

IN THE COURT OF APPEALS OF IOWA

No. 9-044 / 08-0769
Filed March 11, 2009

KENDRA L. SPEICHER,
Petitioner-Appellee,

vs.

DANIEL R. RAJTORA,
Respondent-Appellant.

Appeal from the Iowa District Court for Linn County, James H. Carter,
Judge.

Daniel Rajtora appeals a civil domestic abuse protective order issued in
favor of Kendra Speicher. **REVERSED AND REMANDED.**

James W. Affeldt of Elderkin & Pirnie, P.L.C., Cedar Rapids, for appellant.

Amy L. Reasner, Cedar Rapids, for appellee.

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

EISENHAUER, J.

Daniel Rajtora and Kendra Speicher are the parents of an eight-year-old daughter. Although they never married, the parties have resided with one another on various occasions. Daniel appeals a civil domestic abuse protective order issued in favor of Kendra. He argues the district court's finding he committed domestic abuse assault is not supported by a preponderance of the evidence. He specifically maintains there was insufficient evidence he acted in a manner "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 §§ 239.2(2), 708.1(2) (2007).

The district court ruled on objections as they were made and tried this case as a law action. Therefore, our review is for the correction of errors at law. See *Bacon v. Bacon*, 567 N.W.2d 414, 417 (Iowa 1997). In a law action, the district court's findings of fact are binding upon us if supported by substantial evidence. *Id.*

On March 30, 2008, Daniel returned their daughter to Kendra's residence after a visitation. Daniel did not see Kendra at any time on March 30, and did not speak to her at the drop-off. Kendra testified she called Daniel about five minutes later using a new cell phone Daniel had just purchased for their daughter. Kendra asked Daniel to prevent their daughter from taking her new cell phone to church or school. Kendra testified Daniel threatened her by replying: "Shut the f*** up. Don't worry about it and shut the f*** up before I come over there and beat both [Kendra and boyfriend] your asses."

Kendra stated she placed the call to Daniel's cell phone and he did not say where he was located. However, she believed he had returned to a friend's house one to two miles away. At the hearing, Daniel admitted swearing, but denied making a threat. Daniel was at his friend's house during the call.

Even assuming Daniel made the alleged threat, we are compelled to find insufficient evidence of assault because Kendra did not establish Daniel had "an apparent ability to execute the act." See Iowa Code § 708.1(2). Assault requires "fear of immediate physical contact" coupled with "the apparent ability to execute" the assault. *Id.* The record does not establish Daniel's apparent ability to execute the threat at the time the threat was made. The testimony only established Kendra's belief Daniel had a future ability to return from a distance and execute the threat.

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.