STATE OF MINNESOTA
IN COURT OF APPEALS
A10-384

In the Matter of:
Mariana G. Dimitrova and obo minor, petitioner,
Respondent,

vs.

William Joel Hart,
Appellant.

Filed December 21, 2010
Affirmed in part, reversed in part
Toussaint, Judge

Dakota County District Court
File No. 19AV-FA-09-4756

Richard A. Stebbins, Collins, Buckley, Sauntry & Haugh, P.L.L.P., St. Paul, Minnesota (for respondent)

Joseph P. Tamburino, Caplan Law Firm, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Toussaint, Presiding Judge; Johnson, Chief Judge; and Huspeni, Judge.*

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

U N P U B L I S H E D O P I N I O N

TOUSSAINT, Judge

Appellant William Joel Hart challenges the district court's issuance of an order for protection against him, arguing that the record does not support the district court's finding of domestic abuse and that the district court erred in certain evidentiary rulings. Because the district court did not abuse its discretion by granting the order for protection against him in favor of respondent Mariana G. Dimitrova, we affirm in part. But because the district court did abuse its discretion by granting the order for protection against him in favor of the parties' minor child, we reverse in part.

FACTS

Appellant and respondent were married in September 2001. Their only child was born on October 22, 2004. Respondent filed for dissolution on September 14, 2009. On December 15, 2009, during a hearing for temporary relief in the dissolution proceeding, the parties came to an agreement that appellant would have parenting time supervised by either respondent or appellant's mother or father. Appellant also agreed to move out of the marital homestead by January 15, 2010.

On December 21, 2009, respondent petitioned for an order for protection on behalf of herself and the minor child. The petition alleged that on December 15, 2009, appellant told respondent "'I will not leave a minute before I have to,' in a sadistic way, and he said 'you won't survive these 30 days.'" It also alleged that on many occasions, appellant has stated "You don't know what I am capable of," "You will not see your daughter again," and "You will be sorry." With respect to the child, the petition alleged that (1) appellant

is under investigation for child pornography; (2) appellant slept in the child's bed on December 18, 2009; (3) appellant has taken the child to the basement on many occasions and locked the door from the inside, and lately the child has been using sexual language; and (4) appellant and the child are too physically intimate. The district court held a hearing on the petition on December 30, 2009.

At the hearing on respondent's petition for the order for protection, respondent testified consistent with the allegations in her petition. Respondent also testified that following the incident on December 15, she ran to the home of her neighbor and told her that she was afraid that appellant might try and kill her during the next 30 days because he told her that she would not survive. Respondent's neighbor testified about this interaction and also about her contact with respondent on December 17. Appellant also testified and denied the allegations forming the basis of the petition.

After the hearing, the district court granted respondent's order-for-protection request. The district court found that

> domestic abuse has occurred, consisting of physical and emotional threats to [respondent], threats to [respondent] that she will not survive for 30 days, she will not see her daughter -- five years of age -- again, you don't know what I'm capable of, told [respondent] that he is going to shooting classes, that he is under investigation for child pornography, and the five-year-old daughter is using descriptive language of child genitals in much older street language terms.

The district court specifically found respondent's testimony, evidence, and witness to be "credible and believable."

The district court ordered appellant to have no contact with respondent. The court awarded respondent sole physical and legal custody of the child and awarded appellant

supervised parenting time at the Children's Safety Center only after he completed the Dakota County Domestic Abuse Program and a psychological evaluation.

D E C I S I O N

I.

"The decision to grant an order for protection under the Minnesota Domestic Abuse Act, Minn. Stat. § 518B.01 . . . is within the district court's discretion." *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 926 (Minn. App. 2006). "A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." *Id.* at 927.

> [I]n our review of an order for protection, we review the record in the light most favorable to the district court's findings, and we will reverse those findings only if we are left with the definite and firm conviction that a mistake has been made. We will not reverse merely because we view the evidence differently. And we neither reconcile conflicting evidence nor decide issues of witness credibility, which are exclusively the province of the factfinder.

Pechovnik v. Pechovnik, 765 N.W.2d 94, 99 (Minn. App. 2009) (quotations and citations omitted). Absent sufficient evidence, this court will reverse an order for protection issued under Minn. Stat. § 518B.01. *Bjergum v. Bjergum*, 392 N.W.2d 604, 606-07 (Minn. App. 1986).

A petitioner seeking an order for protection under chapter 518B must allege and prove domestic abuse. Minn. Stat. § 518B.01, subd. 4(b) (2008). Domestic abuse is defined as including "(1) physical harm, bodily injury, or assault; [or] (2) the infliction of fear of imminent physical harm, bodily injury, or assault." Minn. Stat. § 518B.01, subd. 2(a) (2008). This language requires "either a showing of present harm, or an intention on

the part of appellant to do present harm." *Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. App. 1984).

