STATE OF MINNESOTA
IN COURT OF APPEALS
A10-634

In the Matter of:
Kimberly S. Wahl, petitioner,
Respondent,

vs.

Christopher M. Wahl,
Appellant.

Filed December 14, 2010
Affirmed
Collins, Judge[*]

Wright County District Court
File No. 86-FA-10-309

Elizabeth J. Richards, Minnesota Coalition for Battered Women, St. Paul, Minnesota (for respondent)

Kay Nord Hunt, Kate G. Westad, Lommen, Abdo, Cole, King & Stageberg, P.A., Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Kalitowski, Judge; and Collins, Judge.

[*] Retired judge of the district court, serving as judge of the Minnesota Court of Appeals 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

COLLINS, Judge

Appellant Christopher Wahl challenges the district court's grant of respondent Kimberly Wahl's petition for a domestic-abuse order for protection (OFP). Because we conclude that the record supports the district court's finding of terroristic threats as the basis for the OFP and the district court did not abuse its discretion in denying appellant's motion to modify or vacate the OFP, we affirm.

FACTS

The parties' marriage was dissolved in November 2009 and, pursuant to their stipulation, the parties were awarded joint legal and joint physical custody of their four minor children. On January 7, 2010, appellant attempted suicide after sending letters addressed to respondent and each of the children. The next day, respondent sought a harassment restraining order (HRO) against appellant on behalf of herself and the children. In her petition, respondent asserted that appellant, among other things, monitored her cell phone, bank accounts and e-mails; sent harassing text messages; made threats to respondent; and blamed her for "ruining his life." The district court issued the HRO only as to respondent.

According to respondent, following parenting time with appellant on January 15, the parties' then four-year-old daughter volunteered that "daddy says everything is going to be okay because we're all going to be dead in a month." Based in part on this statement, respondent petitioned for an OFP on January 19 on behalf of herself and the children. In her petition, respondent sought sole physical custody of the children. She

also requested that appellant's parenting time be restricted and supervised because appellant "is suicidal and is threatening to do harm to the entire family including himself" and that their 13-year-old son is asking "what he needs to do if he finds his Dad dead."

At a contested hearing on the OFP petition, respondent testified that she was concerned for appellant and her children in light of appellant's recent suicide attempt and its aftermath. In her testimony, respondent repeated the statement her four-year-old daughter had attributed to appellant to the effect that they all would be dead in a month. In addition, respondent testified about e-mails from appellant that she interpreted as threatening. In an e-mail directed at both respondent and her friend, appellant stated that "I just put the nail in your coffin." In another, directed at respondent's friend and copied to respondent, appellant wrote:

> Maybe I should call your employ[]er up tomorrow and let them in on your work hab[]its. Show them how much you are on the phone during work hours talking to Kim. And then show them the e-mails from your work e-mail. I'm sure they would get a kick out of that.
>
> Yea, I think I'll do that tomorrow.
>
> Blow your life up like you did mine.

Respondent's friend replied in an e-mail stating "Doing what? Something illegal perhaps?" Appellant responded "You are one sick mother f--ker. You are caught red handed." Appellant alluded to these e-mails several weeks later in an e-mail to respondent on the day he attempted suicide stating:

> Kim, I don't know what he is trying to do, but I have never threatened him ever. He claimed that I said I was going to blow him up. I have never and would never say anything

> like that. I will however send e-mails to every employer who is hiring that is a CNC Machine operator. I am not telling them anything that I cannot prove, so it's not slander.

Respondent testified that she considered the e-mails threats, and that she was afraid for herself and for the children. When asked about her specific fear, respondent stated that she was concerned that the children would walk in on their father committing suicide or find him dead, or that he would commit suicide while he was caring for the children, and that she "didn't know if he'll hurt [the children]." Although she acknowledged that appellant had never physically harmed the children, respondent testified that she was concerned that appellant would hurt the children if he attempted suicide while the children were in his care and noted that the suicide letters were dated December 31, 2009, a day in which appellant had the children in his care.

Appellant denied telling his daughter that they would all be dead in a month. Regarding the e-mails, appellant stated that he was sending them to respondent's friend and had copied respondent on the e-mails "just to let her know" that he was sending them. In sum, appellant denied making any threats. Appellant also testified that he was receiving counseling following his suicide attempt and that he was able to properly care for his children.

The district court granted the OFP from the bench, concluding that appellant committed terroristic threats "in that he threatened to commit suicide, which is a crime of violence in violation of Minnesota Statute [§] 609.215." The district court went on to state that there was evidence of the terroristic threats in the suicide letters addressed to the children "along with the testimony and evidence that [] their four-year-old daughter

indicated that respondent said we were all going to be okay because we're all going to be dead soon on January 15, 2010." The district court found corroboration for these threats in the e-mails and concluded that appellant "has committed terroristic threats in threatening to commit suicide, sending suicide letters and sending threatening e-mails." But the subsequently issued written order based the OFP solely on the commission of "a crime of violence," the attempted suicide.

