Note: Decisions of a three-justice panel are not to be considered as precedent before any tribunal.

ENTRY ORDER

SUPREME COURT DOCKET NO. 2008-419

APRIL TERM, 2009

VERMONT SUPREME COURT
FILED IN CLERK'S OFFICE

APR 15 2009

Ocean Chance	}	APPEALED FROM:
	}	
v.	}	Chittenden Family Court
	}	
Joanne Brown	}	DOCKET NO. F461-8-08 CnFa
		Trial Judge: Linda Levitt

In the above-entitled cause, the Clerk will enter:

Defendant, Joanne Brown, appeals the family court's order granting plaintiff, Ocean Chance, a final relief-from-abuse order against her. Brown argues that the court (1) denied her due process by limiting her testimony, and (2) abused its discretion in finding that she placed plaintiff in fear of imminent serious physical harm. We affirm.

The parties ended a sexual relationship in May 2007. On May 21, 2007, Brown filed for a relief-from-abuse order against Chance, alleging that Chance had broken a window in her home, grabbed her, and held her against her will. Following a hearing, the court granted Brown a final one-year relief-from-abuse order against Chance on July 19, 2007. Just after the order expired, Brown claims that Chance came to her apartment, knocked on the door and covered the peephole. Brown filed a request for a relief-from-abuse order on July 22, 2008. After Chance was served with Brown's complaint, Chance counter-filed a request for a relief-from-abuse order against Brown on August 11, 2008.

The court held a final hearing on both petitions on August 14, 2008 at which both Brown and Chance appeared pro se. Upon questioning by the court, Brown testified that during the parties' relationship, Chance had held her in a room against her will, screamed at her, held her down, and poured liquid on her head. She explained that two hours after her prior relief-from-abuse order expired, Chance appeared at her home and started banging on the door. In support of his request for a relief-from-abuse order, Chance testified that during the parties' relationship Brown would not leave his apartment at times and once had hit him with a hair dryer. He also testified that during the previous year, when the order was in effect prohibiting him from contacting her, Brown attempted to speak with him on the street and called him on his birthday. When the court questioned Brown about these incidents, she denied ever hitting him, and stated that she had not contacted him during the previous year.

The court found that both parties had been abusive to each other and granted both requests for protection orders. As to Brown's request, the court found that, as Brown testified, Chance kept her in a room, yelled at her, held her down, and poured liquid on her head. The court found further that, just after the first order ended, Chance went to her home at 2 a.m. and knocked on her door. With respect to Chance's request, the court also found Chance's testimony

credible that Brown was violent to Chance by hitting him in the head with a hair dryer, and that she continued to seek contact with Chance during the pendency of the previous relief-from-abuse order. On the order relevant to this appeal, the court found that Brown "caused physical harm" to Chance, and "placed [him] in fear of imminent serious physical harm." The court also found a danger of further abuse and ordered Brown to stay away from Chance.

Brown first argues that the trial court denied her due process by limiting her testimony during the final hearing. The trial judge may question witnesses and "may 'exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence.' " Auger v. Auger, 149 Vt. 559, 561 (1988) (quoting V.R.E. 611(a)). Brown claims that the court gave the impression of partiality because the court allowed Chance to speak uninterrupted but cut off Brown when she was attempting to explain her answers to questions. The video record of the hearing reflects that the court questioned both parties, in turn, regarding their allegations of abuse. In addition to Brown's direct testimony, the court solicited her to respond to Chance's testimony. By the end of her testimony, the court permitted Brown to explain that she believed Chance filed his relief-from-abuse action merely in retaliation to her petition. If the court signaled an interruption to Brown's response, it is not apparent on the record. The court allowed both parties ample opportunity to present their position and their side of the events at issue. Considering the record in its entirety, we conclude that the court acted impartially and within its discretion.

Second, Brown argues that it was an abuse of discretion for the court to issue a final relief-from-abuse order against her because there was insufficient evidence to support the court's finding that she placed Chance in fear of imminent serious harm. On appeal, we view the court's factual findings in the light most favorable to the prevailing party, "disregarding the effect of any modifying evidence, and we will not set aside the findings unless they are clearly erroneous." Coates v. Coates, 171 Vt. 519, 520 (2000) (mem.) (quotation omitted). Factual findings will be upheld "if supported by credible evidence, and the court's conclusions will stand if the factual findings support them." Id. The plaintiff has the burden of proving abuse by a preponderance of the evidence. Id. The statute defines "abuse" as: "(A) Attempting to cause or causing physical harm [or] (B) Placing another in fear of imminent serious physical harm." 15 V.S.A. § 1101(1). The court may grant a protective order if it finds "the defendant has abused the plaintiff," and "there is a danger of further abuse." 15 V.S.A. § 1103(c)(1)(A).

We agree that, even accepting Chance's allegations as true, there was no evidence to support the court's finding that Brown placed Chance in fear of imminent serious harm. Chance testified that during the parties' relationship Brown would not leave his apartment at times and on one occasion Brown hit him with a hair dryer. Chance's description of the hair dryer incident does not, without more,* constitute behavior that placed Chance "in fear of imminent serious physical harm" as required for relief under the statute. 15 V.S.A. § 1101(1)(B) (emphasis added). There was no testimony that Chance was either fearful of such harm, see Coates, 171 Vt. at 521 (concluding that there was no evidence to support trial court's finding that the plaintiff was in fear of imminent serious physical harm where she never testified she feared harm), or that Brown's conduct was reasonably capable of inflicting serious injury.

Even disregarding this finding, however, we conclude that the relief-from-abuse order is supported by sufficient findings of abuse. While the incident with the hair dryer is insufficient to demonstrate fear of imminent serious physical harm, it does support the court's finding that

* The testimony about Brown's past effort to speak with Chance on the street and on his birthday also fails to demonstrate a threat of imminent serious bodily harm.

Brown physically harmed Chance. Because physical harm is sufficient to demonstrate abuse under the statute, see 15 V.S.A. § 1101(1)(A), and Brown does not challenge the remaining court findings, see State v. Settle, 141 Vt. 58, 61 (1982) (stating that "matters which are not briefed will not be considered on appeal"), there is no ground upon which to reverse the trial court's order.

Affirmed.

BY THE COURT:

John A. Dooley, Associate Justice

Marilyn S. Skoglund, Associate Justice

Brian L. Burgess, Associate Justice