STATE OF MINNESOTA
IN COURT OF APPEALS
A23-1450

In the Matter of:
Michael Patrick Rainville,
Respondent,

vs.

Michael Anthony Forcia,
Appellant.

Filed July 22, 2024
Reversed
Larson, Judge
Dissenting
Connolly, Judge

Ramsey County District Court
File No. 62-HR-CV-23-235

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Considered and decided by Connolly, Presiding Judge; Gaïtas, Judge; and Larson, Judge.

NONPRECEDENTIAL OPINION

LARSON, Judge

In early March 2023, respondent Michael Patrick Rainville, the Minneapolis City Council Member for Ward 3, filed a petition for a harassment restraining order (HRO)

against appellant Michael Anthony Forcia based on statements Forcia made to Rainville during a Minneapolis City Council meeting. Rainville sought the HRO under Minn. Stat. § 609.748, subd. 1(a)(1) (2022), and the district court issued the HRO. Forcia now appeals that decision. Because we agree that Forcia's statements did not constitute "repeated incidents of intrusive or unwanted acts, words, or gestures" such that they satisfied the "harassment" definition in Minn. Stat. § 609.748, subd. 1(a)(1), we reverse the district court's decision to issue the HRO.

FACTS

The Minneapolis City Council held a meeting on February 23, 2023, during which it addressed a controversial agenda item. The meeting was open to the public, and Forcia was in attendance. According to Rainville's HRO petition, at the meeting Forcia made multiple threats of violence toward Rainville. These included: "You motherf—er! I know where you live and I'm coming to get you and your family!" and "I'm going to get you! I'm coming to your house motherf—er!" The petition also alleged that Forcia made "physically threatening" body movements when he pointed and screamed at Rainville.

During an evidentiary hearing before the district court on his HRO petition, Rainville made similar allegations. There, Rainville testified that Forcia approached him as he walked into the city council chamber, called him "a motherf—er," and told him "to do the right thing." Rainville further testified that Forcia stood in front of the city council table and repeatedly swore and yelled at Rainville throughout the meeting. According to Rainville, Forcia said he knew where Rainville lived, that Rainville and his family would not be safe, and that Rainville would be constantly threatened with violence.

At the evidentiary hearing, Forcia gave a slightly different account of what occurred at the city council meeting. Forcia testified that he had not encountered Rainville prior to the meeting, but admitted to saying, "There he is that lying motherf—er," when Rainville first entered the council chamber. Forcia admitted to telling Rainville: "[W]e're coming for you. Doesn't matter where you're at. You[r] house. Your grocery store. The gas station." Forcia also admitted to telling Rainville, "You're done," multiple times. Forcia testified that he meant to convey that he would work to unseat Rainville from the city council. Forcia stated that he only intended to threaten Rainville politically and that he did not, at any point, threaten Rainville or Rainville's family with physical harm. Forcia was also asked about allegations that he used an offensive racial slur toward a different city council member. Forcia responded forcefully that he does not condone using this language and unequivocally denied that he used the racial slur at the city council meeting.

The district court issued its written order on August 30, 2023, and made findings consistent with Rainville's testimony. The district found that Forcia admitted to yelling "you're done" three times at Rainville, "I know where your family lives," and "I'm coming for you" or "[w]e're coming for you." The district court noted that Forcia said something to the effect that "they would come for [Rainville] at his house, in the grocery store and in the gas station." The district court found that Forcia's "statements started before the [council] meeting began and continued for nearly the entire meeting which was approximately one hour."[1] The district court noted that Forcia rarely sat down during the

[1] After the city council meeting, Forcia made several social media posts that referenced Rainville. In its order, the district court described the posts as "what could be conceived

city council meeting and "was in front of the dais." The district court further found that Forcia admitted to using the racial slur directed at another city council member.[2]

Notably, the record includes a video of the city council meeting. Despite this evidence, the district court did not make any findings concerning Forcia's movement around the city council chamber, or regarding any acts or gestures that may be observable in the video. Instead, the district court focused almost exclusively on Forcia's statements to Rainville during the city council meeting.

Based on its findings of fact, the district court concluded that Forcia had engaged in "repeated incidents of intrusive or unwanted acts, words, or gestures" during the city council meeting. *See* Minn. Stat. § 609.748, subd. 1(a)(1). The district court reasoned that Forcia's conduct "started and stopped" and took place over "an extended period of time." According to the district court, Forcia "did not engage in one isolated shout, threat, accusation, or nasty comment. He engaged in repeated incidents as pondered by the statute." The district court further determined that Forcia's statements were constitutionally unprotected "fighting words and true threats," rather than protected political speech. The district court issued the HRO.

