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**STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1412**

In the Matter of:

Kathryn M. Larson, on behalf of Minor Child, petitioner,
Respondent,

vs.

Keith Norman Marohn,
Appellant.

**Filed April 29, 2019
Affirmed in part, reversed in part, and remanded
Smith, Tracy M., Judge**

Isanti County District Court
File No. 30-FA-18-13

Leigh J. Klaenhammer, Hennek Klaenhammer Law, PLLC, Roseville, Minnesota (for
respondent)

Keith Norman Marohn, North Branch, Minnesota (pro se appellant)

Considered and decided by Larkin, Presiding Judge; Smith, Tracy M., Judge; and
Randall, Judge.*

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to
Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

SMITH, TRACY M., Judge

Appellant Keith Norman Marohn challenges an order for protection (OFP) issued against him on a petition filed by respondent Kathryn M. Larson on behalf of the parties' minor child, R.N.M. Because the district court did not abuse its discretion by granting Larson's petition with respect to R.N.M., we affirm in part. But, because the order is ambiguous as to whether it relates not just to R.N.M. but also to Larson, we reverse and remand for the district court to modify the OFP to clarify that it relates only to R.N.M.

FACTS

In January 2018, Larson filed a petition for an OFP against her ex-husband, Marohn, on behalf of the parties' then-six-year-old child, R.N.M. Larson and Marohn shared custody of R.N.M., along with the parties' other minor children. In her petition, Larson alleged that, on December 31, 2017, during Marohn's parenting time, Marohn dropped R.N.M. on a kitchen table. The district court issued an ex parte OFP, and an evidentiary hearing was held.

Larson testified that R.N.M. spent the New Year's weekend with Marohn and returned to her home on January 1, 2018. When she was driving R.N.M. to school on January 2, R.N.M. complained about a headache and told her, as described by Larson, that Marohn "came up from behind, picked [R.N.M.] up, [and] dropped him on the kitchen table where he fell onto the chairs on his way down to the floor." Larson noticed slight bruising on R.N.M.'s cheek and took pictures of it. On January 3, Larson took R.N.M. to Julie Carlson, R.N.M.'s therapist. Carlson also testified at the hearing. She said that, during

the appointment, R.N.M. shared that Marohn “had picked him up by the tummy and had dropped him on the table and then he subsequently hit a chair or two chairs on his way down . . . receiving a bruise on his left cheek.” R.N.M. did not testify.

Marohn testified and denied the allegations. He also called three witnesses—his parents and the parties’ adult daughter—who had been home with Marohn and R.N.M. at different times during the New Year’s weekend. They testified that R.N.M. seemed perfectly normal during the weekend, that R.N.M. is happy when he is with Marohn, and that Marohn is not violent.

The district court granted Larson’s petition for an OFP, finding that Marohn “push[ed]” and “dropp[ed]” R.N.M., “causing bruising.” The check-the-box form order includes a paragraph relating to “Protected Person(s)” and lists both the child and Larson (identified as the petitioner) but does not have a check mark in either of the boxes next to the names. Marohn appeals.

D E C I S I O N

“[Appellate courts] review the decision to grant an OFP for an abuse of discretion. A district court abuses its discretion when its decision is based on an erroneous view of the law or is against logic and the facts in the record.” *Thompson v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018) (quotation and citation omitted).

“The Minnesota Domestic Abuse Act provides that a person may seek an OFP by filing a petition with the district court alleging the existence of domestic abuse.” *Olson ex rel. A.C.O. v. Olson*, 892 N.W.2d 837, 840 (Minn. App. 2017). If the district court issues an ex parte OFP and the responding party contests it by requesting a hearing, “the petitioner

has the burden to prove by a preponderance of the evidence that domestic abuse, as defined in the Minnesota Domestic Abuse Act, has occurred in order for a district court to issue an OFP.” *Id.* “Domestic abuse” is defined, in the relevant portion of the statute, as “physical harm, bodily injury, or assault” “committed against a family or household member by a family or household member.” Minn. Stat. § 518B.01, subd. 2(a) (2018).

