STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1078

State of Minnesota,
Respondent,

vs.

Kevin Lee Hanson,
Appellant.

Filed September 23, 2008
Affirmed
Toussaint, Chief Judge

Fillmore County District Court
File No. 23-CR-06-500

Lori Swanson, Attorney General, James B. Early, Assistant Attorney General, 1800 Bremer Tower, 445 Minnesota Street, St. Paul, MN 55101-2134; and

Brett A. Corson, Fillmore County Attorney, 101 Fillmore Street, P.O. Box 307, Preston, MN 55965 (for respondent)

Jed J. Hammell, Rippe, Hammell & Murphy, P.L.L.P., 110 East Main Street, P.O. Box 149, Caledonia, MN 55921-0149 (for appellant)

Considered and decided by Connolly, Presiding Judge; Toussaint, Chief Judge; and Ross, Judge.

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

TOUSSAINT, Chief Judge

Appellant Kevin Lee Hanson challenges his convictions of second-degree burglary, terroristic threats, domestic abuse-violation of order for protection, domestic assault, and trespass. Because we conclude: (1) the order for protection was enforceable; (2) the burglary conviction is valid; (3) the jury could reasonably have found appellant violated an order for protection and committed terroristic threats; and (4) appellant was not deprived of the effective assistance of counsel, we affirm.[1]

D E C I S I O N

I.

Appellant and D.F. were in a romantic relationship from 1991 or 1992 to early 2006. They are the parents of four children. On May 8, 2006, following a hearing at which both appellant and D.F. were present, the district court issued an order for protection. It stated that "the matter came on for hearing . . . pursuant to Minn. Stat. 518B.01 (Domestic Abuse Act.)" and that "[b]ased upon the request of [appellant] for a continuance in order to obtain legal representation . . . IT IS ORDERED . . . [t]hat [appellant] . . . may not be at [D.F.'s] residence."

[1] On appeal, appellant argues for the first time that the order for protection was intrinsically defective and that the burglary conviction was invalid. This court does not generally consider matters not argued to and considered by the district court. *Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But, in the interests of justice, we will address appellant's arguments. *See* Minn. R. Civ. App. P. 103.04 (permitting this court to address any matter as interests of justice may require).

Minn. Stat. § 518B.01, subd. 5 (2004), provides that, upon receipt of a petition for an order of protection, "(a) . . . the court shall order a hearing which shall be held not later than 14 days from the date of the order for hearing . . ." and that, if a party requests a continuance, "(e) . . . Unless otherwise agreed by the parties and approved by the court, the continuance shall be for no more than five days." In accord with this statute, the order at issue provided that "this matter is scheduled for hearing on the merits on May 22, 2006, at 8:30 a.m. for a time slot of 15 minutes." But the May 22, 2006, hearing was cancelled, and no other order was issued. Appellant entered D.F.'s residence on May 25, 2006, and assaulted and threatened her. He was charged with violation of an order for protection, among other charges.

He argues first that, under Minn. Stat. § 518B.01, subd. 5(e), the district court "lacked the authority and jurisdiction to enforce [the order for protection] after the five day time slot." Whether a statute has been properly construed is a question of law subject to de novo review. *State v. Murphy,* 545 N.W.2d 909, 914 (Minn. 1996).

Nothing in Minn. Stat. § 518B.01 provides that an order for protection automatically expires if a scheduled hearing is not held, and the "statutory time frames for holding hearings on petitions for orders for protection set forth in the Domestic Abuse Act . . . are not limitations on the district court's subject matter jurisdiction over domestic abuse matters, but rather operate to give such cases docket priority." *Burkstrand v. Burkstrand*, 632 N.W.2d 206, 207 (Minn. 2001). Moreover, adopting appellant's construction of the statute would be contrary to the practice of this court. The Domestic Abuse Act "is a remedial statute designed to protect a specific class of individuals," i.e.,

those subject to domestic abuse, and this court "interpret[s] the statute in favor of that class." *In re Kleven*, 736 N.W.2d 707, 709 (Minn. App. 2007) (interpreting Vulnerable Adults Act in favor of vulnerable adults). Permitting an order for protection to expire, without notice to the protected party, because of the cancellation of a hearing would not be an interpretation of the statute in favor of those subject to domestic abuse.[2] The district court did not lack jurisdiction to conclude that appellant had violated the order for protection.

Appellant also argues that the order for protection was void because it violated two statutes: Minn. Stat. § 518B.01, subd. 18 (2004), providing that an order for protection must contain a notice of the penalties for violation and information about enforceability of the order for protection, and Minn. Stat. § 518B.01, subd. 5(e), providing that, after a request for a continued hearing, the court shall issue a written order continuing all provisions of the ex parte order pending its issuance. First, Minn. Stat. § 518B.01, subd. 18 (2004), does not void an order for protection or provide any other consequence for a district court's failure to include a notice provision. This court may not add to a statute what the legislature may have deliberately omitted or inadvertently overlooked. *Ullom v. Indep. Sch. Dist. No. 112*, 515 N.W.2d 615, 617 (Minn. App. 1994). Second, the hearing scheduled under Minn. Stat. § 518B.01, subd. 5(e), was never

[2] Appellant's reliance on *El Nashaar v. El Nashaar*, 529 N.W.2d 13, 14 (Minn. App. 1995) (finding that district court lacked authority to continue ex parte order granted to one parent forbidding other parent to have visitation), is misplaced because that case is distinguishable; it concerned an ex parte order forbidding visitation, while the order for protection here was not ex parte and permitted appellant to have contact with D.F. to arrange visitation.

held, so no continuing order was issued. Moreover, this provision pertains to ex parte orders, and the order for protection was not ex parte. The district court had jurisdiction over the order for protection, and the order for protection was not voided by any intrinsic defects.