[of] as threatening posts on social media." As Rainville conceded at oral argument before this court, however, the district court did not rely on the social media posts as a basis for concluding that Forcia engaged in "repeated incidents of intrusive or unwanted acts, words, or gestures." *See* Minn. Stat. § 609.748, subd. 1(a)(1). As such, we will not address the social media posts in our analysis.

[2] Forcia argues the district court clearly erred when it found he "admitted [to] calling an African American city council member the N-word." Because this finding does not affect our analysis, we need not address the issue. We note, however, that our review of the record gives no indication that Forcia used the racial slur, and Forcia testified forcefully at the hearing that he did not use the racial slur.

Forcia appeals.

DECISION

Forcia challenges the district court's decision to issue an HRO. Specifically, Forcia challenges the district court's decision that the statements Forcia made during the city council meeting met the relevant portion of the "harassment" definition in Minn. Stat. § 609.748, subd. 1(a)(1). We review a district court's ultimate decision to grant an HRO for an abuse of discretion. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008). "A district court abuses its discretion by making findings of fact that are unsupported by the evidence, misapplying the law, or delivering a decision that is against logic and the facts on record." *Woolsey v. Woolsey*, 975 N.W.2d 502, 506 (Minn. 2022) (quotation omitted).[3] We review the district court's underlying factual findings for clear error. *In re Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021). Clear error review does not permit an appellate court "to engage in fact-finding anew, even if the court would find the facts to be different if it determined them in the first instance." *Id.* at 221-22 (quotation omitted).

[3] Without analysis, both parties assert that appellate courts use an abuse-of-discretion standard to review a district court's decision that conduct it found to have occurred does or does not constitute "harassment" under Minn. Stat. § 609.748. The parties cite, and research revealed, no precedential authority dispositively addressing the standard for reviewing a district court's decision on this point. Thus, the standard of review for this question appears to be an unsettled area of law. But because these parties assume the abuse-of-discretion standard is appropriate, we use that standard in this appeal. We note, however, that—given this record—our result would not change if we applied a de novo or clear error standard of review.

A district court may grant an HRO if it finds "reasonable grounds to believe that the respondent has engaged in harassment." Minn. Stat. § 609.748, subd. 5(a)(3) (2022). The statute defines "harassment" to include various behaviors. *See* Minn. Stat. § 609.748, subd. 1(a) (2022) (identifying various types of "harassment" for HRO purposes). Here, the district court determined that Forcia's conduct constituted "harassment" under Minn. Stat. § 609.748, subd. 1(a)(1), which defines "harassment" to include:

> [1] a single incident of physical or sexual assault . . . or [2] *repeated incidents* of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target.

Minn. Stat. § 609.748, subd. 1(a)(1) (emphasis added). In this case, the district court relied upon the second part of the definition, which we will refer to as the "repeated-incidents provision."

To constitute harassment under the repeated-incidents provision, a person's behavior must go "beyond an acceptable expression of outrage and civilized conduct." *Kush v. Mathison*, 683 N.W.2d 841, 846 (Minn. App. 2004), *rev. denied* (Minn. Sept. 29. 2004). Further, the limitation that an individual must engage in "*repeated* incidents of intrusive or unwanted acts, words, or gestures" is constitutionally significant. *See Dunham v. Roer*, 708 N.W.2d 552, 566-67 (Minn. App. 2006), *rev. denied* (Minn. Mar. 28, 2006). In *Dunham*, the appellant argued that the repeated-incidents provision was unconstitutionally overbroad on its face because it impermissibly restricts a person's right to free speech. *Id.* at 564. In analyzing the constitutionality of the repeated-incidents

provision, we distinguished it from another harassment statute the supreme court held *was* unconstitutionally overbroad. *Id.* at 566. The other harassment statute prohibited "[a] single incident of intimidating conduct." *Id.* at 566-67. We distinguished the repeated-incidents provision on the grounds that (1) it narrowly targeted constitutionally unprotected speech, and (2) *repeated* incidents must occur. *Id.* In determining that the repeated-incidents provision passed constitutional muster, we specifically noted that the "single incident of intimidating conduct" was not sufficient to justify an HRO. *Id.*

Other than the single finding addressed in footnote 2 above, Forcia does not challenge the district court's underlying factual findings regarding what occurred at the city council meeting. Instead, Forcia challenges the district court's determination that those findings support the conclusion that he committed "*repeated* incidents of intrusive or unwanted acts, words, or gestures." *See* Minn. Stat. § 609.748, subd. 1(a)(1). Forcia argues that his conduct constituted, at most, a *single* incident of intrusive or unwanted words. Thus, Forcia concludes, he did not engage in "harassment" under the repeated-incidents provision.

