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STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0100

In the Matter of: Chelsey Lynn Ness, and On Behalf of the Minor Children, petitioner,
Respondent,

vs.

Hope Michelle Wolfe,
Appellant.

Filed November 2, 2020
Affirmed
Larkin, Judge

Stearns County District Court
File No. 73-FA-19-10421

Chelsey L. Ness, Sauk Rapids, Minnesota (pro se respondent)

Jonathan D. Wolf, Rinke Noonan, St. Cloud, Minnesota (for appellant)

Considered and decided by Jesson, Presiding Judge; Larkin, Judge; and Reilly, Judge.

U N P U B L I S H E D   O P I N I O N

LARKIN, Judge

Appellant challenges the district court's issuance of an order for protection (OFP), arguing that the evidence was insufficient to support the OFP and that the district court

abused its discretion by altering the parenting time of an individual who was not a party to the OFP proceeding. We affirm.

FACTS

On December 11, 2019, respondent Chelsey Lynn Ness (mother) petitioned the district court for an OFP against appellant Hope Michelle Wolfe, on behalf of her three minor children. Wolfe was in a relationship with mother's ex-husband, Ryan Ness (father), and had lived with him since 2018. Mother and father divorced in 2013 and have joint physical custody of their three minor children.

Mother requested relief using a standardized form entitled "Petitioner's Affidavit and Petition for Order for Protection."[1] The combined affidavit and petition was submitted under oath. *See* Minn. Stat. § 358.116 (2018). In a section of that form asking mother to describe the abuse that caused her to request an OFP, mother wrote that her children needed an OFP because Wolfe engaged in "verbal abuse," "demoralizing statements," and "vulgarity," and also "threaten[ed] physical assault." She also wrote, "Attached," thereby incorporating a three-page document attached to the petition, in which mother explained an incident that prompted her to apply for the OFP. Specifically, mother reported that her children were with father and Wolfe on November 27, 2019. That night, mother received a phone call from her nine-year-old daughter, who was crying and told mother that father and Wolfe were fighting. The daughter said she was scared and asked mother to pick her

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[1] "The court shall provide simplified forms and clerical assistance to help with the writing and filing of a petition [for an OFP] under this section." Minn. Stat. § 518B.01, subd. 4(e) (2018).

up. Mother claimed that she could hear the fight in the background over the phone, and that she heard Wolfe say to father, “It’s your fault I’m a crazy a-- b-tch. I will beat you and your stupid a-- kids.” Mother claimed that she heard Wolfe say, “Take your grimy a-- kids and get the f--- out of my house.” Both the daughter and mother’s ten-year-old son were present in the room when the fight occurred. Mother reported that she went to Wolfe’s residence to pick up the kids and that both children “were sobbing” when they got into mother’s car.

Mother mentioned several statements that the children and father purportedly made to her shortly after the incident. The daughter allegedly told mother that Wolfe kicked the daughter’s bag while she was waiting for mother to pick her up. The son allegedly told mother that Wolfe had called him “nasty” and “f---ing gross” because he was “chewing on his fingers.” Father allegedly told mother that Wolfe was “flipping over the tables, threatening my kids.”

The district court granted an ex parte OFP against Wolfe. Wolfe requested a hearing. At the beginning of the hearing, the district court informed the parties that it had reviewed the allegations of mother’s petition and asked mother if there was anything else mother wanted the court to know that was not in the petition. Mother asked the district court if it had her written statement, and the court indicated that it had the statement. Mother did not testify or call any witnesses, but she offered some photographs of text messages that were received as exhibits, without objection.

Wolfe called two witnesses at the hearing: father, and Wolfe’s sister, who was also present during the underlying incident. Wolfe also testified at the hearing. Wolfe

explained that her fight with father began after mother texted father that she wanted to have the children the following morning, which was Thanksgiving, for a "run" that she had enrolled them in. Wolfe was upset because father was supposed to have the children on Thanksgiving morning, and she felt that mother was trying to disrupt her family's Thanksgiving plans.

