STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0062

In re the Matter of: Margaret Patricia Fagre,
and o/b/o minor children, petitioner,
Respondent,

vs.

Adam Lee Fagre,
Appellant.

Filed August 24, 2020
Affirmed
Hooten, Judge

Grant County District Court
File No. 26-FA-19-307

Michael J. Dolan, Thornton, Dolan, Bowen, Klecker & Burkhammer, P.A., Alexandria, Minnesota (for respondent)

Matthew P. Franzese, Wheaton, Minnesota (for appellant)

Considered and decided by Hooten, Presiding Judge; Florey, Judge; and Slieter, Judge.

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

HOOTEN, Judge

In this appeal from the district court's grant of an order for protection (OFP), appellant argues that the record does not support the grant of respondent's OFP because: (1) collateral estoppel and res judicata preclude admission of evidence of domestic abuse

that was the subject of a prior proceeding; (2) the record does not otherwise support a finding that husband committed domestic abuse; and (3) certain evidence admitted by the district court is inadmissible hearsay, excluded by the marital privilege, or hearsay within hearsay. We affirm.

FACTS

Wife Margaret Fagre and husband Adam Fagre were married for nearly ten years before they decided to divorce in 2017. In October 2017, wife filed for, and was granted, a harassment restraining order (HRO) against husband after alleging that husband made harassing comments towards her and "slammed" her arm in a door (the 2017 HRO). In March 2019, husband and wife's divorce was finalized. Wife filed for a second HRO (the 2019 HRO) shortly before the 2017 HRO was set to expire, and the district court granted the petition in October 2019.

The next month, wife petitioned for an OFP. The district court held an evidentiary hearing. At the hearing, wife testified that husband violated the prior HROs several times by sending her harassing text messages in 2017, including messages that read "Get ready b*tch," and "I hope you die soon you rotten c*nt." Wife also testified about an incident in which husband shut her arm in a door. Finally, she testified that husband threatened to kill her on two occasions.

During the hearing, husband objected to the district court's admission of testimony regarding his alleged threats to kill wife as inadmissible hearsay. The district court allowed the testimony on the basis that it showed whether wife was in reasonable fear for her safety, but did not consider the testimony for the truth of whether husband actually threatened to

kill wife. The district court granted the OFP, specifically referencing the 2017 incident where husband shut a door on wife, injuring her arm, and the threatening text messages husband sent to wife, as a basis for the issuance of the OFP. Husband appeals.

D E C I S I O N

Husband argues that the record does not support the granting of an OFP because: (1) collateral estoppel and res judicata preclude the admission of evidence of domestic abuse that was the subject of prior proceedings, (2) the record does not otherwise support a finding that husband committed domestic abuse, and (3) evidence admitted by the district court is inadmissible hearsay or excluded by the marital privilege.

I. The district court did not commit reversible error when it admitted evidence of domestic abuse from prior proceedings.

Husband argues that the district court committed reversible error when it admitted evidence of 2017 incidents in which he shut wife's arm in a door and sent threatening text messages to wife because the claims and issues were barred by res judicata and collateral estoppel.

A. This matter is not barred by res judicata.

Res judicata is the judicial doctrine that precludes the relitigation of claims previously litigated by parties in privity. *Montana v. United States*, 440 U.S. 147, 153, 99 S. Ct. 970, 973 (1979). "Fundamental to [the] doctrine [of res judicata] is that a right, question or fact distinctly put [at] issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties." *Hauschildt v. Beckingham*, 686 N.W.2d 829, 837 (Minn. 2004) (quotation omitted). Res judicata can