The statute does not define the word "incidents," the term "repeated incidents," or the phrase "repeated incidents of intrusive or unwanted acts, words, or gestures." *See* Minn. Stat. § 609.748, subd. 1. Nor does caselaw definitively define these terms. Our precedential[4] caselaw does, however, provide some guideposts to delineate when conduct constitutes a "single incident" or "repeated incidents."

[4] We have also issued a series of nonprecedential opinions regarding the meaning of the repeated-incidents clause. While these cases are nonprecedential and, therefore, not

In *Beach v. Jeschke*, the appellant approached the respondent and respondent's husband after an event and said: "You two had better come up with the $80,000, or you're both going to jail. This is going to be fun," referring to pending child-support litigation between respondent's husband and appellant's wife. 649 N.W.2d 502, 502 (Minn. App. 2002). After an evidentiary hearing, the district court issued an HRO based on appellant's statement. *Id.* at 502-03. We concluded that "the two-sentence statement, uttered on one occasion, does not meet the requirement of 'repeated incidents' necessary to constitute verbal harassment," and the district court therefore abused its discretion when it issued an HRO based on "a single incident of words." *Id.* at 503.

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binding, we find them persuasive and helpful to understanding the meaning of the repeated-incidents clause. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c). In *Peterson v. Meyer*, the district court issued an HRO based on evidence that the appellant sent seven hostile text messages during a one-hour period on one day and sent another long text message the next day. No. A18-1185, 2019 WL 2168770, at *1-2 (Minn. App. May 20, 2019). On appeal, the appellant argued that the seven text messages on the first day did not constitute repeated incidents and that the message on the second day did not meet the criteria for harassment. *Id.* at *3. We rejected this argument, reasoning that the repeated messaging on the first day amounted to harassment and that the message on the second day reiterated some of the same themes. *Id.* at *4. In *Bjerke v. Flomo*, the respondent yelled at the petitioner while inside her car, later called her by telephone more than 50 times, and sent multiple text messages during a single evening and into the next morning. No. A19-0094, 2019 WL 4927070, at *1 (Minn. App. Oct. 7, 2019). The district court did not issue an HRO on the ground that the respondent had not engaged in "repeated incidents." *Id.* at *2. We reversed and remanded, reasoning that the car incident was separate from the calling and texting incidents and, therefore, respondent's conduct constituted repeated incidents. *Id.* at *2-3. In another case, *Rickmyer v. Woodall*, the respondent took photographs and a video, and made threatening statements over the course of 30 minutes. No. A20-0312, 2021 WL 317701, at *1 (Minn. App. Feb. 1, 2021). The district court did not issue an HRO on the ground that the respondent's conduct was "a single incident." *Id.* We affirmed, reasoning that the respondent's conduct occurred within a relatively short time period. *Id.* at *2.

In *Kush*, a property-line and easement dispute arose between neighbors. 683 N.W.2d at 843. The record indicated that on two specific occasions, the appellant made hostile, profanity-laced statements to the respondent. *Id.* On appeal, the appellant argued that his conduct could not constitute "repeated incidents" because the two occasions were separated by 22 months. *Id.* at 844. We rejected that argument, reasoning that, although the district court's order only detailed two incidents, both the order and the record noted ongoing, intervening incidents, including face-to-face encounters, telephone calls, blocking respondent's access to his property, and uninvited visits to the respondent's property. *Id.* at 844-45. Giving due regard "to the district court's opportunity to determine the credibility of witnesses," we affirmed the district court's decision that the "appellant's conduct constituted 'repeated incidents.'" *Id.* at 845.

In *Harris ex rel. Banks v. Gellerman*, a dispute arose between the appellant and the respondent over the appellant visiting the respondent's mother in the mother's care facility. 954 N.W.2d 604, 606 (Minn. App. 2021). The respondent petitioned for an HRO. *Id.* The sole accusation supporting the HRO was that, on one occasion, the appellant called the respondent's workplace (which was also the mother's care facility) and accused the respondent of poisoning her mother, called the respondent a psychopath, and asked for a wellness check on the mother "because she was 'probably dead by now.'" *Id.* at 607. The district court issued an HRO based on this phone call. *Id.* at 607, 610. We reversed, noting that the record was "devoid of any other interactions between [the appellant] and [the respondent] beyond that single, isolated phone call." *Id.* at 610. And "[b]ecause harassment requires *multiple* incidents of adverse and unwanted contact," we concluded

the district court abused its discretion when it granted an HRO based on the single phone call. *Id.*

