STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0528

In re the Matter of:
Trisha Harris Ball, o/b/o R.H.P., petitioner,
Respondent,

vs.

Monty Marcel Prow,
Appellant.

Filed March 3, 2009
Reversed and remanded
Johnson, Judge
Concurring in part, dissenting in part, Schellhas, Judge

Dakota County District Court
File No. 19-F6-07-014943

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Considered and decided by Johnson, Presiding Judge; Schellhas, 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

JOHNSON, Judge

Trisha Harris Ball sought an order for protection (OFP) against Monty Marcel Prow on the ground that Prow had abused their son, R.H.P. The district court granted the petition and issued an OFP of three months' duration. Prow appeals, arguing that (1) the district court erred by admitting hearsay evidence, (2) the district court erred by denying his motion to reopen the hearing on the basis of newly discovered evidence, and (3) the evidence is insufficient to support the issuance of the OFP. We conclude that the district court did not err in admitting hearsay evidence but that the district court erred by denying Prow's motion to reopen the hearing. Therefore, we reverse the denial of Prow's post-trial motion and remand for further proceedings.

FACTS

Ball and Prow lived together from August 2001 to February 2002 and have one child, R.H.P., who was four years old in August and September of 2007. Ball and Prow had joint custody of R.H.P. at that time.

On August 21, 2007, a few days after seeing his father, R.H.P., while taking a bath, told Ball that Prow had touched his "butt," had made him "eat poop," and had "peed" on him. Ball promptly called a domestic-abuse shelter for advice. The next day, she reported R.H.P.'s statements to the police and to Dakota County Social Services. Two days later, Ball took R.H.P. to the Midwest Children's Resource Center (MCRC), where a doctor examined him and a nurse interviewed him.

On September 5, 2007, Ball petitioned the district court for an OFP to prohibit Prow from having contact with R.H.P. An emergency OFP was issued the same day. A hearing on the petition was set for later in September 2007. Prior to the hearing, Ball, through counsel, served notice on Prow that she intended to offer hearsay evidence of out-of-court statements by R.H.P.

At the September 17, 2007, hearing, Ball testified about what R.H.P. had told her while she was bathing him. Ball testified that R.H.P. had said that he did not tell Ball about Prow's conduct earlier because "daddy said that he will lie and he will do it to me more" if he told others. Detective Jeffrey Pfaff testified that Burnsville police officers conducted a search of Prow's residence in an attempt to find videotapes of R.H.P. that he said his father had made. No such videos were found. Officers found other videotapes (which Prow described as pornographic in nature), containers of petroleum jelly, dildos and other sexual toys, and, in the laundry room, towels smeared with feces. Prow vehemently denied abusing R.H.P. He testified that the items of a sexual nature found during the search of his home are "of an adult nature and they're used between two consenting adults." Prow's mother, aunt, and sister, among others, testified that Prow has an appropriate and loving relationship with his son. R.H.P. did not testify at the hearing.

At the conclusion of the hearing, the district court expressed some degree of uncertainty regarding whether Ball or Prow was more credible and whether sexual abuse had occurred. The district court ultimately found that Prow "had sexual contact with his child." The district court granted the petition and issued a three-month OFP. Prow later filed a motion in the district court pursuant to Minn. R. Civ. P. 60.02(b), seeking vacatur of

the OFP and a new hearing or, in the alternative, a reopening of the hearing, based on newly discovered evidence. The district court denied the motion. Prow appeals.

D E C I S I O N

I. Justiciability

The three-month OFP was issued on September 17, 2007, and expired on December 17, 2007. This court heard oral argument on December 9, 2008. Because the OFP has expired, we are obligated to determine whether the dispute remains justiciable. *See In re Application of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997).

Appellate courts "decide only actual controversies and avoid advisory opinions." *In re McCaskill*, 603 N.W.2d 326, 327 (Minn. 1999). A case is moot if there is no justiciable controversy for a court to decide. *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005); *State ex rel. Sviggum v. Hanson*, 732 N.W.2d 312, 321 (Minn. App. 2007). A justiciable controversy "allows for specific relief by a decree or judgment of a specific character as distinguished from an advisory opinion predicated on hypothetical facts." *Sviggum*, 732 N.W.2d at 321. When there is "no injury that a court can redress, the case must be dismissed for lack of justiciability," except in certain "narrowly-defined circumstances." *Id.* There are two exceptions to the mootness doctrine: first, if an issue is capable of repetition yet evading review and, second, if collateral consequences may attach to the otherwise moot ruling. *McCaskill*, 603 N.W.2d at 327-29.

