

IN THE COURT OF APPEALS OF IOWA

No. 6-580 / 06-0080

Filed August 9, 2006

NATALIE M. HOSCH,
Plaintiff-Appellee,

vs.

THOMAS ROLLE,
Defendant-Appellant.

Appeal from the Iowa District Court for Jones County, Douglas S. Russell,
Judge.

Thomas Rollee appeals from the district court order granting a permanent
protective order to Natalie Hosch. **REVERSED AND REMANDED.**

Thomas Bitter of Bitter Law Offices, Dubuque, for appellant.

Robert L. Day, Jr. of Day, Hellmer & Straka, P.C., Dubuque, for appellee.

Considered by Vogel, P.J., and Miller and Eisenhauer, JJ.

EISENHAUER, J.

Thomas Rolle and Natalie Hosch divorced approximately seven years ago. They had two minor children. Rolle voluntarily terminated his parental rights to both children so Hosch's husband could adopt them. An agreement between the parties allowed Rolle to maintain certain contact with the children.

On November 1, 2005, Rolle was upset about Hosch's compliance with the agreement. He called her at 3:54 p.m. and left a message on her cellular phone in which he said, "You and your current husband rot in hell, I hope you die."

On November 7, 2005, Hosch filed a petition for relief from domestic abuse. She alleged that Rolle had been calling and harassing her and her family in the seven years following their divorce, including flying over her farm in an ultralight plane on four occasions and driving by the home. She cited the November 1, 2005, phone call as the most recent threat.

At the hearing on the protective order, Hosch testified that she believed Rolle was threatening her personal safety and that she and her family were in imminent danger when he called her on November 1, 2005. Hosch also testified that in the seven years since the divorce, Rolle had never been on her property or touched her.

Following the hearing, the district court entered a protective order. In its order denying Rolle's post-judgment motion, the court found Rolle's phone message "constituted an act intended to place another in fear of immediate physical contact which would be painful, injurious, insulting or offensive to the

Petitioner coupled with the apparent ability to do the act” and concluded the message constituted an assault.

Domestic abuse occurs when an assault occurs between persons divorced from each other. Iowa Code § 236.2(2)(b) (2005). A person commits assault when, without justification, they do any of the following:

1. Any act which is intended to cause pain or injury to, or which is intended to result in physical contact which will be insulting or offensive to another, coupled with the apparent ability to execute the act.
2. Any act which is intended to place another in fear of immediate physical contact which will be painful, injurious, insulting, or offensive, coupled with the apparent ability to execute the act.
3. Intentionally points any firearm toward another, or displays in a threatening manner any dangerous weapon toward another.

Iowa Code § 708.1.

Upon de novo review, *Knight v. Knight*, 525 N.W.2d 841, 843 (Iowa 1994), we conclude the evidence is not sufficient to support a finding Rolle assaulted Hosch. Rolle’s phone message to Hosch did not indicate that he intended to bring about harm to Hosch or her husband. However, even if we consider the message a threat, it does not meet the definition of assault. By threatening another with immediate serious injury, an assault is not necessarily committed. *State v. Law*, 306 N.W.2d 756, 759 (Iowa 1981), *overruled on other grounds by State v. Wales*, 325 N.W.2d 87 (Iowa 1982). A mere threat, without more, is not necessarily an assault by placing another in fear. *Id.*

In its ruling on Rolle’s post-judgment motion, the district court focuses on Hosch’s belief that Rolle had the apparent ability to execute the act which he threatened. However, the ability to execute such act must be apparent to the offender, not the victim. *Bacon v. Bacon*, 567 N.W.2d 414, 418 (Iowa 1997). At

the time he made the phone call, Rolle was in LaMotte, many miles from Hosch's home. He never approached Hosch or her home that day or in the six days following.

Upon review of the evidence, it is apparent that Rolle was frustrated with Hosch's failure to adhere to their agreement regarding the children. He made a call in which he wished Hosch and her husband ill. He did not voice any intent to harm Hosch or her husband. He did not approach Hosch or her home and was nowhere in the vicinity of Hosch when the call was made. He did not even speak directly with Hosch, but left a voice message. Rolle had no apparent ability to immediately cause Hosch harm. Although Hosch testified Rolle had made "intimidating" phone calls to her in the two years since surrendering his parental rights, she admitted his threats were that of taking her to court. Rolle has never come to Hosch's property or touched her since the divorce. One phone message in which Rolle expressed his anger with her, however inappropriately, is not sufficient to warrant a domestic abuse protective order.

We reverse the protection order and remand for dismissal of the petition for relief from domestic abuse.

REVERSED AND REMANDED.