From this caselaw, we discern that evaluating whether a person engaged in a "single incident" or "repeated incidents of intrusive or unwanted acts, words, or gestures," *see* Minn. Stat. § 609.748, subd. 1(a)(1), is a case-specific determination that depends on the particular facts and circumstances at issue. But the caselaw also suggests some factors a district court may consider when deciding whether a "single incident" or "repeated incidents" occurred: (1) time; (2) location(s); and (3) means.[5]

With respect to time, if an individual's conduct occurred continuously during a relatively short time period, the evidence may suggest a single incident occurred. *See Beach*, 649 N.W.2d at 503; *Harris*, 954 N.W.2d at 610. But if the conduct occurred episodically or over a long time period, the evidence may show repeated incidents occurred. *See Kush*, 683 N.W.2d at 844-45. With respect to location, if the individual's conduct occurred in a single location, the evidence may weigh in favor of concluding a single incident occurred. *See Beach*, 649 N.W.2d at 503; *Harris*, 954 N.W.2d at 610. But if the conduct occurred or was perceived in multiple locations, the evidence may suggest

[5] We note that we previously discussed the relevance and significance of these factors in *Winkowski v. Winkowski*, No. A21-1115, 2022 WL 1297622, at *3 (Minn. App. Apr. 22, 2022) (order op.), *rev. granted* (Minn. Jul. 19, 2022) *and appeal dismissed* (Minn. Apr. 26, 2023). But because *Winkowski* is an order opinion, we do not rely on its analysis to make our decision. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c) ("Nonprecedential opinions and order opinions are not binding authority except as law of the case, res judicata, or collateral estoppel, but nonprecedential opinions may be cited as persuasive authority."). We further note that this is not an exhaustive list of factors and does not limit a district court's ability to consider other factors where it is appropriate to do so.

that repeated incidents occurred. *See Kush*, 683 N.W.2d at 844-45. And with respect to means, if the individual engaged in a single type of conduct, the evidence might suggest a single incident occurred. *See Beach*, 649 N.W.2d at 503; *Harris*, 954 N.W.2d at 610. But if the individual engaged in multiple forms of conduct—such as words, acts, *and* gestures—the evidence might tend to show repeated incidents occurred. *See Kush*, 683 N.W.2d at 844-45.

Applying these factors to this case, we conclude that the district court abused its discretion when it determined that Forcia engaged in repeated incidents of unwanted acts, words, or gestures. Regarding time, the district court made two findings: (1) "[Forcia's] statements started before the meeting began and continued for nearly the entire meeting which was approximately one hour"; and (2) "[Forcia's] statements. . . . started and stopped and were repeated for an extended period of time." While a close call, reviewing our precedential caselaw, we conclude that these findings are akin to multiple oral statements made during a single phone call. *See Harris*, 954 N.W.2d at 610. While the district court found the flow of the statements "started and stopped" and that the statements occurred for "an extended time period," it also found that the oral statements "*continued* for nearly the entire meeting." And the district court found the statements only occurred during a single, time-bound event. Thus, we discern that the time within which Forcia's conduct occurred suggests a single incident.

Regarding location, the district court found: (1) Forcia was in the council chamber when Rainville entered; (2) "seldom sat down"; and (3) "was in front of the dais." Otherwise, the district court made no findings regarding Forcia's movement around the

city council chamber.[6] The district court's findings support only one conclusion: that Forcia's conduct occurred in a single location. And notably for this case, Forcia's conduct occurred during a single, isolated event—a public meeting—where Forcia had a legal right to be present. Thus, we discern that this is more similar to a single confrontation after an event, *see Beach*, 649 N.W.2d at 503, or a single phone call, *see Harris*, 954 N.W.2d at 610, and suggests that a single incident occurred.

Finally, regarding means, the district court only relied on Forcia's oral statements toward Rainville. The district court did not rely on Forcia engaging in other types of conduct to reach its decision.[7] Thus, we discern that this case is in line with other cases where "a single incident of words" is not sufficient to sustain a determination that an individual engaged in "repeated incidents." *See Beach*, 649 N.W.2d at 503; *see also Dunham*, 708 N.W.2d at 566-67 (determining the repeated-incidents provision passed constitutional muster because a "single incident of intimidating conduct" was not sufficient to justify an HRO).[8]

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[6] Even if the district court had made findings regarding Forcia's movement around the chamber, which it did not, we do not discern that Forcia's movement around the city council chamber means his conduct occurred in more than one location.