At oral argument, the parties agreed that the case is not moot because of the possibility of collateral consequences in pending custody proceedings. The Domestic Abuse Act, which was the legal basis of Ball's petition, provides, "In a subsequent custody

proceeding the court must consider a finding in a proceeding under this chapter . . . that domestic abuse has occurred between the parties." Minn. Stat. § 518B.01, subd. 17 (2008). In light of this statute, the collateral-consequences exception to mootness applies. *See McCaskill*, 603 N.W.2d at 331 (holding that collateral consequences attach to commitment as mentally ill due to statutory provisions regarding early intervention). Thus, the appeal is justiciable.

II. Admissibility of Hearsay Evidence

Prow argues that the district court erred by admitting three types of hearsay evidence: (1) Ball's testimony regarding R.H.P.'s statement to her while he was in the bathtub, (2) Ball's testimony regarding the MCRC nurse's statement to her regarding R.H.P.'s answers to questions posed during the nurse's interview of him, and (3) Detective Pfaff's testimony regarding R.H.P.'s answers to questions posed during the MCRC interview, which was based on Detective Pfaff's observation of a videotape of the interview. Each type of hearsay requires separate analysis.

A. Ball's Testimony Regarding Bathtub Statement

Before the hearing on the petition for an OFP, Ball gave notice to Prow that she would offer evidence of out-of-court statements by R.H.P. pursuant to both Minn. R. Evid. 807 and Minn. Stat. § 595.02, subd. 3 (2008). The notice stated, "The contents of any statements are summarized in the Petition for Order for Protection signed by Petitioner on September 5, 2007." Paragraph 8 of the petition described R.H.P.'s bathtub statement. The record does not reflect any objection by Prow to the sufficiency of the contents of the notice.

At the hearing, when Prow objected to the admission of Ball's testimony regarding R.H.P.'s bathtub statement, the district court overruled the objection, stating, "for the record, I've overruled the objection because, as I indicated to Counsel in chambers before this hearing, it is my hope to avoid having the parties' children testify at this hearing. I believe it's not in their best interests to be compelled to testify."

Prow's argument is based on both rule 807 and section 595.02, subdivision 3. Rule 807 is a generally applicable residual hearsay exception; section 595.02, subdivision 3, is a hearsay exception specifically applicable to allegations of sexual abuse of children. Pursuant to the text of each exception, hearsay is admissible if it has sufficient indicia of reliability or guarantees of trustworthiness. Under the caselaw, the factors relevant to each exception are similar. *See State v. Edwards*, 485 N.W.2d 911, 915 (Minn. 1992); *State v. Hollander*, 590 N.W.2d 341, 345-46 (Minn. App. 1999) (affirming admission of hearsay testimony of interviewer of child-abuse victim). If the statements are admissible pursuant to rule 807, it is unnecessary to consider the statutory exception. *Edwards*, 485 N.W.2d at 915.

Pursuant to rule 807, a hearsay statement that is not admissible under any other exception is nonetheless admissible if it has equivalent "circumstantial guarantees of trustworthiness" and the court determines that (1) "the statement is offered as evidence of a material fact"; (2) "the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts"; and (3) "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence." Minn. R. Evid. 807. Rulings on the

admissibility of evidence are committed to a district court's discretion. *Hollander*, 590 N.W.2d at 345; *see also Kroning v. State Farm Auto. Ins. Co.*, 567 N.W.2d 42, 45-46 (Minn. 1997); *Green v. City of Coon Rapids*, 485 N.W.2d 712, 717 (Minn. App. 1992), *review denied* (Minn. June 30, 1992). "Entitlement 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).

To determine the reliability and trustworthiness and, thus, the admissibility of out-of-court statements in cases of alleged abuse of children, the supreme court has explained that a court must look to the "circumstances surrounding the actual making of the statements." *Edwards*, 485 N.W.2d at 915 (applying prior version of Minn. R. Evid. 807, found at Minn. R. Evid. 803(24)); *see also* Minn. R. Evid. 807 cmt. (noting that 2006 amendments combined rules 803(24) and 804(b)(5) into rule 807).

