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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1928**

In re the Matter of: Kimberly Ann Sobiech,
and o/b/o Minor Children, petitioner,
Appellant,

vs.

Mark Joseph Sobiech,
Respondent.

**Filed June 8, 2020
Affirmed
Smith, John, Judge***

Anoka County District Court
File No. 02-FA-19-1749

Nancy Zalusky Berg, Katie E.C. Kelley, Nancy Zalusky Berg, LLC, Minneapolis,
Minnesota (for appellant)

Kay Nord Hunt, Lommen Abdo, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Bryan, Presiding Judge; Florey, Judge; and Smith, John,
Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SMITH, JOHN, Judge

We affirm the district court's denial of appellant's petition for an order for protection (OFP) because the district court did not abuse its discretion by finding an OFP was not warranted under the circumstances.

FACTS

In October 2019, appellant-wife Kimberly Ann Sobiech and respondent-husband Mark Joseph Sobiech got into a dispute in their kitchen that escalated into statements about their marriage being over. After about five minutes of arguing, husband told wife that he was recording their conversation on his cell phone, which was in his pocket. Husband walked towards the door to the house's attached garage and began to put on his shoes. Wife followed husband and reached for his pocket to try "to get the phone out." Husband "slapped" wife's hand away; wife "punched" husband's leg.

Husband then went into the garage, where the parties' two minor children waited in a truck to go to hockey practice. Wife told daughter to get out of the truck; daughter obliged. Husband and wife briefly argued about whether daughter would attend hockey practice before wife "attacked [husband] unprovoked." During the next 15 seconds, daughter yelled "guys, don't fight," "guys, stop," and "mommy, stop swinging." Husband grabbed wife, took her back into the kitchen, and brought her to the kitchen floor. Husband yelled for son and daughter to get inside the house and for wife to "knock it off." Wife said that she was going to call the police and yelled at husband to get off of her. Husband kept wife on the kitchen floor for about 20 seconds before getting up. Wife drove to a police

station and filed an incident report. The officer observed that wife had marks on her wrist and neck. Police officers went to the house, spoke with husband, and arrested husband.

The next day, wife petitioned the court for an OFP and requested that the district court grant ex parte relief. The district court granted an ex parte OFP and scheduled a hearing. The district court heard testimony from eight witnesses, including wife, husband, and two police officers. Wife and husband provided conflicting testimony about whether and how much wife punched husband and whether husband grabbed wife by the neck or shirt collar when he moved her from the garage to the kitchen. The district court received exhibits of pictures depicting wife's and husband's injuries from the altercation. The district court also received as exhibits husband's phone recording of the altercation and husband's statement to police.

After receiving all the testimony, the district court ruled from the bench and denied wife's petition.

D E C I S I O N

We review a district court's decision to grant or deny an OFP for an abuse of discretion. *McIntosh v. McIntosh*, 740 N.W.2d 1, 9 (Minn. App. 2007). A district court abuses its discretion if its factual findings are unsupported by the record or if it misapplies the law. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009). We view the record in the light most favorable to the district court's findings and will reverse only if we are "left with the definite and firm conviction that a mistake has been made." *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 927 (Minn. App. 2006) (quotation

omitted). We will not make credibility determinations or reconcile conflicting evidence. *Aljubailah ex rel. A. M. J. v. James*, 903 N.W.2d 638, 643 (Minn. App. 2017).

The Minnesota Domestic Abuse Act (the Act) provides that a district court may issue an OFP upon a finding of domestic abuse. Minn. Stat. § 518B.01, subd. 4 (2018). The definition of domestic abuse includes, if committed by and against a family or household member, “physical harm, bodily injury, or assault” or “the infliction of fear of imminent physical harm, bodily injury, or assault.” *Id.*, subd. 2(a)(1)-(2) (2018). To establish domestic abuse, the petitioner must show the existence of “harm or an intention on the part of the [alleged abuser] to do . . . harm.” *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005) (quotation omitted). The party petitioning for an OFP has the burden of proving that domestic abuse occurred by a preponderance of the evidence. *Oberg v. Bradley*, 868 N.W.2d 62, 64 (Minn. App. 2015).

In its ruling from the bench, the district court found that wife’s testimony lacked credibility and that the recording of the altercation corroborated husband’s version of events. The district court found that, “if all that [it] heard testimony about was [husband] doing those actions, that would constitute an assault. That would constitute domestic abuse.” But the district court said it “can’t consider evidence just in a vacuum” and found that wife “slapped or punched [husband] at least three times before they even got outside.” Ultimately, the district court found that wife “assaulted her husband, was assaulting her husband, and his actions were reasonable self-defense,” meaning that husband’s actions “did not constitute domestic abuse.”

Wife first argues that the district court “abused its discretion when it found [husband] had not committed an act of domestic abuse.” Wife’s argument is grounded in the two-step analysis for resolving an OFP petition. See *Thompson ex rel. Minor Child v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018). First, the district court determines whether the petitioner has established that an act of domestic abuse occurred. *Id.* Second, if domestic abuse has occurred, the district court “may examine all of the relevant circumstances proven to determine whether to grant or deny the petition for an OFP.” *Id.* We interpret the district court to have followed this process while ruling from the bench. The district court initially found husband’s actions would have constituted assault if that was the only testimony that it heard, then denied wife’s petition after stating that it “can’t consider evidence just in a vacuum.” Put differently, the district court acknowledged that husband’s actions met the statutory definition of domestic abuse (the first *Thompson* step) but denied wife’s petition after examining “all of the relevant circumstances proven” (the second *Thompson* step). We recognize that it is preferable for a district court to adhere to the two-step method described in *Thompson* to resolve a petition for an OFP. But we cannot say that the district court’s ruling in this case, which we construe to follow *Thompson*, constitutes an abuse of discretion.