[7] The dissent asserts that the district court found that Forcia engaged in "acts" and "gestures" that amounted to harassment. We disagree. The district court did not identify any "acts" or "gestures" that were "intrusive or unwanted" or would "have a substantial adverse effect or [was] intended to have a substantial adverse effect on [Rainville's] safety, security, or privacy." *See* Minn. Stat. § 609.748, subd. 1(a)(1). In fact, the only findings made by the district court that plausibly relate to "acts" or "gestures" were: (1) when Rainville walked in, Forcia "approached him"; (2) Forcia "seldom sat down"; (3) Forcia "was in front of the dais"; and (4) Forcia "was sprinkling what he identified as tobacco."

[8] We also note that the facts in this case are strikingly similar to our nonprecedential opinion in *Rickmyer*, where we similarly decided that the alleged harasser had not engaged in the "repeated incidents" necessary to issue an HRO. *See Rickmyer*, 2021 WL 317701, at *1-2

For these reasons, we discern that all three considerations tend to show that a single, isolated incident occurred. Because Forcia engaged in a single type of conduct, at a single location, during a relatively short, timebound meeting, we conclude that the district court's decision that this case involved "repeated incidents of intrusive or unwanted acts, words, or gestures" under the repeated-incidents provision is contrary to logic and the facts on this record. *See* Minn. Stat. § 609.748, subd. 1(a)(1); *Woolsey*, 975 N.W.2d at 506. Therefore, the district court abused its discretion when it determined that Forcia engaged in "harassment," and we reverse the district court's decision to issue the HRO.[9]

Reversed.

(respondent used her cell phone to take pictures and video of appellant and made threatening statements over a period of approximately 30 minutes).

[9] Because we conclude the district court abused its discretion when it determined Forcia engaged in "repeated incidents," we need not address whether Forcia's conduct constituted "intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target." *See* Minn. Stat. § 609.748, subd. 1(a)(1). But the absence of this analysis is *not* an endorsement of Forcia's conduct at the city council meeting. Further, Forcia separately argues that the district court erred when it determined that Forcia's statements constituted "fighting words" or "true threats," rather than protected political speech. Again, because we conclude Forcia did not engage in "harassment" under the repeated-incidents provision, we need not reach this issue. We note, however, that had we reached the issue, we would agree with the dissent's analysis that some of Forcia's statements constituted "fighting words" and "true threats," and therefore were not protected political speech.

CONNOLLY, Judge (dissenting)

I respectfully dissent. I would affirm the district court's issuance of the HRO because I believe that Forcia's conduct at the Minneapolis city council meeting constituted "repeated incidents" of harassing conduct that is not protected under the First Amendment.

I. The district court did not err in determining that Forcia's conduct constituted "repeated incidents" of harassment.

A district court's interpretation of the HRO statue is a question of law that we review de novo. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008). "A district court's findings of fact will not be set aside unless clearly erroneous, and due regard is given to the district court's opportunity to judge the credibility of witnesses." *Id.* (quotation omitted). But the district court's decision whether to grant an HRO is reviewed for an abuse of discretion. *Id.* A district court abuses its discretion when "it makes findings of fact that are not supported by the record, misapplies the law, or resolves the matter in a manner that is contrary to logic and the facts on record." *Borth v. Borth*, 970 N.W.2d 699, 701 (Minn. App. 2022) (quotation omitted).

The HRO statute defines harassment to include "repeated incidents of intrusive or unwanted acts, words, or gestures that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another, regardless of the relationship between the actor and the intended target." Minn. Stat. § 609.748, subd. 1(a) (2022). Forcia interprets this language to mean that "the allegedly harassing conduct [must] occur at separate or distinct events or clearly different times." And he argues that because his allegedly harassing conduct occurred during one event, the

Minneapolis city council meeting, he did not commit "'repeated incidents of harassment.'" Forcia's argument presents a question of statutory interpretation, which we review de novo. *Peterson v. Johnson*, 755 N.W.2d at 761.

The HRO statute does not define "repeated" nor does it explain what constitutes a "repeated incident." *See* Minn. Stat. § 609.748, subd. 1(a). Although Minnesota caselaw is not so illuminating on this issue, several cases are informative.