bar relitigating a subsequent claim when: "(1) the earlier claim involved the same set of factual circumstances; (2) the earlier claim involved the same parties or their privies; (3) there was a final judgment on the merits; and (4) the estopped party had a full and fair opportunity to litigate the matter." *Rucker v. Schmidt*, 794 N.W.2d 114, 117 (Minn. 2011) (footnote omitted). "All four prongs must be met for res judicata to apply." *Hauschildt*, 686 N.W.2d at 840. Appellate courts review issues of res judicata de novo. *Id.* The doctrine is not to be rigidly applied and a court must determine if "its application would work an injustice [to] the party against whom" the doctrine is applied. *Johnson v. Consol. Freightways, Inc*., 420 N.W.2d 608, 613–14 (Minn. 1988). In this way, the determination of whether res judicata is available is a question that we review de novo, but the determination to apply res judicata, when the doctrine is available, is subject to a review for abuse of discretion. *In re Estate of Perrin*, 796 N.W.2d 175, 179 (Minn. App. 2011).

Husband does not make separate arguments for res judicata and collateral estoppel, but contends that the evidence should be barred from admission by both doctrines because:

> [Husband] and [wife] were both involved in the harassment restraining order action in 2017, the allegations involving the text messages and the arm injury are the same in the 2019 order for protection action as they were in 2017 harassment restraining order action, [wife] had a full and fair opportunity to litigate the matter, and in fact, [wife] succeeded in getting a final judgment on the merits in her favor.

This court addressed an issue similar to the one here in *G.A.W., III v. D.M.W.*, 596 N.W.2d 284 (Minn. App. 1999), *review denied* (Minn. Sept. 28, 1999). In *G.A.W.*, respondent argued that appellant's tort claim was barred by res judicata because it implicated some of the same facts contemplated in a prior marital dissolution action

between the two parties. *Id.* at 288–89. We concluded that because different legal theories were contemplated in the tort action, as compared to the dissolution action, and because the tort action contemplated new facts in addition to facts that existed at the time of the dissolution action, the torts claim, despite still including the allegations raised in the dissolution, was not barred by res judicata. *Id.* at 289. Simply, the different legal theories implicated two different legal actions, and the compounding subsequent events meant that the claim no longer involved the same set of factual circumstances. *Id.*

Proceedings seeking an HRO and OFP, while presenting related issues, are different legal actions. The scope of an HRO and an OFP are different. An HRO requires the district court to find harassment occurred, whereas an OFP requires the district court to find that domestic abuse occurred. *Compare* Minn. Stat. § 609.748, subd. 1(a) (2018) (defining what constitutes harassment for the purposes of an HRO), *with* Minn. Stat. § 518B.01, subd. 2(a) (2018) (defining what constitutes domestic abuse for the purposes of an OFP). Although an act may constitute both domestic abuse and harassment, for example an incident of physical assault, there are many instances in which an act may easily constitute harassment without constituting domestic abuse, for example an incident involving targeted residential picketing.

The requirements that a petitioner must show in each petition are also different. *Compare* Minn. Stat. § 609.748, subd. 3 (2018) (noting that a petition for an HRO must contain the names of the alleged victim and the respondent, as well as the alleged harassment), *with* Minn. Stat. § 518B.01, subd. 4 (2018) (noting that an OFP may be requested by any family or household member and must include a description of the alleged

domestic assault); *see also Thompson v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018) (stating that a petitioner seeking an OFP "need only show that physical harm, bodily, injury, or assault has actually occurred, regardless of *when* it occurred, to satisfy the [] definition of domestic assault") (quotation omitted) (italics in original). And significantly, the consequence of violating an HRO and an OFP are different. *Compare* Minn. Stat. § 609.748, subd. 6 (2018) (defining the range of punishments associated with the violation of an HRO), *with* Minn. Stat. § 518B.01, subd. 14 (2018) (defining the range of punishments associated with the violation of an OFP). As an HRO proceeding and an OPF proceeding are based on different causes of action, the legal theories necessary to pursue either order will necessarily implicate different legal theories and may require different factual circumstances.

