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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1148**

In the Matter of:
Josephine Pearl Paul, petitioner,
Respondent,

vs.

David Kevin Wittman,
Appellant.

**Filed April 24, 2017
Reversed
Johnson, Judge**

Hennepin County District Court
File No. 27-DA-FA-16-3846

Josephine Pearl Paul (*pro se* respondent)

Alexander H. De Marco, St. Paul, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Schellhas, Judge; and
Bjorkman, Judge.

UNPUBLISHED OPINION

JOHNSON, Judge

The district court found that David Kevin Wittman engaged in domestic abuse against Josephine Pearl Paul by causing her to fear an assault. The district court issued an order for protection that prohibits him from having contact with her for two years. The issue on appeal is whether the evidence presented to the district court supports the district

court's finding that domestic abuse occurred. We conclude that the evidence is insufficient to support the finding of domestic abuse and, therefore, reverse.

FACTS

From October 2015 to April 15, 2016, the parties lived in the same household but were not in an intimate relationship with each other. Josephine and her boyfriend, Ellyot Stacy, shared a bedroom in a residence owned by David, who is Ellyot's uncle. During the evening of April 15, 2016, David entered Josephine and Ellyot's bedroom while Josephine was alone in bed and Ellyot was not at home. The details of that incident are described below.

On June 1, 2016, Josephine petitioned the district court for an *ex parte* order for protection (OFP) based on the April 15, 2016 incident. In the petition and her accompanying affidavit, Josephine alleged that David had caused her to fear a sexual or physical assault. The district court issued an *ex parte* OFP, and it was served on David on June 6. The *ex parte* OFP restrained David from committing domestic abuse against Josephine and from having any contact with her two years.

David requested an evidentiary hearing on Josephine's petition. *See* Minn. Stat. § 518B.01, subd. 7(c) (2016). The district court conducted the hearing on June 14, 2016. Josephine appeared *pro se* with a domestic-abuse advocate. She testified and called Ellyot as a witness. David testified and called two witnesses: his fiancé, who lived with him in his home, and a friend who was at the home at the time of the incident.

The district court examined Josephine, who testified as follows: On the evening in question, she was alone in bed, wearing only a T-shirt and underpants. She was unable to

fall asleep because David and a friend were making noise. She sent a text message to David to ask him about the noise. She called Ellyot, who was not at home, and left him a message asking him to call David to ask him to be quiet. Shortly thereafter, David entered her bedroom. He smelled of alcohol. He leaned over the bed and hugged her as she sat up in bed. He then kneeled beside the bed, placing his hands on the edge of the bed, and apologized to her repeatedly. He “kept apologizing” and said that he “felt really bad” about the noise. He said that he owed her a favor. She believed that David was making “a sexual advance” and did not “feel comfortable being in the room with him.” She asked him to leave her bedroom, but he said that he would not leave until she hugged him back. Josephine then received a call from Ellyot on her cellular telephone. Ellyot yelled at David through the telephone to leave the bedroom. David “got mad” because Josephine would not give him a hug and told her to hang up on Ellyot. David then lay on the bedroom floor, appeared to be “very drunk,” and “couldn’t get up.” Josephine asked David’s friend, who was standing in the bedroom doorway, to help remove David from the bedroom. The friend coaxed David into leaving the bedroom. After David left, Josephine locked herself in the bathroom and waited for Ellyot to return home. While waiting, she called the police. She described herself as “hysterical” and “really, really, really upset.” She left David’s home that night and never returned. She testified that the incident in the bedroom lasted between five and ten minutes.

Josephine testified that she was seeking an OFP for the following reasons:

[T]he bottom line while I was staying [at David’s residence] was that [David] does not get when I need my space, he doesn’t get when anyone needs their personal space, and he

abuses alcohol and those two combinations is — they don't go together and that's why I feel . . . I feel like I needed to come here and protect myself because the night that I called the cops, they didn't even file a report on it. Like I went to go find a report so that I could bring it here and nobody filed a report on it. Um, I just think it's really unfair and I think that by even him petitioning for this trial is — he just doesn't want to deal with the consequences that he has to because — I don't know. I just — I just feel like I need protection. I'm part of his family now. I do not want to have to deal with this kind of stuff in the future.

Ellyot testified that he called David to ask him to be quiet after Josephine called him to request his assistance. David asked him for a hug over the telephone. Ellyot hung up when David engaged in drunken “rambling.” He then called Josephine while David was in the bedroom, heard David ask her for a hug, and felt that Josephine was “obviously very uncomfortable.” He arrived at the home only minutes after David left the bedroom and had a physical altercation with David in the front yard. He found Josephine locked in the bathroom and perceived that she was fearful for her safety.

