STATE OF MINNESOTA
IN COURT OF APPEALS
A10-515

In the Matter of:
Nancy Toleen Wirth, petitioner,
Respondent,

vs.

James Thomas Wirth,
Appellant.

Filed September 14, 2010
Affirmed
Schellhas, Judge

Douglas County District Court
File No. 21-FA-09-2424

James R. Spangler, Vermeulen Law Office PA, St. Cloud, Minnesota (for respondent)

Matthew P. Franzese, Leuthner Law Office, Alexandria, Minnesota (for appellant)

Considered and decided by Klaphake, Presiding Judge; Toussaint, Chief Judge; and Schellhas, Judge.

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

SCHELLHAS, Judge

Appellant challenges the district court's grant of an order for protection to respondent, arguing that the evidence does not support the district court's findings of domestic abuse in the form of terroristic threats and infliction of fear of imminent bodily harm. We affirm.

FACTS

On the evening of October 7, 2009, respondent Nancy Toleen Wirth reported to police that her ex-husband, appellant James Thomas Wirth, had just threatened to kill her. The next day respondent obtained a temporary order for protection (OFP) against appellant, who requested a hearing.

Respondent testified at the OFP hearing that she and appellant had been divorced for several years after 28 years of marriage, that they had children and grandchildren together, and that, on the evening of October 7, they were staying in separate cottages on Lake Darling. After dinner, upon appellant's invitation, respondent went to appellant's cottage to talk. Appellant asked respondent about getting back to together and "kept persisting." Respondent testified that when she told appellant she was not interested in a romantic relationship, he became angry and told her that she was "the most vile creature that has ever walked the planet" and that she wanted to hurt him, and said, "Nancy, if you ever get near me again, I will kill you." He then "cocked his head," looked at her, pointed his finger at her, and said, "Nancy, do you hear me? Did you hear me? I will kill you." Appellant also added, "And if you try to ever tell anybody about what I just said, I'm going to make you look like the biggest fool that's ever walked the earth."

While appellant made the statements to respondent, he sat on a couch and did not shout. Respondent testified that, although appellant had been "abusive and mean" to her in the past, "this was extremely frightening"; respondent was "absolutely shocked and terrified and afraid for [her] life." She went to her cottage, called a friend, and asked the friend to stay on the phone with her because she was afraid for her life and needed to

pack her bags. During the phone conversation, appellant walked into her cottage. Respondent testified that she was very scared, and she held up the phone, put her hand out, and said, "Stop, you can't come in here." Appellant asked if respondent was leaving, and she said yes. Appellant said, "good," and then left the cottage. Respondent did not know where she would stay, and her friend urged her to go to the police station. Although respondent resides in California, she has family in Minnesota and plans to visit. She testified that she was "very scared" and "terrified" of appellant.

On cross-examination, respondent testified that on the night of the incident, she had two glasses of wine in a four- to four-and-one-half hour period. She did not agree that she was inebriated or feeling the effects of alcohol. When asked whether appellant had said that what was going on was killing him, instead of saying that he would kill her, respondent said that she was "absolutely positive" that "[t]hat is not what he said."

Appellant testified that on October 7, when he spoke with respondent about reconciling, she became angry and was very definite "for the first time" about her disinterest. This made him "very angry"; he felt very small, rejected, and confused, because respondent had told him she loved him "not 24 hours earlier." Appellant testified that he relayed his feelings to respondent by saying: "[I]t's killing me to go through this whole, getting my hopes up, being the bait going out, being reeled in, and then being shot down." When asked on direct examination if he ever told respondent that he was going to kill her, he answered, "Not per se, no, I didn't." When asked what he meant by "not per se," he answered, "I said that it's killing me, not you." Appellant testified that he told respondent that he did not want to see her again and explained to her

that it was "because it starts up this process of me getting my hopes up and then getting clobbered, so if, if there's a chance that any close, any close resemblance to that might have been it will, it will kill you, perhaps, but that would have been as close as it got." Appellant added: "Meaning, meaning if I die, how are you going to feel about that?" Appellant testified that he was "trying to get across the point [to respondent] that you need to stay away from me forever." On cross-examination, appellant testified that "being enticed" was what was killing him, and that he told respondent that he could not have her around him anymore. Appellant also testified that, on the evening of October 7, he saw respondent consume three "tumblers" of wine, equivalent to "eight ounces or more," that her eyes were glassy and reddish, that he could smell alcohol coming from her, and that her speech was slightly slurred.

