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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1467**

In the Matter of: Lisa Marie Hessel,
individually and o/b/o minor children, petitioner,
Respondent,

vs.

Michael John Mohr,
Appellant.

**Filed May 8, 2017
Reversed
Connolly, Judge**

Winona County District Court
File No. 85-FA-16-1645

Joseph E. Winandy, Pflughoeft, Pederson & Johnsrud, LLP, Winona, Minnesota (for respondent)

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Considered and decided by Reyes, Presiding Judge; Connolly, Judge; and Larkin,
Judge.

UNPUBLISHED OPINION

CONNOLLY, Judge

Appellant challenges an order for protection prohibiting his contact with his daughters, arguing that the evidence did not support the granting of the order. Because the

district court misapplied the law and abused its discretion by issuing an order for protection absent a finding of domestic abuse, we reverse.

FACTS

Appellant Michael Mohr and respondent Lisa Hessel were married in 1999 and are the parents of two daughters, M., born in 2001, and A., born in 2005. When the marriage was dissolved in 2013, the parties agreed to joint physical and legal custody of M. and A.

On August 9, 2016, M. told respondent for the first time that appellant sexually abused M. in 2011. Respondent reported the alleged abuse to law enforcement and social services, who began an investigation of appellant. On August 15, 2016, respondent filed an affidavit and petition for an order for protection (OFP) for herself, M., and A. against appellant, stating that he abused M. in 2011 and that A. was now the age M. had been at the time of that abuse.

At the hearing on the petition for the OFP, a Child Protection Investigator (CPI) testified that: (1) he had not met appellant before the hearing; (2) he had “determined that [M.] is conditionally safe provided that she has no contact with [appellant]”; and (3) the CPI agreed that no determinations had been made and no criminal charges were pending against appellant.

Both parties also testified, but M., then 14, did not testify. After hearing all the testimony, the district court said:

[T]he whole case turns on the allegation of sexual abuse [in 2011]. . . . The other incidents complained of are all quite a bit older, in some cases many years old. . . . I’m not sure that any of them rose to the level of domestic abuse.

. . . .

[V]erbally offensive conduct, by itself, without physically aggressive conduct or threats of physical aggression, is just offensive conduct. It's not domestic abuse, and I have no hesitancy in finding . . . that [appellant] was verbally offensive on many occasions, but I'm not seeing the physical abuse present except for *the allegation of sexual abuse*. . . . [W]e're in an OFP hearing today that turns on whether there was or wasn't sexual abuse, and the professional investigation . . . is still ongoing.

(Emphasis added.)

Appellant's counsel asked to have the petition for an OFP dismissed because: (1) appellant had no intention of not complying with the CPI's determination by having contact with M.; (2) if appellant were to have contact with M., respondent could go "into Family Court and get an ex parte motion to modify custody and . . . get the order modified so there was no contact;" and (3) if criminal charges were to be filed, the prosecutor would immediately ask "for a no-contact provision and a domestic abuse no-contact order."

Respondent's counsel asked that the OFP also include A., because she was the same age M. was when the alleged abuse took place. Appellant's counsel pointed out that there had been no allegations of any abuse of A. and that caselaw indicated that "there has to be a finding of domestic abuse against each person who's granted an [OFP]."

The district court replied:

There is an allegation of sexual abuse. If that allegation is disproved, debunked, rejected, [appellant] can come back into Court and seek to have the OFP rescinded,¹ but I think in

¹ We note that an OFP petitioner has the burden of proving that domestic abuse did occur; the party against whom the OFP is sought does not have the burden of proving that it has not occurred. *See Oberg v. Bradley*, 868 N.W.2d 62, 64 (Minn. App. 2015) (requiring petitioners to meet preponderance-of-the-evidence standard to obtain an OFP).

light of the fact that that allegation [of sexual abuse of M. in 2011] is out there, I will grant the OFP based solely on that.

Appellant's counsel noted that:

[T]his [hearing] would have been the opportunity to have the 14-year-old girl [M.] testify as [to] what had occurred. If that had happened; and if the Court found that testimony to be credible, that would have perhaps formed a basis for an [OFP], but at this time all you know is that there [have] been allegations made, and, from our perspective, that is just simply not enough to support an [OFP].

The district court issued an OFP prohibiting all contact between appellant and respondent, M., and A. for a year on the basis of appellant's alleged sexual abuse of M. in 2011. Appellant challenges the OFP.