> "These circumstances include, but are not limited to, [1] whether the statements were spontaneous, [2] whether the person talking with the child had a preconceived idea of what the child should say, [3] whether the statements were in response to leading or suggestive questions, [4] whether the child had any apparent motive to fabricate, and [5] whether the statements are the type of statements one would expect a child of that age to fabricate."

Edwards, 485 N.W.2d at 915 (quoting *State v. Lanam*, 459 N.W.2d 656, 661 (Minn. 1990)). In addition, a court may consider [6] the mental state of the child at the time the statement was made, [7] the "'consistent repetition' of the child's statements during the same interview or conversation," and [8] "whether the child had an apparent motive to speak truthfully." *Id*. (quoting *State v. Larson*, 472 N.W.2d 120, 125-25 (Minn. 1991)).

We review the admissibility of R.H.P.'s bathtub statement according to the factors identified by the supreme court in *Edwards.*

1. Spontaneity

According to Ball's testimony, R.H.P.'s disclosure was spontaneous during a bath with his brother. According to Ball's testimony, R.H.P. provided additional details of the alleged abuse voluntarily in response to open-ended questions. Thus, this factor weighs in favor of admission. *See In re Welfare of L.E.P.*, 594 N.W.2d 163, 172 (Minn. 1990).

2. Interviewer Preconception

Ball testified that she "was in shock" during R.H.P.'s spontaneous disclosure. She also testified that she previously was concerned because R.H.P. would make his little brother "touch his butt hole area." Thus, this factor neither weighs in favor of nor against admission.

3. Leading Questions

Ball testified that her questions to R.H.P. after his spontaneous disclosure were mostly open-ended and not leading. She testified that she asked R.H.P., "did he do anything else?" R.H.P. responded by saying, "my dad made me eat poop and I didn't like it so I spit it in the toilet." Thus, this factor weighs in favor of admission.

4. Motive to Fabricate

R.H.P.'s statement is not the type that a child typically would fabricate. *See Edwards*, 485 N.W.2d at 916; *see also Lanam*, 459 N.W.2d at 661. There is no evidence that R.H.P. made similar false statements in the past. Thus, this factor weighs in favor of admissibility.

5. Type of Statement a Child would be Expected to Fabricate

According to Ball, R.H.P. used words such as "butt," "poop," and "pee." These terms are commonly used by four-year-old boys. Ball also testified that R.H.P. told her that his daddy put a toy in R.H.P.'s "butt." Knowledge of that type of sexual act is not common among four-year-old children. R.H.P.'s description of this type of conduct, normally not known to a child of this age, indicates reliability. *See L.E.P.*, 594 N.W.2d at 171; *Hollander*, 590 N.W.2d at 346. Thus, this factor weighs in favor of admissibility.

6. Mental State of the Declarant

The caselaw indicates that a child's statement may be more credible if the child is in an agitated state. *See Edwards*, 485 N.W.2d at 916 (holding statement admissible where child was frightened and agitated). The supreme court, however, also has held statements admissible where the child was "cheerful" during the interview. *L.E.P.*, 594 N.W.2d at 171-72. Ball did not testify about R.H.P.'s mental state during his bath. Thus, this factor neither weighs in favor of nor against admissibility.

7. Consistent Repetition

Ball testified that R.H.P.'s statement regarding the alleged assault was internally consistent. Thus, this factor weighs in favor of admissibility. *See Lanam*, 459 N.W.2d at 661 (holding that consistent statements by young child admissible even though some details varied).

8. Motives of Declarant and Witness to Speak Truthfully

There was no testimony concerning whether R.H.P. had a motive to speak truthfully. As discussed above, there is no indication that R.H.P. had a motive to fabricate the story.

The supreme court's most recent case regarding admission of hearsay testimony in these circumstances also considers the motive of the witness to speak truthfully. *L.E.P.*, 594 N.W.2d at 170; *see also State v. Conklin*, 444 N.W.2d 268, 276 (Minn. 1989). The district court record indicates that Ball may have had a motive and tendency to give false testimony. According to Prow, the allegations arose soon after he and Ball had discussed a change in custody arrangements that would have resulted in R.H.P. spending more time with Prow and a change in child support that would have resulted in Ball receiving reduced child support payments. In addition, Prow testified that he believed that Ball wanted to move to South Dakota to be near her family, which he would oppose. Furthermore, there is evidence in the record that, in 2003, Ball accused Prow of rape and recanted her allegation eight months later. The recantation consists of a notarized one-page document stating that the "allegations were made by me during a custody battle because I was afraid of losing my son." Ball, however, testified at the hearing that Prow "manipulated" her into signing the document, which he apparently had prepared. This factor weighs against admissibility.

