STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1465

In the Matter of:
Heidi Kay Wiplinger obo minor children, petitioner,
Respondent,

vs.

Nicholas John Wiplinger,
Appellant.

Filed May 16, 2022
Affirmed
Frisch, Judge

Olmsted County District Court
File No. 55-FA-21-5580

Heidi Kay Wiplinger, Rochester, Minnesota (pro se respondent)

Lisa K. Stevens, Thomas Braun, Restovich Braun & Associates, Rochester, Minnesota (for appellant)

Considered and decided by Worke, Presiding Judge; Reilly, Judge; and Frisch, Judge.

NONPRECEDENTIAL OPINION

FRISCH, Judge

On appeal from the district court's grant of an order for protection (OFP), appellant argues that the district court (1) abused its discretion by admitting hearsay evidence, (2) issued the OFP without making a specific finding of intent to commit domestic abuse,

(3) displayed bias against appellant, and (4) imposed impermissible conditions in the OFP. We affirm.

FACTS

Appellant Nicholas John Wiplinger (father) and respondent Heidi Kay Wiplinger (mother) were previously married and share joint custody of triplets who are approximately seven years old.

On September 19, 2021, the children were staying with father. The next day, one of the children, P.W., indicated to mother that he was sad and that he had been grabbed by the throat the previous night. Mother contacted law enforcement, and on September 22, an investigator with the Rochester Police Department interviewed all three children. On September 27, mother petitioned for an OFP on behalf of the children to prohibit father from committing acts of domestic abuse against them, along with other relief. On September 29, the district court issued an ex parte OFP against father. A hearing was scheduled for October 6.

On October 5, father's counsel filed a notice of representation. Later that day, mother submitted her witness and exhibit lists, indicating her intent to call the investigator to testify about what the children told her and to admit the police reports related to the incident. Father filed a motion to exclude the police reports as containing inadmissible hearsay, including hearsay statements attributable to P.W.

At the hearing the next day, the district court granted father's motion and excluded the police reports. The district court, however, notified the parties that it would allow the video recording of the children's interview with the investigator to be admitted pursuant to

Minn. Stat. § 260C.165 (2020). Father objected to the admission of the recording because he did not receive adequate notice of mother's intent to introduce the recording into evidence. After considering father's objection, the district court granted a one-day continuance for the parties to review the recording, and, at the continued hearing the following day, it admitted the recording into evidence over father's objection.

The recording shows that P.W. told the investigator that father "grabbed [his] throat" and picked him up. P.W. described the grip as feeling like "choking" and stated that he could not breathe. The investigator testified, consistent with the recording, that P.W. "showed [her] that his dad grabbed him around his upper throat . . . under his chin and picked him up off his feet." The investigator found P.W. to be reliable and honest, and testified that she did not believe he had been coached.

The investigator also testified that she interviewed father regarding the incident. She testified that father admitted that he "grabbed [P.W.] around his face" and that "he did squeeze [P.W.] and it might have been a little harder than he meant to." The investigator interpreted father's statements as corroborating P.W.'s description of events and concluded that "maybe [father] was minimizing what really happened."

Father also testified regarding the events from that night. He stated that the children were having trouble settling down before bedtime and were acting "wild." This behavior continued after he put the children to bed in the same room, despite multiple warnings from father. After the third warning, father removed P.W. from the room. Father placed P.W. in another room and told him to stay there and to go to sleep. P.W. did not follow father's instructions and continued to leave the room. Father told P.W. that P.W. was making poor

choices and needed to listen to father. After the third time P.W. left the room, father testified that he "grab[bed] [P.W.] by the jawline and told P.W. that he needed to listen." Father then picked up P.W. and placed him back in bed. On cross-examination, father admitted that he told law enforcement that he probably grabbed P.W. too tightly, and that he was frustrated with P.W.

After the hearing, the district court found that domestic abuse had occurred because father admitted that he squeezed P.W.'s face too tightly which caused physical harm. The district court also found that P.W. was fearful of bodily harm based on father's admission and P.W.'s interview with the investigator. The district court granted mother's petition for an OFP with respect to P.W., and the district court required father, in relevant part, to cooperate with law enforcement and social services during any investigations related to the incident and to exercise parenting time with P.W. only when supervised by the children's nanny. Father appeals.

