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Minn. Stat. § 480A.08, subd. 3 (2018).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-2046**

In re the Matter of:

Amanda Lynn Smith, petitioner,
Respondent,

vs.

Christopher Gordon Carothers,
Appellant.

**Filed July 8, 2019
Reversed
Smith, Tracy M., Judge**

Dakota County District Court
File No. 19AV-FA-18-2651

Amanda Lynn Smith, Apple Valley, Minnesota (pro se respondent)

Christopher G. Carothers, Cannon Falls, Minnesota (pro se appellant)

Considered and decided by Jesson, Presiding Judge; Schellhas, Judge; and Smith,
Tracy M., Judge.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Upon petition by respondent Amanda Smith, the district court issued an order for protection (OFP) against appellant Christopher Carothers, finding that Carothers had taken Smith's cell phone and gone through its contents and had taken her laptop. Carothers

appeals, arguing that the district court's findings do not support the OFP. We agree and reverse.

FACTS

Carothers and Smith were in a romantic relationship from 2011 until 2018. On October 3, 2018, Smith and Carothers got into an argument. Several facts regarding the argument are not disputed: Carothers took Smith's cell phone, read through its contents, and then took Smith's laptop and went outside. While Carothers was outside, Smith contacted the police, using a second cell phone. The police came to the house and asked Carothers to return Smith's property; he did so.

In late October 2018, Smith petitioned the district court for an OFP based primarily on the incident of October 3. The petition also alleged a prior incident in which Carothers had hit Smith with a disc-golf disc and had implicitly threatened her with his body language. The district court granted an ex-parte OFP pending a hearing. About a week later, Smith sought to modify the order for protection by adding the parties' joint children as protected parties. Smith alleged that Carothers had physically abused the children. The district court modified the ex-parte OFP accordingly.

At the evidentiary hearing, held a few days later, the bulk of the evidence was testimony from Smith and Carothers, though Smith called several witnesses who testified that Carothers had hit both of the parties' children on several occasions and Carothers called a witness who testified, essentially, that she did not witness any abuse.

The testimony of Smith and Carothers as to the events of October 3 differed on several points. Smith testified that Carothers had taken the second cell phone from her.

Carothers testified that, while he remembered Smith having a second phone, and remembered being surprised that she had two cell phones, he did not remember taking the second phone. Smith testified that, when Carothers took the first phone, he snatched it out of her hand and, when he took the second phone, he twisted her arm behind her back in order to make her release it. Carothers testified that he took the first phone after Smith set it down on a counter. Carothers said that he did not recall taking the second phone and challenged Smith's testimony that he twisted her arm behind her back, stating that, if he had done so, the police likely would have seen bruises or redness. But he did not specifically deny Smith's testimony about the arm twisting, stating only that he did not recall. Smith also described how Carothers blocked a door to a room that she was in after a second "tussle" over the second cell phone. Carothers did not mention any such event and was not asked about it.

The district court granted an OFP in favor of Smith and the children for two years, using a form order. In its written finding of abuse, the district court checked the box next to "Acts of domestic abuse have occurred, including the following:" and wrote "Taking phone & going through it; Taking laptop." The district court also described its findings and rationale orally, on the record:

Okay. I'm going to make a finding that domestic abuse did occur with respect to the incidents around the phone and the laptop. I think in this day and age taking somebody's phone away and going through it constitutes a statement that "I'm in control." And taking away somebody's laptop and phone is an effort to say "I'll decide what part of the world you'll be in touch with."

Though it did not make any explicit credibility determinations, the district court appears not to have believed the testimony of Smith’s witnesses who described abuse against the children. After Smith had presented her evidence, the district court stated that it was only interested in “the incident with respect to the phone and the computer that she testified about. Those are the incidents that I think may involve domestic abuse.” And the district court directed Carothers to focus on those incidents in his testimony. The district court did not find that Carothers had committed domestic abuse against the children. Nor did the district court find that Carothers had committed any acts of domestic abuse against Smith other than on October 3.

