

IN THE COURT OF APPEALS OF IOWA

No. 9-708 / 09-0093
Filed September 17, 2009

MELISSA DELISLE,
Petitioner-Appellee,

vs.

ANTHONY DELISLE SR.,
Respondent-Appellant.

Appeal from the Iowa District Court for Polk County, Michael D. Huppert,
Judge.

Appellant appeals the entry of a final domestic abuse protective order
pursuant to Iowa Code section 236.3 (2009). **REVERSED.**

Anthony DeLisle Sr., Des Moines, pro se.

Melissa DeLisle, Des Moines, pro se.

Considered by Vaitheswaran, P.J., Mansfield, J., and Schechtman, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2009).

MANSFIELD, J.

Anthony DeLisle Sr. appeals the entry of a final domestic abuse protective order on the grounds that the evidence was insufficient to sustain a finding of domestic abuse. We agree with Anthony and, therefore, reverse.

I. Facts and Prior Proceedings

On January 5, 2009, Melissa DeLisle filed a pro se form petition for relief from domestic abuse alleging Anthony had threatened her and that she was in fear for her physical safety. In her petition, Melissa claimed:

An overwhelming amount of mental/emotional abuse. Profanity, name calling, screaming abusive words. Hitting/slamming/kicking doors/walls to drive intimidation and fear in our family. Extremely unhealthy and unsafe environment. My children and I live in fear someone is about to get very hurt/die.

A temporary protective order was issued that day, and a hearing was scheduled for January 15, 2009, to determine whether a permanent protective order would be entered.

At the permanent protective order hearing, both parties represented themselves. The district court questioned both parties thoroughly; the parties also cross-examined each other. Melissa testified that in the last four to five months, Anthony had not physically abused her:

THE COURT: Over this period of time that we're talking about, has Mr. DeLisle ever been physically abusive to you?

MELISSA: Has he physically put his hands on me?

THE COURT: Yes.

MELISSA: No.

Rather, as Melissa explained, she believed Anthony's difficulties in controlling his anger were going to *lead* to physically abusive conduct:

His behaviors are threatening, his aggressiveness, his yelling and screaming in my face, pushing and slamming doors, just driving intimidation and fear that that's going to happen, as it has in the past, and I have documentation that it always becomes physical.

....

He pushes doors open and slams them and kicks them open and just makes you very intimidated. I've had three orders in the past where it always becomes physical, and I don't want to get to that point.

However, Melissa went on to testify that Anthony had not even threatened her with physical abuse during the relevant time period:

THE COURT: Has he ever – and I'm talking about here in these last few months. Has he ever said anything to the effect that if you don't do this or if you do this I am going to be physically abusive to you in some way or any way?

MELISSA: Does he verbally say that to me?

THE COURT: Yes.

MELISSA: No, not that I can recall.

....

THE COURT: Give me an example of what he has said that has led you to believe that he would become physically abusive.

MELISSA: I don't really know how to answer that, Your Honor. I just know the feelings and I know the past experiences and what it leads up to, and myself and my children are just afraid it's going to become physical. I guess we just live in fear of that all the time. These episodes are occurring more frequently and becoming more aggressive.

Anthony denied that he had engaged in threatening behavior toward Melissa and testified that he had not screamed at his wife nor directed insults towards her. In addition, Anthony presented documentation from Steven Mitchell, a licensed mental health counselor, which stated that he had been in counseling for the last four to five months and was committed to making improvements in his life. However, this document also stated:

This is not to say that Anthony doesn't struggle with feelings of anger. He is working on managing his anger in such a manner that it doesn't give way to aggressive behaviors.

Melissa also testified that there had been incidents of physical abuse in years past. These included a night where Anthony kept her awake by poking her with a large stick, a struggle over her purse that resulted in the purse striking her in the face, and occasions in which Anthony spit on her or threw ketchup or syrup on her.

Based upon the testimony of the parties, their demeanor, and the documentation, the district court determined there was sufficient proof that Anthony committed domestic abuse by placing Melissa in fear of immediate offensive or injurious physical contact, coupled with the apparent ability to execute those actions. Therefore, the court entered a final protective order prohibiting Anthony from having any contact with Melissa for one year, awarding Melissa exclusive possession of their residence, and granting Melissa temporary custody of the parties' four children. Anthony has appealed.