DECISION

I. The district court did not abuse its discretion by admitting the video recording of P.W. into evidence.

Father challenges the district court's decision to admit the video recording of P.W. speaking to the investigator into evidence because mother failed to provide father with sufficient notice of her intent to offer the recording. An evidentiary ruling in an OFP proceeding is within the district court's discretion and should not be disturbed "unless [the ruling] is based on an erroneous view of the law or is an abuse of that discretion." *Aljubailah v. James*, 903 N.W.2d 638, 644 (Minn. App. 2017). A district court abuses its

discretion if it misapplies the law, makes findings that are unsupported by the record, or resolves the discretionary question in a manner that is contrary to logic and the facts on record. *Bender v. Bernhard*, 971 N.W.2d. 257, 262 (Minn. 2022).

The district court admitted the recording under Minn. Stat. § 260C.165, which provides a statutory hearsay exception for out-of-court statements made by a child under ten years of age if the statements describe an act of physical abuse of the child and "the court finds that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability," and the other parties are properly notified. However, this statutory exception does not apply to OFP proceedings;[1] it is only applicable to cases involving a "child in need of protection or services, neglected and in foster care, or domestic child abuse proceeding or any proceeding for termination of parental rights." Minn. Stat. § 260C.165.

On appeal, father only argues that the district court abused its discretion because he did not receive adequate notice of mother's intent to use the recording as required under Minn. Stat. § 260C.165. But because the statute is inapplicable to these proceedings, the district court was not required to find that father received sufficient notice under that statute before admitting the recording into evidence. We therefore do not conclude that the district court abused its discretion by admitting the recording, regardless of the amount of notice provided to father.

[1] A similar statute applies to OFP proceedings. *See* Minn. Stat. § 595.02, subd. 3 (2020).

Even if mother were required to satisfy a notice requirement of her intent to introduce the recording, the record indicates that father received adequate notice. A party attempting to admit evidence under Minn. Stat. § 260C.165 must notify "other parties of an intent to offer the statement and the particulars of the statement sufficiently in advance of the proceeding at which the proponent intends to offer the statement into evidence, to provide the parties with a fair opportunity to meet the statement." Minn. Stat. § 260C.165(4). We are aware of no caselaw, and the parties cite to none, that explicitly defines what constitutes adequate "notice" under the statute.

Father cites to *Andrasko v. Andrasko* to support his argument that he was not provided with proper notice. 443 N.W.2d 228 (Minn. App. 1989). In *Andrasko*, the district court denied a request for a continuance when a party only received one day's notice of the OFP hearing. *Id.* at 229. We held that the district court abused its discretion by denying the continuance because one day was not enough time to obtain counsel and prepare for the hearing and because the district court's failure to grant a continuance ran afoul of the notice requirements of the Minnesota Domestic Abuse Act. *Id.* at 230; *see* Minn. Stat. § 518B.01, subd. 5 (2020). Father also cites to a criminal-law case where we held that seven months' notice was sufficient to satisfy the notice requirement of the residual hearsay exception. *State v. Moore*, 433 N.W.2d 895, 899 (Minn. App. 1988); *see* Minn. R. Evid. 807. In that case, we held that the only deficiency in notice related to the "form" of the notice, not the substance, and that the evidence was not improperly admitted. *Moore*, 433 N.W.2d at 899.

This case is more analogous to *Moore* than it is to *Andrasko*. Like the circumstances in *Moore*, the deficiency in notice is one of form and not of substance; father received notice that mother intended to introduce hearsay statements attributable to the children via the police reports, and the same hearsay statements were instead introduced via the video recording. And unlike *Andrasko*, the district court here granted a continuance for father to review the recording and formulate a strategy regarding its contents. Considering the summary nature of OFP proceedings, we conclude that this continuance afforded father sufficient notice for him to adequately "meet the statement[s]" contained in the recording. Minn. Stat. § 260C.165(4); *see* Minn. Stat. § 518B.01, subd. 5(a) (providing 14-day timeline for hearing following filing of OFP petition). We also observe that father does not explain why the continuance was inadequate or how a longer continuance would have benefited him. We therefore conclude that father received adequate notice of mother's intent to use the recording of P.W., and the district court did not abuse its discretion by admitting the recording into evidence.

