STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0635

Catherine A. Dunham, petitioner,
Respondent,

vs.

Douglas L. Lawson,
Appellant.

Filed April 7, 2009
Affirmed
Larkin, Judge

Dakota County District Court
File No. 19-F5-07-013041

Catherine A. Dunham, 11513 – 205th Street West, Lakeville, MN 55044 (pro se respondent)

Jill M. Waite, 2856 Humboldt Avenue South, Suite 3, Minneapolis, MN 55408 (for appellant)

Considered and decided by Larkin, Presiding Judge; Stauber, Judge; and Randall, Judge.*

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

U N P U B L I S H E D O P I N I O N

LARKIN, Judge

Appellant challenges the district court's issuance of an order for protection against him and its subsequent denial of his motion to vacate the order and grant a new hearing. Because the district court's factual findings are not clearly erroneous, and because the district court did not abuse its discretion by issuing the order or by denying appellant's motion for a new hearing, we affirm.

FACTS

On April 3, 2007, respondent Catherine Dunham filed a petition for an order for protection, pursuant to Minn. Stat. § 518B.01 (2006)[1], alleging that her ex-husband, appellant Douglas Lawson, called her earlier that day and threatened to kill her and take the parties' children if respondent pursued criminal charges against appellant for taking the parties' oldest son in violation of a custody order.

The district court issued an emergency ex parte order for protection and later held a hearing on the petition. At the hearing, respondent testified that she received a threatening phone call from appellant on April 3, 2007, while at her brother's home. She testified that, although the caller ID panel on her cell phone showed that the incoming call was from a restricted number, she recognized appellant's voice during the call. Respondent's sister-in-law also testified at the hearing and said that she heard appellant threaten to kill respondent and their children during the April 3 phone call. This witness

[1] There were no substantive changes in the relevant parts of the statute between 2006 and 2008.

testified that she was able to hear the phone call because respondent had turned on the speaker-phone function of her cell phone at the witness's encouragement.

Appellant testified that he was working as an over-the-road truck driver on the day of the phone call. Appellant had a copy of his cell-phone records from April 3 available on the day of the hearing and testified that his phone records showed two phone calls to his home number and one call to the crisis center at a shelter, but no other phone calls during the time period of the threatening phone call. Appellant's phone records for April 3, 2007 were not introduced into evidence.[2]

At the conclusion of the hearing, the district court left the evidentiary record open to allow the parties to review respondent's phone records, and to submit a copy of those records to the district court along with any closing arguments in letter form. Respondent's cell-phone records were not available on the day of the hearing because Verizon Wireless had not yet responded to a subpoena from appellant for those records. After the hearing, respondent submitted a copy of her cell-phone bill that showed that her cell phone received an "Unavailable" call at 4:45 p.m. on April 3, which respondent identified as the harassing phone call; appellant submitted a different version of respondent's phone records, which he obtained pursuant to the subpoena. Appellant claimed that these phone records showed that the 4:45 p.m. call to respondent's cell phone on April 3 had actually come from respondent's brother's home and not from appellant.

[2] The record contains an exhibit showing appellant's Comcast phone records from February 1, 2007 through March 13, 2007, but these records neither pertain to appellant's cell phone, nor the date of the phone call at issue here.

The district court found that the testimony of respondent and her witness was credible and believable. The district court also found that the cell-phone records were inconclusive and did not disprove the threatening call. The district court issued an order for protection. Appellant moved the district court to vacate the order for protection and grant a new hearing, which the district court denied. This appeal follows.

D E C I S I O N

Appellant argues that the district court erred by denying his motion to vacate the order for protection and grant a new hearing and that the district court abused its discretion because the order for protection was contrary to the weight of the evidence.