At the hearing, counsel presented arguments about whether respondent had an imminent fear of physical harm and whether appellant's words constituted terroristic threats. The district court noted that the offense of terroristic threats includes conduct that is in reckless disregard of the risk of causing terror in another, that the case boiled down to the court's credibility determinations, and that the court found "most credible" respondent's allegation that appellant said that he would kill her. In its written OFP, the district court found that appellant committed an act of domestic abuse by telling respondent, "I will kill you." The district court concluded that the act of abuse constituted terroristic threats and caused respondent to fear imminent bodily harm.

D E C I S I O N

A district court's grant of an OFP under the Domestic Abuse Act is reviewed for an abuse of discretion. *Braend v. Braend*, 721 N.W.2d 924, 926–27 (Minn. App. 2006); *see also Sperle v. Orth*, 763 N.W.2d 670, 672 (Minn. App. 2009) (stating that decision to grant OFP is within district court's discretion). "A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." *Sperle*, 763 N.W.2d at 673. "We review de novo the district court's construction and application of a statute." *Braend*, 721 N.W.2d at 927.

"The Domestic Abuse Act allows a victim of domestic abuse to petition for relief from the court." *Sperle*, 763 N.W.2d at 673 (citing Minn. Stat. § 518B.01, subds. 4, 6 (2006)). "Domestic abuse is defined to include several acts . . . committed against a family or household member by a family or household member." *Id.* (quotation omitted). The acts are: (1) physical harm, bodily injury, or assault; (2) the infliction of fear of imminent physical harm, bodily injury, or assault; and (3) terroristic threats, criminal sexual conduct, or interference with an emergency call. Minn. Stat. § 518B.01, subd. 2(a) (2008).

Here, the district court found domestic abuse in the form of terroristic threats and inflicting fear of imminent bodily harm. Appellant argues that both findings were in error.

Terroristic Threats as Domestic Abuse

Terroristic threats for purposes of the Domestic Abuse Act is defined by Minn. Stat. § 609.713, subd. 1 (2008). Minn. Stat. § 518B.01, subd. 2(a)(3). Section 609.713,

subdivision 1, defines terroristic threats as threatening, "directly or indirectly, to commit any crime of violence with purpose to terrorize another . . . or in a reckless disregard of the risk of causing such terror." "Crime of violence" for purposes of the terroristic-threats statute has the same meaning as "violent crime" as defined by Minn. Stat. § 609.1095, subd. 1(d) (2008). Minn. Stat. § 609.713, subd. 1. "Violent crime" is defined as violating certain statutes, including Minn. Stat. § 609.185(a)(1) (2008), which defines as first-degree murder causing the death of another human being with premeditation and intent to effect the death. Minn. Stat. § 609.1095, subd. 1(d). "Premeditation means 'to consider, plan or prepare for, or determine to commit, the act referred to prior to its commission.'" *State v. Yang*, 774 N.W.2d 539, 560 (Minn. 2009) (quoting Minn. Stat. § 609.18 (2008)). The supreme court has also stated that a threat to kill is a threat that obviously involves a crime of violence "prohibited by our homicide statutes." *State v. Schweppe*, 306 Minn. 395, 399–400, 237 N.W.2d 609, 613–14 (1975).

Under *Schweppe*, appellant's threat to kill is a threat to commit a crime of violence. In particular, the threat is a threat to commit first-degree murder because it is a threat to kill that reflects a prior determination to commit the act. Because first-degree murder is a crime of violence, when appellant threatened to kill respondent, he threatened to commit a crime of violence.

Appellant argues that the record does not show that he intended to terrorize respondent and instead shows that his words were made in transitory anger. The basis for appellant's transitory-anger argument is a dissent issued in *State v. Taylor*, 264 N.W.2d 157 (Minn. 1978). In *Taylor*, the majority addressed only whether the district court erred

by allowing the state to elicit evidence of the defendant's prior conviction. 264 N.W.2d at 157. The dissent questioned whether the terroristic-threats statute "should have been utilized by the prosecution," noting that a comment made by the defendant may not have been a terroristic threat but, rather, a flippant remark or a joke. 264 N.W.2d at 159–60 (Sheran, C.J., dissenting). The dissent stated that section 609.713 is patterned after a section of the Model Penal Code, and that the drafters in their comments stated that they did not wish to authorize grave sanctions against a verbal threat that expresses transitory anger rather than a settled purpose to either carry out the threat or to terrorize another. *Id.* at 160.

