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TRACEY BEEMER, APPELLEE, V. MIKE HAMMER, APPELLANT.

826 N.W.2d 599

Filed February 19, 2013. No. A-12-397.

1. **Injunction.** A domestic violence protection order is analogous to an injunction.
2. **Judgments: Appeal and Error.** The grant or denial of a domestic violence protection order is reviewed de novo on the record. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court.
3. ____: ____. Where the credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another.
4. **Words and Phrases.** The term "physical menace," within the meaning of the abuse definition under the Protection from Domestic Abuse Act, means a physical threat or act and requires more than mere words.
5. ____. The term "imminent bodily injury," within the abuse definition under the Protection from Domestic Abuse Act, means a certain, immediate, and real threat to one's safety which places one in immediate danger of bodily injury, that is, bodily injury is likely to occur at any moment.

Appeal from the District Court for Saunders County: MARY C. GILBRIDE, Judge. Reversed and remanded with directions.

Harry A. Moore for appellant.

John H. Sohl for appellee.

IRWIN, MOORE, and PIRTLE, Judges.

IRWIN, Judge.

I. INTRODUCTION

Tracey Beemer filed a petition for a domestic abuse protection order against her father, Mike Hammer (Mike). The district court entered an ex parte order granting her request. Subsequently, the district court held a hearing to determine whether the order should remain in effect. After the hearing, the court affirmed the entry of the protection order.

Mike appeals from the district court's order. On appeal, he asserts that the district court erred in finding sufficient evidence to warrant granting the protection order. For the reasons set forth herein, we reverse, and remand with directions.

II. BACKGROUND

On March 7, 2012, Tracey filed a petition in the district court requesting a domestic abuse protection order against Mike for herself and her two minor children. That same day, Tracey also filed an affidavit containing allegations to support her request. The preprinted affidavit form asks the affiant to list the most recent incidents of domestic abuse, giving dates and times. In Tracey's affidavit, she describes three separate instances which occurred between her and Mike and which made her "very afraid of him."

The first incident Tracey described occurred on March 4, 2012, a few days before she filed her petition and affidavit. On that day, Tracey learned that Mike was visiting her children when they were with their father, Lance Beemer. Tracey did not want Mike around the children. As such, she called Lance and indicated that she wanted to come get the children. Subsequently, Mike called Tracey and left a message. On the message, Mike called Tracey names and said, "'I'll see you in [p]rison.'"

The second incident Tracey described occurred approximately a year earlier, in March 2011. Tracey stated that Lance told her that he was taking the children to visit Mike, despite her objections. Tracey telephoned Mike prior to the visit so that she could assess "his state of mind [and] disposition." During that telephone conversation, Mike yelled at Tracey and called her names. Mike told Tracey that he was "through" with her.

The final incident Tracey described in her affidavit occurred in November 2010. Tracey stated that during this incident, Mike became angry and yelled at her in front of the children. He told her that if she left with the children, she would regret it. The children became upset and one of them told Mike that he was "mean." Tracey also stated that Mike was in possession of "illegal substances" in the children's presence.

Based on Tracey's petition and affidavit, the district court entered an ex parte domestic abuse protection order for Tracey and the children.

On April 5, 2012, the district court held a hearing allowing Mike to show cause why the protection order should

not remain in effect. Both Mike and Tracey testified at the hearing.

Mike testified that the allegations in Tracey's affidavit are not true. He admitted to leaving Tracey a message on March 4, 2012, after she told Lance that she wanted to pick up the children in order to keep them away from Mike. He testified that he told Tracey not to tell lies or she would go to prison. He admitted to calling her a "bitch," but stated that he did not raise his voice during the message.

Mike testified that he did speak with Tracey on the telephone in March 2011. Tracey was angry that Lance was bringing the children to see Mike. Mike stated that Tracey was yelling and using strong language, but he did not yell at her. Mike admitted that he called Tracey a "bitch" during the telephone call.

Mike testified that in November 2010, he and Tracey argued because Mike refused to assist Tracey in paying for her home after she and Lance divorced. He indicated that Tracey was angry with him and started to cry during their conversation. However, he denied that he was angry at her, that he called her names, or that he used inappropriate language with her.

