STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2086

In the Matter of: Patrick James Brown obo Dakota Mae Brown, petitioner,
Respondent,

vs.

Tammy Lynn Brown,
Appellant.

Filed June 13, 2011
Affirmed
Connolly, Judge

Scott County District Court
File No. 70-FA-10-25604

Mark A. Olson, Olson Law Office, Burnsville, Minnesota (for respondent)

Elizabeth Palmer, Debra Julius, Prior Lake, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Toussaint, Judge; and Connolly, Judge.

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

CONNOLLY, Judge

Appellant-mother appeals an order for protection (OFP) granted to respondent-father on behalf of the parties' minor daughter along with the district court's temporary award of custody to father. Because we conclude that the evidence was sufficient to

support the finding of domestic abuse and because the district court gave primary consideration to the safety of the child when awarding custody to father, we affirm.

FACTS

Mother Tammy Lynn Brown and father Patrick James Brown were married in 1993 and divorced in 2005. The parties have one minor daughter.[1] Mother was granted sole physical custody of daughter and the parties shared legal custody. At some point, daughter stated that she would rather live with father. Father brought a motion to change custody in September 2009. Custody of daughter has not yet been resolved.

On October 22, 2010, father petitioned for an OFP on behalf of daughter against mother based on events that occurred on October 15. Attached to the petition were (1) a letter from father, stating that mother had "acted punitively" towards daughter since daughter expressed a preference to live with father and that mother had physically abused daughter, threatened daughter, burned most of daughter's shoes, and had taken away daughter's computer that contained school-related information; (2) a letter from mother's attorney to daughter's therapist, co-signed by mother, revoking all authorization for treatment or services; (3) an unsigned letter from Dr. Paul Reitman, the parties' custody evaluator, expressing concern for daughter's mental well-being and describing daughter as "an at risk adolescent who is being adversely affected by [mother's] refusal to cooperate with the custody study recommendations"; and (4) an e-mail from daughter to Dr. Reitman, describing the events of October 15 and stating that mother tried to prevent

[1] Daughter was 15 years old at the time of the OFP proceedings.

her from attending her grandfather's funeral and kept changing her computer passwords. The district court issued an emergency ex parte OFP and a hearing was scheduled.

At the hearing, mother objected to the unsigned letter of Dr. Reitman. The district court observed that it was aware of the "lengthy letter" written by Dr. Reitman and "whatever is in the [OFP] file, and that formulated the basis for the [OFP]"; stated that it could not ignore that the information exists; and overruled mother's objection, concluding that the letter "was attached to filings made that were made under oath and there's incorporation of these matters in connection with that filing that was made under oath as part of the process of obtaining the [OFP]."

Daughter, mother, a police officer, and father all testified at the OFP hearing. Daughter testified that on Friday, October 15, she got into an argument with mother over a baseball hat while waiting for father to pick her up at mother's house. Earlier that week, mother had given daughter permission to bring the hat to father's house, but changed her mind that day. Daughter put the hat by the stairs, intending to take it back up to her room. Mother saw the hat on the stairs, next to daughter's things, and "started yelling . . . and screaming at [daughter] that [she] was going to sneak [the hat] out." Daughter decided "that since [she] was already going to get in trouble for it that [she'd] try to get [mother] to let [her] bring the hat." Daughter told mother that she was going to bring the hat and walked away; mother yelled that she did not want daughter to bring the hat and began to chase daughter.

Daughter decided to wait for father outside and put on her hooded sweatshirt and backpack. Mother grabbed the backpack and sweatshirt, pulling daughter back and

choking her. Daughter was unable to talk or breathe. Daughter tried to step on mother's foot and alert her to the fact that she could not breathe. Daughter eventually flung her hand backward, hitting mother's glasses, which caused mother to let go. Daughter said she did not hit mother, but tried to use her elbow and might have kicked mother. Daughter went outside to wait for father. Daughter spent the weekend with father and then asked father to call the police on Sunday night, October 17, because she was afraid to go back to mother's house. Ultimately, daughter returned to mother's house on Monday after school.

