

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0905**

State of Minnesota,
Respondent,

vs.

Carolina Zarate,
Appellant.

**Filed May 15, 2023
Affirmed in part, reversed in part, and remanded
Larson, Judge**

Cottonwood County District Court
File No. 17-CR-21-499

Keith Ellison, Attorney General, St. Paul, Minnesota; and

Nicholas A. Anderson, Cottonwood County Attorney, Casey Schofield-Mork, Assistant
County Attorney, Windom, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Amy Lawler, Assistant Public
Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Larson,
Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

Appellant Carolina Zarate appeals from her conviction for violating a harassment
restraining order (HRO). We affirm in part, reverse in part, and remand.

FACTS

Appellant and T.T., who never married and did not live together, had a child in 2014. The district court granted T.T. joint custody around 2018, with a roughly 50/50 division of parenting time. In mid-2021, appellant and T.T. had a parenting-time disagreement. Appellant subsequently sent T.T. verbally abusive text messages, which led T.T. to petition the district court for an HRO against appellant. On September 27, 2021, the district court held a hearing and orally granted the petition. The resulting written HRO contained factual findings that appellant “[c]ontacted [T.T.] 60 times in a 5-day period, some communications occurring in the middle of the night[,]” and that appellant had called T.T. “abusive names.” The HRO prohibited appellant from contacting T.T., with the only exception that “[appellant] may have written communication with [T.T.] for the sole purpose of discussing the parties’ joint child and parenting time.”

Beginning around 9:00 p.m. on October 12, 2021, appellant sent T.T. a series of text messages. Some text messages related to the joint child and others did not, including some disparaging text messages about T.T. One text message from appellant stated, “I [guess I will] find out if u call [the] cops on me and have me put in jail Tomorrow.” T.T. reported the alleged violation to law enforcement within hours. Respondent State of Minnesota charged appellant by citation with one misdemeanor count for violating the HRO, in violation of Minn. Stat. § 609.748, subd. 6(a)-(b) (2020). Appellant was served with the HRO and citation on October 14, 2021.

The district court held a jury trial for the alleged violation. During pretrial, the district court heard argument from counsel on the only pending motion in limine. There,

appellant moved the district court to redact the HRO's factual basis on the grounds that it was evidence of prior bad acts under Minn. R. Evid. 404(b), and unfairly prejudicial under Minn. R. Evid. 403. Appellant also requested that the district court prohibit "the state's witnesses from testifying as to what was said by the judge on September 27, 2021" at the HRO hearing, because such testimony would be inadmissible hearsay and violate appellant's Confrontation-Clause rights. The district court declined to redact the HRO, finding that the existence of the HRO was an element of the crime, the factual findings in the HRO were minimal, and the state's need to prove that element of the offense was not outweighed by unfair prejudice. The district court reserved its decision on the second issue, stating it needed to hear the state formulate specific questions in context to make a ruling.

During trial, the state first laid the foundation to introduce the HRO. The state asked T.T. why he sought the HRO, when the HRO hearing occurred, and whether the district court granted the HRO. The state then moved to admit the written HRO, and appellant renewed her objections to the unredacted HRO. The district court overruled the objections and admitted a certified copy of the HRO. The state then asked T.T. to read directly from the HRO. Appellant objected that "[t]he exhibit speaks for itself." The district court overruled this objection, allowing T.T. to describe the no-contact provisions and the exception for written communication regarding the joint child and parenting time. T.T. further testified that T.T. and appellant appeared at the HRO hearing and that at the hearing's conclusion, T.T. understood the legal effect of the court granting his petition. Appellant did not object again to T.T.'s testimony about the HRO's contents or what took place at the HRO hearing.

T.T. was the only witness at trial—appellant did not testify, call any witnesses, or introduce any evidence. The jury found appellant guilty and the district court sentenced appellant to 90 days in jail, stayed its execution, and placed appellant on probation for two years.

This appeal follows.

DECISION

Appellant challenges her conviction on the grounds that: (1) the state presented insufficient evidence to prove her guilt; (2) the district court plainly erred when it admitted T.T.’s testimony reading from the HRO and concerning the district court’s statements at the HRO hearing because both were inadmissible hearsay; (3) the district court legally erred when it admitted the same evidence because it violated her Confrontation-Clause rights; and (4) the district court legally erred when it imposed a probationary term exceeding one year. We address these issues in turn.

I.