"Whether to grant relief under the Domestic Abuse Act (Minn. Stat. ch. 518B) is discretionary with the district court." *McIntosh v. McIntosh*, 740 N.W.2d 1, 9 (Minn. App. 2007). Absent sufficient evidence, we will reverse an order for protection issued under Minn. Stat. § 518B.01. *Bjergum v. Bjergum*, 392 N.W.2d 604, 606-07 (Minn. App. 1986). "Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses." Minn. R. Civ. P. 52.01. A reviewing court should not reverse the district court's findings unless it is left with the definite and firm conviction that the district court made a mistake. *First Trust Co. v. Union Depot Place Ltd. P'ship*, 476 N.W.2d 178, 182 (Minn. App. 1991), *review denied* (Minn. Dec. 13, 1991). The district court has the discretion to grant a new hearing, and we will not disturb its decision absent a clear abuse of that discretion. *See Halla Nursery, Inc. v.*

Baumann-Furrie & Co., 454 N.W.2d 905, 910 (Minn. 1990) (making this ruling in the context of a motion for a new trial).

Here, both parties submitted copies of respondent's cellular-telephone records to the district court after the hearing, per the district court's instruction. The version of the records submitted by respondent shows that an "Unavailable" call was received by her phone at 4:45 p.m. on April 3, 2007. The version submitted by appellant contains what appear to be internal designations for use by respondent's cellular-service provider. The significance of these codes is not self-explanatory upon mere inspection, and the record does not contain evidence that explains the codes. Appellant also submitted the result of an Internet search that appellant argues proves that the threatening phone call came from respondent's brother's home. This document, however, was not received into evidence. The district court left the evidentiary record open for submission of respondent's telephone records, but not for any other evidence, such as the Internet search result. Appellant is correct that a phone number which he claims to be respondent's brother's home telephone number does appear in respondent's cell-phone records. But the telephone number appears in a column labeled "AUTO_CPN_NO," with no explanation of the significance or meaning of that designation.

In its order for protection, the district court stated, "[The t]elephone records are not conclusive of lack of threat or contact. [Respondent's] testimony and witness testimony was credible and believable." Nothing in the record demonstrates that the district court's statement that the phone records were inconclusive is clearly erroneous because appellant offered no evidence that explains the significance of the various

column designations. In essence, while it may be possible that the phone records could lead to the conclusion appellant advances, this is not readily apparent from the record. If the evidence had actually established that the alleged threatening call came from respondent's brother's home, it would cast doubt on the credibility of respondent and her witness. But the existing record, without further explanation, does not establish the origin of the call. And this court should only reverse a district court's findings of fact where we are left with a clear and firm conviction that the district court made a mistake. *First Trust Co.*, 476 N.W.2d at 182.

Appellant argues that because no evidence was presented to suggest that the documentary evidence he provided was untrustworthy, the evidence must be accepted as credible. Appellant argues that "[w]here critical evidence is documentary, there is no necessity to defer to the trial court's assessment of the meaning and credibility of that evidence." Appellant cites numerous cases to support his position that we need not defer to the district court's findings regarding the phone records. But the cases relied upon by appellant were all decided prior to the adoption of the current version of Minn. R. Civ. P. 52.01. The current version of the rule, applicable in this case, draws no distinction between documentary and testimonial evidence, and we are to set aside the district court's findings of fact on either documentary or testimonial evidence only if such findings are clearly erroneous. Minn. R. Civ. P. 52.01; *see also First Trust Co.*, 476 N.W.2d at 181-82.

Appellant also argues that the district court's denial of his motion to vacate the order for protection and grant a new hearing was an abuse of discretion because the order

for protection was contrary to law. Appellant fails to cite any authority to support this argument. Appellant simply points out that "the only incident that could be considered by the trial court was the alleged [April 3, 2007] incident." Presumably, appellant's argument is based on his contention that the evidence shows that appellant did not make the April 3 phone call. But the district court rejected this contention. Appellant does not contend that the district court's findings, as stated, are insufficient to support the order for protection. And appellant makes no argument that a single incident of abusive conduct is insufficient to justify an order for protection.

Because the record does not contain evidence that explains the cellular-telephone records that appellant submitted into evidence, and because the district court based its findings on a credibility determination to which we defer, the district court's findings of fact are not clearly erroneous. The district court did not abuse its discretion by issuing the order for protection or by denying appellant's motion for a new hearing.

Affirmed.

Dated: _____

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The Honorable Michelle A. Larkin
Minnesota Court of Appeals