9. Summary

More factors weigh in favor of admissibility than weigh against admissibility, and the factors favoring admissibility collectively outweigh the factors favoring inadmissibility. The eighth factor described above is significant and would have been a sufficient ground for the district court to rule that the statements are inadmissible, depending on whether the district court accepted Ball's explanation of her recantation of her 2003 sworn statement. But we review evidentiary rulings with considerable deference to the district court. *Kroning*, 567 N.W.2d at 45-46. In addition, the possibility of undue prejudice in this case,

in which the district court is the finder of fact, is significantly less than in a jury trial. *See Irwin v. State*, 400 N.W.2d 783, 786 (Minn. App. 1987) (noting that admission of other-acts evidence is less likely to be prejudicial in bench trial), *review denied* (Minn. Mar. 25, 1987). The district court may consider the weight of the hearsay evidence in light of the entire evidentiary record when making findings of fact. *See* Minn. R. Civ. P. 52.01.

To reverse the district court's evidentiary ruling concerning R.H.P.'s bathtub statement would force the district court to disregard evidence that the district court deemed probative of the issues that needed to be resolved. Determinations concerning the admissibility of evidence must depend primarily on the judgment of district court judges, who, because of their advantageous position, are entrusted with sorting out reliable hearsay from unreliable hearsay based on their evaluation of witness credibility and other relevant factors. An appellate court should not erect a *per se* rule that a witness who once has been untruthful may not, as a matter of law, give testimony concerning a young child's out-of-court statements. To reverse a district court's admissibility ruling in these circumstances would, in the run of cases, tend to make it unduly difficult for parents to protect their children from abuse.

The district court record reveals sufficient bases for admitting Ball's testimony regarding R.H.P.'s bathtub statement. The district court's failure to hold a hearing and make explicit findings concerning the proffered evidence is not, in itself, a ground for reversal. *See State v. Burns*, 394 N.W.2d 495, 498 (Minn. 1986) (holding that failure to hold hearing pursuant to section 595.02, subdivision 3, was not fatal; affirming admission of evidence based on "record made at trial").

Thus, we conclude that the district court did not abuse its discretion in ruling that Ball's testimony regarding R.H.P.'s bathtub statement is admissible. Because we conclude that the evidence is admissible under rule 807, we need not analyze the statutory exception. *See Edwards*, 485 N.W.2d at 915.

B. Ball's Testimony Regarding Nurse's Summary of Interview

Ball also testified about a statement made to her by the MCRC nurse who interviewed R.H.P. Ball was not present for the interview and did not watch the video recording of the interview.

As far as the record reveals, Prow did not object to Ball's testimony regarding the nurse's statement regarding R.H.P.'s answers to interview questions. A claim of "error in admission of evidence can be waived either by failing to make timely objection or by a party introducing the evidence himself." *Jones v. Fleischhacker*, 325 N.W.2d 633, 639 (Minn. 1982) (citation omitted); *see also* Minn. R. Evid. 103(a)(1) (requiring "a timely objection or motion to strike"). The obligation to object exists even when the district court is questioning a witness, as was the case when Ball testified about the nurse's summary of the interview. *See* Minn. R. Evid. 614(c); *State v. Olisa*, 290 N.W.2d 439, 440 (Minn. 1980) (noting that defendant waived right to challenge district court's interrogation by failing to object). In addition, an attorney's duty to preserve an objection is not relieved because a discussion occurred off the record; the attorney must ensure that a complete objection is made on the record. *H Window Co. v. Cascade Wood Prods., Inc.*, 596 N.W.2d 271, 274-75 (Minn. App. 1999), *review denied* (Minn. Aug. 17, 1999); *Bowen v. Arnold*, 380 N.W.2d 531, 536 (Minn. App. 1986), *review denied* (Minn. Mar. 27, 1986).