Appellant argues the state presented insufficient evidence to prove she violated the HRO. When considering an insufficient-evidence claim, we perform “a painstaking analysis of the record to determine whether the evidence, when viewed in the light most favorable to the conviction,” was sufficient to allow the jury to reach a guilty verdict. *State v. Ortega*, 813 N.W.2d 86, 100 (Minn. 2012) (quotation omitted). We “will not disturb the verdict if the jury, acting with due regard for the presumption of innocence and the requirement of proof beyond a reasonable doubt, could reasonably conclude that the defendant was guilty of the charged offense.” *Id.* at 100. Where the evidence of one or

more elements of an offense is entirely circumstantial, the more rigorous circumstantial-evidence standard of review applies. See *State v. Griffin*, 887 N.W.2d 257, 264 (Minn. 2016); *State v. Al-Naseer*, 788 N.W.2d 469, 473-75 (Minn. 2010). To support a conviction, “Circumstantial evidence must form a complete chain that, in view of the evidence as a whole, leads so directly to the guilt of the defendant as to exclude beyond a reasonable doubt any reasonable inference other than guilt.” *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted).

The circumstantial-evidence test requires a two-step process. *Griffin*, 887 N.W.2d at 264. First, we “identify the circumstances proved” at trial and, consistent with our standard of review, we defer “to the jury’s acceptance of the proof of these circumstances and rejection of evidence in the record that conflicted with the circumstances proved by the State.” *Al-Naseer*, 788 N.W.2d at 473 (quotation omitted). Second, we “examine independently the reasonableness of all inferences that might be drawn from the circumstances proved, including inferences consistent with rational hypotheses other than guilt.” *Id.* at 473-74 (quotation omitted). In the second step, “We give no deference to the fact finder’s choice between reasonable inferences.” *Id.* at 474 (quotation omitted). We consider not just whether the inferences leading to guilt are reasonable, but also whether “there are no other reasonable, rational inferences that are inconsistent with guilt.” *Id.* (quotation omitted).

Appellant challenges only the sufficiency of the evidence regarding the knowledge element. To convict appellant of a misdemeanor HRO violation, the state must prove that appellant “*kn[ew]* of the order.” Minn. Stat. § 609.748, subd. 6(b) (emphasis added). This

element requires the state to prove that the defendant knew their conduct would subject them to criminal liability. *State v. Andersen*, 946 N.W.2d 627, 637 (Minn. App. 2020). Thus, the state must prove that appellant knew the HRO prohibited her from sending the October 12, 2021 text messages that did not relate to the parties' joint child and parenting time. *See id.* The state can prove knowledge using circumstantial evidence. *State v. Gunderson*, 812 N.W.2d 156, 161 (Minn. App. 2012).

In this case, the state proved the following circumstances. The district court granted the HRO on September 27, 2021. The HRO provided that appellant could not have direct or indirect communication with T.T., except written communication for the sole purpose of discussing the parties' joint child and parenting time. Appellant was present at the September 27, 2021 hearing when the district court granted the HRO. At the conclusion of that hearing, T.T. understood the HRO's terms and that it was in effect. On October 12, 2021, appellant sent numerous text messages to T.T., some relating to the joint child and others unrelated to the joint child. Some text messages disparaged T.T. One text message stated, "I [guess I will] find out if u call [the] cops on me and have me put in jail Tomorrow." On October 14, 2021, the state served appellant with a copy of the HRO order and issued a citation for the HRO violation.

Relying on *Andersen* and a series of nonprecedential decisions, appellant argues the state's failure to serve appellant with the HRO order prior to the violation is dispositive. According to appellant, the state cannot prove appellant knew the HRO's specific conditions or language when the HRO order had not been served. We are not persuaded.

It is certainly true that, in many cases, the state relies on evidence that “an individual was served with an HRO” as circumstantial evidence that the individual knew of the HRO order and its terms. *Gunderson*, 812 N.W.2d at 161; *see also Andersen*, 946 N.W.2d at 628 (noting appellant was served with the HRO). But we have never concluded that failure to serve the HRO order dispositively shows the individual lacked the requisite knowledge. Instead, we have interpreted Minn. Stat. § 609.748, subd. 6(b), to require the state to prove the individual knew their conduct subjected them to criminal liability. *Andersen*, 946 N.W.2d at 637. And because the state can prove knowledge using circumstantial evidence, including but not limited to service of the HRO, *Gunderson*, 812 N.W.2d at 161, we disagree with appellant that failure to serve the HRO alone shows appellant lacked the requisite knowledge.