II. Scope and Standard of Review

Because this civil domestic abuse case was heard in equity, our review is *de novo*. *Wilker v. Wilker*, 630 N.W.2d 590, 594 (Iowa 2001). We give respectful consideration to the trial court's factual findings and credibility determinations, but those holdings are not binding on appeal. *Id.*

III. Merits

Anthony contends the evidence was not sufficient to prove that he committed domestic abuse.

"Domestic abuse" occurs when a person commits an assault as defined in section 708.1 under certain circumstances, such as assault between family or household members who reside together at the time of the assault. Iowa Code

§ 236.2(2)(a). Allegations of domestic abuse must be established by a preponderance of the evidence. *Id.* § 236.4(1). A preponderance of the evidence is the evidence that is more convincing than opposing evidence or more likely true than not true; it is evidence superior in weight, influence, or force. *Martinek v. Belmond-Klemme Cmty. Sch. Dist.*, ___ N.W.2d ___, ___ (Iowa 2009).

We conclude there is insufficient proof to show by a preponderance of the evidence that Anthony assaulted Melissa within the meaning of section 708.1(2). In reaching this conclusion, we acknowledge that factual disputes depending heavily on the credibility of the witnesses are best resolved by the district court, which has a better opportunity than we do to evaluate the witnesses. *Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996). In this matter, the district court credited Melissa's testimony. However, we believe that even Melissa's testimony did not establish that Anthony had assaulted her. Since it was undisputed that Anthony had not perpetrated any physical abuse against Melissa, the assault statute required proof of an "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). We believe the proof at the permanent order hearing fell short.

According to Melissa, Anthony was having "angry spells" where he was "yelling and screaming," "pushing and slamming doors," and doing "a lot of cursing." Melissa conceded that Anthony had not been physically abusive nor had he threatened physical harm. Instead, as expressed in her own words, her concern was that "*eventually* he's going to make contact and he's going to hurt

me physically” (emphasis added). While we do not downplay Melissa’s or the district court’s concerns about the future, the law requires an act which was intended to place another in fear of *immediate* physical contact. That was not proved here. “Eventually” and “immediately” are not the same thing.

Furthermore, the pertinent state of mind is that of the defendant, not the victim. *State v. Keeton*, 710 N.W.2d 531, 535 (Iowa 2006). Thus, the record would have to show that Anthony’s angry behavior around the household was intended by him to place Melissa in fear of immediate physical contact, even though he concededly did not commit or threaten physical contact. We agree that prior incidents of domestic abuse between persons with a close emotional attachment are relevant under Iowa Rule of Evidence 5.404(b) to show motive and intent at the time of the offense. *See State v. Taylor*, 689 N.W.2d 116, 125 (Iowa 2004) (stating “the defendant’s prior conduct directed to the victim of a crime, whether loving or violent, reveals the emotional relationship between the defendant and the victim and is highly probative of the defendant’s probable motivation and intent in subsequent situations”). Thus, Melissa’s testimony regarding Anthony’s prior acts against Melissa was potentially relevant (and Anthony did not object to the admission of that evidence). However, it is one thing to use prior bad acts to explain that violent conduct against the victim was intended to cause pain and injury, as was the situation in *Taylor*. *See id.* at 122-23. It is another to try to use such evidence to close a gap between general

complaints about angry behavior and specific proof of an “act intended to place another in fear of immediate physical contact.” Iowa Code § 708.1(2).¹

IV. Conclusion

Because the evidence did not establish an assault within the meaning of Iowa Code section 708.1(2), and thus did not establish domestic abuse within the meaning of section 236.2(2), we reverse the order entered below.

REVERSED.

¹ For example, Melissa questioned Anthony:

Q. You don't recall the order in 2001 around the same time of year when you were poking me with a stick for all hours of the night at one o'clock in the morning because you needed money? A. I contested that, and that was not the situation. I was not allowed a hearing on that or to present any type of evidence, but I do not—that was not what happened. I did not poke you with a stick.

Although that was the end of questioning on that subject, Iowa's on-line court records show that the State charged Anthony with domestic abuse in 2001, but the charges were ultimately dismissed. Regardless, we do not believe this evidence allows the inference to be drawn that Anthony's angry behavior seven years later amounted to an assault.