Next, wife argues that the district court abused its discretion by “limiting the definition of domestic abuse” to assault. Her argument has two parts: (1) the district court failed to consider whether husband inflicted fear of imminent physical harm, bodily injury, or assault; and (2) the district court equated “domestic abuse” with the criminal definition of “assault.” As previously noted, the Act defines “domestic abuse” in multiple ways. See

Minn. Stat. § 518B.01, subd. 2(a)(1)-(3). Because the Act’s definition of “domestic abuse” contains the disjunctive term “or,” a party petitioning for an OFP can “establish domestic abuse by demonstrating that the facts fit any one of the three definitions.” *Thompson*, 906 N.W.2d at 499 (quotation omitted).

We do not agree that the district court limited the definition of domestic abuse to assault. Again, we construe the district court to have found that domestic abuse occurred but determined that an OFP was not justified by the surrounding circumstances. The district court found that husband’s actions “would constitute domestic abuse” because his actions would “cause some bodily harm, and that would constitute an assault.” The district court thus found that domestic abuse occurred, meaning that it had no need to consider whether domestic abuse occurred by any other definition. We conclude that the district court did not abuse its discretion when it found that domestic abuse occurred under one definition and did not consider whether domestic abuse also occurred under another definition.

Wife also is not entitled to relief based on her argument that the district court erred by defining “assault” according to criminal statutes. An appellant must show both error and prejudice to obtain relief on appeal. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Loth v. Loth*, 35 N.W.2d 542, 546 (Minn. 1949) (stating that “error without prejudice is not ground for reversal”) (quotation omitted). Even if the district court erred in using an improper definition of “assault,” wife cannot establish prejudice because the district court found that husband *did* commit a domestic assault.

Wife next argues that the district court abused its discretion by considering husband’s asserted self-defense claim and whether wife assaulted husband. She argues that

whether wife assaulted husband is not an issue “properly before [the district court] for consideration” and that the district court’s finding that husband acted reasonably under the circumstances is not supported by the record.

Neither of wife’s arguments are persuasive. While self-defense is not expressly provided for in the Act, *see* Minn. Stat. § 518B.01 (2018), a district court “may examine all of the relevant circumstances proven to determine whether to grant or deny the petition for an OFP” after finding that an act of domestic abuse has occurred. *Thompson*, 906 N.W.2d at 500. This is a very broad grant of discretion to the district court. Again, we interpret the district court to have found that husband’s actions “would constitute domestic abuse” but denied wife’s petition after considering the circumstances. We cannot say that the district court abused its discretion by taking into account wife’s physical acts towards husband while resolving wife’s OFP petition after “examin[ing] all of the relevant circumstances proven.” Moreover, the district court’s factual findings are not clearly erroneous. *See Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004) (stating that appellate court will not reverse unless district court’s findings are clearly erroneous). The district court found that wife “punched or slapped [husband] three times before they even got into the garage,” wife “attacked [husband] unprovoked” while they were in the garage, and husband had “bruises in the locations that he said that she punched him at various times in this incident.” The district court’s findings are supported by husband’s testimony and consistent with the video recording taken on husband’s phone.

Lastly, wife argues that “the district court erroneously applied the rules of evidence when it refused to consider testimony offered by two of [her] witnesses regarding ‘the

credibility of another witness's statement.'" Husband responds that the district court did not err and, even if it did, wife is not entitled to reversal because the error did not cause her prejudice.

"The Minnesota Rules of Evidence apply to domestic abuse hearings." *Olson v. Olson*, 892 N.W.2d 837, 841 (Minn. App. 2017). "Rulings on the admissibility of evidence lie within the district court's discretion, and [an appellate court] will not disturb an evidentiary ruling unless it is based on an erroneous view of the law or is an abuse of that discretion." *Aljubailah*, 903 N.W.2d at 644. "[T]he complaining party must demonstrate prejudicial error to be entitled to a new trial or hearing based on an erroneous evidentiary ruling." *Olson*, 892 N.W.2d at 841 (quotation omitted). "An evidentiary error is prejudicial if it might reasonably have influenced the fact[-]finder and changed the result of the proceeding." *Id.* at 842.

Even assuming that the district court erred, wife does not identify any prejudice in her briefing. We also cannot identify any prejudice upon review. The first instance complained of by wife occurred when her attorney asked a police officer, "Do you have any reason to question the credibility of [wife] as a witness—or a victim?" The second instance occurred when wife's attorney asked wife's neighbor, "Have you ever known [daughter] to lie?" Reviewing wife's and husband's testimony against the recording of the altercation on husband's phone provided the district court with ample record evidence to make its factual findings. Any opinion about wife's or daughter's credibility did not reasonably change the result of the hearing—especially considering the district court's finding wife not credible because of the recording and wife's inconsistent testimony at the

hearing. Accordingly, without any prejudice articulated or to be inferred from the record, wife's argument on this ground does not require a new hearing.

In sum, while the district court could have been clearer while providing the reasons for denying wife's OFP petition, any lack of clarity does not amount to an abuse of discretion.

Affirmed.