In the present case, wife did not assert the same set of factual circumstances in her petition for an OFP as she did in her prior petitions for HROs. In the petition for an OFP, wife describes husband's conduct and explains further the reasons she fears husband, which include husband's repeated violations of the prior HROs—which demonstrate an indifference by husband to the consequences of violating an HRO—and the emotional impact of husband's threats to kill her. Further, while husband's violations of the 2017 HRO occurred before wife sought the 2019 HRO and the OFP, the alleged threats to her life occurred after the 2019 HRO was issued.

Thus, because an HRO and an OFP are different legal actions, and the factual circumstances that gave rise to the OFP, while inclusive of the circumstances that gave rise to the HROs, also contemplate the addition of wife's reasonable fear of imminent harm

based on husbands threats, we conclude that wife's claim for an OFP was not barred by res judicata. As all four elements of res judicata must be met for res judicata to be applied, and husband has failed to show that an OFP and an HRO are the same claim and include the same factual circumstances, *Hauschildt*, 686 N.W.2d at 840, we conclude that this matter was not barred by res judicata.

B. This matter is not barred by collateral estoppel.

Collateral estoppel is similar to res judicata, but applies to issues, rather than claims, that have already been litigated. *Hauschildt*, 686 N.W.2d at 837. Collateral estoppel bars further action when four elements are met: (1) the issue subsequently litigated was identical to the one in a prior adjudication, (2) "there was a final judgment on the merits," (3) "the estopped party was a party or was in privity with a party to the prior adjudication," and (4) "the estopped party was given a full and fair opportunity to be heard on the adjudicated issue." *Id.* "The issue must have been distinctly contested and directly determined in the earlier adjudication for collateral estoppel to apply." *Id.* at 837–38. Whether collateral estoppel applies is a mixed question of law and fact that we review de novo. *Id.* at 837.

As described above, because the elements necessary to grant an OFP are different from the elements necessary to grant an HRO, the legal issues considered in the two proceedings are necessarily different. *Compare* Minn. Stat. § 609.748, subd. 3 (defining the petition requirements for an HRO), *with* Minn. Stat. § 518B.01, subd. 4 (defining the petition requirements for an OFP). In the present OFP proceeding, wife alleged abuse by husband and further reasons to fear him, particularly the repeated violations of the prior HROs and the new alleged threats to her life. These events clearly create new factual

circumstances and thus different issues from those that existed at the time of the 2019 HRO.[1]

Therefore, we conclude that the factual circumstances and legal elements contemplated by the district court before it issued the OFP were not identical to the factual circumstance or legal elements at issue in the 2017 and 2019 HRO proceedings, and the legal issues contemplated by the district court before it issued the OFP were different than the issues contemplated by the district court before it issued the HROs. Because the OFP hearing involved different facts and circumstances and a different legal analysis from those in the previous HRO hearings, no collateral estoppel existed. *See Hauschildt*, 686 N.W.2d at 837 (noting that all four elements of collateral estoppel must be met for collateral estoppel to be applied).

II. The district court did not abuse its discretion when it granted wife's OFP.

Husband argues that the district court abused its discretion when it relied on acts that were not domestic abuse when it granted wife's OFP petition.

"We review the district court's decision to grant an OFP for an abuse of discretion." *Ekman v. Miller*, 812 N.W.2d 892, 895 (Minn. App. 2012). "A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record." *Thompson*, 906 N.W.2d at 500 (quotation omitted).

[1] We determine that these differences of circumstance are particularly evident considering the ex parte nature of the second HRO. As the ex parte HRO did not provide both parties with an opportunity to litigate the issues, we are not persuaded that an ex parte proceeding truly constitutes prior litigation as required for collateral estoppel to apply.

A. The district court did not abuse its discretion when it concluded that domestic abuse existed.

The Minnesota Domestic Abuse Act allows victims of domestic abuse to petition for an OFP. Minn. Stat. § 518B.01, subd. 4. Under the Minnesota Domestic Abuse Act:

> Domestic abuse means the following, if committed against a family or household member by a family or household member:
> (1) physical harm, bodily injury, or assault;
> (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or
> (3) terroristic threats . . . ; criminal sexual conduct . . . ; or interference with an emergency call . . . .

