

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1485**

In the Matter of Katie Ann Pyka On Behalf Of Minor Children,
Respondent,

vs.

Steven David Pyka,
Appellant.

**Filed June 20, 2023
Affirmed
Jesson, Judge**

Waseca County District Court
File No. 81-FA-22-520

Jacob M. Birkholz, Michelle K. Olsen, Birkholz & Associates, LLC, Mankato, Minnesota
(for respondent)

Tammy J. Stafford, Jovanovich, Dege & Athmann, P.A., St. Cloud, Minnesota (for
appellant)

Considered and decided by Jesson, Presiding Judge; Smith, Tracy M., Judge; and
Hooten, Judge.*

NONPRECEDENTIAL OPINION

JESSON, Judge

After bruises in the shape of fingerprints were discovered on respondent Katie Ann
Pyka's (mother's) two minor children following the children's visit with their father,

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

appellant Steven David Pyka (father), mother filed an order for protection (OFP) petition on behalf of her children. The district court granted the OFP. Father appeals, arguing that the district court abused its discretion by granting the OFP based on hearsay testimony by mother regarding one of the children's out-of-court statements and consideration of his two criminal charges, and because by granting the OFP, the court changed the custody agreement he made with mother regarding the children. Further, father asserts that the district court erred when it did not appoint the children a guardian ad litem for the OFP hearing. Because the district court did not abuse its discretion in determining that mother met her burden of proof and granting supervised parenting time per its authority under the applicable statute, and because father did not object to mother's testimony as hearsay and did not request a guardian ad litem, we affirm.

FACTS

In August 2022, mother filed an OFP petition on behalf of her two minor children—twin five-year-old sons—against father. Mother's petition alleged that, upon the children's return from an unsupervised visit with father, she noticed bruising on both children's shoulders that appeared to be in the shape of a thumb and fingerprints. She explained in the petition that when she asked one of her sons who hurt him, he replied, "Daddy did . . . but he was real sorry." Mother claimed that after she sent pictures of the bruising to father and asked him where the children got the bruises, father responded that he did not know and that nothing happened.

In her petition, mother also listed other allegations of abuse, citing to circumstances leading to father's open criminal cases. One was a domestic-abuse charge from an incident

with mother, and the other was a malicious-punishment-of-a-child charge with one of his twin sons, where father allegedly punched his son in the face resulting in a bruise on the child's cheek. Finally, mother requested that father have no parenting time until his criminal cases are resolved, apart from having video calls with the children. The district court granted the OFP in an ex parte order. Father denied all allegations, and the OFP was set for a contested hearing.

At the hearing, both mother and father testified. Mother's testimony mirrored her allegations from her OFP petition, testifying that her son told her, "Daddy gave me those owies, but he was really sorry, mommy, he was really, really sorry." Father did not object to this testimony but mentioned in closing remarks that "whatever [mother] said is hearsay." Mother also testified that father has two open criminal cases, providing case numbers to the court. Father did not object.

And mother and father testified that they have an open marriage-dissolution case, but that they had reached a mediated settlement on custody and parenting time for the two children in June 2022, approximately two months before mother filed her OFP petition.

The district court issued the OFP for the two minor children against father, finding that father subjected his sons to domestic abuse under Minnesota Statutes section 518B.01 (2022). In granting the OFP, it reasoned that "[w]hile [father] has been charged with prior domestic incident and malicious punishment of a child, those are no[t] convictions at this point, however, they can be considered as incidents of prior abuse." And the district court

ordered that father cannot have contact with his children for a period of two years, except for supervised parenting time.

Father appeals.

DECISION

Father argues that the district court abused its discretion when it granted the OFP based on hearsay testimony by mother and on evidence of his criminal charges and when it ordered supervised parenting time, which changed the custody agreement between father and mother. And he contends that the district court erred by not appointing a guardian ad litem to represent his sons for the OFP hearing.

Generally, we review for an abuse of discretion the district court's decision to grant an OFP. *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). In conducting our review, we give deference to the district court's assessments regarding witness credibility. *Id.* at 500-01.

With this standard of review in mind, we turn to Minnesota Statutes section 518B.01, which governs the issuance of OFPs. This section explains that, at a contested hearing, the petitioner has the burden to prove by a preponderance of the

evidence¹ that domestic abuse has occurred for a district court to issue an order for protection. *Oberg*, 868 N.W.2d at 64.

Applying that burden of proof consistent with our standard of review, we address each argument in turn.

I. The district court did not abuse its discretion by granting the OFP after consideration of the hearsay evidence and father’s criminal charges.