Finally, we see no prejudice to father in the district court's decision to admit the recording because the district court's findings are substantiated by other evidence in the record not challenged on appeal. Even if the district court abused its discretion by admitting the recording, a "complaining party must demonstrate prejudicial error to be entitled to a new trial or hearing based on an erroneous evidentiary ruling." *Olson ex rel. A.C.O. v. Olson*, 892 N.W.2d 837, 841 (Minn. App. 2017) (quotation omitted). "An evidentiary error is prejudicial if it might reasonably have influenced the fact-finder and changed the result of the proceeding." *Id.* at 842. "An evidentiary error is not prejudicial

if the record contains other evidence that is sufficient to support the findings." *In re Welfare of Child of J.K.T.*, 814 N.W.2d 76, 93 (Minn. App. 2012).

Even in the absence of the recording, the record contains sufficient evidence to substantiate the district court's finding of domestic abuse. To support the issuance of an OFP, a petitioner must prove domestic abuse by a preponderance of the evidence. *Oberg ex rel. Minor Child v. Bradley*, 868 N.W.2d 62, 64 (Minn. App. 2015). Domestic abuse includes "physical harm, bodily injury, or assault," when "committed against a family or household member by a family or household member." Minn. Stat. § 518B.01, subd. 2(a)(1) (2020). Father admitted to the investigator that he "squeez[ed] a little too hard on the face" of P.W. The investigator testified that P.W. told her that father grabbed P.W. by the throat, picked him up off his feet to take him into another room, and that P.W. could not breathe while this was occurring. The investigator also testified that she felt father might be minimizing what had happened considering the similarities between father and P.W.'s stories and the fact that father admitted to squeezing P.W.'s face too hard. Father does not challenge any of this testimony on appeal, which provides support independent of the challenged recording for the district court's finding that physical harm occurred. *See Aljubailah*, 903 N.W.2d at 643 (stating that the district court only abuses its discretion when its conclusions are not supported by the record). Because other evidence in the record supports the district court's finding that P.W. suffered physical harm, we conclude that father was not prejudiced by the admission of the video recording.

II. The district court did not abuse its discretion by granting mother's OFP petition against father.

Father next argues that the district court abused its discretion by granting mother's petition for an OFP because it failed to specifically find that father intended to inflict fear of bodily harm on P.W. "We review the decision to grant an OFP for an abuse of discretion." *Thompson v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018). On appeal from a district court's decision regarding whether to grant an OFP, "[a]n appellate court will 'neither reconcile conflicting evidence nor decide issues of witness credibility.'" *Aljubailah*, 903 N.W.2d at 643 (quoting *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004)). We review the district court's factual findings for clear error. *Ekman v. Miller*, 812 N.W.2d 892, 895 (Minn. App. 2012).

The Minnesota Domestic Abuse Act provides that a district court may issue an OFP in cases involving domestic abuse. Minn. Stat. § 518B.01, subd. 4 (2020). To show domestic abuse based on the infliction of fear of imminent physical harm, the petitioner must establish that the party accused of perpetrating the abuse intended to cause such fear. *Aljubailah*, 903 N.W.2d at 643. An OFP petitioner has the burden of proving that domestic abuse did occur. *Oberg*, 868 N.W.2d at 64. "Once 'domestic abuse' has been established, the district court may examine all of the relevant circumstances proven to determine whether to grant or deny the petition for an OFP." *Thompson*, 906 N.W.2d at 500.

Here, the district court made a finding of abuse based in part on father's admission to "squeez[ing] [P.W.] and it might have been a little harder than he meant to," and it also made a finding that, combined with father's admissions, P.W.'s statements to the

investigator established that P.W. was fearful of bodily harm. Thus, the district court provided two alternative grounds for finding that domestic abuse occurred: one based on the physical harm P.W. suffered and one based on the fear P.W. experienced as a result of this act. *See* Minn. Stat. § 518B.01, subd. 2(a)(1)-(2) (2020).

On appeal, father only challenges the district court's conclusion that father intended to inflict fear of imminent harm. We agree with father that the district court abused its discretion when it found that father had committed domestic abuse for this reason because the record contains no evidence that father intended to cause fear and no evidence that P.W. actually experienced fear of imminent harm. P.W. did not express to either the investigator or mother that he was afraid of father and instead described his feelings about the incident as being "sad."

However, the district court also found a separate basis for finding domestic abuse: the physical harm suffered by P.W. Father's counsel seemingly conceded at oral argument to this court that the district court was not required to find that father intended to cause physical harm to P.W. before finding that domestic abuse occurred. Nor does father challenge the district court's basis for finding that physical harm occurred.