Transitory-anger theories are best understood as strict enforcement of the intent requirement of the terroristic-threats statute. 9 Henry W. McCarr & Jack S. Nordby, *Minnesota Practice* § 47.21 (3d ed. 2001). The terroristic-threats statute has two alternative intent requirements: one is having the purpose to terrorize, and the other is acting in reckless disregard of the risk of causing terror. Minn. Stat. § 609.713, subd. 1. Here, the district court relied on appellant acting with reckless disregard of the risk of causing terror, and the court found that respondent was afraid. Respondent's frightened state is circumstantial evidence of appellant's intent to terrorize. *See State v. Marchand*, 410 N.W.2d 912, 915 (Minn. App. 1987) (rejecting transitory-anger argument in part by stating that victim's reaction is circumstantial evidence on the issue of intent), *review denied* (Minn. Oct. 21, 1987).

Based on our careful review of the record, we conclude that the evidence is sufficient to support the district court's finding that appellant acted with reckless

disregard of the risk of causing terror in respondent and its conclusion that appellant's conduct constituted domestic abuse in the form of terroristic threats.

Fear of Imminent Bodily Harm

Appellant also argues that the district court erred by concluding that he committed domestic abuse in the form of causing fear of imminent bodily harm. Basing his argument on *Kass v. Kass*, 355 N.W.2d 335 (Minn. App. 1984), appellant argues that the evidence is insufficient to show an intent to do present harm.

In *Kass*, this court considered domestic abuse in the form of inflicting fear and stated that domestic abuse under the Domestic Abuse Act requires a showing of present harm or an intention to do present harm. 355 N.W.2d at 337. This court explained that use of the phrase "infliction of fear" in the definition of domestic abuse implied that the legislature "intended that there be some overt action to indicate that appellant *intended* to put respondent in fear of imminent physical harm." *Id.* And this court then concluded that domestic abuse requires a showing of present harm or an intention to do present harm. *Id.*

Appellant also cites *Bjergum v. Bjergum*, 392 N.W.2d 604, 606 (Minn. App. 1986), in which this court, in reliance on *Kass*, reversed an OFP because the record did not establish a present intention to do harm or inflict fear of harm. In *Bjergum*, the record showed only that domestic abuse had occurred in the past. 392 N.W.2d at 606.

"*Kass* and *Bjergum* hold that evidence of domestic abuse which occurred years earlier does not, in itself, justify issuance of a protective order and that a petitioner is required to show present harm or present infliction of fear of harm." *Hall v. Hall*, 408

N.W.2d 626, 629 (Minn. App. 1987), *review denied* (Minn. Aug. 19, 1987). But "[a] verbal threat, depending on the words and the circumstances, can also inflict 'fear of imminent physical harm, bodily injury, or assault.'" *Id.* In *Hall*, the evidence was sufficient for an OFP because the abusing party made threats that were "sufficiently specific and violent" to support the victim's claim of fear of physical harm. *Id.* The abusing party in *Hall* told the victim that if she did not stop "f---ing with" him she would "end up in a box," that he would be the one that "buries" her, and he threatened to "hunt her down." *Id.* at 628.

Another case, *Boniek v. Boniek*, 443 N.W.2d 196 (Minn. App. 1989), is instructive here. In *Boniek*, the victim and abusing party were former spouses who had an "informal dating relationship," seeing each other on a casual basis, visiting at their respective homes, and occasionally dining out together. 443 N.W.2d at 197. The relationship ended and the victim became fearful for her safety because of the occurrence of several incidents. *Id.* at 197–98. In one incident, the abusing party dropped off the parties' marriage certificate, which he had cut in half, with a note saying that the relationship was over and that they should not see each other anymore. *Id.* at 197. In another incident, the abusing party went to the victim's home unannounced and attacked a salesperson who was at the home. *Id.* at 197–98. This scared the victim, although the abusing party did not strike or threaten to strike the victim. *Id.* at 198. On occasion, the abusing party also drove around the victim's home. *Id.* The abusing party argued that there was no evidence of a present intent to inflict fear of imminent physical abuse. *Id.* This court rejected that argument, stating that the abusing party had exhibited behavior "such as to

allow an inference that he intended to instill fear of physical abuse in [the victim]." *Id.* This court also noted that the incident with the salesperson had frightened the victim "considerably." *Id.*

In the instant case, like in *Hall*, appellant made a threat to kill respondent the night before she sought the temporary OFP. The act of abuse on which the OFP was based was not an act that occurred in the distant past. And here, like in *Boniek*, the evidence is sufficient to allow an inference that appellant intended to instill fear in respondent. Appellant threatened to kill respondent, then followed her to her cottage, and entered her cottage without invitation. Respondent was reasonably frightened and abruptly left her cottage with no alternate place to spend the night. Because the evidence supports the inference that appellant intended to instill fear, the evidence is sufficient to support the district court's finding of domestic abuse in the form of inflicting fear of imminent bodily harm.

Because both findings of abuse are supported by the record, the district court did not abuse its discretion in issuing the OFP.

Affirmed.