Hearsay Evidence

Father maintains that the district court abused its discretion by misapplying the law when, at the hearing, it allowed mother to testify to out-of-court statements regarding what her son told her. He further asserts that this error was prejudicial because this hearsay testimony was the primary basis for granting the OFP.

But father did not object to this testimony at trial. If he had objected, we would apply an abuse-of-discretion standard of review to this evidentiary issue. *See Aljubailah v. James*, 903 N.W.2d 638, 644 (Minn. App. 2017) (holding that “[r]ulings on the admissibility of evidence lie within the district court’s discretion” and an appellate court is not to “disturb an evidentiary ruling unless it is based on an erroneous view of the law or is an abuse of that discretion”).

¹ The preponderance-of-the-evidence burden of proof is the lowest burden of proof in a court of law, meaning that the petitioner must prove that it is more likely than not that the alleged events occurred. *Oberg v. Bradley*, 868 N.W.2d 62, 65 (Minn. App. 2015) (explaining that “the preponderance of the evidence standard requires that to establish a fact, it must be more probable that the fact exists than that the contrary exists” (quotation omitted)).

When an appellant did not object to an evidentiary error, this argument may be forfeited at the appellate level, because “an undecided question is not usually amenable to appellate review.” *Hoyt Inv. Co. v. Bloomington Com. & Trade Ctr. Assocs.*, 418 N.W.2d 173, 175 (Minn. 1988); see *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (explaining that appellate courts generally address only those questions previously presented to and considered by the district court).

Here, father did not object to mother’s testimony about son telling her that father gave him the bruises on his arms. Accordingly, the district court did not analyze whether these statements were inadmissible as hearsay or if they met an exception to hearsay. As a result, father forfeited this argument.

Still, father argues that he preserved this issue on appeal because he mentioned in closing remarks that mother’s testimony was hearsay. We disagree. Because, under the contemporaneous-objection requirement for trial errors, father was required to object to mother’s testimony as hearsay at the time the issue arose, his mention in his closing argument of hearsay testimony by mother was not sufficient. See *State v. Ramey*, 721 N.W.2d 294, 299 (Minn. 2006) (explaining, in a criminal trial context, that the contemporaneous-objection requirement encourages trial participants to seek a fair and accurate trial the first time around).

Yet, father asserts that his case mirrors *Olson v. Olson*. 892 N.W.2d 837, 842 (Minn. App. 2017) (reversing and remanding the grant of an OFP because statements in the petition constituted inadmissible hearsay and the district court abused its discretion by considering those statements as the exclusive basis for a finding of domestic abuse and the

grant of an OFP). But in *Olson*, Olson objected to the admission of the hearsay statements at the time they were introduced and in their main arguments on the record, unlike father here. *Id.* at 839. Thus *Olson* is distinguishable.

Finally, even if father objected to the testimony by mother as hearsay and we concluded that the testimony regarding the child's out-of-court statements was erroneously admitted, father must demonstrate that the error reasonably would have influenced the factfinder and changed the result of the proceeding. *Id.* at 841. Father has not done so. Father argues that the district court exclusively found that the burden was met to prove domestic abuse because of mother's statements about what her son told her. But that is not accurate. In addition to mother's statements, three pictures of the children were admitted showing the bruising on their shoulders,² mother testified that she noticed these bruises right after her sons had an unsupervised visit with their father, and mother testified that she experienced past incidents of domestic abuse between herself and father and father and the children, which led to criminal charges. Even if the contested statements were excluded, given the remainder of the record, it would not have been against logic to conclude that it was more likely than not that domestic abuse had occurred by father against sons, and we cannot say that excluding the contested statements would have changed the result of the proceeding.

² Although father objected to the admission of these pictures at the hearing, he does not challenge their admission on appeal.

In sum, even if father objected to mother's statements at the OFP hearing and the statements were inadmissible as hearsay, the district court would not have abused its discretion in making a finding of domestic abuse by a preponderance of the evidence.

Father's Criminal Charges

Next, father contends that the district court abused its discretion by considering his two pending criminal charges of domestic abuse and malicious punishment of a child as prior-bad-acts evidence and using them as a basis for granting the OFP. But again, father did not object to the introduction of these charges at the hearing. *See Thiele*, 425 N.W.2d at 582. As a result, father has forfeited this argument on appeal.

Still, father asserts that the district court's consideration of these charges was an abuse of its discretion because every citizen enjoys the "right to be presumed innocent until proven guilty." And, in fact, father was not convicted of either charge. But we are not persuaded that the district court abused its discretion.

The district court did not research father's criminal charges.³ Nor did it utilize the citations or complaints that accompanied them. Rather, it appears that what the district court considered was *not* the charges themselves, but the events that underlie those charges, which mother presented through her testimony. And the district court deemed this testimony credible. We defer to the district court's witness-credibility determinations. *Thompson*, 906 N.W.2d at 500-01.⁴ Because the district court's consideration of father's

³ Father does not argue that this occurred.