Daughter testified that mother had been physical with her "lots of times over the past years," beginning with the parties' divorce.[2] Daughter testified:

> I've had bruises and stuff and just like sprained like wrists and stuff from like trying to stop myself from hitting the wall. But like this is the first time where I like felt literally scared to death because I could not breathe and I was afraid I was going to pass out or die or something.

Daughter also testified that, on October 15, mother threatened to burn her shoes, sell her computer, and cash her paycheck. When asked if mother carried through with any of these threats, daughter responded:

> DAUGHTER: Yes. My computer was gone; she all of a sudden had cash halfway through the following week; and I found my shoes burnt.
> FATHER'S ATTORNEY: And where were your shoes burnt?

[2] While the district court gave the parties some leeway to discuss other conduct not specifically stated in the petition, observing that "a certain amount of door-opening" had occurred, the court also stated that "whatever happened, what, six years ago or so isn't necessarily going to make much difference in terms of what decision [the court would make on this petition]."

> DAUGHTER: They were in our fireplace—or like our fire ring thing outside that we have like bonfires and stuff in.
> FATHER'S ATTORNEY: Okay. Just to be clear, the threats about the shoes and the computer and the money, that didn't occur on October 15 though, did it?
> DAUGHTER: Yes.
> FATHER'S ATTORNEY: It did?
> DAUGHTER: Yeah, right before she was like choking me.
> FATHER'S ATTORNEY: Were the shoes burnt?
> DAUGHTER: Yes. I found like one of my heels like in a pile of ashes.

Daughter testified that she was afraid of mother and that "slowly over the years [mother's] gotten worse and worse and worse with like how she acts and like how like hard [mother's] been pushing [her] and stuff."

Additionally, daughter testified that a month earlier, while she and mother were driving in the car, mother told daughter: "You know, I think if I got into a car accident, I'd just make sure the right side of the car got injured where you're sitting . . . ." Daughter stated that there have been times that she has been so scared that she has jumped out of the car and described an argument she and mother had approximately six months ago:

> Like so my mom had picked me up from my dad's house and we had an argument, and I can't remember exactly what the argument was, but she just kept getting madder and madder and madder and she kept like hitting her steering wheel really hard and like really hard. And all of a sudden she hit like the little thing in between the two seats, I don't know what it's called, like the cup holder thing, and she just smacked that. Then she smacked my chair and it was like really close to me, and that just scared the bejabbers out of me, for lack of a better word. And so my mom was driving, I unbuckled my seatbelt and opened the door. And so she slowed down a little bit and was like, What are you doing? And I got out because I was like, I am not going to get hit because I've been hit enough.

Daughter hid in some bushes and called father. Daughter also testified that mother has thrown things at her and shredded some of her favorite shirts with scissors. Daughter said that she barricades herself in her bathroom in order to get away from mother approximately every other week.

On cross-examination, daughter acknowledged that she had run away from mother and previously reported to Dr. Reitman that mother had pushed her into walls and destroyed her things, but not that she had bruises. When asked why she did not report the October 15 choking incident to police, daughter said, "Because there's no bruises. And every time I do call the police, they don't do anything, and it just gets worse." Pressed further by mother's attorney about the times that she has called the police, daughter explained, "I called the police when [mother] goes off on random times and doesn't come back for hours and hours and hours." Later, when asked if she would have called the police and made a report if she had the opportunity, daughter stated, "I would have, but also there's no phones at my mom's house, so there would have been no way to."

The following exchange also took place on cross-examination:

> MOTHER'S ATTORNEY: Now, there's been a prior [OFP] hearing and you've testified before. Isn't that true?
> DAUGHTER: Yeah.
> MOTHER'S ATTORNEY: And you have actually been in court and testified about a bruise you received from your father. Is that right?
> DAUGHTER: Yes, but that's back when my mom had brainwashed me into believing my dad was the devil.
> MOTHER'S ATTORNEY: So did you lie then? Were you lying?
> DAUGHTER: No.