Prow's earlier objections to the first type of hearsay evidence, R.H.P.'s bathtub statement, do not suffice because those objections did not result in a ruling by the district court that clearly resolved the issue of the admissibility of the second type of hearsay evidence. The rules of evidence require that an earlier objection to the admission of evidence be renewed so long as the district court has not ruled on the admissibility of the specific evidence at issue. As this court recently explained, it is only after "'a *definitive* ruling on the record admitting . . . evidence, either at or before trial, [that] a party need not renew an objection . . . to preserve a claim of error.'" *State v. Word*, 755 N.W.2d 776, 782 (Minn. App. 2008) (some alterations in the original) (quoting Minn. R. Evid. 103(a)). More specifically, *Word* requires that "evidentiary objections should be renewed at trial when an in limine or other evidentiary ruling is not definitive but rather provisional or unclear." *Id*. at 783.

In this case, when the district court overruled Prow's objection to Ball's testimony regarding R.H.P.'s bathtub statement, the district court's explanation did not definitively extend to all other types of hearsay evidence. In fact, the district court's rationale -- that it did not wish to require the child to testify -- does not logically extend to Ball's testimony concerning the nurse's summary of the interview because other forms of evidence conceivably might have been available, namely, the nurse's testimony or the videotape of the interview. Thus, we conclude that Prow waived his objection to the admission of Ball's

testimony regarding the nurse's statement concerning the answers R.H.P. gave during the MCRC interview. *See Fleischhacker*, 325 N.W.2d at 639.[1]

C. Detective Pfaff's Testimony Regarding Videotape of Interview

As far as the record reveals, Prow also did not object to Detective Pfaff's testimony regarding R.H.P.'s answers in the videotaped MCRC interview. For the same reasons as stated above in part II.B., we conclude that Prow waived his objection to the admission of Detective Pfaff's hearsay testimony. *See id.*

III. Rule 60.02(b) Motion

After the district court issued its OFP, Prow, through counsel, brought a motion in which he asked the district court to amend its findings of facts to state that Ball did not satisfy her burden of proof or, alternatively, to either grant a new hearing or reopen the hearing pursuant to rule 60.02(b). Prow also submitted an affidavit with two exhibits: a five-page report of MCRC's examination and interview of R.H.P. and a one-page letter from the Dakota County Social Services Department, stating that the department "did not determine that sexual abuse or neglect occurred." Prow stated in his affidavit that, despite his efforts, he was unable to obtain and introduce into evidence the MCRC report or the testimony of its authors because MCRC would not release the report while the investigation

[1]The dissenting opinion states that we should consider Prow's arguments in part II.B. and part II.C. pursuant to Minn. R. Evid. 103(d), which provides, "Nothing in this rule precludes taking notice of errors in fundamental law or of plain errors affecting substantial rights although they were not brought to the attention of the court." Although rule 103(d) has been applied in criminal cases in conjunction with the plain-error rule of Minn. R. Crim. P. 31.02, *see, e.g.*, *Bernhardt v. State*, 684 N.W.2d 465, 475 (Minn. 2004); *State v. Ferguson*, 581 N.W.2d 824, 836 (Minn. 1998), there is no precedent for applying rule 103(d) in a civil case.

was pending. In addition, Prow stated that he was unable to introduce the Dakota County Social Services letter or the testimony of its author because that investigation also had not been completed at the time of the hearing. In fact, the Dakota County Social Services letter was dated and sent to Prow 10 days after the district court hearing. The district court denied Prow's motion.

The applicable rule provides:

> On motion and upon such terms as are just, the court may relieve a party or the party's legal representatives from a final judgment (other than a marriage dissolution decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons:
>
> . . . .
>
> (b) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial pursuant to Rule 59.03[.]

Minn R. Civ. P. 60.02(b). For relief to be granted, the newly discovered evidence must, first, be relevant and admissible at trial; second, be likely to have an effect on the result of a new trial; and third, not be merely collateral, impeaching, or cumulative. *Regents of Univ. of Minn. v. Medical Inc.*, 405 N.W.2d 474, 478 (Minn. App. 1987), *review denied* (Minn. July 15, 1987); *see also Gruenhagen v. Larson*, 310 Minn. 454, 459, 246 N.W.2d 565, 569 (1976). When reviewing the denial of a motion for a new trial based on newly discovered evidence, this court reviews the district court's decision for an abuse of discretion. *Minder v. Peterson*, 254 Minn. 82, 92, 93 N.W.2d 699, 707 (1958); *Peller v. Harris*, 464 N.W.2d 590, 593 (Minn. App. 1991); *Regents of Univ. of Minn.*, 405 N.W.2d at 478.

