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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1450**

In the Matter of:

Krystal Marie Ketchmark, petitioner,
Respondent,

vs.

Aaron Bruce Fruen,
Appellant.

**Filed May 15, 2017
Reversed and remanded
Smith, Tracy M., Judge**

Hennepin County District Court
File No. 27-DA-FA-16-5877

Krystal Marie Ketchmark, Osceola, Wisconsin (pro se respondent)

Jason R. Vohnoutka, Vohnoutka Law Office, Ltd., Minneapolis, Minnesota (for appellant)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Smith, Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Aaron Bruce Fruen appeals the district court's issuance of an order for protection (OFP) against him, arguing that the district court abused its discretion by basing the OFP on findings that are unsupported by the record and by improperly admitting certain

text messages into evidence without proper authentication. Because the record does not support the district court's finding of infliction of fear of harm, and because the findings are not sufficiently clear to justify an OFP based on the alternative ground of physical harm, we reverse and remand. Given our disposition, we need not reach appellant's evidentiary challenge to the text messages.

FACTS

Ketchmark's OFP petition asserted that she and the parties' minor child needed protection from Fruen based on an incident that occurred on August 15, 2016. The parties had agreed that Ketchmark would pick up their child at Fruen's residence that evening. Ketchmark arrived at Fruen's residence and entered Fruen's enclosed three-season front porch. Fruen saw Ketchmark through the window and twice asked her to leave the porch, but she did not leave. Fruen put his cell phone in his hand, walked toward Ketchmark, and attempted to get her to leave the porch. According to Ketchmark's testimony, Fruen pushed Ketchmark into the door of the porch and hit her several times. Ketchmark then left the porch, hit Fruen's phone out of his hand, and walked to her car. Ketchmark testified that Fruen followed Ketchmark to her car and threw her into the side of the car.

The district court issued an emergency ex parte OFP. The district court thereafter held an evidentiary hearing, at which Fruen was represented by counsel and Ketchmark was not. While Ketchmark was cross-examining Fruen, she asked if he had written text messages that asked Ketchmark to drop the charges and told her to ask herself if it would be in their child's best interest to see Fruen arrested. Fruen denied writing the text messages. The district court asked for proof that the text messages Ketchmark referred to

came from Fruen's phone. Ketchmark responded that she had a printed screenshot of the text messages and that it "says Aaron at the top." Over Fruen's lack-of-foundation objection, the district court received the printed screenshot of the text messages as exhibit 2. The district court's findings state that in the text messages Fruen "accuses [Ketchmark] of lying about the events of August 15, but then begins insulting her and saying he will make it his mission to destroy her life."¹

The district court found that Ketchmark "testified credibly with respect to the threats made to her by [Fruen] on August 15, 2016, with respect to the allegations of abuse on August 15." The district court issued an OFP against Fruen on behalf of Ketchmark based on its finding that Ketchmark "is in reasonable fear for her safety." The district court dismissed the OFP as it related to the child because there were no allegations of threats or harm to the child.

Fruen appeals.

D E C I S I O N

Fruen argues that there is insufficient evidence to justify the OFP. We will reverse an OFP if the district court abused its discretion by misapplying the law or by making

¹ The text messages are no longer in the record. Exhibit 2 apparently was not retained in the district court's file but was returned to Ketchmark. In response to Fruen's motion to correct the record on appeal to include exhibit 2, the district court ordered Ketchmark to provide Fruen's counsel with a copy of the exhibit. Ketchmark failed to do so. Accordingly, in an order filed January 20, 2017, this court denied the motion to correct the record to include the missing exhibit 2 and directed this panel to decide this appeal without considering the text messages.

findings that are unsupported by the record. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009).

The Minnesota Domestic Abuse Act, Minn. Stat. § 518B.01 (2016), establishes an action for an OFP “in cases of domestic abuse.” Minn. Stat. § 518B.01, subd. 4. An OFP “is available only if the petitioner shows that the respondent committed domestic abuse against the petitioner or the person on whose behalf the petition is brought.” *Schmidt ex rel. P.M.S. v. Coons*, 818 N.W.2d 523, 529 (Minn. 2012). Domestic abuse means, in relevant part, “(1) physical harm, bodily injury, or assault” or “(2) the infliction of fear of imminent physical harm, bodily injury, or assault” if committed against a family or household member by a family or household member. Minn. Stat. § 518B.01, subd. 2(a). To establish domestic abuse, an OFP petitioner must either establish present physical harm or establish that the alleged abuser has a present intention to inflict either physical harm or fear of imminent physical harm. *Chosa ex rel. Chosa v. Tagliente*, 693 N.W.2d 487, 489 (Minn. App. 2005); *Bjergum v. Bjergum*, 392 N.W.2d 604, 606 (Minn. App. 1986). An OFP petitioner must prove the existence of domestic abuse by a preponderance of the evidence. *Oberg v. Bradley*, 868 N.W.2d 62, 63 (Minn. App. 2015).