In *Beach v. Jeschke*, this court reversed the grant of an HRO based on an ex-husband's two-sentence statement to his ex-wife and her new husband. 649 N.W.2d 502, 502-03 (Minn. App. 2002). This court reasoned that the "two-sentence statement, uttered on one occasion, d[id] not meet the requirement of 'repeated incidents' necessary to constitute . . . harassment" because it was a "single incident of words." *Id.* at 503. And, based on the limited facts provided in *Beach*, the interaction between the parties seemingly ended after the single statement was made. *See id.* Similarly, in *Harris ex rel. Banks v. Gellerman*, this court reversed the grant of an HRO that related only to an isolated phone call in which appellant called respondent's place of employment, a care facility where respondent's mother lived, to accuse respondent of poisoning her mother. 954 N.W.2d 604, 610-11 (Minn. App. 2021). The facts here are unlike these cases. Forcia's statements were not a "single incident of words," *see Beach*, 649 N.W.2d at 503, or an "isolated phone call," *see Harris*, 954 N.W.2d at 610. Instead, Forcia made many threatening statements while face-to-face with Rainville, with breaks between the statements. And he did not cease making these statements until he was removed from the city council meeting. This was not a one-and-done situation like the statements in *Beach* and *Harris*.

In contrast, in *Peterson v. Meyer*, this court affirmed the issuance of an HRO based on evidence that the defendant sent six hostile text messages to the complainant over the course of an hour. No. A18-1185, 2019 WL 2168770, at *1-3 (Minn. App. May 20, 2019), *rev. denied* (Minn. Aug. 6, 2019).[10] The next day, the defendant sent one more message that related back to the text messages sent on the previous day. *Id.* And in *Bjerke v. Flomo*, this court reversed the denial of an HRO when the defendant refused to exit the complainant's car and continually called and texted the complainant over a 12-hour period. No. A19-0094, 2019 WL 4927070, at *3 (Minn. App. Oct. 7, 2019).

While the facts here are somewhat different from those in *Peterson v. Meyer* and *Bjerke*, I do not believe that an HRO may be granted only when communications occur over the course of two days or 12 hours. In those cases, the alleged harasser's conduct was achieved largely through indirect communication. Here, all of Forcia's statements were made to Rainville in person. Based on these unique facts, Forcia was not in a situation where he was left to communicate with Rainville by phone. Instead, Rainville was far less difficult to communicate with, as he sat in audience to Forcia's threats.

This court has recently acknowledged that whether a person has engaged in "repeated incidents" of harassment, rather than a single incident, turns on the specific facts of the case. *Winkowski v. Winkowski*, No. A21-1115, 2022 WL 1297622, at *3 (Minn. App. Apr. 22, 2022) (order op.), *rev. granted* (Minn. Jul. 19, 2022) *and appeal dismissed*

[10] Nonprecedential opinions may be cited as persuasive authority. Minn. R. Civ. App. P. 136.01, subd. 1(c).

(Minn. Apr. 26, 2023).[11] In doing so, this court identified three factors helpful in answering that question: (1) "the relative timing of the allegedly repeated incidents," (2) "the location or locations in which the offensive conduct occurs or is perceived," and (3) "the means by which the alleged harasser engages in offensive conduct." *Id.* In *Winkowski*, the appellant, Winkowski, attempted to get his ex-wife's attention by texting and calling her, honking his car's horn, knocking on her front door, and ringing her doorbell during one two-hour period. *Id.* And he did so within the same general location—his ex-wife's residence. *Id.* Thus, Winkowski's presence outside his ex-wife's home—a general location—was divisible between his ex-wife's driveway and her front door. *Id.* Noting that the facts of the case were unlike the facts in other Minnesota cases, this court determined that the district court did not err by concluding that Winkowski engaged in "repeated incidents" of harassment. *Id.* Because I believe that the facts presented here are also distinguishable from those in other HRO cases, applying *Winkowski*'s framework is helpful.

First, with respect to timing, Forcia's conduct began before the start of the one-hour city council meeting and escalated during the last 10 to 25 minutes of the meeting. Rainville testified that Forcia first approached him as he was taking his seat before the meeting, called him a "motherf—ker[,]" and told him "to do the right thing"—which Rainville understood to be related to the vote at issue. Rainville also testified that

[11] I am aware that *Winkowski* is an order opinion, which would not generally be cited and is not binding authority. *See* Minn. R. Civ. App. P. 136.01, subd. 1(c). However, prior to this court's decision in this case, it was in this order opinion that, for the first time, this court provided a thoughtful framework for resolving whether a person engaged in "repeated incidents" of harassment.

throughout the meeting, Forcia told Rainville that he "knew where [Rainville] lived. That [his] family would not be safe. [He] would not be safe. [And he] would be constantly threatened with violence."

