

IN THE NEBRASKA COURT OF APPEALS

Opal Vance,

Appellee,

v.

Todd Gertsch,

Appellant.

No. A-10-057

MEMORANDUM OPINION

AND

JUDGMENT ON APPEAL

**FILED**

JUN 16 2010

INBODY, Chief Judge, and MOORE and CASSEL, Judges.

MOORE, Judge.

CLERK  
NEBRASKA SUPREME COURT  
COURT OF APPEALS

INTRODUCTION

The Seward County District Court entered a domestic abuse protection order in favor of Opal Vance and against Todd Gertsch. Vance now appeals and pursuant to Neb. Ct. R. App. P. § 2-111(E)(6) this case was submitted without oral argument. For the reasons set forth herein, we reverse and remand with directions to vacate the protection order and dismiss the action.

BACKGROUND

Vance and Gertsch are divorced. They have a minor child, Allie, who resides with Vance and is approximately 5 years old. Gertsch has visitation with Allie.

On November 23, 2009, Vance filed a petition and affidavit to obtain a domestic abuse protection order. She alleged that on November 20, Gertsch called her on the phone "screaming, yelling

at me [and] told me he was going to 'Fuck me in the ground one last time.'" She also alleged that in a separate incident, Gertsch "left [a] message on my phone that stated if someone lays a hand on Allie he was going to step in and it won't be pretty." Vance attached to her petition and affidavit a copy of Gertsch's Facebook page in which he called Vance names and stated that she abused Allie. Vance alleged that Gertsch has also stated that he has called the cops, who would not do anything, "so he will 'handle' it;" and that Gertsch wishes Vance would "go away" so he can get Allie. Gertsch has also screamed over the phone to Vance and called her names.

The same day, the district court entered an ex parte domestic abuse protection order. Gertsch apparently requested a hearing to show cause why the order should not remain in effect; however the request does not appear in our record.

At the hearing on December 21, Gertsch and Vance each testified, as did Vance's sister, Ansel. Vance testified that the phone call on November 20 was related to the parties' arrangements for Gertsch's visitation with Allie that evening. Gertsch had previously informed Vance that Gertsch's girlfriend, Kim, and Kim's sister, Jill, would meet Vance to pick up Allie. On the day of visitation, Kim had to work and was unable to go along get Allie. Vance, who did not know Jill well, was uncomfortable with Jill taking Allie and called Gertsch to

request that he meet them in Emerald, Nebraska, instead to get Allie. A disagreement ensued and at some point one of the parties referenced that he or she would take the other back to court to modify custody or visitation of Allie. In the course of that conversation Gertsch stated "I would love to fuck you into the ground one last time." Both Ansel and Gertsch testified that the statement was made in reference to the parties going back to court. Gertsch testified that he was in Douglas, Nebraska, at the time the phone conversation occurred and his statement was not a physical threat toward Vance, rather that he meant he would be aggressive in court if the parties were to litigate a custody modification. Vance acknowledged that no physical abuse has occurred between the parties and that she was in or near Emerald and Gertsch was in Douglas at the time of the phone conversation. There was no testimony regarding any of the other allegations alleged in Vance's petition for a protection order.

The same day, the court entered an order affirming the domestic abuse protection order which was to remain in effect for one year from the date of the original order.

Gertsch timely filed this appeal.

#### ASSIGNMENT OF ERROR

Gertsch asserts, restated, that the trial court erred when it affirmed the domestic abuse protection order based on the evidence adduced at the hearing.

## STANDARD OF REVIEW

A protection order is analogous to an injunction. On appeal, the granting or denial of an injunction is reviewed de novo on the record. In a de novo review, an appellate court reaches conclusions independent of the factual findings of the trial court, but where the credible evidence is in conflict on a material issue of fact, the 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. *Cloeter v. Cloeter*, 17 Neb. App. 741, 770 N.W.2d 660 (2009).

## ANALYSIS

The Protection from Domestic Abuse Act allows any victim of domestic abuse to file a petition and affidavit for a protection order. Neb. Rev. Stat. § 42-924 (Reissue 2008). Abuse is defined 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 . . .

Neb. Rev. Stat. § 42-903(1) (Reissue 2008).

The Act defines "household member" to include a former spouse. Neb. Rev. Stat. § 42-903(3) (Reissue 2008). Vance makes no allegations consistent with the entry of a domestic abuse protection order pursuant to Neb. Rev. Stat. § 42-903(1)(a) or (c) and she specifically testified that there has been no physical abuse between the parties. As such, we consider whether Vance has established abuse within the meaning of § 42-903(1)(b) to support the district court's entry of the domestic abuse protection order. Specifically, we must determine whether Gertsch placed, by physical menace, Vance in fear of imminent bodily injury. In *Cloeter v. Cloeter*, 17 Neb. App. 741, 770 N.W.2d 660 (2009) we defined "physical menace" and "imminent" as used in § 42-903(1)(b). "Physical menace" means a physical threat or act and requires more than mere words. "Imminent" bodily injury means an immediate, 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.

Gertsch argues that there is no evidence that he engaged in any conduct constituting abuse as defined in § 42-903. He submits that even if Vance's allegations are assumed to be true, the alleged conduct does not rise to the level of abuse within the meaning of the statute.