Tracey's testimony concerning the three incidents reiterated the allegations in her affidavit. In addition, she testified that Mike never threatened physical violence toward her, nor did he ever make physical contact with her. She indicated that the basis for her protection order application was Mike's "rage, anger, [and] outbursts." Tracey also indicated that between March 2011 and March 4, 2012, there was virtually no contact between her and Mike except when she sent him a card in an effort to try and better the situation between the two of them.

On April 5, 2012, the district court entered a modified domestic abuse protection order. The court made no specific factual findings, but concluded that Tracey had proven that Mike "(1) attempted to cause, or intentionally, knowingly, or recklessly caused, bodily injury to [Tracey], or (2) by physical menace, placed [Tracey] in fear of imminent bodily injury." The order prohibited Mike from telephoning or otherwise

contacting Tracey and prohibited him from coming to her home. The district court dismissed that part of the ex parte protection order which concerned Mike's being restricted from Tracey's children.

Mike appeals from the district court's order granting Tracey a protection order against him.

III. ASSIGNMENT OF ERROR

On appeal, Mike asserts that the district court erred in determining that Tracey produced sufficient evidence to grant the protection order against him.

IV. STANDARD OF REVIEW

[1-3] A domestic violence protection order is analogous to an injunction. See, Neb. Rev. Stat. § 42-924 (Reissue 2008); *Hronek v. Brosnan, ante* p. 200, 823 N.W.2d 204 (2012). See, also, *Mahmood v. Mahmud*, 279 Neb. 390, 778 N.W.2d 426 (2010). Accordingly, the grant or denial of a domestic violence protection order is reviewed de novo on the record. See *Hronek v. Brosnan, supra*. In such de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court. *Id*. However, where the credible evidence is in conflict on a material issue of fact, an appellate court considers and may give weight to the circumstances that the trial judge heard and observed the witnesses and accepted one version of the facts rather than another. *Id*.

V. ANALYSIS

The Protection from Domestic Abuse Act (the Act), Neb. Rev. Stat. § 42-901 et seq. (Reissue 2008 & Cum. Supp. 2010), allows any victim of domestic abuse to file a petition and affidavit for a protection order pursuant to § 42-924. "Abuse" is defined under the Act as the occurrence of one or more of the following acts between household members:

> (a) Attempting to cause or intentionally and knowingly causing bodily injury with or without a dangerous instrument;
>
> (b) Placing, by physical menace, another person in fear of imminent bodily injury; or

> (c) Engaging in sexual contact or sexual penetration without consent as defined in section 28-318.

§ 42-903(1).

The Act defines "household member" to include "persons related by consanguinity." § 42-903(3). As such, any abuse perpetrated by a father against his daughter is covered by the Act.

In this case, the district court's form order states that Tracey showed that Mike "(1) attempted to cause, or intentionally, knowingly, or recklessly caused, bodily injury to [Tracey], or (2) by physical menace, placed [Tracey] in fear of imminent bodily injury." However, Tracey did not allege, nor does the record show, that Mike ever caused Tracey bodily injury. In fact, Tracey testified at the show cause hearing that Mike never made physical contact with her. Accordingly, we limit our consideration to whether Tracey has shown that Mike, by physical menace, placed her in fear of imminent bodily injury as required by § 42-903(1)(b).

Mike argues that there is no credible evidence that he engaged in any conduct constituting abuse as defined in § 42-903. Specifically, he argues that even if all of Tracey's allegations are assumed to be true, the alleged conduct does not rise to the level of abuse within the meaning of the statute. Upon our review of the record, we find that Mike's assertions have merit.

[4] This court has recently concluded that the term "physical menace," within the meaning of the abuse definition under the Act, means a physical threat or act and requires more than mere words. See, § 42-903(1)(b); *Cloeter v. Cloeter*, 17 Neb. App. 741, 770 N.W.2d 660 (2009). There is no evidence in the record that Mike physically threatened Tracey or engaged in any inappropriate behavior beyond mere words. Tracey testified at the hearing that Mike never threatened her with physical violence. Moreover, the three instances of abuse that she described in her affidavit and reiterated at trial include one telephone message, one telephone call, and one face-to-face interaction. Tracey alleged that in each of these instances, Mike raised his voice at her and called her inappropriate names. Even if we assume Tracey's allegations to be true,

Mike's conduct cannot be considered to be physically menacing because it amounts to nothing more than harsh, inappropriate language.