Wolfe, father, and Wolfe's sister all admitted that Wolfe and father argued with each other, but they insisted that Wolfe did not make any threatening statements about the children. They denied mother's allegation that Wolfe had said, "I will beat you and your stupid a-- kids" and "Take your grimy a-- kids and get the f--- out of my house."

The district court issued an OFP against Wolfe on behalf of two of mother's children, effective for one year. It did not issue an OFP on behalf of the third child because the testimony at the hearing revealed that he was not present during the incident. The district court used a standardized form order intended for OFP proceedings. The district court found that "[a]cts of domestic abuse have occurred," specifically, "verbal threats" toward the two children who were present during the fight. The district court ordered that Wolfe cannot commit acts of domestic abuse against the children, cannot have any contact with the children, cannot go to the children's residence, and must stay 500 feet away from the children's residence. In addition, the district court found that "[t]he prior custody order giving [mother]/Mr. Ness custody remains in effect." The district court crossed out "Respondent" in a section of the form regarding limitations on parenting time, replaced "Respondent" with "Mr. Ness," and ordered that father would have parenting time with the children "as scheduled but not with Ms. Wolfe (Rsp.) present."

Wolfe appeals.[2]

DECISION

I.

Wolfe contends that the district court abused its discretion by issuing the OFP because there was insufficient evidence that she committed domestic abuse. An appellate court reviews a district court's grant of an OFP for an abuse of discretion. *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 926-27 (Minn. App. 2006). "A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." *Id.* at 927.

The Minnesota Domestic Abuse Act enables a person to file a petition for an OFP based on an allegation of domestic abuse. Minn. Stat. § 518B.01, subd. 4 (2018). "Domestic abuse" includes, as relevant here, "the infliction of fear of imminent physical harm, bodily injury, or assault" against a family or household member. *Id.*, subd. 2(a)(2) (2018). A petitioner seeking an OFP must demonstrate by a preponderance of the evidence that domestic abuse occurred. *Oberg v. Bradley*, 868 N.W.2d 62, 64 (Minn. App. 2015). Appellate courts will reverse an OFP when the evidence is insufficient to support it. *Bjergum v. Bjergum*, 392 N.W.2d 604, 606-07 (Minn. App. 1986).

Wolfe argues that there is no evidence of domestic abuse in the record. She points out that mother did not testify at the hearing and that the witnesses who did testify stated

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[2] Mother did not file a brief. This court ordered the appeal to proceed under Minn. R. Civ. App. P. 142.03 (providing that if a respondent fails to file a brief, the case shall be determined on the merits).

that Wolfe did not make the alleged threats. Wolfe's argument is based on her contention that mother's sworn affidavit and petition for an OFP, which incorporated mother's written statement describing abuse, was not part of the evidentiary record on which the district court could rely when deciding whether to grant an OFP. We therefore begin our analysis by considering whether the district court erred by treating mother's affidavit and petition as evidence when ruling on mother's request for an OFP.

A petition for an OFP "shall allege the existence of domestic abuse, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought." Minn. Stat. § 518B.01, subd. 4(b). A district court may grant an ex parte OFP when the petition alleges an immediate and present danger of domestic abuse. *Id.*, subd. 7(a) (2018). When the district court grants an ex parte OFP and the respondent requests a hearing, the district court must hold a hearing. *Id.*, subd. 5(d) (2018).

Wolfe does not cite authority indicating that a district court errs by treating an affidavit and petition for an OFP as evidence at a hearing on the petition. In fact, this court has suggested, without deciding, that a supporting affidavit and petition may be part of the evidentiary record in an OFP proceeding. For example, in *Olson ex rel. A.C.O. v. Olson*, this court held that the district court abused its discretion by considering inadmissible hearsay statements in an affidavit and petition for an OFP as the exclusive basis for finding domestic abuse and granting an OFP. 892 N.W.2d 837, 842 (Minn. App. 2017). In reaching that decision, this court did not state that the affidavit and petition could not be treated as evidence; instead, it assumed that those documents were evidence and applied the hearsay rules to them. *See id.*