In David's testimony, he admitted that he was drunk, that he touched Josephine on the shoulder, and that he asked for a hug, but he denied that he made a sexual advance or that he was angry. He entered the bedroom because “we had agreed in our house that we would talk to each other and . . . not let things fester.” He often hugs others when he is intoxicated. The incident in the bedroom lasted no more than two minutes. He sought and obtained an OFP against Ellyot three days after the incident based on their physical altercation in the front yard, and he expressed the belief that Josephine's petition was retaliatory.

David's friend testified that he observed David in the bedroom through the bedroom door, which was ajar. He testified that the incident lasted approximately one minute. David's fiancé testified that she was asleep in her bedroom at the time, that she is a light sleeper, and that she did not hear anything that occurred in Josephine's bedroom. She testified that David likes to hug people when he is intoxicated.

On the same day as the hearing, the district court issued a five-page order with 16 paragraphs of findings of fact. The district court found Josephine's testimony to be credible and found that domestic abuse had occurred. The district court concluded its findings of fact as follows:

Based on [David]'s conduct in hugging [Josephine] while she was in bed, refusing to leave until she hugged him again, along with his intoxication and anger, she feared an assault by [David]. When he left the room, she locked herself in the bathroom, called the police, and later left the premises never to return. She is clearly fearful for her safety.

The district court found that David's testimony is not credible because he was "extremely intoxicated" such that his memory is not as reliable as Josephine's. The district court also did not credit the testimony of David's two witnesses because they did not see or hear the entire incident in the bedroom. The district court issued an OFP that prohibits David from committing domestic abuse against Josephine and from contacting her for two years. David appeals.

D E C I S I O N

David argues that the district court erred by issuing the OFP on the ground that the evidence does not support the district court's findings that he engaged in domestic abuse.

Under the Minnesota Domestic Abuse Act, a district court may issue an OFP to protect victims of domestic abuse. *See* Minn. Stat. § 518B.01 (2016). To obtain an OFP, a petitioner must prove by a preponderance of the evidence that the respondent has committed domestic abuse “against a family or household member.” Minn. Stat. § 518B.01, subd. 2(a); *see also Oberg v. Bradley*, 868 N.W.2d 62, 64 (Minn. App. 2015). The term “domestic abuse” is defined by statute to include any of the following:

- (1) physical harm, bodily injury, or assault;
- (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or
- (3) terroristic threats, . . . criminal sexual conduct, . . . or interference with an emergency call

Minn. Stat. § 518B.01, subd. 2(a).

This court applies an abuse-of-discretion standard of review to a district court’s issuance of an OFP. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009). A district court abuses its discretion if it issues an OFP without sufficient evidence to support the district court’s findings. *Id.* We review the district court’s factual findings for clear error. *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004). We will not “reconcile conflicting evidence” or “decide issues of witness credibility, which are exclusively the province of the factfinder.” *Id.*

In light of the district court’s findings, it is apparent that the legal basis of the OFP is the second clause of the definition of domestic abuse: “the infliction of fear of imminent physical harm, bodily injury, or assault.” *See* Minn. Stat. § 518B.01, subd. 2(a)(2). David contends that the record does not contain evidence that Josephine feared imminent physical

harm, bodily injury, or assault. David's contention has merit. Josephine testified in detail about her reactions to David's conduct, but she never testified that she was fearful. She testified that she was "really upset," "uncomfortable," and "obviously not into whatever it was going on at the time." But she never testified that she was fearful that David might inflict physical harm, bodily injury, or assault. Likewise, Ellyot testified that, while David was in the bedroom with Josephine and he was on the telephone with Josephine, he perceived that she was "obviously very uncomfortable." The closest the evidentiary record gets to fear of an assault is Ellyot's testimony that, when he arrived at the home and found Josephine in the bathroom, she was "scared for her own safety." But those are Ellyot's words, not Josephine's. Furthermore, Josephine described conduct by David that, by itself, does not allow an inference that the infliction of physical harm, bodily injury, or assault was imminent. David was on the floor, not on her bed. He touched Josephine only twice, by giving her a hug and by touching her hand with his hand. Josephine testified that she perceived David's conduct and his mention of a "favor" to be "a sexual advance," which made her not "feel comfortable being in the room with him." A sexual advance (*i.e.*, an offer to voluntarily engage in sexual contact with another), by itself, does not satisfy the statutory definition of domestic abuse, unless there also is fear of an imminent assault. But Josephine did not testify that she feared a sexual assault or any other form of "imminent physical harm, bodily injury, or assault." See Minn. Stat. § 518B.01, subd. 2(a).

Thus, the evidence in the record does not support the district court's finding that Josephine experienced fear of an assault by David. Because the evidence does not support the district court's finding on that issue, the district court erred by finding that David

engaged in domestic abuse against Josephine. Because David did not engage in domestic abuse, the district court erred by issuing the OFP.

Reversed.