> MOTHER'S ATTORNEY: No. So the bruise really did happen from your dad, or didn't?
> DAUGHTER: No, it didn't.
> MOTHER'S ATTORNEY: So there wasn't a bruise, but you testified to [the district court] that there was a bruise?
> DAUGHTER: I don't remember what I testified. I was little.[3]

Daughter told the district court that she prefers living with father because she does not get pushed around, things are not thrown at her, and she feels safer. Daughter also admitted that she was frustrated with the custody process.

The police officer testified that father told him, over the phone, that father was not going to return daughter to mother because father feared for daughter's safety. The officer also spoke with daughter, who "said that she was in fear for her safety and that she didn't want to go home with her mother." The officer then went to mother's house, where he met with mother. Mother stated that she and daughter had an argument over a hat, "there was some pushing and shoving," and "[daughter] pushed her first, and then she pushed back and that she wasn't going to stand for that." The officer testified that he viewed the situation "as a parent correcting an unruly child."

The officer subsequently went into father's house where he observed daughter, who "seemed fine," "appeared healthy, normal," and "wasn't upset." The officer testified that father told him that he would return daughter on "Tuesday"[4] after school. The officer asked father what made him think daughter would be safe to return to mother's on

[3] The record reflects that daughter was approximately eight years old at the time.
[4] While the officer and mother's attorney both stated that Tuesday was the day that daughter would return to mother, daughter stated that she returned on Monday after school.

Tuesday if she was not safe tonight; father responded "that [mother] would have calmed down by then and things would be better." The officer testified that he "had no indication that [daughter would] be in danger with either parent," but, after consulting with his sergeant, who also came out to father's house, allowed daughter to remain with father that evening.

Mother testified that, during the week leading up to October 15, daughter repeatedly asked if she could take the hat to father's and had always been told no. Mother stated that, on October 15, while she was at the computer, daughter again asked if she could take the hats and was told no. When mother stood to go upstairs, daughter also stood up quickly and asked mother where she was going. As mother was walking up the stairs, she picked up daughter's backpack and saw the hats. Mother asked daughter if daughter was trying to sneak things out of her house; daughter said no. Mother then took the hats and went back to the computer, placing the hats on her lap underneath the desk. Daughter attempted to reach around mother to get the hats. Mother and daughter then engaged in a tug-of-war over the hats. Mother testified that daughter knocked off her glasses, punched her, kicked her, and shoved her into a wall. Daughter then got a hold of the hats, put on her hooded sweatshirt and backpack, and went outside.

After a minute or so, mother followed daughter outside and told her that she "cannot take this property from the house" and that she "need[ed] to return it." Daughter refused to give the hats back and said "mean things." When father's wife came to pick up daughter, mother told her that daughter "is taking things that she does not have permission that she was sneaking out" and asked that they be returned "so that things

aren't leaving here that there [is] no permission for." Father's wife responded that she was not going to interfere with mother and daughter and that she and daughter were leaving.

Mother denied pushing, shoving, or choking daughter on October 15 as well as burning her shoes. Mother also stated that there was no history of physical violence toward daughter. Mother testified that daughter returned on Monday and "was fine, her normal self." Mother testified that, on the following Friday evening, two police officers came to her door and told her "they were going to take [daughter] away due to a restraining order." Mother asked daughter if she knew anything about this and daughter denied having any knowledge of it. On cross-examination, mother stated that daughter "does not always tell the truth" and that daughter lied in her testimony.

Father testified as a rebuttal witness and stated that he allowed daughter to go back to mother's house because he had previously complained to the police about mother's actions towards daughter without response and that the police just enforced the divorce decree. Father did acknowledge that, on October 17, both the officer and the sergeant told him that they would not enforce the decree.