D E C I S I O N

Absent sufficient evidence, this court will reverse a statutory order for protection. *Bjergum v. Bjergum*, 392 N.W.2d 604, 606-07 (Minn. App. 1986). "The decision to grant an OFP under the Minnesota Domestic Abuse Act, Minn. Stat. § 518B.01 . . . is within the district court's discretion. A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009) (quotations omitted).

"[Minn. Stat. § 518B.01, subd. 11(b) states] the requirement that a petitioner meet a preponderance-of-the-evidence standard to modify or vacate an OFP . . . [, which] implies the requirement that a petitioner must meet the same preponderance-of-the-evidence standard to obtain an OFP, and we so hold." *Oberg*, 868 N.W.2d at 64. Appellant argues

that M.'s 2016 allegation of sexual abuse in 2011 was not sufficient to support the issuance of an OFP.

We agree. The only evidence before the district court was that: (1) in August 2016, M. had alleged sexual abuse occurring in 2011; and (2) the allegation was being investigated by social services and law enforcement. This evidence did not make it more likely than not that domestic abuse had occurred. *See City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn. 2004) (defining “preponderance of the evidence” as enough evidence to make it “more probable that the fact exists than that the contrary exists”). There was no evidence offered by the alleged victim, then 14 years old, or by anyone else as to the nature, time, place, duration, or frequency of the alleged abuse, and appellant offered evidence “that the contrary exist[ed]” by denying the allegations. Respondent did not meet the “preponderance of the evidence standard” for an OFP. *See Oberg*, 868 N.W.2d at 64.

Moreover, a district court issuing an OFP “err[s] by failing to make any findings concerning domestic abuse.” *Andrasko v. Andrasko*, 443 N.W.2d 228, 231 (Minn. App. 1989) (reversing OFP from domestic abuse in part because of failure to make domestic abuse findings). Here, the district court made no written findings of domestic abuse. The form for an OFP states: “Acts of domestic abuse have occurred, including the following.” In response, the district court wrote: “[M.] has alleged she was the victim of sexual abuse at the hands of [appellant] when she was in 5th grade. [A.] is now the same age as [M.] was when the alleged abuse occurred.” This is not a written finding that “acts of domestic abuse have occurred.” It is merely a reiteration that there has been an allegation of sexual abuse.

Nor did the district court make any oral findings of domestic abuse; in fact, it said it was “not seeing the physical abuse present except for the allegation of sexual abuse.”² Thus, there was no finding, written or oral, that domestic abuse had occurred. Here, as in *Andrasko*, the district court has “erred by failing to make any findings concerning domestic abuse.”

Finally, we note that the OFP was based solely on hearsay evidence about M.’s allegations of abuse. A district court’s evidentiary rulings are not generally reversed absent an abuse of discretion. *State v. Flores*, 595 N.W.2d 860, 865 (Minn. 1999) (reviewing a hearsay ruling). When appellant’s attorney objected to the admission of hearsay, the district court said, “This is an [OFP] hearing, and the rules are a little bit – I’m going to let [respondent] continue [with the hearsay testimony].”

Although respondent’s attorney did not invoke any of the exceptions to the hearsay rule at the hearing, respondent now invokes Minn. R. Evid. 801(c) (defining “hearsay” as a statement offered by someone other than the declarant to prove the truth of the matter asserted) to argue that her statements concerning M.’s allegations were admissible because they were not offered to prove the truth of the matter asserted, *i.e.*, that appellant abused M. But testimony about M.’s allegations provided the only support for respondent’s argument that, because appellant was alleged to have abused one daughter, he should be

² There was not even an allegation of sexual abuse as to A.; thus, there was absolutely no basis for extending the OFP to her. *See Schmidt ex rel. P.M.S. v. Coons*, 818 N.W.2d 523, 529 (Minn. 2012) (holding that “an OFP may be granted only to a victim of domestic abuse” and reversing this court’s affirmance of OFP granted to child whose mother had been abused).

prohibited from contact with both daughters for a year: that testimony about M.'s allegations was offered to prove that appellant had abused M.

Respondent's argument that the testimony was actually offered to show the effect of M.'s allegations on herself is not persuasive: the fact that the allegations disturbed respondent is not evidence of domestic abuse that would support an OFP. *See* Minn. Stat. § 518B.01, subd. 2 (a) (defining domestic abuse as physical harm, bodily injury, or assault; the infliction of fear of imminent physical harm, bodily injury or assault, or terroristic threats committed against a family or household member, criminal sexual conduct, or interference with an emergency call).

The district court abused its discretion and misapplied the law by granting an OFP based on hearsay and without any finding that domestic abuse had occurred.

Reversed.