Appellant contends that the district court abused its discretion by granting an order for protection against him in favor of respondent because there was no evidence showing that he had a present intent to inflict fear of imminent harm. "Present intent to inflict fear of imminent physical harm, bodily injury, or assault can be inferred from the totality of the circumstances, including a history of past abusive behavior." *Pechovnik*, 765 N.W.2d at 99 (affirming issuance of order for protection based on conduct that included "gestures, persistent questioning, aggressive conversation and controlling behavior," as well as prior history of threatening behavior). Depending on the words and the circumstances, "[a] verbal threat . . . can also inflict 'fear of imminent physical harm, bodily injury or assault.'" *Hall v. Hall*, 408 N.W.2d 626, 629 (Minn. App. 1987), *review denied* (Minn. Aug. 19, 1987).

Here, there was sufficient evidence from which appellant's present intent to inflict fear of imminent harm could be inferred. Respondent testified that on December 15, 2009, appellant got very close to her face, told her that she would be sorry and would not survive the next 30 days, and then laughed in her face. Respondent also testified that she feared for her life and for her child's safety. The district court's findings explicitly indicate that the district court found respondent's testimony credible, and this court affords great deference to the district court's determination of witness credibility. *Alam v. Chowdhury*, 764 N.W.2d 86, 89 (Minn. App. 2009). Deferring to the district court's factual and credibility determinations and viewing the evidence in the light most

favorable to the district court's findings, the evidence is sufficient to infer a present intent to inflict fear of imminent harm. *See Boniek v. Boniek*, 443 N.W.2d 196, 198 (Minn. App. 1989) (affirming issuance of order for protection where husband's "present intent to inflict fear of imminent physical harm, bodily injury or assault within the meaning of the Domestic Abuse Act" could be inferred from the totality of the circumstances). Accordingly, the district court did not abuse its discretion by granting the order for protection in favor of respondent.

Appellant argues that there was insufficient evidence of domestic abuse to support the issuance of the order for protection in favor of the parties' minor child because "the entire record is devoid of any evidence that [appellant] caused, or threatened to cause, any harm to their daughter." We agree.[1]

The evidence presented at trial regarding the child fails to show any direct harm or intent on the part of appellant to cause the child fear of harm. Because the record fails to establish that appellant harmed or presently intended to harm the child, the district court's issuance of the order for protection in favor of the child was an abuse of discretion. Therefore, we reverse the order for protection as to the child

II.

Appellant argues that the district court abused its discretion by committing a number of evidentiary errors. Appellate courts largely defer to the district court's evidentiary rulings, which will not be overturned absent a clear abuse of discretion.

[1] At oral argument, respondent's attorney conceded that there is nothing in the record to support the issuance of an order for protection in favor of the child. Our independent examination of the record confirms respondent's concession.

Kroning v. State Farm Auto Ins. Co., 567 N.W.2d 42, 45-46 (Minn. 1997). "Entitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Id.* at 46 (quotation omitted). That a reviewing court disagrees with a district court's ruling and would have reached a different result is not a sufficient basis for reversal. *Williams v. Wadsworth*, 503 N.W.2d 120, 123 (Minn. 1993). "In the absence of some indication that the [district] court exercised its discretion arbitrarily, capriciously, or contrary to legal usage, the appellate court is bound by the result." *Kroning*, 567 N.W.2d at 46.

First, appellant argues that the district court abused its discretion by admitting the testimony of respondent's neighbor about statements that respondent made to her on December 17, 2009, because it was inadmissible hearsay. Specifically, he contends that this testimony is inadmissible hearsay because respondent never testified about any interaction with her neighbor on December 17. The district court ruled that this testimony was admissible because both the witness and the declarant were present and subject to cross-examination and "[h]earsay is an out of Court statement, not under oath, asserted for the truth of the matter, not subject to cross-examination." The district court noted that "because they [both] are subject to cross-examination, it's not hearsay, whether it's a prior consistent or prior inconsistent statement."

"'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). Unless a recognized hearsay exception applies, hearsay is not admissible. Minn. R. Evid. 802. Minn. R. Evid. 801(d)(1) provides that a prior out-of-

court statement by a witness is not hearsay if:

> The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with the declarant's testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition, or (B) consistent with the declarant's testimony and helpful to the trier of fact in evaluating the declarant's credibility as a witness . . . .

Minn. R. Evid. 801(d)(1)(A), (B). Because respondent's statements on December 17 were not given under oath subject to the penalty of perjury, the district court erred by ruling that this testimony was admissible as a prior inconsistent statement. The district court also erred by ruling that respondent's neighbor's testimony about respondent's statements on December 17 was admissible as a prior consistent statement because respondent's testimony at trial did not include any testimony about December 17 and "rule 801(d)(1)(B) only applies to prior statements that are consistent with the declarant's trial testimony." Minn. R. Evid. 801(d)(1) 1989 comm. cmt. Therefore, respondent's neighbor's testimony constituted inadmissible hearsay, and the district court abused its discretion by overruling appellant's hearsay objections.

