

**SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION,
FOURTH DEPARTMENT**

Dietzman v. Dietzman

112 A.D.3d 1370, 978 N.Y.S.2d 516 (N.Y. App. Div. 4th Dep't 2013) · Decided December 27, 2013

SUMMARY

The New York Appellate Division affirmed an order of protection issued in a Family Court Act article 8 proceeding. The court held that the finding that respondent committed assault in the third degree, harassment in the second degree, and disorderly conduct was supported by a preponderance of the evidence, rejected his self-defense argument, and found no ineffective assistance of counsel.

CASE DETAILS

COURT	Supreme Court of the State of New York, Appellate Division, Fourth Department
WRITING FOR THE COURT	Smith, J.P.; Fahey, J.; Lindley, J.; Valentino, J.; Whalen, J.
JURISDICTION	New York
DECIDED	December 27, 2013
DISPOSITION	affirmed
PROCEDURAL POSTURE	Respondent appealed from an order of protection issued by Family Court in a Family Court Act article 8 proceeding.
STANDARD OF REVIEW	Whether Family Court's findings were supported by a preponderance of the evidence and whether its factual determinations, including rejection of self-defense, were supported by the record.
PRECEDENTIAL VALUE	Published appellate decision
PARTIES	Respondent v. Petitioner

TOPICS

domestic violence family law procedure evidence burden of proof appellate procedure

PRACTICE AREAS

family law domestic violence evidence appellate procedure

QUESTIONS PRESENTED

1. Whether Family Court's findings that respondent committed assault in the third degree, harassment in the second degree, and disorderly conduct were supported by a preponderance of the evidence.
2. Whether Family Court's determination that respondent was not acting in self-defense was supported by the record.
3. Whether respondent was denied effective assistance of counsel.

HOLDINGS

1. Family Court's finding that respondent committed assault in the third degree, harassment in the second degree, and disorderly conduct was supported by a preponderance of the evidence.
2. Family Court's determination that respondent was not acting in self-defense was supported by the record and would not be disturbed.
3. Respondent's contention that he was denied effective assistance of counsel was rejected.

FACTUAL BACKGROUND

Respondent kicked petitioner in the face, causing bruises, swelling, and a cut lip that required stitches. While on top of petitioner, respondent also put his hands around her neck and prevented her from breathing. Family Court found that respondent committed family offenses corresponding to assault in the third degree, harassment in the second degree, and disorderly conduct, and determined that he was not acting in self-defense.

PROCEDURAL HISTORY

Family Court, Genesee County, entered an order directing respondent, petitioner's former husband and the father of her two children, to stay away from petitioner. After a fact-finding hearing, Family Court found that respondent committed assault in the third degree, harassment in the second degree, and disorderly conduct, rejected his self-defense claim, and issued the order of protection. The Appellate Division unanimously affirmed without costs.

DISPOSITION

affirmed

CASES CITED

- Matter of Marquardt v. Marquardt, 97 A.D.3d 1112, 1113 (N.Y. App. Div. 4th Dep't 2012)
- Matter of Medranda v. Mondelli, 74 A.D.3d 972, 972 (N.Y. App. Div. 2d Dep't 2010)
- Matter of Amodea D. (Jason D.), 112 A.D.3d 1367 (N.Y. App. Div. 4th Dep't 2013)

OPINION

PER CURIAM.

Appeal from an order of the Family Court, Genesee County (Eric R. Adams, J.), entered April 26, 2012 in a proceeding pursuant to Family Court Act article 8. The order, among other things,

directed respondent to stay away from petitioner. It is hereby ordered that the order so appealed from is unanimously affirmed without costs. Memorandum: In this proceeding pursuant to article 8 of the Family Court Act, respondent, the former husband of petitioner and the father of her two children, appeals from an order of protection directing him, inter alia, to stay away from petitioner.

Contrary to respondent's contention, Family Court's finding that he committed the family offenses of assault in the third degree (Penal Law § 120.00 [1]), harassment in the second degree (§ 240.26 [1]), and disorderly conduct (§ 240.20 [1]) is supported by a preponderance of the evidence (see *Matter of Marquardt v Marquardt*, 97 AD3d 1112, 1113 [2012]; see generally Family Ct Act § 812 [1]).

The testimony presented at the fact-finding hearing established that respondent kicked petitioner in the face, resulting in bruises, swelling, and a cut lip requiring stitches, and that while on top of petitioner he put his hands around her neck to prevent her from breathing.

The court's determination that respondent was not acting in self-defense is supported by the record and will not be disturbed (see *Matter of Medranda v Mondelli*, 74 AD3d 972, 972 [2010]). We reject respondent's further contention that he was denied effective assistance of counsel (see *Matter of Amodea D. [Jason D.]*, 112 AD3d 1367 [2013]). Present — Smith, J.P, Fahey, Lindley, Valentino and Whalen, JJ.