

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1600**

In the Matter of: Mara Jareth Butler, and on behalf of minors,
Respondent,

vs.

Andrew John Jakes,
Appellant.

**Filed June 27, 2022
Affirmed
Reyes, Judge**

Dakota County District Court
File No. 19AV-FA-1748

Corey W. Kobbervig, Kobbervig Law, L.L.C., St. Paul, Minnesota (for respondent)

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Considered and decided by Reyes, Presiding Judge; Jesson, Judge; and Rodenberg,
Judge.*

SYLLABUS

A party forfeits an argument on appeal in a civil case based on any technological problem they experienced during a virtual proceeding before a district court when that problem does not appear in the record and the party did not attempt to correct or supplement the record.

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

OPINION

REYES, Judge

Appellant argues on appeal that the record does not support the district court's grant of an order for protection (OFP) and that the district court violated his due-process rights when it granted the OFP despite his assertion that he and his attorney lost their internet connection during the video hearing for approximately three minutes. Because the evidence supports issuing an OFP and because appellant forfeited his argument regarding the technological problem, we affirm.

FACTS

Appellant Andrew John Jakes and respondent Mara Jareth Butler dated for nine years and have two minor children together. In October 2021, Butler filed a petition for an OFP for herself and the two minor children based on four alleged incidents of domestic abuse. The district court held a virtual evidentiary hearing on the petition over Zoom, a web-based video-conference application. A court reporter was present and transcribed the proceedings. At the hearing, the district court heard testimony from Butler, Jakes, and a police officer who responded to one of the incidents. Two incidents are relevant to this appeal.

The first incident occurred in July 2021. At the hearing on the OFP petition, Butler testified that while she slept, Jakes, who had been drinking, accessed data on her cell phone. Jakes woke Butler up by shaking her and yelling at her. The two minor children observed Jakes throwing items at the front door during the incident before Butler told the children to go upstairs. A responding police officer testified that, when police arrived, there "was a

lot of property that was kinda thrown around the front yard.” The officer testified that Jakes was “civil” and “cooperative” while Butler was “[e]xtremely upset” but not angry. Jakes and Butler both appeared intoxicated.

The second incident occurred about a month later in August 2021. Jakes became angry after drinking in Butler’s home, and Butler threatened “to dump out the bottle” from which Jakes was drinking. Butler testified that, in response, Jakes told her that he would go home to “grab his gun from his top drawer, and shoot his kids in the face and then shoot his father and his brother.” Eventually Butler and Jakes went to bed, and Jakes “passed out.”

Jakes claims that he and his attorney lost their internet connection during Butler’s testimony and that they could not participate in the hearing for approximately three minutes. Once they restored their connection, neither Jakes nor his attorney alerted the district court to the technological problem. This loss of internet connection is not reflected in the record.

The district court, recognizing that Butler’s credibility was “in many instances, impeached” throughout the hearing, nonetheless granted her petition for an OFP for her and the minor children because a preponderance of the evidence supported a finding that Jakes committed domestic abuse against them. The OFP lasted for six months and required Jakes to maintain a distance of a one-mile radius from Butler’s home and not to go to the children’s school. Jakes was allowed to email or text Butler only “for purposes of child visitation and school.” This appeal follows.

ISSUES

- I. Did the district court abuse its discretion by determining that sufficient evidence supported issuing an OFP?
- II. Did the district court deny Jakes due process of law?

ANALYSIS

- I. The district court did not abuse its discretion by determining that sufficient evidence supported issuance of an OFP.**

Jakes first argues that the district court abused its discretion by issuing the OFP because a preponderance of the evidence does not support the finding that domestic abuse occurred. We disagree.

A district court may issue an OFP upon a finding of domestic abuse. Minn. Stat. § 518B.01, subds. 4, 6 (2020). The person requesting an OFP has the burden of proving that domestic abuse occurred by a preponderance of the evidence. *Oberg ex rel. Minor Child v. Bradley*, 868 N.W.2d 62, 64 (Minn. App. 2015). A preponderance of the evidence is evidence showing that it is “more probable that the fact [in question] exists than that the contrary exists.” *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn. 2004).