Rainville's testimony is corroborated by the testimony of another city council member, who sat next to Rainville at the city council meeting, who testified that she heard Forcia call Rainville a "motherf—ker" and state, "[w]e're going to attack every time we see you." She also testified that Forcia directed his comments at Rainville, stating: "'You're not going to go anywhere. Everywhere you go we're going to come.'" She stated that Forcia was using words like "'attack'" and "'I know where your family is'" and "'I'm going to – [go] everywhere you go. When you step out of here I'm going to be there.'" And, although the city council president warned Forcia individually, and later warned all attendees, that the disruptive conduct was to stop, Forcia persisted in his threats to Rainville. Thus, similar to *Winkowski*, Forcia's statements would temporarily stop and resume again. *See id.* (stating that the alleged harasser was at times "intensively engaged in making contact with [his ex-wife]" while other times "he paused his offensive conduct").

The majority refers to the hour that Forcia made his statements as a "relatively short time period." But one hour is not a substantially shorter time period than the two-hour period in *Winkowski*. And, based on the record, Forcia's near-constant threats only stopped at the one-hour mark because he was removed from the city council meeting. I would therefore conclude that the timing factor weighs in favor of the district court's finding of "repeated incidents" of harassment.

Second, while Forcia's statements occurred in one general location—the city council chamber—Forcia approached Rainville before the meeting, walked away, and returned throughout the meeting. Thus, similar to *Winkowski*, Forcia moved to different places within the same general location. *See id.* Moreover, Forcia had the advantage of being face-to-face with Rainville—by virtue of the designated location of the public forum—and had no need to move to vastly different areas to get Rainville's attention. *See id.* (describing the alleged harasser's different attempts to contact his ex-wife). I do not believe that accessibility to the complainant should preclude a finding that Forcia harassed Rainville. In fact, Forcia threatened Rainville, stating, "We will follow you wherever you go." And the other city council member testified that Forcia stated that "he knew where [Rainville's] family was and that everywhere he went he was going to attack, attack, attack." It just so happened that, during the city council meeting, Forcia did not need to go very far to reach Rainville, nor could Rainville leave the meeting, so Forcia had no need to change his location to continue his conduct. Accordingly, I believe that the location factor weighs in favor of the district court's finding of "repeated incidents" of harassment.

Third, evidence that the alleged harasser engaged in multiple forms of conduct, such as words, acts, or gestures, supports a finding of repeated incidents. *Winkowski*, 2022 WL 1297622, at *3. I disagree with the conclusion that the district court relied only on Forcia's verbal statements. The district court expressly found that Forcia's "statements" and "actions" constitute repeated incidents of harassment, that Rainville was "frightened" by Forcia's "threats *and* behavior," and that Forcia's "*behavior* amounted to repeated incidents of intrusive or unwanted acts, words *or* gestures." (Emphasis added.) On appeal,

Forcia implicitly challenges these findings by arguing that "there was only one kind of act – verbal statements made in person" and that "he did not even engage in 2-3 different sorts of actions." These assertions contradict the district court's findings that Forcia's "acts," "gestures," and "words" constitute repeated incidents of harassment. And I believe that the record supports the district court's findings, even if the precise acts or behaviors are not named with specificity. *See Kush v. Mathison*, 683 N.W.2d 841, 844 (Minn. App. 2004) (concluding that "the lack of specificity is not fatal to the district court's findings" of harassment), *rev. denied* (Minn. Sept. 29, 2004); *see also In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221 (Minn. 2021) ("If there is reasonable evidence to support the [district] court's findings of fact, a reviewing court should not disturb those findings." (quotation omitted)).

The district court referred to Forcia's conduct while "in front of the dais." And the record reflects that, while in front of the dais, Forcia engaged in various types of harassing conduct. First, Rainville testified that Forcia approached his seat, where, according to the other city council member, Rainville was closest to the public and the easiest to reach. Second, video footage from the city council meeting shows Forcia put his cell phone in Rainville's face and pointed at Rainville while yelling at him. Third, Forcia used different means to threaten Rainville by threatening the safety of Rainville's family, as well as Rainville himself. I believe this constitutes more than one type of conduct, in contrast to the very singular forms of conduct perpetrated in cases like *Harris* and *Beach*. *See Harris*, 954 N.W.2d at 610 (involving one phone call); *see also Beach*, 649 N.W.2d at 502-03

(involving one, two-sentence statement). Therefore, I believe that the conduct factor weighs in favor of the district court's finding of "repeated incidents" of harassment.