The MCRC report contradicts, in significant ways, Ball's testimony regarding the MCRC nurse's statement to her regarding R.H.P.'s interview answers. First, Ball testified that the nurse told her that R.H.P. said that his father touched his "butt," but the report states that R.H.P. said that only his younger brother had touched his "butt." When asked again if anyone had "given him a bad touch before on any of his private parts," R.H.P. "again shook his head no." Second, Ball testified that the nurse told her that R.H.P. said that he was afraid of his father, but the MCRC report indicates that R.H.P. said he was not afraid of anyone. Third, the MCRC report states that R.H.P.'s medical examination, which was performed by a physician and the nurse, revealed that his "anus is normal in appearance with no signs of bruising, tearing, scar[r]ing, or presence of condylomas."

The MCRC report satisfies the criteria applicable to a rule 60.02(b) motion. First, the substance of the report is directly relevant to the central issue raised by Ball's petition: whether Prow abused R.H.P. In fact, the report raises significant questions concerning the accuracy of the district court's findings, which were made before the report was provided to Prow and submitted to the district court. The report should be admissible in light of the standards applied by the district court to hearsay evidence offered by Ball, if Prow does not seek oral testimony of the authors of the report and does not seek to introduce the videotape itself. *See L.E.P.*, 594 N.W.2d at 173 (concluding that videotaped statement of child is admissible under section 595.02, subdivision 3(b)). Second, the substance of the report (or the videotape) is likely to have an effect on the ultimate resolution of the petition. That is not to say that a contrary ultimate conclusion is compelled, but the new evidence from MCRC unavoidably will affect the district court's analysis of the evidence. Third, the new

evidence is not collateral, impeaching, or cumulative. The newly discovered evidence reflected in the MCRC report should have prompted reconsideration of the petition because it went to the central issue, was offered as substantive evidence, and contained information that had not previously been introduced into evidence. In short, the newly discovered MCRC evidence was too significant to be ignored. *See Gruenhagen*, 310 Minn. at 459, 246 N.W.2d at 569; *Regents of Univ. of Minn.*, 405 N.W.2d at 478. The new evidence obtained from Dakota County Social Services is less significant, but it buttresses the new MCRC evidence. Thus, we conclude that the district court erred by denying Prow's motion to reopen the hearing.

Because we have concluded that the hearing must be reopened, we need not analyze Prow's sufficiency-of-the-evidence argument.

In sum, we reverse and remand to the district court for further proceedings consistent with this opinion.

Reversed and remanded.

SCHELLHAS, Judge (concurring in part and dissenting in part)

I concur with the majority's opinion insofar as it reverses the district court's refusal to reopen the OFP and remands to the district court for further proceedings. But I must respectfully dissent as to the majority's conclusion that the district court did not abuse its discretion in issuing the OFP. I conclude that the district court abused its discretion in admitting the hearsay evidence and would reverse and remand for a new trial.

Hearsay Evidence

As noted by the majority, the admission of out-of-court statements in this case is governed by Minn. R. Evid. 807 and Minn. Stat. § 595.02, subd. 3 (2008). The hearsay evidence in this case was not admissible under either rule 807 or section 595.02, subdivision 3.

Rule 807

Under rule 807, when two conditions are met, a court may admit hearsay evidence that has "equivalent circumstantial guarantees of trustworthiness" to the hearsay exceptions in rule 803 and rule 804. Minn. R. Evid. 807. One condition is notice to the opposing party. *Id.* The proponent of the hearsay statement must make known to the adverse party in advance of the hearing "the proponent's intention to offer the statement and the particulars of it, including the name, address and present whereabouts of the declarant." *Id.* The other condition is that the district court determine that: (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on

the point for which it is offered than any other evidence which can be produced through reasonable efforts; (3) the general purposes of the rules of evidence and the interests of justice will be best served by admission of the statement. *Id.* Neither condition is met here.

Notice Requirement

As noted by the majority, prior to the OFP hearing on September 17, 2007, Ball moved the district court to admit R.H.P.'s out-of-court statements, pursuant to Minn. R. Evid. 807 and Minn. Stat. § 595.02, subd. 3. In her notice, Ball said:

> Petitioner will offer the out-of-court statements made by the child, [R.H.P.], to the following individuals: his mother, Trisha Harris Ball and therapists at Christian Recovery Center.[1]
> . . . .
> [R.H.P.'s] statements allege, explain and describe acts of sexual abuse or neglect by the father, Respondent Monte Prow, and the environment in which the child resides in the paternal home.
> . . . .
> The content of any statements are summarized in the Petition for Order for Protection signed by Petitioner on September 5, 2007.

