STATE OF MINNESOTA
IN COURT OF APPEALS
A22-1805

In the Matter of:

Gladys Barkey Asiedu, petitioner,
Respondent,

vs.

Michael Kwabena Asiedu,
Appellant.

Filed June 26, 2023
Reversed
Gaïtas, Judge

Olmsted County District Court
File No. 55-FA-22-732

Opal D. Richards, Richards Law, LLC, Rochester, Minnesota; and

Laura Blatti, Blatti Legal, LLC, Rochester, Minnesota (for respondent)

Max A. Keller, Barry S. Edwards, Keller Law Offices, Minneapolis, Minnesota (for appellant)

Considered and decided by Johnson, Presiding Judge; Gaïtas, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

Appellant-father Michael Kwabena Asiedu appeals the district court's grant, after a contested hearing, of an order for protection (OFP) that limits father's contact with his

three minor children. Father argues that the district court abused its discretion by allowing two child-protection social workers to testify at the hearing because their testimony violated the statutory privilege for communications with a social worker, and because they relayed the children's inadmissible hearsay statements. We agree with father that the district court prejudicially erred when it admitted the children's hearsay statements through the social workers' testimony, and we reverse.

FACTS

Father and respondent-mother Gladys Barkey Asiedu were married in 2004 and are the parents of three minor children, 17-year-old J.A., 14-year-old M.A., and 10-year-old A.A. In February 2022, mother filed a petition for an OFP for herself and on behalf of the three children, alleging that father had committed domestic abuse. The district court issued an ex parte OFP prohibiting father from contacting mother and the children and granting mother temporary sole physical and temporary sole legal custody of the children. Father contested the OFP, and the district court held an evidentiary hearing.[1] Following the evidentiary hearing, the district court denied mother's request for an OFP on behalf of herself. But the district court granted the request for an OFP prohibiting father from committing domestic abuse against the children and from having contact with the children except under limited circumstances. Father now challenges the district court's decision to grant an OFP on behalf of the children, arguing that it was the result of prejudicial evidentiary errors.

[1] The parties commenced marriage-dissolution proceedings after the evidentiary hearing.

The focus of the evidentiary hearing—and the basis for mother's OFP petition—was an incident that occurred on January 30, 2022, in what was then the family's shared home.[2] Mother testified that she was in the family room when she heard yelling and screaming upstairs and footsteps running down the stairs. She left the family room and saw father chasing M.A. Mother testified that J.A. attempted to intervene in the conflict between father and M.A., but father pushed J.A. to the floor. When mother approached father, he pushed her aside, and she fell. Father then followed M.A. into the laundry room. Mother also went to the laundry room. Father pushed mother again, so she left the laundry room and called the police.[3]

The three children, who were all present in the home during the incident, did not testify. Mother's attorney stated that the children were "unavailable witnesses, so I don't think we're going to have them testify as part of this proceeding." But the attorney did not explain why the children were unavailable.

In support of the OFP petition, mother called two county child-protection social workers to testify. Father's attorney objected to any testimony from the social workers, asserting that it would violate the statutory privilege for communications with social

[2] Mother testified about some other incidents, including incidents on March 20, 2021, and January 17, 2022. The district court found that these incidents "involve[d] arguments . . . but d[id] not demonstrate domestic abuse," and we do not address them here.

[3] Based on the January 30 incident, father also was charged with misdemeanor domestic assault. He was acquitted of the charge following a jury trial.

workers.[4] The district court overruled the objection and allowed both social workers to testify.

The first social worker testified that a child-protection case was opened in December 2019 when one child reported to a school social worker that father used spanking as a form of discipline. This social worker worked with the family from February 2020 until the case was closed in September 2020. During this period, there were no further reports of spanking and there was never a maltreatment finding. The social worker testified that mother was cooperative, but father was not interested in engaging with child protection.

Mother's attorney asked the first social worker, "What did the children share with you?" Father's attorney objected to the question on the ground of hearsay. Without identifying a legal basis for allowing the testimony, the district court permitted the social worker to respond. The social worker testified, "The children shared with me they -- that [father] would use an open hand to spank them and that they were generally just afraid of being in their home when their mother wasn't present. That was the gist of it."

The second child-protection social worker testified that she was assigned to the family after the January 30 incident. She met with mother twice, the children twice, and father once after the incident. Father again objected on the ground of hearsay, but the district court determined that the children's statements to the social worker were admissible

[4] *See* Minn. Stat. § 595.02, subd. 1(g) (2022) ("A . . . licensed social worker engaged in a psychological or social assessment or treatment of an individual at the individual's request shall not, without the consent of the professional's client, be allowed to disclose any information or opinion based thereon which the professional has acquired in attending the client in a professional capacity, and which was necessary to enable the professional to act in that capacity.").

because they were "received in the course of her professional work as a social worker." The second social worker then testified about M.A.'s account of the January 30 incident:

> [T]here was a piece of jewelry that she could not find. She was looking for that piece of jewelry and asked her father if he had seen it or where it was. At that point, an argument occurred. She had run downstairs stating that . . . her father . . . chased [her] downstairs. At which point, [J.A.] came out in an attempt to protect [M.A.] and I believe [J.A.] was the one who got pushed by dad and then they reported that [father] also pushed [mother] down and leaving injuries on both of them.