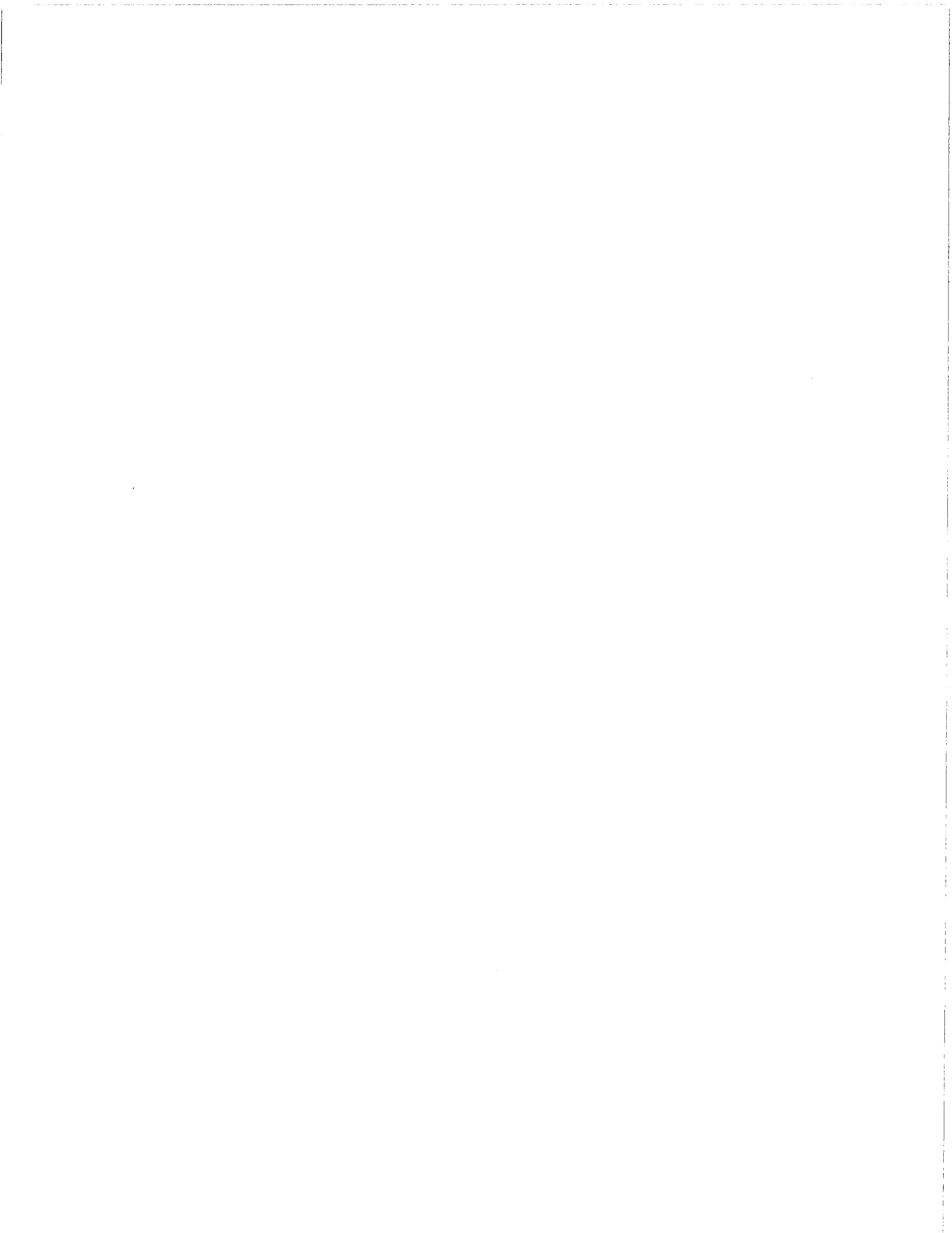
The record shows that the parties had a disagreement over the phone on November 20, which conversation occurred while the parties were physically located in two different towns. There is no evidence that Vance was in fear of imminent bodily injury. Although Vance stated that Gertsch verbally threatened her, the statement was apparently made in reference to the parties becoming aggressive in a court proceeding involving their daughter, and in any event, mere words are insufficient to establish abuse as contemplated by § 42-903(1)(b). *Cloeter, supra*. Likewise, the allegations in Vance's petition and affidavit with respect to statements Gertsch made on his Facebook page and to Vance previously on the phone are not instances of physical menace which would place Vance in fear of imminent bodily injury.

In our de novo review, we find that the facts Vance alleges in the present case do not constitute abuse within the contemplation of § 42-903, therefore the record does not support the district court's entry of a protection order pursuant to § 42-924. Accordingly, we conclude that the district court's order affirming the domestic abuse protection order should be reversed and we direct the district court to enter an order dismissing the domestic abuse protection order against Gertsch.

CONCLUSION

For the aforementioned reasons we reverse and remand with directions to vacate the protection order against Gertsch and dismiss the action.

REVERSED AND REMANDED WITH DIRECTIONS.





THE STATE OF NEBRASKA, ss.

I hereby certify that I have compared the foregoing copy of an opinion filed by this Court with the original on file in my office and that the same is a correct copy of the original.

IN TESTIMONY WHEREOF, I have hereunto set my hand  
and caused to be affixed the Seal of this Court, in the City of  
Lincoln.



*Dan Adams*  
Clerk/Deputy Clerk

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