The notice does not reference a nurse at MCRC, whose out-of-court statements were admitted at the hearing, and the petition contains nothing about an MCRC nurse or a videotaped interview of R.H.P. The notice does not provide "the particulars" of the out-of-court statements. I therefore conclude that the notice requirement of rule 807 was not

[1] No therapist from Christian Recovery Center was called.

met for either Ball's testimony about the MCRC nurse's statements or Detective Pfaff's testimony about the MCRC interview videotape.

Determinations Required of District Court

I also disagree with the majority's analysis of the second requirement of rule 807. Pursuant to the second requirement, the district court must determine that: (1) the statement is offered as evidence of a material fact; (2) the statement is more probative on the point for which it is offered than any other evidence which can be produced through reasonable efforts; (3) the general purposes of the rules of evidence and the interests of justice will be best served by admission of the statement. Minn. R. Evid. 807. I agree with the majority about the factors that we should consider and the majority's conclusion that most of them weigh in favor of admission. But, I disagree with the majority's analysis regarding the "Motives of Declarant and Witness to Speak Truthfully."

The majority notes that the record contains evidence that Ball previously accused Prow of rape and later recanted her allegation, admitting in a notarized statement that the "allegations were made by me during a custody battle because I was afraid of losing my son" and the "allegations were exaggerated and are totally untrue." Ball admitted during her testimony at the OFP hearing that she signed the statement containing the above-quoted language. Thus, Ball admitted in writing that to gain an advantage over Prow in a custody proceeding, she falsely accused him of sexual misconduct. In fact, Ball made her false allegation in a previous petition for an OFP.

The circumstances in this case are quite similar. On August 21, 2007, Prow expressed to a child support worker that he wanted a change of custody. Prow claims that he also expressed this to Ball, who acknowledges a conversation with Prow on August 21, but disputes the content. On the evening of August 21, Ball reported Prow's alleged abuse of R.H.P. to Lewis House and on August 22, to the police. These circumstances, combined with Ball's prior history of falsely accusing Prow of sexual misconduct to gain an advantage in a custody proceeding, call Ball's reliability as a witness into grave doubt. Ball's motives to lie combined with her history of lying weigh heavily in favor of a conclusion that the hearsay statements offered by Ball lack sufficient indicia of reliability. I conclude that this factor weighs so heavily against admission that it outweighs the other factors supporting admissibility under rule 807.

Because the notice requirements were not met for either Ball's testimony about the MCRC nurse's statements or Detective Pfaff's testimony about the MCRC interview videotape, and because Ball's testimony about R.H.P.'s alleged out-of-court statements lacked sufficient indicia of reliability, I conclude that the hearsay statements admitted in this case were not admissible under rule 807.

Of course, the district court's utmost concern in a proceeding such as this must be the child's best interests and protecting those interests. But, nothing in the record reflects that the court considered whether the videotape of R.H.P.'s MCRC interview could be produced through reasonable efforts or questioned why Ball had not produced it. Given the competing concerns of protecting R.H.P. and fairness in the proceeding, especially in

light of the concerns raised about Ball's motives and credibility, the court's insistence on the production by Ball of the videotaped interview of R.H.P would have provided the court with an out-of-court statement of R.H.P. that is substantially more probative then Ball's hearsay testimony.

Section 595.02, subdivision 3

Like rule 807, Minn. Stat. § 595.02, subd. 3, requires that before an out-of-court statement of a child under the age of ten years is admitted as substantive evidence, the district court must make findings. The statute requires (1) that "the court or person authorized to receive evidence" find "that the time, content, and circumstances of the statement and the reliability of the person to whom the statement is made provide sufficient indicia of reliability"; (2) that the child either testify or be unavailable as a witness; and (3) where the child is unavailable, corroborating evidence of the act. Minn. Stat. § 595.02, subd. 3(a)-(b). The statute also requires the proponent of the statement to notify an adverse party of "the proponent's intention to offer the statement and the particulars of the statement." *Id.* at subd. 3(c).