Because the district court established that domestic abuse based on physical harm did occur, which father does not challenge and which we have already affirmed based on unchallenged record evidence, the district court acted within its discretion to issue an OFP against father.

III. The district court was not biased against father.

Father argues that the district court displayed bias against him because it prohibited father from cross-examining his son and suggested to mother that she could admit the video as evidence. "There is the presumption that a judge has discharged his or her judicial duties properly." *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006). We review the impartiality of a judge by asking from the perspective of an objective, unbiased layperson "whether a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge's impartiality." *State v. Reek*, 942 N.W.2d 148, 156 (Minn. 2020) (quotation omitted).

We see no evidence in the record indicating that the district court was biased against father. The district court reviewed the exhibits that mother intended to offer and granted father's request to exclude some of those exhibits. The district court then stated that it would "allow" the recording to be entered into evidence. Mother later formally requested the recording be admitted, and the district court considered father's objection before overruling it. Although father alleges that the district court directed mother to obtain and offer the recording into evidence, the district court merely stated that it would "allow" the evidence to be entered.

Father also argues that the district court displayed prejudice by bifurcating the hearing to allow the recording to be produced. But the district court continued the hearing primarily to allow father additional time to review the recording. We cannot conclude that an action by the district court to allow father to prepare to meet the evidence of the recording demonstrated bias *against* father.

The district court also did not display bias by refusing to allow father to cross-examine P.W. Father attempted to serve a subpoena on P.W. by delivering the subpoena to mother's attorney. The district court found that service was improper under Minn. R. Civ. P. 45.02. We note that father does not clearly argue on appeal that the district court committed a legal error or an abuse of discretion in its ruling; father only suggests that the district court denied him a fair hearing by not allowing him to cross-examine his minor son. But father does not specify any error by the district court or point to any authority compelling a district court to reach a different result, so we decline to consider his argument. *Horodenski v. Lyndale Green Townhome Ass'n*, 804 N.W.2d 366, 372 (Minn. App. 2011) ("Error is not presumed on appeal, and the burden of showing error rests on the party asserting it."); *see State, Dep't of Lab. & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address an issue not adequately briefed); *Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (deeming arguments forfeited on appeal that are unsupported by facts in the record and contain no citation to relevant legal authority).

IV. The OFP issued against father does not contain impermissible requirements.

Lastly, father objects to those aspects of the OFP requiring that his parenting time with P.W. be supervised and that he cooperate with the pending criminal investigation. The scope of relief that can be granted under the Minnesota Domestic Abuse Act is discretionary with the district court. *McIntosh v. McIntosh*, 740 N.W.2d 1, 9 (Minn. App. 2007); *see* Minn. Stat. § 518B.01, subd. 6 (2020) (stating district court *may* provide relief via the issuance of an OFP); *In re Welfare of Child. of J.D.T.*, 946 N.W.2d 321, 327-28

(Minn. 2020) (explaining that the use of the term "may" in a statute shows legislative intent to give district courts "great discretion"); *FitzGerald v. FitzGerald*, 406 N.W.2d 52, 54 (Minn. App. 1987) (explaining that courts "having jurisdiction over dissolution actions also have jurisdiction to hear an application for relief under the Domestic Abuse act" and that the Act affords "courts broad discretion to fashion relief").

"The district court has broad discretion in deciding parenting-time issues and will not be reversed absent an abuse of that discretion." *Shearer v. Shearer*, 891 N.W.2d 72, 75 (Minn. App. 2017) (quotation omitted). We see no abuse of discretion by the district court in imposing supervised parenting time until the matter could be resolved in the family file, which the district court concluded was the more appropriate forum to resolve these issues. Although father argues that the district court relied on evidence outside of the record in imposing this condition, our review shows that the district court did not base its decisions on matters outside of the record. Because father has failed to identify any error and because error is not presumed, we conclude that the district court did not abuse its discretion when it imposed a parenting-time condition on father. *See Horodenski*, 804 N.W.2d at 372.

Father also argues that the requirement that he "cooperate with Olmsted County Child Protective Services" violates his Fifth Amendment right against self-incrimination. But father cites to no authority providing that such a condition violates his Fifth Amendment rights or that he has actually been placed in a position where he would be

compelled to incriminate himself. We therefore see no abuse of discretion by the district court in setting the conditions of the OFP.

Affirmed.