Older opinions by this court also have assumed, without deciding, that an affidavit and petition for an OFP can be treated as evidence. In *Andrasko v. Andrasko*, this court reversed the grant of an OFP on the basis that neither the evidence presented at the hearing, nor the allegations in the petition, were sufficient to satisfy the definition of domestic abuse. 443 N.W.2d 228, 230 (Minn. App. 1989). And in *Hall v. Hall*, this court determined that the appellant was not denied an evidentiary hearing because a hearing was held, both parties testified, and the petitioner's "petition and affidavit were also part of the file." 408 N.W.2d 626, 628 (Minn. App. 1987), *review denied* (Minn. Aug. 19, 1987). The court then explained that "[t]he specific acts of domestic abuse were outlined in the affidavit and petition," and it considered those allegations when determining whether there was sufficient evidence of domestic abuse. *Id.* at 628-29.

In sum, although the issue has never been directly raised and determined by this court, our decisions suggest that a district court may treat an affidavit and petition for an OFP as evidence at a hearing on the OFP. We are not aware of any precedent indicating that a district court errs by doing so.

Moreover, Wolfe's only objection to the district court's reliance on mother's affidavit and petition for an OFP was based on the rule against hearsay; counsel did not object that the document was not part of the evidentiary record. Once again, at the beginning of the hearing, the district court stated that it had reviewed the allegations of mother's petition and asked mother if there was anything else she wanted the court to know. Mother asked the district court if it had her written statement, and the court indicated that it had the statement. Near the end of the hearing, Wolfe's counsel argued that no witness

had testified that Wolfe threatened to beat the children. The district court responded, "Well, Ms. Ness said that in a sworn Affidavit attached to the Petition."[3] That comment reasonably put Wolfe on notice that the district court viewed mother's affidavit and petition for an OFP as evidence. Although Wolfe's counsel responded that the children's statements in that document were hearsay, counsel did not object that the document was not part of the evidentiary record. And even though Wolfe now complains that mother was not put under oath and subjected to cross-examination, Wolfe never asked the district court to do so.

This court has held that a party waived the right to cross-examination during an OFP hearing because she never requested the opportunity to do so. *Beardsley v. Garcia*, 731 N.W.2d 843, 850 (Minn. App. 2007), *aff'd*, 753 N.W.2d 735 (Minn. 2008). "Although a [party] in an OFP proceeding is entitled to a hearing, the failure to request a particular procedure, such as cross-examination, constitutes waiver." *Id.* In addition, an appellate court generally will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Given Wolfe's failure to object to the district court's stated reliance on mother's affidavit and petition for an OFP as evidence, and Wolfe's failure to cite authority indicating the district court abused its discretion in doing so, we reject Wolfe's contention

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[3] We understand the district court's reference to be to the written statement that mother attached to her affidavit and petition. Although that statement was not formally styled as an affidavit, it was incorporated into mother's sworn affidavit and petition for an OFP.

that the district court erred by treating mother's affidavit and petition as evidence when ruling on mother's request for an OFP.

II.

Wolfe argues that, even if the district court did not err by treating the allegations in mother's affidavit and petition for an OFP as evidence, the record evidence is still insufficient to show that she committed domestic abuse justifying an OFP. We address each of Wolfe's challenges to the record in turn.

Children's Out-of-Court Statements to Mother

Mother's affidavit and petition for an OFP contained mother's statements regarding what the children allegedly told her after she picked them up at Wolfe's home on the night of the incident. Those statements included the daughter's claim that Wolfe kicked the daughter's bag while she was waiting to be picked up and the son's claim that Wolfe called him "nasty" and "gross" because he was "chewing on his fingers." Wolfe objected to those statements at the hearing, asserting that they were hearsay. On appeal, Wolfe reiterates that assertion.