The district court found that Marohn committed domestic abuse by pushing and dropping R.N.M. Marohn argues that the district court abused its discretion in several ways by issuing the OFP. We address each of Marohn’s arguments in turn.

I. Protected person

Marohn argues that the district court abused its discretion by failing to clarify who the “protected person” is in the OFP. The order restrains Marohn from “hav[ing] any contact with the Protected Person(s).” The paragraph identifying the “Protected Person(s)” lists “Petitioner Kathryn M. Larson” and R.N.M.; it also includes a box next to each name, but neither box is checked.

The Domestic Abuse Act “authorizes a district court to grant an OFP only to a victim of domestic abuse,” and a district court errs if it issues an OFP with respect to a person without finding that the person was a victim of domestic abuse. *Schmidt ex rel. P.M.S. v. Coons*, 818 N.W.2d 523, 524-25 (Minn. 2012). Larson petitioned for an OFP on behalf of R.N.M., and the district court found that Marohn had committed domestic abuse against R.N.M. The district court made no finding of abuse against Larson. The only protected person in the OFP must therefore be R.N.M. Clarity regarding the identity of the protected person is important because law enforcement could be called upon to enforce the order in

the future. Because the OFP does not unambiguously identify only R.N.M. as the protected person, we reverse and remand to the district court to correct this aspect of the order.

II. Nondisclosure of exculpatory evidence

Marohn argues that exculpatory evidence—specifically, an intake summary from child protective services—was withheld from him in violation of his due-process rights.

We first note that Marohn mischaracterizes the intake summary. He describes it as “a forensic interview” of R.N.M. In fact, the intake summary is not an interview of R.N.M.; it is the summary of a report made to child protective services via a phone call. The reporter, whose identity is not clear from the summary, reiterated Larson’s and R.N.M.’s description of the dropping. The child-protection worker who wrote the intake summary “screened out” the report, concluding that there was “insufficient evidence that the incident was nonaccidental and that the bruise was the result of the fall.”

Marohn relies on *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194 (1963).¹ In *Brady*, the United States Supreme Court held that the Due Process Clause of the Fourteenth Amendment obligates the government to disclose potentially exculpatory information in criminal proceedings. 373 U.S. at 86-87, 83 S. Ct. at 1196. Even if *Brady* applied to this civil proceeding, Marohn has not shown that his due-process rights were violated because

¹ Marohn also refers to rule 26 of the Minnesota Rules of Civil Procedure. But, rule 26.01, defining certain required disclosures, does not apply to Domestic Abuse proceedings. Minn. R. Civ. P. 26.01(a)(2)(H); Minn. R. Gen. Prac. 301.01(b)(3). And even if rule 26.01 did apply, because Larson did not use the intake summary to support her claim, Marohn’s argument that she violated an obligation to automatically disclose the document is unpersuasive. See Minn. R. Civ. P. 26.01(a) (providing for initial disclosure of documents that a party “may use to support its claims”).

of nondisclosure of the intake summary. “Three elements must be met to succeed on the claim of a *Brady* violation: (1) the evidence must be favorable to the defendant as either exculpatory or impeaching; (2) the evidence must have been suppressed by the prosecution, intentionally or otherwise; and (3) the evidence must be material.” *Campbell v. State*, 916 N.W.2d 502, 510 (Minn. 2018). “Evidence is material under *Brady* if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” *Walen v. State*, 777 N.W.2d 213, 216 (Minn. 2010) (quotation omitted). The intake summary was not material. The district court found that Marohn pushed and dropped R.N.M. because it credited the testimony by Larson and Carlson regarding R.N.M.’s statements. R.N.M.’s statements are not contradicted in any way by the undisclosed evidence; the exculpatory nature of the intake summary comes solely from its disposition that the statements were “insufficient” to prove maltreatment. There is no reasonable probability that that determination by the child-protection worker would have substantially affected the district court’s decision when the court reviewed additional evidence and made independent determinations about the credibility and weight of the evidence.