[5] We must also note that there is no evidence to suggest that Mike's conduct placed Tracey in fear of imminent bodily injury. The term "imminent bodily injury," within the abuse definition under the Act, means a certain, immediate, and real threat to one's safety which places one in immediate danger of bodily injury, that is, bodily injury is likely to occur at any moment. See, § 42-903(1)(b); *Cloeter v. Cloeter, supra*.

Here, two of the alleged instances of abuse occurred over the telephone. In fact, one of those instances was a telephone message. Neither instance could have placed Tracey in fear of imminent bodily injury because Mike was nowhere near Tracey at the time of the telephone calls, nor did he threaten that he was going to come near her.

The other alleged instance of abuse did involve a face-to-face confrontation between Mike and Tracey. And, while Tracey did testify that she had "some concern for her physical safety" during this interaction, she also testified that she and Mike were able to work out their differences after the argument and that when she left Mike's house, things were "fine." In addition, this confrontation occurred well over a year before Tracey filed her request for a protection order. Since this confrontation, it is clear that Mike and Tracey have had very little interaction, either in person or over the telephone. When viewed as a whole, Tracey's testimony about this interaction does not provide sufficient evidence to warrant a finding that she was placed in fear of imminent bodily injury.

Upon our review of the record, we conclude that the allegations of abuse contained in Tracey's affidavit cannot sustain the entry of a domestic abuse protection order within the meaning of §§ 42-903 and 42-924. As such, we find that the district court erred in granting Tracey a domestic abuse protection order against Mike.

VI. CONCLUSION

We find that the record does not support a conclusion that Mike, by physical menace, placed Tracey in fear of imminent

bodily injury. We therefore reverse the district court's order affirming the ex parte domestic abuse protection order and remand the matter with directions that the district court enter an order dismissing the domestic abuse protection order against Mike.

REVERSED AND REMANDED WITH DIRECTIONS.

STATE OF NEBRASKA, APPELLEE, V. JOSE JESUS LLERENAS-ALVARADO, APPELLANT.

827 N.W.2d 518

Filed February 26, 2013. No. A-12-131.

1. **Pleas: Appeal and Error.** A ruling on a withdrawal of a plea will not be disturbed on appeal absent an abuse of discretion.
2. ____: ____. The right to withdraw a plea previously entered is not absolute, and, in the absence of an abuse of discretion, refusal to allow a defendant's withdrawal of a plea will not be disturbed on appeal.
3. **Pleas: Waiver.** To support a finding that a plea of guilty or nolo contendere has been voluntarily and intelligently made, the court must (1) inform the defendant concerning (a) the nature of the charge, (b) the right to assistance of counsel, (c) the right to confront witnesses against the defendant, (d) the right to a jury trial, and (e) the privilege against self-incrimination; and (2) examine the defendant to determine that he or she understands the foregoing. Additionally, the record must establish that (1) there is a factual basis for the plea and (2) the defendant knew the range of penalties for the crime for which he or she is charged. A voluntary and intelligent waiver of the above rights must affirmatively appear from the face of the record.
4. **Pleas: Proof.** The burden is on the defendant to establish by clear and convincing evidence the grounds for withdrawal of a plea.
5. **Constitutional Law: Waiver: Records.** A court may conclude that an accused has waived a constitutional or statutory right if the waiver, knowingly and intelligently made, appears affirmatively on the record.
6. **Pleas: Waiver: Proof.** Even if a defendant was not sufficiently advised of his or her rights under Neb. Rev. Stat. § 29-1819.02(1) (Reissue 2008), failure to give the advisement is not alone sufficient to entitle a convicted defendant to have the conviction vacated and the plea withdrawn pursuant to § 29-1819.02(2). A defendant must also allege and show that he or she actually faces an immigration consequence which was not included in the advisement given.

Appeal from the District Court for Madison County: JAMES G. KUBE, Judge. Affirmed.