

**IN THE COURT OF APPEALS OF IOWA**

No. 7-917 / 07-0892  
Filed December 12, 2007

**LISA WIEDERIEN,**  
Petitioner-Appellee,

**vs.**

**RONALD WIEDERIEN,**  
Respondent-Appellant.

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Appeal from the Iowa District Court for Guthrie County, Dale B. Hagen,  
Judge.

Ronald Wiederien appeals a civil domestic abuse protective order issued  
in favor of his ex-wife, Lisa Wiederien. **REVERSED AND REMANDED.**

A. Eric Neu of Neu, Minnich, Comito & Hall, P.C., Carroll, for appellant.

Lisa Wiederien, Bayard, pro se.

Considered by Sackett, C.J., and Vaitheswaran and Baker, JJ.

**VAITHESWARAN, J.**

Ronald Wiederien appeals a civil domestic abuse protective order issued in favor of his ex-wife, Lisa Wiederien. He contends the district court's finding that he committed domestic abuse assault is unsupported by a preponderance of the evidence. He specifically maintains there was insufficient evidence he performed an act "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." See Iowa Code §§ 236.2(2), 708.1(2) (2007). On our de novo review of the record, we agree.

Lisa's petition for relief from domestic abuse alleged the following injuries or threats by Ronald:

He calls me on my cell phone and tells me, he will kick the shit out of me. Texts messages he will be (sic) the shit out with his girlfriends help. Come to my house to pick the kids up and threatens me all the time. He has his girlfriend keep tabs on me all the time and other people too. He always knows where I am.

At a hearing on the petition, Lisa testified she received three text messages from Ronald. The first message stated, "I am watching every move you make." The second message stated, "Kristie and I will beat the shit out of you, you dumb whore." The third message made reference to having Lisa held in "contempt." The district court found that all three messages came from Ronald. The court rejected Ronald's assertions that the first two were not sent by him, stating, "I think you sent those two messages to her and I think you are lying to this court about it." The court chose to believe Lisa over Ronald despite extensive evidence impugning Lisa's credibility. This was the court's prerogative. *Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996) ("The trier

of fact—here, the district court—has the prerogative to determine which evidence is entitled to belief.”).

Despite this credibility determination and the threatening language in the first two text messages, we are compelled to find insufficient evidence of assault because Lisa did not establish that Ronald had “an apparent ability to execute the act.” Iowa Code § 708.1. On direct examination, the district court asked Lisa if she believed Ronald “will follow through on those threats.” Lisa responded, “Yeah, if he don’t, somebody else will.” While this testimony established Lisa’s belief that Ronald had a future ability to execute the threats, it did not establish Ronald’s apparent ability to execute the threats at the time the threats were made. Lisa did not testify to where Ronald was at that time or even that he was in the vicinity. Although she stated that he came to pick up the children from her home later that night, this was after a temporary protective order had been issued. Therefore, his proximity to her that night could not serve as the predicate for a finding that he had the apparent ability to execute the threats forming the basis of the temporary protective order.

For this reason, we find insufficient evidence to support the assault element of domestic abuse assault. We reverse and remand for dismissal of the protective order.

**REVERSED AND REMANDED.**