Alternatively, appellant argues that the circumstances proved are consistent with her subjective belief that the October 12, 2021 text messages fell within the HRO’s exceptions. Again, we are not persuaded. Here, the state proved that appellant attended the HRO hearing and, after the hearing, sent text messages indicating concern T.T. would call the police. Based on this evidence, it is not reasonable to conclude appellant was ignorant that her conduct violated the HRO. Further, given that appellant made many disparaging remarks about T.T. during the text-message conversation—text messages that certainly did not relate to their joint child or parenting time—it would be unreasonable to infer that appellant believed her conduct fell within the HRO’s exceptions.

For these reasons, we conclude the jury did not ignore any reasonable inference inconsistent with guilt. *See Al-Naseer*, 788 N.W.2d at 474. The state proved appellant’s violation beyond a reasonable doubt.

II.

Appellant argues that the district court plainly erred when it allowed the state to elicit hearsay testimony when T.T.: (1) read directly from the HRO and (2) testified about what the district court said at the HRO hearing. Because appellant did not object to T.T.’s testimony when he read from the HRO on hearsay grounds, we review the first issue for plain error. *State v. Manthey*, 711 N.W.2d 498, 504 (Minn. 2006) (articulating the plain-error standard for unobjected-to hearsay); *State v. Vasquez*, 912 N.W.2d 642, 649-50 (Minn. 2018) (“A defendant’s objection to the admission of evidence preserves review only for the stated basis for the objection[,]” and other grounds for objection not raised to the district court are forfeited.). We also review T.T.’s testimony regarding statements at the HRO hearing for plain error because the district court did not conclusively rule on appellant’s hearsay objection during pretrial, and appellant failed to renew that objection when the state introduced the evidence at trial. *State v. Word*, 755 N.W.2d 776, 782-83 (Minn. App. 2008) (concluding that when district court makes limited ruling on motion in limine not renewed by objection during trial, we review under plain error). Under the plain-error doctrine, appellant must show: (1) an error; (2) that was plain; and (3) that the error affected her substantial rights. *State v. Griller*, 583 N.W.2d 736, 740 (Minn. 1998). If these three prongs are met, we assess whether we should “address the error to ensure fairness and the integrity of the judicial proceedings.” *Id.*

To constitute plain error, the “error must have been so clear under applicable law at the time of conviction, and so prejudicial to the defendant’s right to a fair trial, that the defendant’s failure to object—and thereby present the trial court with an opportunity to avoid prejudice—should not forfeit his right to a remedy.” *State v. Pilot*, 595 N.W.2d 511, 518 (Minn. 1999) (quoting *Rairdon v. State*, 557 N.W.2d 318, 323 (Minn. 1996)). Regarding hearsay in particular, “The number and variety of exceptions to the hearsay exclusion make objections to such testimony particularly important to the creation of a record.” *Manthey*, 711 N.W.2d at 504. Consequently, we are hesitant “to deem the admission of [unobjected-to] hearsay plain error.” *State v. Stone*, 982 N.W.2d 500, 512-13 (Minn. App. 2022), *rev. granted* (Minn. Feb. 14, 2023) (citing *Manthey*, 711 N.W.2d at 504). “With respect to the substantial-rights requirement, [appellant] bears the burden of establishing that there is a reasonable likelihood that the absence of the error would have had a significant effect on the jury’s verdict.” *State v. Horst*, 880 N.W.2d 24, 38 (Minn. 2016) (quotation omitted).

With this standard in mind, we address appellant’s hearsay arguments in turn.

A. Reading the HRO

We first consider appellant’s challenge to T.T.’s testimony when he read directly from the HRO. We conclude that even if the district court erred when it admitted the testimony, there was no effect on appellant’s substantial rights. The district court admitted a certified copy of the HRO into evidence, which appellant does not challenge on appeal. Therefore, even without T.T.’s testimony reading directly from the HRO, the jury would have received the HRO’s contents in written form. Appellant cannot show a reasonable

effect on her substantial rights when the jury received the same evidence in a different form. *See Griller*, 583 N.W.2d at 741-42.

B. Testimony regarding HRO hearing

We next consider appellant's challenge to T.T.'s testimony regarding what the district court said at the HRO hearing. In particular, appellant challenges the following exchange: "Q. And did the Court order that the HRO was granted at that hearing? A. Yes, the Court did."