III. Hearsay

Marohn complains that the district court’s finding of abuse—specifically, that he pushed and dropped R.N.M., causing a bruise—is based solely on hearsay. “‘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). R.N.M. did not testify at the hearing. The witnesses who testified that Marohn pushed or

dropped R.N.M. did so based on R.N.M.’s out-of-court statements. Thus, the finding that Marohn pushed and dropped R.N.M. was based on hearsay. Under the Minnesota Rules of Evidence, which apply to OFP hearings, *Olson*, 892 N.W.2d at 841, “[h]earsay is not admissible except as provided by [the Rules of Evidence] or by other rules prescribed by the Supreme Court or by the Legislature,” Minn. R. Evid. 802.

But, as Marohn acknowledges, he failed to object to the admission of the hearsay statements, and the district court did not consider whether they were admissible. 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). We see no reason to deviate from the general rule here and thus decline to address the issue of admissibility. To the extent that Marohn argues that his testimony and that of his witnesses should have been given more weight than the hearsay statements, the argument is unavailing. On appeal from a district court’s decision regarding whether to grant an OFP, an appellate court does not decide issues of witness credibility. *Aljubailah v. James*, 903 N.W.2d 638, 643 (Minn. App. 2017) (quoting *Gada v. Dedefo*, 684 N.W.2d 512, 514 (Minn. App. 2004)).

IV. Factual finding of pushing

Marohn argues that the district court abused its discretion by finding that he “push[ed]” R.N.M. “Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous” Minn. R. Civ. P. 52.01. “If there is reasonable evidence to support the [district] court’s findings of fact, a reviewing court should not disturb those findings.” *Fletcher v. St. Paul Pioneer Press*, 589 N.W.2d 96, 101 (Minn. 1999).

Larson testified that R.N.M. told her that “he was slammed up against the wall between the kitchen and the living room” by Marohn.² This statement provides the necessary record support for the finding of pushing. The testimony to the contrary from Marohn’s witnesses does not change that result. “It is not the province of [an appellate] court to reconcile conflicting evidence,” *id.*, and “due regard [must] be given to the opportunity of the [district] court to judge the credibility of the witnesses,” Minn. R. Civ. P. 52.01. And, because the district court did not clearly err by finding that Marohn pushed R.N.M., Marohn’s argument that dropping alone does not constitute domestic abuse is moot.

V. Other alleged errors

Marohn also argues that the district court made the following miscellaneous errors: (1) overruling his objections to some of the opposing counsel’s questions; (2) not considering “the family-law file”;³ and (3) dismissing the OFP petition that Marohn filed against Larson based on the same injury suffered by R.N.M., which Marohn attributed to Larson. Marohn cites no authority showing that these decisions were in fact erroneous. “[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it.” *Waters v. Fiebelkorn*, 13 N.W.2d 461, 464-65 (Minn. 1944). An assignment of error in

² Marohn ignores this testimony by Larson and incorrectly argues that the pushing is mentioned only in Larson’s recounting of what she had told the police.

³ “The family-law file” is a case with the district court file number 30-FA-15-117. The file is not part of the record and is allegedly “filled with a history of [Larson] making similar allegations with previous OFPs” that have been dismissed.

a brief based on “mere assertion” and not supported by argument or authority is forfeited unless prejudicial error is obvious on mere inspection. *Scheffler v. City of Anoka*, 890 N.W.2d 437, 451 (Minn. App. 2017) (citing *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971)), *review denied* (Minn. Apr. 26, 2017). No prejudicial error is obvious here. Given that the finding of domestic abuse was based on R.N.M.’s statements, prejudicial error, if any, must go to the weight given to those statements by the district court. Inspection of the record does not make clear that, but for the alleged errors, Marohn would have so undermined the credibility of R.N.M.’s statements that the district court would have ruled in Marohn’s favor. Marohn’s arguments are forfeited.

Affirmed in part, reversed in part, and remanded.