The majority suggests that we are to make "a case-specific determination that depends on the particular facts and circumstances at issue." It is my belief that this includes considering the unique circumstances presented here: Forcia made repeated threats to Rainville within the circumstances and confines of a single city council meeting. Forcia should not reap the benefit of the city council meeting being inherently time-limited and confined to the four walls of the city council chamber. I believe this to be particularly true in light of the discretion afforded to district courts in making these difficult and fact-intensive determinations. Accordingly, I would conclude that the district court did not err by determining that Forcia engaged in "repeated incidents" of harassment. Consequently, I do not see any abuse of discretion in the district court's granting of the HRO.

II. The district court did not err in determining that Forcia's statements are not protected speech under the First Amendment.

Because I would affirm the district court's grant of the HRO, I examine Forcia's First Amendment argument here. Generally, the "First Amendment prohibits the government from abridging the freedom of speech." *State v. Mrozinski*, 971 N.W.2d 233, 238 (Minn. 2022) (quotation omitted); *see* U.S. Const. amend. I; *see also* Minn. Const. art. 1, § 3. But this protection does not extend to "fighting words" or "true threats." *Id.* "Fighting words are those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Dunham v. Roer*, 708 N.W.2d 552, 565 (Minn. App. 2006) (quotations omitted), *rev. denied* (Minn. Mar. 28, 2006). And "[t]rue threats

encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Id.*

Forcia argues that his statements constituted "political speech" because they were made in the context of a city council meeting and expressed Forcia's political position on the vote at issue. For two reasons, I disagree.

First, Forcia's statements constitute fighting words. Forcia suggests that *In re Welfare of S.L.J.*, 263 N.W.2d 412 (Minn. 1978), is dispositive here. In *S.L.J.*, our supreme court held that a 14-year old's statement "[F]—k you pigs" to two police officers, did not constitute fighting words because the statement from the 14-year-old child "spoken in retreat from more than 15 feet away rather than eye-to-eye," created "no reasonable likelihood that they would tend to incite an immediate breach of the peace or to provoke violent reaction by an ordinary, reasonable person." *Id.* at 420. The opposite facts are present here. Rainville was face-to-face with Forcia, and Forcia remained in the same room as Rainville—often standing directly in front of him—until he was escorted out with the other attendees. Rainville stated that he was physically threatened by Forcia, describing himself as a "physically vulnerable person" who had recently undergone "major surgery" and was "69 years old." Forcia's statements to Rainville were not merely insulting comments; they were fighting words likely to cause reasonable persons to protect their own safety.

Second, Forcia's statements constitute "true threats." Rainville stated that he felt physically threatened by Forcia's pointing and screaming. And Rainville understandably

interpreted Forcia's statements that, Rainville and "[his] family would not be safe" because he "would be constantly threatened with violence," to mean physical violence. These threats caused Rainville and the other city council member to later discuss their shared fear "about how threatened [they] felt and how helpless [they] felt sitting on the dais and having nowhere to go." Forcia's statements were not, as he contends, simply warnings that Forcia would run against Rainville in the next election. In fact, Forcia never mentioned the election.

As noted by the majority, Forcia has a legal right to be present at city council meetings. But his threats to "attack [Rainville] every time we see you" and warnings that he "know[s] where [Rainville's] family is" crossed the line. A reasonable person would not, as Forcia alleges, construe his references to Rainville's family as mere statements to let Rainville's family know who he is. But, even if that is what Forcia intended, it was within the district court's discretion to judge Forcia's credibility. *See Peterson v. Johnson*, 755 N.W.2d at 761.

I note that the HRO prohibited Forcia from going near Rainville's office and from having any direct or indirect contact with Rainville. It did not prohibit Forcia from going to Minneapolis City Hall. *See Welsh v. Johnson*, 508 N.W.2d 212, 215 (Minn. App. 1993) (explaining that an HRO order prohibiting appellant from personally addressing respondent but allowing him to picket outside an abortion clinic did not impede his ability to express his beliefs on abortion). I also note my concern that our decision may hinder alleged victims of harassment from obtaining protection under an HRO when all incidents of harassing conduct occur within the context of one event, however that is interpreted. For

example, under our decision, an alleged harasser could make repeated threatening statements toward an ex-partner throughout a shared child's parent-teacher conference, more than the single statement uttered in *Beach*, but evade an HRO because the statements were made within the span of the parent-teacher conference—one designated and time-limited event. *See Beach*, 649 N.W.2d at 502-03. As it stands now, scenarios like this may very well come to pass.

In conclusion, by affording due deference to the district court's determination, I would affirm the district court's order granting the HRO because Forcia engaged in "repeated incidents" of harassment not protected under the First Amendment. Consequently, I must dissent.