The district court based its decision to grant the OFP on its finding that Ketchmark “testified credibly with respect to the threats made to her by [Fruen] on August 15, 2016, with respect to the allegations of abuse on August 15.”² While we are aware that appellate

² The district court found that Ketchmark met her burden for an OFP by proving that she was “in reasonable fear for her safety.” This language indicates that the district court applied the standard for extending an OFP or issuing a subsequent OFP after a prior OFP has expired. See Minn. Stat. § 518B.01, subd. 6a(b)(2) (allowing a court to issue a

courts defer to district court credibility determinations, *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004), Ketchmark did not testify that Fruen threatened her. The district court found that, in the exhibit 2 text messages, Fruen accused Ketchmark of lying about the allegations of abuse and then said he would make it his mission to destroy Ketchmark's life. That finding implies that the "threats . . . with respect to the allegations of abuse" were contained in the exhibit 2 text messages rather than in testimony. But, because exhibit 2 is not in the record and nothing else in the record supports the finding that Fruen actually threatened Ketchmark, we conclude that the district court's finding of threats is unsupported by the record presented to this court. *See Pechovnik*, 765 N.W.2d at 98. Therefore, the OFP cannot be sustained based on fear of physical harm. *See id.*; *see also* Minn. Stat. § 518B.01, subd. 2(a)(2); *id.*, subd. 6a(b)(2).

It is possible that an alternative ground exists to justify the OFP. In the petition for the OFP and in her testimony, Ketchmark alleged physical abuse. A district court may issue an OFP if the petitioner proves "physical harm, bodily injury, or assault." *See* Minn. Stat. § 518B.01, subd. 2(a)(1). The district court addressed Ketchmark's allegations of physical harm in paragraph 5 of its order, stating:

[Ketchmark] testified to the events of August 15, 2016. [Ketchmark] arrived at [Fruen's] residence to pick up the minor child. She entered [Fruen's] porch, and [Fruen] entered the porch, yelling at [Ketchmark] to leave his property. [Fruen]

subsequent OFP without a new finding of domestic abuse "if the petitioner is reasonably in fear of physical harm" from the same abusing party). It may have been improper to apply that standard here because the only OFP between the parties prior to the current proceeding was an ex parte OFP that was dismissed after a hearing found no domestic abuse. *Compare id.*, *with id.*, subd. 2(a). In any event, we conclude that the record does not support the issuance of the OFP under either standard.

pushed [Ketchmark] into the door of the porch, and then hit her several times. When [Ketchmark] left the porch, [Fruen] pursued her to her car, and threw her into the side of it. These events all happened within full view of the minor child.

It is unclear from this paragraph whether the district court found that the alleged physical abuse occurred. Factual findings must be affirmatively stated as findings of the district court, and statements prefaced by phrases such as “petitioner claims” are not findings. *Dean v. Pelton*, 437 N.W.2d 762, 764 (Minn. App. 1989). Paragraph 5 can reasonably be read to apply the preface that “Petitioner testified” to the entire paragraph, which would mean that the paragraph is a summary of Ketchmark’s allegations but not a finding that those events actually occurred. Furthermore, the district court made no express finding as to the credibility of this part of Ketchmark’s testimony. In addition, the district court’s findings describe Fruen’s testimony denying physical harm but do not make a credibility determination regarding his testimony. From the district court’s order, we cannot conclude that the district court made an affirmative finding that Fruen committed physical harm, bodily injury, or assault amounting to domestic abuse under Minn. Stat. § 518B.01, subd. 2(a)(1).

Because the record does not support the district court’s finding of threats, and because the district court did not make findings regarding the allegations of physical abuse sufficient to justify the OFP on that ground, we reverse the district court’s order. We remand to the district court to make credibility determinations and findings regarding the alleged physical abuse and to determine whether an OFP is warranted on that ground. The

district court may make its determinations based on the existing record or may reopen the record at its discretion.³ In the meantime, the emergency ex parte OFP remains in effect.

Reversed and remanded.

³ The existing record does not include the text messages. We therefore do not decide Fruen's argument that the district court considered the text messages without proper authentication.