Like rule 807, the statute includes requirements of notice and sufficient indicia of reliability. For the same reasons included in the analysis of the rule 807 notice requirement, I conclude that the notice requirement of section 595.02, subdivision 3, was not met for R.H.P.'s out-of-court statements introduced through Detective Pfaff's testimony. I also conclude that the reliability of Ball was so in doubt that R.H.P.'s statements introduced through Ball lacked sufficient indicia of reliability to be admissible

under section 595.02, subdivision 3. Additionally, the statements were not admissible because section 595.02, subdivision 3(b), requires that the child either testify or be unavailable, and where the child is unavailable, corroborative evidence of the act is also required. Here R.H.P. did not testify, the district court made no finding that he was unavailable, and there was no corroborating evidence of the act.

Because none of the out-of-court statements was admissible under either rule 807 or section 595.02, subdivision 3, I conclude that the district court abused its discretion in admitting the out-of-court statements.

The majority makes much of the fact that no objection was made on the record to the out-of-court statements of the nurse or R.H.P.'s out-of-court videotaped statements introduced through Detective Pfaff. While I acknowledge that Prow had the responsibility to make his objections part of the record and to request a ruling on the record, *see* Minn. R. Evid. 103(a) (stating that a timely objection must be made to preserve claim of error), (b) (stating that upon request the court shall place its ruling on the record), I also acknowledge the difficulty of Prow's circumstances. The district court's ruling occurred off the record and, although both parties were represented by counsel, the court conducted direct and redirect examination of Ball and elicited the hearsay testimony.

In any event, the majority does not address that where no objection to an evidentiary ruling is made, this court may review the rulings for plain error that affects substantial rights. Minn. R. Evid. 103(d) ("Nothing in this rule precludes taking notice of

errors in fundamental law or of plain errors affecting substantial rights although they were not brought to the attention of the court."). Although no published authority has applied this rule in a civil case, and our unpublished civil cases citing the rule are not precedential, even if rule 103(d) does not apply here, this court may review any issue as the interests of justice may require. *See Crest Group Inc. v. Deloitte & Touche, LLP*, Nos. A06-1230, A06-1231, A07-478, 2007 WL 2769619, at *5 (Minn. App. Sept. 25, 2007) (declining to take notice of error under rule 103(d) where no error of fundamental law or plain error affecting substantial rights existed), *review denied* (Minn. Dec. 19, 2007); *Feldmann v. Bailey*, No. A03-651, 2004 WL 771429, at *7 (Minn. App. Apr. 13, 2004) (same); Minn. R. Civ. App. P. 103.04 (allowing this court to review any issue as the interests of justice may require); *State v. Hannuksela*, 452 N.W.2d 668, 673 n. 7 (Minn. 1990) (stating that "it is the responsibility of the appellate courts to decide cases in accordance with law and that responsibility is not to be diluted by counsel's oversights, lack of research, failure to specify issues or to cite relevant authorities" (quotation omitted)); *see also Greenbush State Bank v. Stephens*, 463 N.W.2d 303, 306 n.1 (Minn. App. 1990) (applying *Hannuksela* in a civil case), *review denied* (Minn. Feb. 4, 1991). "Our test for whether an evidentiary admission rises to the level of plain error is whether there was or was not a reasonable likelihood that any error substantially affected the verdict." *State v. Miller*, 573 N.W.2d 661, 675 (Minn. 1998) (quotation omitted). Here, a significant likelihood exists that the error substantially affected the decision—the district court's finding that Prow had sexual contact with this child is based almost

entirely on the hearsay evidence admitted at the hearing. I conclude that it was plain error to admit Ball's testimony about the MCRC nurse's statements and Detective Pfaff's testimony about R.H.P.'s videotaped statements.

New Trial

I agree with the majority that prejudicial error must be demonstrated for a party to receive a new trial due to improper evidentiary rulings, *Kronig v. State Farm Auto Ins. Co.*, 567 N.W.2d 42, 46 (Minn. 1997). The error in admitting the statements was prejudicial. As noted above, the OFP was issued based on the finding that Prow had sexual contact with this child, a finding which is based almost entirely on the hearsay statements. And the OFP, the violation of which is a crime, restrains Prow from contacting his child. A parent's enjoyment of his child's companionship is a significant interest that rises to the level of a fundamental right. *See In re Welfare of H.G.B.*, 306 N.W.2d 821, 825 (Minn. 1981) (recognizing the longstanding fundamental right of parents to their children's companionship); *Halverson ex rel. Halverson v. Taflin*, 617 N.W.2d 448 (Minn. App. 2000) (stating that a change of custody, however temporary, infringes on parents' fundamental right to their children's companionship). I would reverse the OFP and remand for a new trial.