⁴ Further, OFP proceedings are civil in nature, and the burden of proof in OFP proceedings—preponderance of the evidence—is significantly lower than the

charges was within the limited context of mother's testimony regarding the incidents underlying the charges, it properly exercised its discretion when it took into account witness testimony before granting the OFP.

II. The district court did not abuse its discretion in granting supervised parenting time after finding domestic abuse occurred.

Father next argues that the district court abused its discretion when it ordered supervised parenting time when it granted the OFP. Minnesota Statutes section 518B.01, subdivision 6, governs the district court's discretionary ability to order relief after a hearing on an OFP. Specifically, section 518B.01, subdivision 6(a)(4), relates to the court's parenting-time determinations:

[T]he court may provide relief as follows:

. . . .

(4) award temporary custody or 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. . . . If the court finds that the safety of the victim or the children will be jeopardized by unsupervised or unrestricted parenting time, *the court shall condition or restrict parenting time as to time, place, duration, or supervision*, or deny parenting time entirely, as needed to guard the safety of the victim and the children.

Minn. Stat. § 518B.01, subd. 6(a)(4) (emphasis added).

beyond-a-reasonable-doubt burden of proof applicable to the criminal charges based on the events that underlie both mother's testimony and the criminal charges against father. Thus, a ruling in this civil proceeding that the lower standard of proof is satisfied would not be logically inconsistent with a ruling in a criminal proceeding that the higher standard of proof applicable there was not satisfied.

Here, the district court properly exercised its discretion under the statute in ordering supervised parenting time in conjunction with the OFP. The statute explicitly grants the district court authority to order such parenting time, stating that if the children's safety will be jeopardized by unsupervised parenting time, the court *shall* restrict parenting time as to supervision. *Id.* Since the district court made the finding that domestic abuse more likely than not occurred by father against the two minor children, the parenting-time decision was not error.

To persuade us otherwise, father asserts that the ordering of supervised parenting time essentially terminated his parental rights with an unwarranted custody modification. This argument is unpersuasive because the OFP is not a custody modification. *See* Minn. Stat. § 518.18 (2022) (addressing modification of custody). Nor did it terminate his parental rights. *See* Minn. Stat. § 260C.301 (2022) (addressing termination of parental rights). Rather, the order provided relief to mother and the children in the form of supervised visitation between father and the children, whom he still has legal rights to parent. And the OFP is in effect temporarily for a period of two years—it is not a permanent modification of custody or parenting time.

III. The district court did not err by not appointing a guardian ad litem for the two children for the OFP hearing.

Finally, father asserts that the district court erred by not appointing a guardian ad litem for his two minor children during the OFP proceeding, citing Minnesota Statutes section 518.165, subdivision 2 (2022), to support this contention. We review this issue

de novo. *Harlow v. State Dep't of Hum. Servs.*, 883 N.W.2d 561, 568 (Minn. 2016) (holding that appellate courts review the district court's application of the law de novo).

Turning to the circumstances before us, the district court did not err when it did not sua sponte appoint a guardian ad litem for the children for the OFP hearing. Minnesota Statutes section 518.165, subdivision 2, states that a district court is required to appoint a guardian ad litem “[i]n all proceedings for child custody or for marriage dissolution or legal separation in which custody or parenting time with a minor child is an issue, if the court has reason to believe that the minor child is a victim of domestic child abuse or neglect.”

But father never requested a guardian ad litem for his children at the district court. And a party on appeal generally cannot complain about their own mistake. *See Eisenschenk v. Eisenschenk*, 668 N.W.2d 235, 243 (Minn. App. 2003) (holding that “a party cannot complain about a district court’s failure to rule in [the party’s] favor when one of the reasons it did not do so is because that party failed to provide the district court with the evidence that would allow the district court to fully address the question”), *rev. denied* (Minn. Nov. 25, 2003). Further, father does not cite to any caselaw supporting his position that a guardian ad litem appointment is mandatory. Accordingly, we do not need to reach the question of whether the appointment of a guardian ad litem is mandatory in this context because it was neither presented to nor considered by the district court. *See Thiele*, 425 N.W.2d at 582.

In sum, since father’s unobjected-to evidentiary issues would not have affected the district court’s ability to find by a preponderance of the evidence that domestic abuse had occurred, and because the district court has clear discretion to order relief through

supervised parenting time, the district court did not abuse its discretion in granting the OFP or ordering such relief. And since father did not request a guardian ad litem for his children, the district court also did not err in this regard.

Affirmed.