But even if respondent's neighbor's testimony was erroneously admitted as substantive evidence, "[e]ntitlement to a new trial on the grounds of improper evidentiary rulings rests upon the complaining party's ability to demonstrate prejudicial error." *Kroning*, 567 N.W.2d at 46 (quotation omitted). "An evidentiary error is prejudicial if the error might reasonably have changed the result of the trial." *Cloverdale Foods of Minn., Inc. v. Pioneer Snacks*, 580 N.W.2d 46, 51 (Minn. App. 1998). In this case, appellant has not shown that the error was prejudicial. The district court's findings of

domestic abuse appear to be predominantly based on respondent's testimony. Therefore, the admission of respondent's neighbor's testimony about respondent's statements to her on December 17 does not require reversal. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356, 237 N.W.2d 76, 78 (1975) (stating that a party must show error and that the error caused prejudice to prevail on appeal).

Second, appellant challenges the district court's refusal to allow him to present evidence that no police reports had been filed with the Apple Valley Police Department regarding domestic abuse. But only relevant evidence is admissible. Minn. R. Evid. 402. Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Minn. R. Evid. 401. In this case, whether any police reports had been filed with the Apple Valley Police Department regarding domestic abuse is irrelevant to whether appellant inflicted fear of imminent bodily harm. Therefore, the district court did not abuse its discretion by excluding this evidence.

Third, appellant challenges the district court's exclusion of a letter he wrote in November 2009 in which he stated that he was taking the child to visit his parents for a few days. After appellant made an offer of proof, the district court sustained an objection to the letter on relevancy grounds. Whether appellant told respondent in a letter that he was taking the child to visit appellant's parents in November—one month before the events alleged in respondent's petition occurred—did not have "any tendency to make the existence of any fact that [was] of consequence to the determination of the action more probable or less probable." *See* Minn. R. Evid. 401. The testimony was therefore

irrelevant and inadmissible. *See* Minn. R. Evid. 402 (providing that irrelevant evidence is not admissible). Moreover, the admission of the letter would not have changed the outcome of the proceeding because the district court received the substance of the letter through respondent's testimony. Therefore, any error in excluding this evidence did not prejudice appellant.

Fourth, appellant challenges the district court's exclusion of a document certifying his completion of parenting classes. Appellant argued in the district court that the document was relevant to the issue of whether he is abusive towards the child. But the district court correctly concluded that the document only means that he went to a class, which is not relevant to the issue of whether domestic abuse occurred. Furthermore, even if the district court erroneously excluded this evidence, appellant's testimony essentially restated the contents of the document. Therefore, any error in excluding this evidence did not prejudice appellant.

Fifth, appellant challenges the district court's ruling excluding the parties' marriage certificate for lack of foundation. The exclusion of evidence for lack of foundation is within the district court's discretion, and "its determination will not be disturbed unless practical justice requires otherwise." *Smith v. Kahler Corp.*, 297 Minn. 272, 283, 211 N.W.2d 146, 153 (1973). Although appellant claims in his brief that the document he attempted to introduce was signed and dated by respondent, respondent testified at trial that she had not filled out the document nor had she signed it. Our independent review of this document clearly shows that it has not been signed by respondent. Furthermore, appellant argues that this evidence was essential to impeaching

respondent's credibility. But Minn. R. Evid. 608(b) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness'[s] credibility . . . may not be proved by extrinsic evidence." Thus, the district court did not abuse its discretion by excluding this evidence.

Finally, appellant merely asserts, without any authority or argument, that the district court erroneously excluded photographs of narcotics that respondent brought into their house. The district court concluded that this evidence was inadmissible because respondent, who is an anesthesiologist, had testified that none of the photographed items are narcotics and appellant had not presented any evidence to the contrary. Appellant similarly asserts that the district court erred by sustaining objections to his questions about an argument that occurred about a woman that appellant was dating as well as an argument regarding some missing coins worth $100,000. The district court concluded that the testimony about the argument over the woman was inadmissible because it was not relevant to the issue of whether domestic abuse had occurred. And contrary to appellant's assertion, the transcript indicates that all of the testimony concerning the missing coins was admitted. Because none of these assertions is supported by argument or authority and prejudicial error is not obvious, appellant has waived consideration of these issue on appeal. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that assignment of error in a brief based on mere assertion and not supported by argument or authority is waived "unless prejudicial error is obvious on mere inspection").

Affirmed in part and reversed in part.