Minn. Stat. § 518B.01, subd. 2(a).

In order for a district court to grant an OFP, a petitioner must allege that domestic abuse occurred and explain "the specific facts and circumstances from which relief is sought." Minn. Stat. § 518B.01, subd. 4(b). "An OFP is justified if a person manifests a present intention to inflict fear of imminent physical harm, bodily injury, or assault on the person's spouse." *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009). A district court can infer a present intent to inflict fear of imminent physical harm from the totality of the circumstances, including a history of abusive behavior. *Id.* Importantly, an overt physical act is not required for a district court to infer an intent to inflict fear of imminent physical harm. *Hall v. Hall*, 408 N.W.2d 626, 629 (Minn. App. 1987) (concluding that a verbal threat can inflict fear of imminent physical harm, bodily injury, or assault), *review denied* (Minn. Aug. 19, 1987).

The district court determined that the incident in which husband shut wife's arm in the door plainly constituted domestic abuse. Further, in its order, the district court noted

the threatening text messages, wife's knowledge of husband's threats, and wife's knowledge that husband had "firearms and a permit to carry firearms contributed to wife's reasonable fear that husband would inflict great bodily harm on her." The district court found that these events and circumstances supported the granting of an OFP.

Husband argues that the 2017 text messages "Get ready b*tch" and "I hope you die soon you rotten c*nt" do not constitute domestic abuse as described by Minn. Stat. § 518B.01, subd. 2(a), because the admission of the statements are barred by collateral estoppel and res judicata, or do not constitute the intentional infliction of fear of harm or a terroristic threat as required by the Minnesota Domestic Abuse Act. We have already concluded that the district court was not barred by res judicata or collateral estoppel from considering facts relevant to the HRO proceeding. Therefore, we move to husband's argument that his actions do not constitute domestic violence.

When considering the totality of the circumstances of this case, including husband's past abusive behavior and violations of the previous HRO, we agree with the district court's conclusion that the text messages could be reasonably viewed to demonstrate an intent by husband to inflict fear of imminent bodily harm on wife at the time they were sent. Further, we are satisfied that the arm incident also constitutes domestic assault under the Minnesota Domestic Abuse Act. Thus, under a totality of the circumstances, we determine that the district court did not abuse its discretion when it concluded husband's action allowed for the inference of a present intent to inflict fear of imminent bodily harm. *See Pechovnik*, 765 N.W.2d at 99 ("Present intent to inflict fear of imminent physical harm, bodily injury, or assault can be inferred from the totality of the circumstances, including a history of past

abusive behavior."). Therefore, we conclude that the district court did not abuse its discretion when it determined that husband committed domestic abuse as described by Minn. Stat. § 518B.01, subd. 2(a).

B. The district court did not rely on inadmissible hearsay.

Husband also contends that there was no evidence that the incident in which he allegedly shut wife's arm in a door was domestic abuse under Minn. Stat. § 518B.01, subd. 2(a), because wife testified that husband merely "shut [her arm] in the door" causing bruising, and not that he "slammed" her arm in the door, as was recounted in wife's petition. Husband argues that the district court improperly relied upon the evocative language in the petition when it concluded that the incident constituted domestic abuse. He also alleged that he did not intend to harm wife during this incident.

"Hearsay is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). The rules of evidence bar the admission of hearsay evidence unless an exception to the rule against hearsay applies. Minn. R. Evid. 802.