Domestic abuse includes the following “if committed against a family or household member by a family or household member: (1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; or (3) . . . criminal sexual conduct.” Minn. Stat. § 518B.01, subd. 2(a) (2020). To establish domestic abuse, a party must show “present harm or an intention on the part of [the alleged abuser] to do present harm.” *Andrasko v. Andrasko*, 443 N.W.2d 228, 230 (Minn. App. 1989).

Intention to do present or imminent harm may “be inferred from the totality of the circumstances, including a history of past abusive behavior,” and the petitioning party need not show an “overt physical act” of abuse. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009).

We review the district court’s decision to issue an OFP for an abuse of discretion. *See Thompson v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018). “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.” *Id.* (quotation omitted). On appeal, we view the evidence in the light most favorable to the district court’s findings and will reverse “only if we are left with the definite and firm conviction that a mistake has been made.” *Pechovnik*, 765 N.W.2d at 99 (quotation omitted). We defer to the district court’s credibility determinations and do not “reconcile conflicting evidence.” *Id.* (quotation omitted); *see In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221-23 (Minn. 2021) (discussing clear-error standard of review).

As for the first incident, Butler testified that Jakes threw items around the front door near where the children slept, waking the children up. And one of the responding officers confirmed seeing items strewn around the front yard and that Butler seemed extremely upset. A preponderance of the evidence in the record supports the district court’s finding that Jakes committed domestic abuse against Butler and the children during the first incident.

As for the second incident, Butler testified that Jakes was drinking in her home, and Jakes became angry when Butler threatened “to dump out the bottle” of alcohol he was

drinking from. According to Butler, Jakes responded by stating that he would shoot his children, his father, and his brother. Butler’s petition says that this statement “terrified” her because Jakes “does not give empty threats.” These remarks in the record support the district court’s finding that a preponderance of the evidence showed that, in the second incident, Jakes committed domestic abuse against Butler and the children. We therefore conclude that the district court’s findings were not clearly erroneous.

Jakes’s two arguments against this conclusion are unpersuasive. Jakes first argues that the district court mischaracterized the second incident by finding that Jakes “threatened to shoot [*Butler*] and the children,” despite the fact that Jakes never threatened to shoot Butler. (Emphasis added.) Jakes asserts that this alleged error constitutes reversible error by the district court. But Jakes still threatened to shoot his children and father and brother, and these threats instilled in Butler a fear of imminent physical harm to her children. Thus, even if the district court partially erred in describing the second incident, Jakes has failed to show how that error would change the district court’s conclusion that domestic abuse occurred. Moreover, Jakes fails to show any prejudice from this alleged error. *Kallio v. Ford Motor Co.*, 407 N.W.2d 92, 98 (Minn. 1987) (stating that “[a]lthough error may exist, unless the error is prejudicial, no grounds for reversal exist”). Absent more, even if the district court made this error, it would not merit relief on appeal. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored); *Goldman v. Greenwood*, 748 N.W.2d 279, 285 (Minn. 2008) (citing this aspect of Minn. R. Civ. P. 61).

Second, Jakes argues that the evidence does not support issuing an OFP for the two minor children. In the first incident, the children witnessed Jakes yelling and throwing

items around the home. In the second incident, Jakes threatened to shoot his children. *See Hall v. Hall*, 408 N.W.2d 626, 629 (Minn. App. 1987) (concluding that, depending on circumstances, verbal threat can inflict fear of imminent physical harm, bodily injury, or assault), *rev. denied* (Minn. Aug. 19, 1987). Both incidents support issuing an OFP for the two minor children.

II. Jakes forfeited his due-process argument by failing to inform the district court of the problem, objecting during the hearing, requesting relief at the district court, or creating a record of the technological problem.

Jakes next argues that the brief period when he and his attorney could not participate in the OFP hearing because of technological difficulties infringed on his right to procedural due process. For two reasons, we are not persuaded.