The district court issued the OFP, concluding that domestic violence occurred in the form of pushing, shoving, and choking. The district court awarded temporary sole physical and legal custody to father, but specifically noted that its ruling was "subject to the results of the parties contested child custody proceeding." The district court also ordered mother to attend family therapy. Mother was granted parenting time as part of family therapy and weekly phone contact with daughter. This appeal follows.

D E C I S I O N

I. The evidence was sufficient to support the finding of domestic abuse.

The decision to grant an OFP under the Domestic Abuse Act, Minn. Stat. §§ 518B.01-.02 (2010), lies with the discretion of the district court. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009). When issuing an OFP, the district court abuses its discretion if it makes findings not supported by the record or misapplies the law. *Id.* This court views the record in the light most favorable to the district court's findings and will not reverse simply because it views the evidence differently, but only upon a "definite and firm conviction" that a mistake was made. *Id.* at 99 (quotation omitted). Furthermore, this court neither reconciles conflicting evidence nor decides the credibility of witnesses as these tasks belong exclusively to the fact-finder. *Id.*

A petitioner seeking an OFP must allege and prove domestic abuse. Minn. Stat. § 518B.01, subd. 4(b). Domestic abuse includes "physical harm, bodily injury, or assault" and "the infliction of fear of imminent physical harm, bodily injury, or assault" as well as terroristic threats, criminal sexual conduct, and interference with an emergency call. *Id.*, subd. 2(a). In essence, the act "require[s] either a showing of present harm, or an intention on the part of [the responding party] to do present harm." *Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. App. 1984). An OFP petition must be "accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought." Minn. Stat. § 518B.01, subd. 4(b). "Ordinarily, consideration of any affidavits and some brief questioning of the parties will suffice for issuance of an order for temporary relief . . . ." *Vogt v. Vogt*, 455 N.W.2d 471, 475 (Minn. 1990). Mother argues

that the evidence was insufficient to support the district court's conclusion that domestic abuse occurred because daughter's testimony was "plainly incredible" and the district court abused its discretion in accepting Dr. Reitman's unsigned letter and e-mail correspondence, in which Dr. Reitman reported suspected physical abuse to a third person based on an e-mail daughter had sent him.

A. Daughter's testimony

Mother argues that daughter paints an incredible picture of shoe-burning and choking and that her testimony as to how the alleged abuse progressed and in which instances she was injured was inconsistent. Mother asserts that, if daughter's testimony were to be believed, the district court would have had to conclude that, despite the family's involvement with police, counselors, and evaluators, physical abuse had been taking place for at least six years and that "[a]ll these mandatory reporters looked the other way." Mother also contends that there was "[n]o corroborating evidence in the form of testimony, photographs, or police reports" regarding the alleged abuse and that the police officer's testimony contradicted daughter's.

Mother is essentially asking us to reweigh the credibility of the witnesses who testified at the hearing. It is well established that "the district court is in the best position to judge the credibility of the witnesses and make determinations in the face of conflicting testimony and must be given due deference." *Braith v. Fischer*, 632 N.W.2d 716, 724 (Minn. App. 2001) (citing *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988)), *review denied* (Minn. Oct. 24, 2001); *see also Pechovnik*, 765 N.W.2d at 99. Moreover, the district court was not required to believe each and every aspect of

daughter's testimony. The finding of domestic abuse implicitly indicates that the district court credited certain aspects of daughter's testimony,[5] not that the testimony was credited in its entirety. *See Pechovnik*, 765 N.W.2d at 99 ("The district court's findings implicitly indicate that the district court found [the petitioner's] testimony credible."). We also note that mother's statements as to whether pushing and shoving occurred on October 15 are also inconsistent. At the hearing, mother testified that she did not push or shove daughter, but the officer testified that, on October 17, mother told him that there was pushing and shoving, only it was daughter who started it and that mother "wasn't going to stand for that."