Hearsay is "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Minn. R. Evid. 801(c). The Minnesota Rules of Evidence apply to domestic abuse hearings, and a district court abuses its discretion when it uses inadmissible hearsay statements as the exclusive basis for finding domestic abuse. *Olson*, 892 N.W.2d at 841-42. However, a party must demonstrate prejudicial error to receive a new hearing based on an erroneous evidentiary ruling. *See id.* at 841.

Mother’s affidavit and petition for an OFP did not claim that the children told her that Wolfe threatened them. Moreover, at the hearing, the district court referred to mother’s claim that she herself heard Wolfe threaten to beat the children, indicating that the district court was influenced by that statement. Under the circumstances, we need not decide whether the district court erroneously considered the children’s out-of-court statements because any erroneous reliance on those statements was harmless and does not provide a basis for relief. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

Wolfe’s Out-of-Court Statements to Mother

Mother’s affidavit and petition for an OFP stated that mother heard Wolfe’s threats over the phone, which included the statements, “I will beat you and your stupid a-- kids,” and, “Take your grimy a-- kids and get the f--- out of my house.” Wolfe asserts, with little supporting argument, that those statements were inadmissible hearsay. But in district court, Wolfe’s hearsay objection was limited to the children’s out-of-court statements. Again, an appellate court generally will not consider matters not argued to and considered by the district court. *Thiele*, 425 N.W.2d at 582. Moreover, “[a]n assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.” *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971).

A statement is not hearsay if it is offered only to show that the statement was made, and not to prove the truth of the matter asserted. *State v. Boykin*, 172 N.W.2d 754, 757 (Minn. 1969). In addition, a statement is not hearsay if it was made by a party opponent

and it is offered against that party opponent. Minn. R. Evid. 801(d)(2). Wolfe does not attempt to refute the application of those principles in this case. We discern no obvious prejudicial violation of the rule against hearsay.

The Testimony of Wolfe's Witnesses

At the hearing, Wolfe, father, and Wolfe's sister testified that Wolfe did not make any of the alleged threats. That testimony contradicted mother's assertion that she heard Wolfe threaten to beat the children. It is the duty of the district court, as fact-finder, to reconcile conflicting evidence and decide issues of witness credibility. *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004). In an appeal challenging the sufficiency of the evidence to support a decision, we defer to the fact-finder's assessments of witness credibility and its weighing of the evidence. *Id.*

The district court apparently found mother more credible than Wolfe, father, and Wolfe's sister. Wolfe argues that the district court erred by finding that domestic abuse occurred because all of the witnesses testified that Wolfe did not make the alleged threats. That argument is unavailing because we defer to the district court's credibility determinations and its weighing of the evidence. The record is sufficient to establish that Wolfe made the threats that mother reported.

Wolfe's Threats and Fear of Imminent Harm

Wolfe argues that her alleged threats did not constitute domestic abuse. Domestic abuse includes "the infliction of fear of imminent physical harm, bodily injury, or assault." Minn. Stat. § 518B.01, subd. 2(a)(2). Wolfe's threat that she would "beat you and your stupid a-- kids" most closely satisfies that definition of domestic abuse. Wolfe maintains,

however, that such a comment does not constitute domestic abuse because there is no evidence that she intended to place the children in fear of imminent physical harm or that the children feared imminent physical harm.

An OFP is justified when "a person manifests a present intention to inflict fear of imminent physical harm, bodily injury, or assault" on another person. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009). Such a present intent can be inferred from the totality of the circumstances, and an "overt physical act is not necessary to support the issuance of an OFP." *Id.* "A verbal threat, depending on the words and the circumstances, can also inflict fear of imminent physical harm, bodily injury or assault." *Hall*, 408 N.W.2d at 629 (quotation omitted). Additionally, a fact-finder may infer that a person "intends the natural and probable consequences" of her actions. *State v. Cooper*, 561 N.W.2d 175, 179 (Minn. 1997).

In arguing that the evidence is insufficient to show that she intended to place the children in fear of imminent physical harm, Wolfe points out that her statements were directed at father, and not the children. That may be true, but those statements included her threat to beat the children, and it is undisputed that Wolfe's statements were made during a heated argument with father, which the children witnessed. Given the circumstances, the evidence reasonably supports an inference that Wolfe intended to cause the children to fear imminent physical harm. Such fear is the natural and probable consequence of Wolfe's threat.