We conclude that, even if the district court erred when it admitted testimony about what the district court said at the HRO hearing, any error was not "plain." "An error is plain if it is clear or obvious, which is typically established if the error contravenes case law, a rule, or a standard of conduct." *State v. Webster*, 894 N.W.2d 782, 787 (Minn. 2017) (quotation omitted). Appellant cites no authority, and we are aware of none, that testimony regarding the disposition in an underlying case constitutes inadmissible hearsay. *See State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (reciting principle that "[a]n assignment of error based on mere assertion and not supported by any argument or authorities . . . is waived and will not be considered on appeal"). Thus, the district court did not plainly err when it admitted this statement because the statement did not "clear[ly] or obvious[ly] . . . contravene[] case law, a rule, or a standard of conduct." *Webster*, 894 N.W.2d at 787; *see also Manthey*, 711 N.W.2d at 504 ("The complexity and subtlety of the operation of the hearsay rule and its exceptions make it particularly important that a full discussion of admissibility be conducted at trial.").

III.

Appellant argues the district court violated the Confrontation Clause when it allowed T.T. to read directly from the HRO and testify about the district court's statements at the HRO hearing. We review de novo whether the admission of evidence violates a defendant's rights under the Confrontation Clause. *State v. Caulfield*, 722 N.W.2d 304, 308 (Minn. 2006).

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.” U.S. Const. amend. VI; *see also* Minn. Const. art. I, § 6; *State v. Hull*, 788 N.W.2d 91, 100 (Minn. 2010) (“We apply an identical analysis under both the state and federal Confrontation Clauses.”). The Confrontation Clause generally bars the admission of a prior testimonial statement of a person who does not testify at trial. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004). As a result, the admissibility of a prior statement under the Confrontation Clause depends on whether the statement is testimonial in nature. *Davis v. Washington*, 547 U.S. 813, 821-22 (2006). The supreme court has said on multiple occasions that “the critical determinative factor in assessing whether a statement is testimonial is whether it was prepared for litigation.” *Caulfield*, 722 N.W.2d at 309; *see also State v. Bobadilla*, 709 N.W.2d 243, 250-51 (Minn. 2006) (noting that Minnesota appellate courts and numerous others have “determined that the testimonial question turns on whether government questioners or declarants take or give a statement with an eye toward trial”) (quotation omitted)); *State v. Scacchetti*, 711 N.W.2d 508, 513 (Minn. 2006) (recognizing central consideration in assessing potentially testimonial

evidence was “whether either a declarant or government questioner is acting, to a substantial degree, in order to produce a statement for trial”).

Here, appellant cites no authority, and we are aware of none, that a district court’s oral decision and written HRO order constitute testimonial statements. District courts issue HROs to protect victims of harassment. *See* Minn. Stat. § 609.748, subd. 2 (2020). District courts do not issue HROs “with an eye toward trial.” *Bobadilla*, 709 N.W.2d at 250-51. Instead, HROs seek to end litigation by constructing remedies to deter and prevent future harassment. *See* Minn. Stat. § 609.748, subd. 5(a) (2020) (describing scope of an HRO). Thus, we discern no Confrontation-Clause violation from the submission of the district court’s prior oral and written HRO decisions because they do not constitute testimonial statements.

IV.

Appellant finally argues, and the state agrees, that the district court legally erred when it imposed a probationary term exceeding one year. We agree with the parties that the district court imposed an illegal sentence.

“The legislature has the exclusive authority to define crimes and offenses and the range of the sentences or punishments for their violation.” Minn. Stat. § 609.095(a) (2020); *State v. Brist*, 799 N.W.2d 238, 242 (Minn. App. 2011), *aff’d*, 812 N.W.2d 51 (Minn. 2012) (“Minnesota courts do not have inherent authority to impose terms or conditions of sentences for criminal acts and must act within the limits of their statutory authority when imposing sentences.” (quotation omitted)). Under Minn. Stat. § 609.135, subd. 2(e) (2020), if a defendant is convicted of a misdemeanor, then a district court cannot stay a sentence

for “more than one year,” except for those violations enumerated in Minn. Stat. § 609.135, subd. 2(d) (2020).¹ Here, the district court convicted appellant of violating Minn. Stat. § 609.748, subd. 6(a)—a violation that falls squarely within Minn. Stat. § 609.135, subd. 2(e). The district court then sentenced appellant to a stayed 90 days in jail and imposed two years of probation. But, as the state readily admits, the district court erred when it imposed a two-year probationary term, because that term exceeds one year. We, therefore, remand for the district court to modify appellant’s sentence in accordance with this opinion. *See Brist*, 799 N.W.2d at 242.

Affirmed in part, reversed in part, and remanded.

¹ Section 609.135, subdivision 2(d), provides that, “[i]f the conviction is for any misdemeanor under section 169A.20; 609.746, subdivision 1; 609.79; or 617.23; or for a misdemeanor under section 609.2242 or 609.224, subdivision 1, in which the victim of the crime was a family or household member as defined in section 518B.01, the stay shall be for not more than two years.”