B. Unsigned letter from Dr. Reitman

Mother next argues that the district court abused its discretion when it considered the unsigned letter submitted as part of father's affidavit because the letter was not properly authenticated. We first observe that it is not clear to us that the letter was admitted as substantive evidence of domestic abuse at the hearing. Based on our review of the hearing transcript, it does not appear that any exhibits were introduced.

Assuming that the letter was introduced, this court reviews evidentiary rulings for an abuse of discretion. *Braith*, 632 N.W.2d at 721. The rules of evidence provide that

[5] Father states that the district "court listened to [d]aughter's allegations of abuse and adopted them as true in its findings" and that "[t]here was nothing *implicit* about his finding the child credible." But there is no explicit statement by the district court that it credited all of daughter's testimony or only some of it. Daughter talked about other acts that would arguably fit within the definition of domestic abuse, but, as the district court did not list these as part of its findings, there appears to be a question as to whether the district court credited this testimony. Without an explicit statement from the district court, any credibility determination would have to be implicit and derived from the court's ultimate findings.

"[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Minn. R. Evid. 901(a); *see also Lundgren v. Union Indem. Co.*, 171 Minn. 122, 125, 213 N.W. 553, 555 (1927) ("[A]ny relevant writing may be admitted when from its contents and other circumstances in evidence it is reasonably inferable that the author is the person sought to be charged or another lawfully acting for him."). A "writing should be admitted if from the evidence there can be drawn the necessary inference of authorship." *Lundgren*, 171 Minn. at 125, 213 N.W. at 555. We agree with mother that the letter was not properly authenticated. The letter's purported author did not testify and there was no testimony from a witness with knowledge that the letter was what father claimed it to be. *See* Minn. R. Evid. 901(b)(1) (testimony of witness with knowledge). The letter also does not fit within the "reply doctrine" as it was not signed and there was no authenticated, originating letter admitted into evidence from which to draw the inference of a response. *See* Minn. R. Evid. 901(b)(4) (distinctive characteristics); 11A Peter N. Thompson & David F. Herr, *Minnesota Practice*, Courtroom Handbook of Minnesota Evidence 278 (2011 ed.) ("If a reply letter is signed, and refers to or is in response to an authenticated letter sent to the purported author of the reply letter, the reply letter can be considered to be authenticated."). The district court abused its discretion by admitting the letter.

But, the complaining party "bears the burden of demonstrating that an improper evidentiary ruling caused prejudicial error." *Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, Inc.*, 624 N.W.2d 796, 808 (Minn. App. 2001). Such an error is

prejudicial if it "might reasonably have changed the result." *Id.* Mother asserts that the district court "relied upon the unsigned letter" and that "[t]he letter is material in this matter because [it] was used by the court to issue the ex-parte [OFP]." But mother has not shown that, without the letter, the finding of domestic abuse might reasonably have changed in this case. As father points out, the letter alleges harm to daughter's mental health as a result of mother's conduct, not physical harm. The letter does not discuss any instances of pushing, shoving, or choking, the acts that the district court concluded constituted domestic abuse. Therefore, although it was error to admit the letter for substantive purposes, the error was not prejudicial. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

C. E-mail correspondence

Mother also argues that the district court erred in not striking the e-mail that daughter sent to Dr. Reitman. However, at no time did mother object to the e-mail; an objection was only raised regarding Dr. Reitman's letter. Appellate courts generally do not address issues that were not raised to and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). And we decline to do so here.

Viewing the evidence in the light most favorable to the district court's findings and leaving all credibility determinations to the district court, we conclude that daughter's testimony regarding acts of physical abuse committed by mother was sufficient to support the finding of domestic abuse. *See* Minn. Stat. § 518B.01, subd. 2(a). Therefore, the district court did not abuse its discretion in issuing the OFP.