Appellant moved to amend or vacate the OFP on the ground that suicide is not a crime of violence and therefore the OFP lacked legal foundation. The district court noted that, although it did mistakenly refer to suicide as a crime of violence, the court had also found that appellant told his daughter that they would all be dead soon and identified that statement as a threat of a crime of violence. Also, the district court again characterized the e-mails as containing threats. Appellant's attorney argued the admission of the daughter's statement was improper. The district court noted that there was no objection to the introduction of the statement at the February 2010 hearing and ultimately concluded that it was admissible. After considering appellant's new submissions supporting his ability to properly care for his children and that he was engaged in counseling, the district court amended the OFP only to expand on the findings regarding terroristic threats that had not previously been recited in the written order. This appeal followed.

D E C I S I O N

I

Appellant argues that the record is insufficient to support the district court's grant of the OFP. The decision to grant an OFP under the Minnesota Domestic Abuse Act is discretionary with the district court. *Pechovnik v. Pechovnik*, 765 N.W.2d 94, 98 (Minn. App. 2009). "A district court abuses its discretion if its findings are unsupported by the record or if it misapplies the law." *Id.* (quoting *Braend ex rel. Minor Children v. Braend*, 721 N.W.2d 924, 927 (Minn. App. 2006)). This court reviews "the record in the light most favorable to the district court's findings, and we will reverse those findings only if we are left with the definite and firm conviction that a mistake has been made." *Braend*, 721 N.W.2d at 927 (quotation omitted).

Under Minnesota law "domestic abuse" includes terroristic threats. Minn. Stat. § 518B.01, subd. 2(a)(3) (2008). To commit a terroristic threat, one must threaten "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." Minn. Stat. § 609.713, subd. 1 (2008). "Crime of violence" has the same meaning as "violent crime" under Minn. Stat. § 609.1095, subd. 1(d) (2008). *Id.* "Violent crime" is defined in relation to a violation of certain specified statutes and does not include suicide. *See* Minn. Stat. § 609.1095, subd. 1(d).

Because it is indisputable that attempted suicide is not a crime of violence, appellant contends there is no basis for finding terroristic threats, no record for the determination of domestic abuse, and no legal support for the OFP. First, appellant

argues that the contents of the e-mails, such as "I think I'll do that tomorrow. Blow your life up like you did mine" and "I just put the nail in your coffin," do not constitute threats of violence when considered in their context. "[T]he question of whether a given statement is a threat turns on whether the communication in its context would have a reasonable tendency to create apprehension that its originator will act according to its tenor." *State v. Schweppe*, 306 Minn. 395, 399, 237 N.W.2d 609, 613 (1975) (quotation omitted). And under Minnesota law one can commit the crime of terroristic threats if the threat was "in a reckless disregard of the risk of causing such terror." Minn. Stat. § 609.713, subd. 1.

Appellant contends the context of the e-mails clearly indicates that the statements were merely figurative threats representing the destruction of a career, and not literal threats to do physical harm. We note first that appellant's explanation based on the context was not made in December 2009, when the e-mails were sent, but on January 7, 2010, after appellant received a call about the e-mails from a police officer. Even without the added events of the suicide attempt and the statement in the presence of the four-year-old daughter suggesting impending death, the district court's conclusion that the e-mails contained terroristic threats is not clearly erroneous because appellant's attempt to explain the context did not occur until weeks later. Further, it was not unreasonable for the district court to read these e-mails in the context of the entire escalating situation, including the suicide attempt and the communication of impending death to the four-year-old daughter. Viewed in total context, we hold that the district

court's finding that the communications were threats of violence was not clearly erroneous.

Appellant next argues that the record does not support a finding of terroristic threats in regard to the e-mails because, although the e-mails were directed at or copied to respondent, the district court did not find that appellant communicated the threats with the purpose of terrorizing respondent. But, again, the statute allows for a finding of terroristic threats if the threat was communicated in a "reckless disregard of the risk of causing such terror." *See id.* While the district court made no explicit findings as to whether the threats in the e-mails were communicated in a reckless disregard for the fear they would cause, the aggressive nature of the e-mails and the violent language in the context of an escalating situation nonetheless supports the district court's conclusion that the elements of terroristic threats were met.

Finally, appellant argues that the district court erred by admitting the daughter's statement through respondent's testimony. However, as the district court noted, there was no objection to respondent's testimony about this statement at the contested OFP hearing. A claim of error in the admission of evidence may be waived if a party fails to timely object. *Jones v. Fleischhacker*, 325 N.W.2d 633, 639 (Minn. 1982); *see also* Minn. R. Evid. 103(a)(1) (requiring "a timely objection or motion to strike"). But even if appellant waived the challenge, this court may still address it if the error was plain error. Minn. R. Evid. 103(d). The plain-error standard, most frequently applied in the criminal context but nonetheless pertinent here, requires a party to show (1) there was error; (2) it

is plain; and (3) the error affected the party's substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998).