Carothers appeals.

D E C I S I O N

“A petitioner seeking an OFP must ‘allege the existence of domestic abuse’ by affidavit, including the ‘specific facts and circumstances from which relief is sought.’” *Thompson o/b/o Minor Child v. Schrimsher*, 906 N.W.2d 495, 498 (Minn. 2018) (quoting Minn. Stat. § 518B.01, subd. 4(b) (2016)). “[A]n OFP is available only if the petitioner shows the respondent committed domestic abuse against the petitioner or the person on whose behalf the petition is sought.” *Schmidt ex rel. P.M.S. v. Coons*, 818 N.W.2d 523, 527 (Minn. 2012) (footnote omitted).

“Domestic abuse” means: “(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) (2018). Whether the facts found by the district court constitute

domestic abuse is a question of statutory interpretation. *Thompson*, 906 N.W.2d at 498. Appellate courts review the district court’s interpretation of a statute de novo, because the meaning of a statute is a question of law. *Id.* Because “appellate courts may not sit as factfinders,” *Dunn v. Nat’l Beverage Corp.*, 745 N.W.2d 549, 555 (Minn. 2008) (quotation omitted), they review the district court’s findings for clear error but may not “make or amend findings of fact,” *Butch Levy Plumbing & Heating, Inc. v. Sallblad*, 126 N.W.2d 380, 387 (Minn. 1964).

By checking box 4.a on the OFP form and adding a description, the district court indicated that “Acts of domestic abuse have occurred, including the following: taking phone & going through it; Taking laptop.” These described acts were taken against Smith, but they do not meet the statutory definition of “acts of domestic abuse.” Taking property and going through another’s digital files may be bad conduct, but it does not cause physical harm, bodily injury, or assault, and it does not constitute terroristic threats, criminal sexual conduct, or interference with an emergency call. *See* Minn. Stat. § 518B.01, subd. 2(a)(1), (3). And even if those acts communicate the messages suggested by the district court—“I’m in control,” and “I’ll decide what part of the world you’ll be in touch with”—those messages, by themselves, do not inflict “fear of imminent physical harm, bodily injury, or assault.” *Id.*, subd. 2(a)(2). Thus, Carothers’s conduct as found by the district court did not constitute domestic abuse. The district court therefore erred in granting the OFP. *See Schmidt*, 818 N.W.2d at 529 (holding that an OFP may only be issued “to a victim of domestic abuse”).

Smith argues that this court should nonetheless affirm the OFP, pointing to the evidence of other alleged domestic abuse that she introduced at trial. But the district court did not find that other domestic abuse occurred. After Smith presented her case, the district court instructed Carothers to focus on “the incident with respect to the phone and the computer,” stating “[t]hose are the incidents that I think may involve domestic abuse.” By doing so, the district court indicated that it was not persuaded by the evidence of other events. Similarly, when giving its oral findings, the district court focused specifically on the invasive and controlling messages sent by taking another person’s electronics and going through the person’s cell phone. If the district court had believed that an assault occurred when Carothers took the phone, there would have been no need to explain the coercive message conveyed by controlling another’s communication devices—the court could have simply said that there was an assault. The fact that it did not do so suggests that the district court did not believe Smith’s testimony about how the phones were taken from her. Finally, in its written findings, the court mentioned only that Carothers took Smith’s phone and laptop and read through her cell phone. The district court premised the OFP solely on conduct that was not domestic abuse. Even if the evidence would have supported findings that met the statutory definition of domestic abuse, it is beyond the power of this court to make such findings. *Dunn*, 745 N.W.2d at 555.

As for the children, the district court made no findings of any acts taken against them. An OFP is not available unless the restrained party committed domestic abuse against the protected parties. *Schmidt*, 818 N.W.2d at 527. The district court erred by

issuing an OFP to protect the children without finding that Carothers had committed domestic abuse against them.

Because the only conduct found by the district court does not meet the statutory definition of domestic abuse, its findings do not support the issuance of the OFP with respect to Smith or the children.

Reversed.