone calls while Jerry drove.

The district court took judicial notice of the prior case and, over objection, admitted into evidence a transcript of the hearing that led to the protective order issued in February 2007. The court found that there had been a finding of domestic abuse in the past, which was affirmed on appeal, and that the behavior of Jerry Owens was continuing. The court issued the protective order and verbally ordered Jerry to stay away from and to refrain from having any contact with Charlotte. The court informed Charlotte that the order would extend for one year and that she could renew the order prior to the expiration.

Jerry appeals, contending there is insufficient evidence of assault to sustain the restraining order.

II. Discussion

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." "Domestic

abuse” is defined by the Code as an “assault as defined in section 708.1” by one person in a specified relationship against the other person in a specified relationship. Iowa Code § 236.2(2). Former spouses are one such specified relationship. *Id.* § 236.2(2)(b). The allegations of domestic abuse must be proved by a preponderance of the evidence. Iowa Code § 236.4(1); *Wilker v. Wilker*, 630 N.W.2d 590, 596 (Iowa 2001). A preponderance of evidence supports a finding when such evidence is greater “in weight, influence, or force” than the evidence supporting a different conclusion. *Walhart v. Bd. of Dirs. of Edgewood-Colesburg Cmty. Sch. Dist.*, 694 N.W.2d 740, 744 (Iowa 2005).

Jerry contends Charlotte did not prove an assault by a preponderance of the evidence. Iowa Code section 708.1 defines an assault as:

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.

The trial court did not make a finding that Jerry had committed an assault. Instead, the court found that “domestic abuse has occurred in the past” and that “the behavior is continuing on the part of the defendant.” We conclude this finding is not sufficient to sustain the domestic abuse protective order.

A claim of “fear,” standing alone and absent an assault, does not give rise to a claim under chapter 236. Charlotte’s testimony may support a finding of harassment (see Iowa Code § 708.7) or perhaps stalking (see *id.*, § 708.11). And, we agree with the trial court that Jerry’s behavior in following his former wife

and making false reports to law enforcement is “reprehensible.” Remedies for such conduct may be available; however, they do not find their bases in chapter 236.

We have examined the record and are unable to find evidence of an assault by Jerry to support the district court’s finding and subsequent issuance of a protective order. We therefore reverse the decision of the district court and vacate the protective order.

REVERSED.