Appellant argues it was plain error to admit the daughter's statement because it came in as inadmissible hearsay. Respondent first characterizes it as a statement against a party opponent and, thus, admissible under Minn. R. Evid. 801(d)(2). But, because respondent, not her daughter, testified to the out-of-court statement, respondent's testimony is hearsay and must be separately admissible in order to admit her daughter's hearsay statement. *See* Minn. R. Evid. 805 (allowing the admission of hearsay within hearsay if each part of the combined statements conforms with an exception to the hearsay rule).

Respondent argues that the statement was admissible under the residual exception in Minn. R. Evid. 807. This "catch-all" exception states:

> A statement not specifically covered by rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines that (A) the statement is offered as evidence of a material fact; (B) 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 (C) 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.[1]

[1] The rule also requires that the proponent of the statement make it known to the adverse party prior to the trial or hearing. Minn. R. Evid. 807. In this case, respondent made the statement known to appellant prior to the hearing by reciting the statement in her petition for the OFP and appellant has not argued that such notice is inadequate.

In examining the admissibility of statements attributed to a child victim under the "catch-all" hearsay exception, the supreme court has stated that whether the statement contains sufficient "particular guarantees of trustworthiness" to be admissible "must be determined from the totality of the circumstances surrounding the actual making of the statement, not evidence corroborating the statement." *State v. Edwards*, 485 N.W.2d 911, 915 (Minn. 1992) (applying prior version of rule 807, found at Minn. R. Evid. 803(24) (1992)).

> 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.

Id. at 915-16 (quotation omitted). Courts should also examine "[6] the mental state of the child at the time the statements were made[,]" "[7] the consistent repetition of the child's statements[,]" and "[8] whether the child had an apparent motive to speak truthfully." *Id.* at 916 (quotation and citation omitted).

The district court was not called upon to consider these eight *Edwards* factors when the statement was admitted because appellant had not objected. The district court did, however, consider the relevant circumstances, including appellant's writings, and found that the child had made the statement and found the statement to be admissible based on the surrounding context. The record, albeit limited, is sufficient for us to determine that the admission of the unobjected-to statement was not plain error.

Because the statement was spontaneous and not elicited by leading questions, the first and third *Edwards* factors weigh in favor of admission. While respondent knew that appellant had recently attempted suicide and was concerned about appellant's behavior, the testimony that she "gasped" and was upset upon hearing her daughter's statement indicates that respondent did not expect her daughter to say what she said. Thus, the second factor, interviewer preconception, also weighs in favor of admission. And, absent a showing that the daughter was motivated to lie about anything her father said, the fourth factor, motive to fabricate, weighs in favor of admission.

There is nothing in the record going to whether this is the type of statement a child would be expected to fabricate, or to indicate the daughter's mental state. Thus, the fifth and sixth factors do not lend support to either party's argument. The seventh factor, consistent repetition, arguably weighs against admission because, according to respondent, after repeating the statement just once and seeing how upset the statement made her mother, the child would not say anything more. Finally, while there is nothing to suggest that the child had a reason to be untruthful, respondent had such a motive in that she was seeking the OFP; thus, the eighth factor, motives of the declarant and witness to speak truthfully, weighs both in favor and against admission. We conclude that, on this record, any error in admitting the statement is not plain because multiple factors support the admission under rule 807.

While it is undisputed that the initial written OFP was based on an error of law, the district court's prior oral findings from the bench and the subsequent amended order clarified that the OFP was not based solely on the suicide attempt, but also on the

contents of the e-mails and the statement of impending death made to the parties' daughter. The district court's finding that these constituted terroristic threats has record support in light of the statutory language that allows for a finding of terroristic threats if the threats were made in a reckless disregard for the fear they would cause. We hold that the record supports the district court's finding of terroristic threats and the district court did not abuse its discretion in granting the OFP on that basis.

II

Appellant argues that, even if the OFP has a factual and legal basis, the district court erred in denying his motion to vacate or modify the OFP. Appellant's submissions in support of the motion included (1) affidavits from his mother and father stating their belief that appellant should have unsupervised visits with the children; (2) a notarized letter from appellant's counselor stating she did not feel appellant was a threat to himself or his children; (3) a letter from the doctor appellant was seeing as a result of his previous opioid dependence stating his belief that appellant "is stable and not manifesting his addictive behaviors"; and (4) appellant's affidavit explaining his previous opioid dependence, his suicidal history, and the negative impact the OFP has had on his relationship with his children.

Appellant argues that the district court should have considered this evidence and vacated the OFP. But the record reflects that the district court duly considered appellant's submissions, and having carefully reviewed the entire record, we hold that the district court acted within its discretion in declining to vacate or amend the OFP.

Affirmed.