Wolfe also argues that the evidence is insufficient to show that the children feared imminent physical harm. *See Aljubailah ex rel. A.M.J. v. James*, 903 N.W.2d 638, 644

(Minn. App. 2017) (stating that any "threats of a general nature" must result in either physical harm or fear of imminent harm in order to constitute domestic abuse). Wolfe posits that the children may have been afraid and upset only because they had witnessed her heated argument with father. Accepting that view of the evidence would require us to reweigh the evidence, which we will not do. *See Gada*, 684 N.W.2d at 514. Mother's affidavit and petition for an OFP stated that both children were "sobbing" when she picked them up after the fight. That evidence, combined with evidence regarding the threats that Wolfe made during the fight, is sufficient to establish that the children feared imminent physical harm from Wolfe.

In sum, the record contains sufficient evidence that Wolfe committed domestic abuse, and the district court did not abuse its discretion by issuing an OFP directed at Wolfe.

III.

Wolfe argues that the district court erred by altering father's parenting time under the OFP. Once again, the district court crossed out "Respondent" on a standardized OFP form order, replaced it with "Mr. Ness," and wrote that father would have parenting time "as scheduled but not with Ms. Wolfe (Rsp.) present." Wolfe argues that the district court had no authority to alter father's parenting time because father was not a party to this OFP proceeding.[4] *See Sammons v. Sammons*, 642 N.W.2d 450, 457 (Minn. App. 2002) ("The district court may not exercise jurisdiction over a nonparty.").

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[4] We question whether Wolfe has standing to make that argument. *See State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 493 (Minn. 1996) ("Standing is the requirement

"Upon notice and hearing," the district court may order relief as provided in the OFP statute. *See* Minn. Stat. § 518B.01, subd. 6(a) (2018) (listing 15 forms of relief). One form of relief that the district court may provide is to "establish temporary parenting time with regard to minor children *of the parties* on a basis which gives primary consideration to the safety of the victim and the children." *Id.*, subd. 6(a)(4) (emphasis added). The parties to this OFP proceeding are mother and Wolfe. Father is not a party. We acknowledge that because the OFP prohibits Wolfe from having any contact with the children, the OFP has the effect of preventing father from exercising parenting time with Wolfe present. Nonetheless, it is not clear to us that the district court was authorized to separately limit father's parenting time in this OFP proceeding between mother and Wolfe, without first providing father notice and a hearing.

This court has held that "[a] parent meeting the criteria of Minn. R. Civ. P. 24.01 has a right to intervene in non-ex parte proceedings commenced under the Domestic Abuse Act, Minn. Stat. § 518B.01 . . . on behalf of the parent's child." *Halverson ex rel. Halverson v. Taflin*, 617 N.W.2d 448, 449 (Minn. App. 2000). In *Halverson*, the appellant's ex-husband sought an OFP on behalf of their child, alleging abuse by the appellant's boyfriend. *Id.* The appellant, the child's joint legal and sole physical custodian, was not made a party to the domestic-abuse proceedings. *Id.* The district court granted an OFP that awarded the ex-husband temporary custody for one year. *Id.* The district court

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that a party has a sufficient stake in a justiciable controversy to seek relief from a court."). But we ultimately decline to review the alteration of father's parenting time on other grounds.

later denied the appellant's motion to intervene as untimely. *Id.* at 449-50. This court concluded that the district court erred by denying the appellant's motion to intervene, reasoning that "absent an immediate and present danger of abuse necessitating an ex parte order, due process compelled [the] appellant's inclusion in the action to protect her fundamental parental rights." *Id.* at 452.

The record here does not indicate that father attempted to intervene or otherwise challenge the district court's order altering his parenting time. Because father is not a party to this appeal, we do not review the portion of the OFP that alters his parenting time.

Affirmed.