The second social worker also testified that the children,

- "have shared worries about their father over time they have had including being fearful of him"
- "have reported that [father] gets angry very quickly and will get violent with them"
- "fear and do not feel like they can express how they truly feel"
- "reported . . . that they weren't sure how much longer that they could live in the environment with their dad"
- "reported that their mental health was becoming very affected by their dad's actions due to him continuously escalating very frequently, yelling at them, things like that."

Father also testified at the evidentiary hearing. According to father, as he was trying to get the children to bed, an argument with M.A. began over a bracelet. M.A. ran downstairs, and he followed. Father acknowledged that J.A. "got in front" of him, and he admitted that he "brushed" past her and that she fell to the ground. He denied pushing her. Father also admitted that mother "got in front" of him and that he "made [his] way past her" and then "saw that she'd fallen to the ground." He also denied pushing mother. Father

testified that he attempted to treat a bruise that J.A. received but mother prevented him from doing so.

Months after the hearing, and after numerous continued appearances to enable the parties to work toward a stipulated agreement, the district court issued an order denying an OFP as to mother and granting an OFP as to the children. The district court found that the "parties' reports of what happened do not differ greatly." It determined that father was "heedless and reckless during a domestic argument with one of his children and his actions caused [J.A.] and [mother] to fall to the floor and to be in fear of bodily harm." The district court found that father "did engage in yelling and screaming that caused [M.A.] to fear him." And it determined that the children "as reported, are still not comfortable being alone with [father] for any significant time," and they "still have a reasonable fear of domestic abuse from [father]." The OFP prohibits father from engaging in acts of domestic abuse against the children and bars him from having contact with the children except through text and other electronic media, to attend therapy, or to exercise supervised parenting time as agreed to by the parties or ordered in the family-court case.

DECISION

Father raises two arguments regarding the social workers' testimony. First, he contends that the social workers' testimony was improper because it violated Minnesota Statutes section 595.02, subdivision 1(g), which provides that some communications with social workers are privileged. Second, he argues that the district court prejudicially erred in allowing the social workers to relay the children's hearsay statements during their

testimony. We conclude that the erroneous admission of the children's hearsay statements requires reversal of the OFP, and we do not reach the privilege issue.

We initially identify our standard of review. An appellate court reviews a district court's decision to grant an OFP for an abuse of discretion. *Thompson v. Schrimsher*, 906 N.W.2d 495, 500 (Minn. 2018). Father specifically challenges the district court's decision to admit the children's out-of-court statements in evidence, which is an evidentiary decision that we also review for an abuse of discretion. *See Rew v. Bergstrom*, 845 N.W.2d 764, 788 (Minn. 2014) ("District courts have broad discretion to admit or exclude evidence . . . ."). "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*, 906 N.W.2d at 500 (quotation omitted).

Under the Minnesota Domestic Abuse Act, Minn. Stat. § 518B.01 (2022), a district court may issue an OFP to address domestic abuse by a family or household member. Minn. Stat. § 518B.01, subds. 1, 4, 6(a). Among other forms of relief, an OFP may prohibit the respondent from engaging in acts of domestic abuse, bar the respondent from having contact with designated individuals, and award temporary custody and parenting time. *Id.*, subd. 6(a)(1), (4), (10), (13).

To obtain an OFP, a petitioner must establish by a preponderance of the evidence that the respondent committed domestic abuse. *Oberg v. Bradley*, 868 N.W.2d 62, 64-65 (Minn. App. 2015); *see* Minn. Stat. § 518B.01, subds. 2, 4. "'Domestic abuse' means 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 . . . ." Minn. Stat. § 518B.01, subd. 2(a)(1), (2). "Family or household members" include partners and children. *Id.*, subd. 2(b)(2). "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." *Oberg*, 868 N.W.2d at 65 (quoting *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn. 2004)); *see Butler v. Jakes*, 977 N.W.2d 867, 871 (Minn. App. 2022).

The rules of evidence apply to OFP proceedings. *Olson v. Olson*, 892 N.W.2d 837, 841 (Minn. App. 2017). "Under the rules of evidence, hearsay is a statement, other than one made by the declarant while testifying, offered into evidence to prove the truth of the matter asserted." *Id.* (citing Minn. R. Evid. 801(c)). Unless a hearsay statement falls within an exception under the rules or within a statute, the statement is generally inadmissible. *Id.*

Father argues that the district court erred in allowing the social workers to relay the children's out-of-court statements because the statements were hearsay that did not satisfy an exception to the hearsay rule.