II. The district court's findings were sufficient to support the temporary transfer of custody.

Mother argues that the district court failed to make adequate findings regarding the transfer of legal and physical custody of daughter to father.[6] In conjunction with granting the petitioner's request for an OFP, the district court may "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." Minn. Stat. § 518B.01, subd. 6(a)(4). "Section 518B.01 neither establishes nor terminates a legal relationship." *Beardsley v. Garcia*, 731 N.W.2d 843, 847 (Minn. App. 2007) (quotation omitted), *aff'd*, 753 N.W.2d 735 (Minn. 2008).

Mother argues that nothing in the record suggests that daughter would be endangered if mother retained joint legal custody with father and that "the [district] court d[id] not state who was injured or why [it] awarded sole legal and sole physical custody of [daughter] to [father]." But the Domestic Abuse Act does not state that temporary awards of custody must be accompanied by a finding that the child would otherwise be endangered if changes in custody were not made or even require the district court to modify custody. *See* Minn. Stat. §§ 518B.01, subd. 6(a)(4) (stating "the court may . . .

[6] Father asserts that the issue of temporary custody is moot because custody proceedings are currently taking place before a different district court judge as part of "the post-decree dissolution of marriage file." "If a party to an appeal suggests that the controversy has, since the rendering of judgment below, become moot, that party bears the burden of coming forward with subsequent events that have produced the alleged result." *Cardinal Chem. Co. v. Morton Int'l, Inc.*, 508 U.S. 83, 98, 113 S. Ct. 1967, 1976 (1993). While the OFP specifically stated that the temporary custody determination would be superseded by an order issued in the contested custody proceedings, father has not shown that a definitive custody determination has since been made.

award temporary custody"), 645.44, subd. 15 (2010) (defining "may" as "permissive"). The act gives the district court authority to award temporary custody, "giv[ing] primary consideration to the safety of the victim and the children." Minn. Stat. § 518B.01, subd. 6(a)(4).

> In addition to the primary safety considerations, the court *may consider* particular best interest factors that are found to be relevant to the temporary custody and parenting time award. Findings [pursuant to the factors for determining custody in custody disputes] under section 257.025 [and marriage dissolution proceedings under section] 518.17 [and those for determining parenting time under section] 518.175 *are not required* with respect to the particular best interest factors not considered by the court.

Id. (emphasis added).

Mother is correct that the district court did not explicitly state "which person the domestic abuse was against." But we conclude that the district court was nonetheless clear when it stated:

> Respondent shall not commit acts of domestic abuse against ~~the Petitioner or~~ the child~~(ren)~~. This means that Respondent may not harm or cause fear of harm to the ~~Petitioner or the~~ child~~(ren)~~, and that Respondent may not use, attempt to use, or threaten to use physical force that would reasonably be expected to cause bodily injury to ~~Petitioner or~~ the child~~(ren)~~.

The district court had already found that the pushing, shoving, and choking testified to by daughter had occurred. The district court had also found "[t]hat the safety of the Petitioner and the child~~(ren)~~ requires that custody of the child~~(ren)~~ be granted to the

Petitioner."[7] These findings, along with the district court's order to restrain mother from committing acts of violence against daughter, implicitly credit daughter's testimony that mother was the abusing party. *See Vogt*, 455 N.W.2d at 474 (stating that district court implicitly found probable cause of physical abuse).

In sum, "[a]s a remedial statute, the Domestic Abuse Act receives liberal construction in favor of the injured party." *Pechovnik*, 765 N.W.2d at 98-99 (quotation omitted). Because the act does not require specific findings in making a temporary award of custody and because the district court's findings, while not extensive, reflect that daughter's safety was the court's primary concern in temporarily awarding father sole legal and physical custody, we conclude that the findings are sufficient to support the district court's temporary custody determination.[8]

Affirmed.

[7] Mother is correct that "[t]here were no allegations or testimony that [father] was in any danger whatsoever from [mother]." While it is true that the district court found "[t]hat the safety of *the Petitioner and the child*~~ren~~" required a temporary change custody, this finding is not supported by the record with respect to father. (Emphasis added.)

[8] Nothing in this opinion is intended to apply to the pending permanent custody determination.