II.

To convict appellant of second-degree felony burglary, the jury had to find that he entered a dwelling without consent and either intended to commit a crime when he entered or did commit a crime while in the dwelling. *See* Minn. Stat. § 609.582, subd. 2 (2004) (defining second-degree burglary).[3] Appellant relies on *State v. Colvin*, 645 N.W.2d 449, 454 (Minn. 2002) (holding that violation of no-entry provision of order for protection does not meet independent-crime criterion of burglary), to argue that, because the jury did not identify an independent crime, the burglary conviction constitutes reversible error. But in *Colvin*, "there [was] no allegation that [the defendant] committed or attempted to commit a crime other than violation of the order for protection" and "if the state had established the commission of . . . terroristic threats, for example, the independent crime element of burglary would be established." *Id.* at 452. Appellant was

[3] In accord with this statute, the jury was instructed that, to convict appellant of second-degree burglary, it had to find that he "entered or remained in the dwelling with intent to commit a crime . . . [o]r . . . committed a crime while in the dwelling." Although appellant did not previously challenge the jury instruction, he now argues that the jury should have specified the independent crime. *But see State v. Baird*, 654 N.W.2d 105, 113 (Minn. 2002) (stating that district court has considerable latitude in selecting language of jury instructions provided they do not misstate law). Moreover, while an appellate court may review jury instructions in the absence of an objection if the instructions contain plain error, appellant has also failed to show an essential element of the plain error test, namely any effect on his substantial rights. *See id.* ("[c]hallenging party must show: 1) error, 2) that is plain, and 3) that affects substantial rights.").

charged with and convicted of felony terroristic threats. *Colvin* thus supports his second-degree burglary conviction.

III.

In considering a claim of insufficient evidence, this court's review "is limited to a painstaking analysis of the record to determine whether the evidence, when viewed in a light most favorable to the conviction, was sufficient to permit the jurors to reach the verdict which they did." *State v. Webb*, 440 N.W.2d 426, 430 (Minn. 1989). Appellant claims the evidence was insufficient to support his terroristic threats verdict.

A person is guilty of terroristic threats if he "threatens . . . to commit any crime of violence with purpose to terrorize another . . . or [possesses] a reckless disregard of the risk of causing such terror." Minn. Stat. § 609.713, subd. 1 (2004). Appellant relies on *State v. Dick* to argue that his language to D.F. was "merely an expression of transitory anger." 638 N.W.2d 486, 492 (Minn. App. 2002) (upholding jury determination that defendant's intoxication did not render him unable to form intent requisite for terroristic threats), *review denied* (Minn. April 16, 2002). But D.F. testified that she was four to five months pregnant when appellant entered her residence during the night and threatened her with physical violence, that he was not joking and she took his threat seriously, that she left her residence because appellant would not leave when she asked him to, and that she then called 911. The jury could reasonably have found that appellant threatened D.F. "in a reckless disregard of the risk of causing . . . terror" or "with purpose to terrorize" her. Appellant's terroristic-threats conviction is supported by sufficient

evidence.[4]

IV.

When a defendant's guilt is admitted without his consent, the defendant is entitled to a new trial and prejudice is presumed. *Dukes v. State*, 621 N.W.2d 246, 254 (Minn. 2001). Appellant argues that he is entitled to a new trial because his counsel admitted appellant's guilt without his permission.[5] Appellant relies on *State v. Wiplinger*, 343 N.W.2d 858, 861 (Minn. 1984) (remanding for new trial when defendant's counsel implicitly admitted guilt without defendant's consent and over defendant's objection). But *Wiplinger* is distinguishable on two grounds. First, appellant did not either object to or move for a mistrial because of his counsel's alleged admission of guilt. A defendant who does not object to his counsel's conduct is held to have acquiesced in the admission of guilt, thus precluding a finding of error. *Dukes*, 621 N.W.2d at 254. Second, the identity of the defendant was at issue in *Wiplinger*, but counsel repeatedly referred to the perpetrator of the crime as "Mr. Wiplinger," *id*. at 859-60; here, appellant's identity was not at issue.[6] *See Wiplinger*, 343 N.W.2d at 859-60.

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[4] Appellant also challenges the sufficiency of the evidence to support the order for protection conviction but concedes that this challenge is dependent on a finding that there was no independent crime committed. The sufficiency of the evidence to support the terroristic-threats conviction refutes this challenge.

[5] Appellant has different counsel on appeal.

[6] Appellant concedes that he was not adjudicated guilty of trespassing but objects to his counsel's admission of guilt on the trespass charge during closing argument. This was arguably a trial tactic to induce the jury to find appellant not guilty of the more significant charges. *See Wiplinger*, 343 N.W.2d at 861 (admitting guilt to lesser offense is one situation in which admission would "make sense" but holding that *when defendant is*

Counsel's statements do not amount to an admission of appellant's guilt without appellant's permission, and appellant is not entitled to a new trial on the basis of ineffective assistance of counsel.

Affirmed.

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found guilty of charge on which his counsel admitted his guilt without his consent, defendant is entitled to new trial on that charge). Appellant was not found guilty of trespass.