As an initial matter, we agree with father that the children's statements to the social workers were hearsay. They were statements that the children made outside of the courtroom. And mother offered the statements for their truth, primarily to establish that father inflicted fear on the children, thereby committing domestic abuse.

Next, we must determine whether the children's hearsay statements were admissible under an exception to the hearsay rule. At the hearing, mother did not identify any applicable exception to the hearsay rule. Instead, mother stated that the children were "unavailable." Mother does not pursue this position on appeal, and for good reason.

Although the statements of an unavailable witness may be admissible under several exceptions to the hearsay rule, *see* Minn. R. Evid. 804(b)(1)-(6), mother did not establish that the children were, in fact, unavailable. *See* Minn. R. Evid. 804(a)(1)-(5).[5]

Instead, mother argues for the first time on appeal that the children's statements were admissible under the state-of-mind hearsay exception. This exception allows for the admission of "[a] statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed." Minn. R. Evid. 803(3). Ordinarily, when a party fails to raise an argument before the district court, it is forfeited on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that arguments not raised in the proceedings below will not be considered on appeal). As noted, mother did not raise the state-of-mind

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[5] Under rule 804(a), an unavailable declarant includes "situations" where the declarant:

> (1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement; or
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> (2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> (3) testifies to a lack of memory of the subject matter of the declarant's statement; or
>
> (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or
>
> (5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.

exception before the district court. But even if she had, the children's statements would not have qualified for admission under this exception. The hearsay statements relayed by both social workers were the children's statements of memory or belief, and those statements were offered to prove the facts remembered or believed. Specifically, the children's hearsay statements concerned allegations regarding father's past acts and the children's fear of their father based on those alleged acts. Thus, even if mother's argument on this point were properly before this court, we would reject any argument that the children's hearsay statements were admissible under the state-of-mind exception to the hearsay rule.[6]

In admitting the children's statements to the second social worker over father's objection, the district court explained that it was allowing the statements because they were "received in the course of [the social worker's] professional work as a social worker." However, there is no such exception to the hearsay rule. And mother does not pursue this rationale on appeal.

We also note that, based on the record before us, no statutory exception applies to the hearsay statements. Under Minnesota Statutes section 595.02, subdivision 3 (2022), certain out-of-court statements made by minors under ten years old that allege physical

[6] Mother also seems to argue that the children's statements were not hearsay because they were offered only to show the children's state of mind, and they were not offered for their truth. Many of the children's statements may have reflected their state of mind, specifically that they feared father. But those statements *were* offered for their truth. They were offered to prove that the children feared father. Thus, to the extent that mother argues that the statements were nonhearsay, we would also reject that argument if it were properly before this court.

abuse may be admissible. At the time of the January 2022 incident, J.A. and M.A., the two children involved in the incident, were ten or older, and therefore the statute does not apply to any statements they made about the incident. Likewise, J.A. and M.A. were ten or older when they spoke with the social worker during the 2020 investigation. Although A.A. was under ten years old at the time of both the 2020 investigation and the January 2022 incident, neither social worker who testified at the OFP hearing specifically attributed any statements to A.A. Thus, on this record, section 595.02, subdivision 3, does not apply to the children's hearsay statements.

Because the children's statements to the social workers were hearsay, and mother does not identify any exception to the hearsay rule that applied under the circumstances, the statements were inadmissible. Accordingly, the district court abused its discretion in allowing the social workers to relay the children's statements during their testimony.

Even when a district court errs in admitting inadmissible evidence, we will reverse only if the evidentiary error resulted in prejudice. *See Olson*, 892 N.W.2d at 841. "An evidentiary error is prejudicial if it might reasonably have influenced the fact-finder and changed the result of the proceeding." *Id.* at 842. The appellant bears the burden of showing that an error was prejudicial. *State v. Amos*, 658 N.W.2d 201, 203 (Minn. 2003).

We conclude that the evidentiary error was prejudicial. The district court granted the OFP as to the children because it found that father caused the children fear of harm. *See* Minn. Stat. § 518B.01, subd. 2(a)(2) (defining domestic abuse as "the infliction of fear of imminent physical harm, bodily injury, or assault"). However, the only direct evidence that father inflicted fear on the children was the inadmissible hearsay statements relayed

during the social workers' testimony. It is possible that the district court inferred the children's fear from the circumstances surrounding the incident. But based on our review of the district court's order, the inadmissible statements might reasonably have influenced the district court and changed the result of the proceeding. Indeed, given the scant evidence that father caused the children fear, we are not convinced that, setting aside the hearsay evidence, the preponderance of the evidence established that father committed domestic abuse against the children. Because there is a reasonable probability that the district court relied on the inadmissible evidence to find domestic abuse and to issue the OFP, the district court's error in admitting the testimony was prejudicial. We therefore reverse the OFP without prejudice to mother's right to file a subsequent petition.

Reversed.