First, neither the hearing transcript nor any other part of this record on appeal mentions the technological problem alleged by Jakes. *See* Minn. R. Civ. App. P. 110.01 (stating that record on appeal consists of “[t]he documents filed in the [district] court, the exhibits, and the transcript of the proceedings”). The record on appeal lacks any indication that Jakes notified the district court that he and his attorney lost their connection during the hearing. Jakes similarly failed to correct or supplement the record to mention the technological problem after the hearing. *See* Minn. R. Civ. App. P. 110.05 (allowing correction of record at district court or through motion to this court so record accurately

reflects anything of material value omitted from the record by error or accident). The only assertion that the technological problem occurred is in Jakes's argument to this court.¹

Second, even if we ignore the fact that the record does not show the alleged problem, relief would still not be proper. Appellate courts generally address only those matters that were presented to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); see *Aljubailah v. James*, 903 N.W.2d 638, 643 (Minn. App. 2017) (applying this aspect of *Thiele* in an OFP appeal). This rule applies to constitutional questions. *In re Welfare of C.L.L.*, 310 N.W.2d 555, 557 (Minn. 1981) (declining to address a constitutional issue raised for first time on appeal in termination-of-parental-rights matter). Appellate courts cannot presume error by the district court, and the complaining party has the obligation to provide the appellate court with a record sufficient to show any alleged error. See *Noltimier v. Noltimier*, 157 N.W.2d 530, 531 (Minn. 1968) (dismissing appeal for an inadequate record, stating both that “[e]rror cannot be presumed” and that appellant has burden to provide an adequate record on appeal). This record does not show the problem alleged by Jakes and we cannot assume error by the district court on

¹ There is nothing in the record showing that Jakes lost his internet connection, and, in his appellate brief, Jakes did not identify when he lost his connection. At oral argument, Jakes argued, for the first time, that he lost his internet connection at the point in the proceedings reflected on page nine of the transcript. But, based on our review, the proceedings on that transcript page are inconclusive at best regarding whether Jakes lost a video connection to the hearing. The district court discusses the admission of Butler's exhibits supporting her petition. It then begins to address Jakes's counsel before going off the record. After the district court goes back on the record, it mentions that the proceedings were interrupted with “another case” and then resumed discussing Butler's exhibits. This page in the transcript neither supports Jakes's assertion that he lost his internet connection at that time nor shows us when he regained his connection.

appeal. Because Jakes' first assertion of his constitutional argument is in this court, the argument was neither presented to nor considered by the district court. *See Continental Retail, LLC, v. County of Hennepin*, 801 N.W.2d 395, 399 (Minn. 2011) (stating that evidentiary rulings made at trial must be assigned as error in motion for new trial or amended findings to properly preserve objection for appeal). Therefore, appellant forfeited this argument because it is not properly before this court, and we decline to address it for the first time on appeal.

We note that the caselaw on forfeiture does not address technological problems specifically. Here, because the record does not show that Jakes alerted the district court to the alleged technological problem, the district court could not address or rule on the issue. Nor can we determine whether the technological problem occurred, or whether and to what extent that technological problem might have affected Jakes's procedural due-process rights as nothing in the record suggests a technological problem occurred. We therefore hold that, in a civil case, a party forfeits arguments on appeal based on any technological problem they experience during a virtual proceeding before a district court when evidence of that issue does not appear in the record and the party failed to correct or supplement the record.

Jakes requests, again for the first time on appeal, that this court require district courts to keep a video recording of district court proceedings held virtually.² We decline this request. We are an error-correcting court and we neither change existing law nor have

² Jakes argues that this is an issue of first impression and implies that we should issue a precedential opinion.

supervisory power. *See Cmty. Cares v. Faulkner*, 949 N.W.2d 296, 298 (Minn. App. 2020) (stating that court of appeals cannot create public policy by changing how to interpret court rules), *rev. denied* (Minn. Nov. 17, 2020). Further, a transcript is the official record of district court proceedings. Minn. R. Pub. Access to Recs. of Jud. Branch 4, subd. 3(a).

DECISION

We conclude that the district court did not abuse its discretion by determining that sufficient evidence supported issuing an OFP against Jakes. We also hold that, because the record fails to show that any technological problem occurred during the OFP hearing and Jakes failed to correct or supplement the record, Jakes forfeited his arguments on appeal based on that technological problem.

Affirmed.