The district court concluded that husband "slammed [wife]'s arm in the door causing injury." Although this allegation was made in wife's OFP petition, it was echoed in her testimony at the OFP hearing. *Cf.*, *State v. Burch*, 170 N.W.2d 543, 552 (Minn. 1969) (A final decision "may be based on the testimony of a single witness no matter what the issue."). As wife provided direct testimonial evidence regarding the incident, we conclude that the district court did not rely on inadmissible hearsay when it determined that husband committed domestic abuse as described by Minn. Stat. § 518B.01, subd. 2(a).

III. The district court did not abuse its discretion by admitting inadmissible hearsay or evidence protected by spousal privilege.

Husband argues that the district court erred when it relied on allegedly inadmissible hearsay evidence from wife indicating that husband threatened to kill her and evidence that is protected by spousal privilege.

"[E]videntiary rulings are within the district court's discretion and are [] reviewed for an abuse of that discretion. *Braith v. Fischer*, 632 N.W.2d 716, 721 (Minn. App. 2001), *review denied* (Minn. Oct. 24, 2001). A district court's ruling on the admissibility of evidence will only be reversed if the objecting party can show that the district court abused its discretion and that abuse prejudiced the objecting party. *Hous. & Redevelopment Auth. of City of St. Paul v. Kieffer Bros. Inv. & Const. Co.*, 170 N.W.2d 862, 865 (Minn. 1969).

A. The district court did not abuse its discretion when it allowed wife to testify regarding her state of mind following the death threats.

Under one recognized exception to the rule excluding hearsay evidence, a declarant's statements about his or her own then-existing state of mind are admissible. Minn. R. Evid. 803(3). Out-of-court statements introduced to show their effect on the state of mind of the listener, instead of the truth of the statement, are not hearsay and thus may be considered by the factfinder. *See State v. Stillday*, 646 N.W.2d 557, 563–64 (Minn. App. 2002) (noting that statements neither offered to prove the truth of the matter nor assert a fact are not hearsay), *review denied* (Minn. Aug. 20, 2002).

Husband argues that the district court improperly allowed wife to testify regarding the sheriff's statement about the threat against her life for the truth of the matter asserted. However, husband misunderstands the district court's ruling, which allowed the statements

to be admitted to show the impact of the statements on the state of mind of the listener, and not the mindset of the declarant as described by Minn. R. Evid. 803(3).

The district court plainly stated: "I'm going to allow it for the limited purpose of the impact on the witness." The district court did not admit the statements to prove the truth of the matter asserted, or to show the sheriff's then existing state of mind; instead, the statements were admitted only to demonstrate their effect on wife. Statements admitted to show their effect on the state of mind of the listener, and not prove the truth of the matter asserted or assert a fact, are not hearsay. *See* Minn. R. Evid. 801(c) (defining hearsay). Because wife's testimony is admissible as they were offered neither to prove the truth of the matter nor assert a fact, we conclude the district court did not abuse its discretion when it allowed the testimony to be admitted.

B. The district court did not impermissibly admit evidence protected by spousal privilege.

Finally, husband argues that the district court abused its discretion when it allowed wife to testify that husband's new spouse informed wife that husband intended to kill wife because the statements were protected by spousal privilege.

"Minn. Stat. § 595.02, subd. 1(a) (2018) provides that parties to a marriage cannot testify for or against each other without the other's consent, and further, that neither spouse can be examined as to any communication made by one to the other during the marriage, absent the other's consent." *State v. Gianakos*, 644 N.W.2d 409, 416 (Minn. 2002). The spousal privilege does not prevent a third-party witness from testifying to a conversation held between the husband and wife that was overheard, "even if the presence of the third

party is not visible to a husband or wife." *State v. Lasnetski*, 696 N.W.2d 387, 394–95 (Minn. App. 2005).

We conclude that spousal privilege does not apply here because no testimony was given by husband's spouse. Instead, all information regarding threats heard by husband's spouse were passed on to wife, a third party who testified to the conversation. Therefore, the district court did not abuse its discretion when it relied on the impact of the statements on the wife because it did not admit evidence protected by spousal privilege.

Affirmed.