

Supreme Court of the State of New York  
Appellate Division: Second Judicial Department

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Submitted - June 8, 2012

RUTH C. BALKIN, J.P.  
L. PRISCILLA HALL  
PLUMMER E. LOTT  
JEFFREY A. COHEN, JJ.

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2011-08089

DECISION & ORDER

In the Matter of Pilar Salazar, respondent,  
v Candido Melendez, appellant.

(Docket No. O-01151-11)

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Thomas T. Keating, Dobbs Ferry, N.Y. (Joseph M. Angiolillo of counsel), for  
appellant.

Warren S. Hecht, Forest Hills, N.Y., for respondent.

In a family offense proceeding pursuant to Family Court Act article 8, the husband appeals from an order of fact-finding and disposition of the Family Court, Orange County (Bivona, J.), dated July 19, 2011, which, after a hearing, inter alia, found that he committed two family offenses of harassment in the second degree, directed him to comply with an order of protection dated April 28, 2011, and directed him to complete a batterer's program and an alcohol abuse program.

ORDERED that the order of fact-finding and disposition is modified, on the law, by deleting the provision thereof, in effect, finding that the husband committed the family offense of harassment in the second degree with respect to an incident occurring in February 2011; as so modified, the order of disposition is affirmed, without costs or disbursements.

A family offense must be established by a fair preponderance of the evidence (*see* Family Ct Act § 832; *Matter of Pearlman v Pearlman*, 78 AD3d 711, 712). "The determination of whether a family offense was committed is a factual issue to be resolved by the Family Court, and that court's determination regarding the credibility of witnesses is entitled to great weight on appeal and will not be disturbed if supported by the record" (*Matter of Richardson v Richardson*, 80 AD3d 32, 43-44; *see Matter of King v Edwards*, 92 AD3d 783).

July 18, 2012

Page 1.

MATTER OF SALAZAR v MELENDEZ

Here, a fair preponderance of the credible evidence supports the Family Court's determination that the husband committed the family offense of harassment in the second degree when, on March 7, 2011, he made a telephone call to the wife and threatened to kill her and send her in a box or coffin to her parents (*see* Penal Law § 240.26[1]; Family Ct Act § 812; *Matter of Williams v Maise*, 85 AD3d 933; *Matter of Marsha C. v Latoya D.*, 224 AD2d 522).

However, the Family Court improperly found that the husband committed the family offense of harassment in the second degree with respect to an incident that occurred in February 2011, since that incident was not charged in the petition (*see Matter of Czop v Czop*, 21 AD3d 958, 959; *Matter of Cavanaugh v Madden*, 298 AD2d 390, 392; *Matter of Whittemore v Lloyd*, 266 AD2d 305).

The parties' remaining contentions are without merit.

BALKIN, J.P., HALL, LOTT and COHEN, JJ., concur.

ENTER:

  
Aprilanne Agostino  
Clerk of the Court