This opinion is nonprecedential except as provided by Minn.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
A24-0085

Mikesha Pauline Barnes,
Appellant,

vs.

Andrew Christopher Lee,
Respondent.

Filed July 22, 2024
Affirmed
Cleary, Judge*
Dissenting, Segal, Chief Judge

Anoka County District Court
File No. 02-CV-23-5646

Eric Richard, Brooklyn Center, Minnesota (for appellant)

Ben Gisselman, Gisselman Law Firm, PLLC, Bloomington, Minnesota (for respondent)

Considered and decided by Smith, Tracy M., Presiding Judge; Segal, Chief Judge; and Cleary, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

NONPRECEDENTIAL OPINION

CLEARY, Judge

On appeal from the district court's dismissal of appellant's petition for a harassment restraining order (HRO), appellant argues that the district court abused its discretion by determining that she did not prove that harassment occurred. We affirm.

FACTS

Appellant Mikesha Pauline Barnes and respondent Andrew Christopher Lee divorced in April 2023 and share both physical and legal custody of two minor children. In October 2023, Barnes petitioned for an HRO against Lee.[1] The petition alleged that Lee had repeatedly sent harassing and insulting emails to Barnes, some of which included sexually explicit videos that were made while the parties were in a relationship. The petition further alleged that Lee had frightened Barnes by yelling at her during a custody exchange and that Lee shoved Barnes to the ground during an altercation at their son's football game. The district court issued an ex parte HRO, and Lee requested a hearing on the allegations in the petition.

At the hearing, the district court admitted 13 exhibits from Barnes into evidence. The exhibits contain copies of emails Lee sent to Barnes in September and October 2023. Several of the email discussions relate to disagreements over parenting issues, including whether: (1) Barnes should be added to the account for their older son's football league; (2) Barnes should attend the football games; and (3) their younger son should switch

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[1] Barnes previously petitioned for an HRO against Lee, but it was dismissed following a hearing.

daycares. In other email discussions, Lee berates Barnes for destroying their family and being unfaithful to him, says sometimes he "think[s] maybe [he] should've abused [Barnes] like [another man] did," tells Barnes that she has been looking pretty, "[i]t's not too late to try for a daughter," and that she should come home. Three of the emails contain video attachments; the videos themselves were not admitted into evidence but Barnes testified they were sexually explicit videos of the parties from when they were married. Barnes ultimately asked Lee to stop sending her sexually explicit messages, and Lee responded that he understood and would "comply."

At the hearing, Barnes testified about the emails and her in-person interactions with Lee. She testified that she created an email account specifically to facilitate coparenting with Lee, but that Lee sent her messages that were not related to the children and were instead personal in nature.[2] She found the messages "offensive" and testified they made her "feel disrespected" and "[d]isgusted." She testified that Lee sent her a sexually explicit video even after she requested that he only contact her about the children but acknowledged that he did not send any videos after she specifically asked him to stop sending them. She also testified that Lee pushed her to the ground during a confrontation at their older son's football game.

At the conclusion of Barnes's testimony, Lee's counsel requested that the district court determine that Barnes had not proven that harassment occurred by Lee. The district

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[2] The sexually explicit videos were sent to Barnes's personal email account, but other messages about the parties' relationship history were sent to Barnes's parenting email account.

court granted the request in part and determined that the emails did not constitute harassment. The district court reasoned that Lee's emails conveyed an attitude that was "absolutely inappropriate" and argumentative, but not "so intrusive or intended to adversely affect the safety, security, or privacy of another." The district court cautioned Lee that if he continued to send Barnes sexually explicit media, it would be harassment, and then "it's going to be real easy for [Barnes] to get an order" because she stated that she did not want to receive the messages.

The district court then advised that the only remaining matter was the allegation that Lee assaulted Barnes during one of their son's football games. Lee testified that during a football game Barnes was hugging their younger son and Lee told her "that's enough." According to Lee, he grabbed their son's arm, but Barnes pulled on the child's other arm. Barnes then pushed Lee, who in turn pushed Barnes, resulting in Barnes falling to the ground. Both parties called the police; the police responded and spoke with the parties but took no further action.

At the conclusion of Lee's testimony, the district court dismissed the petition for the HRO. The district court determined there was insufficient evidence to conclude that an act of physical abuse occurred, and reiterated that Lee's conduct was "certainly inappropriate," but did not rise to the level of harassment. Barnes appeals.

DECISION

We review a district court's decision whether to grant an HRO for an abuse of discretion. *Kush v. Mathison*, 683 N.W.2d 841, 843 (Minn. App. 2004), *rev. denied* (Minn. Sept. 29, 2004). "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). We review factual findings for clear error, giving due regard to the district court's credibility determinations. *Kush*, 683 N.W.2d at 843-44.

When reviewing a district court's findings of fact for clear error, appellate courts (1) view the evidence in the light most favorable to the findings; (2) do not find their own facts; (3) do not reweigh the evidence; (4) do not reconcile conflicting evidence; and (5) "need not go into an extended discussion of the evidence to prove or demonstrate the correctness of the findings of the [district] court." *In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221-22 (Minn. 2021) (quotation omitted). "[A]n appellate court's duty is fully performed after it has fairly considered all the evidence and has determined that the evidence reasonably supports the decision." *Id.* at 222 (quotations omitted).

Barnes argues that the district court abused its discretion by dismissing her petition for an HRO. She asserts that the evidence she presented demonstrates "multiple incidents of harassing, unwanted conduct and messages" that support granting an HRO. She also contends that the district court erred in determining that Lee's repeated emails with sexually explicit videos were not harassment. We are not persuaded.

At the outset, we note that we agree with Barnes's assertion that Lee's "comments were vulgar, insulting, sexual in nature, and offensive." But conduct must meet a higher standard to constitute harassment. "Harassment" is defined, in relevant part, as "repeated incidents of intrusive or unwanted acts, words, or gestures that 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) (2022).[3] This definition "requires both objectively unreasonable conduct or intent on the part of the harasser and an objectively reasonable belief on the part of the person subject to harassing conduct." *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. App. 2006), *rev. denied* (Minn. Mar. 28, 2006); *see also Peterson v. Johnson*, 755 N.W.2d 758, 764 (Minn. App. 2008).

Here, the district court determined that Lee's conduct was "absolutely inappropriate," but not "so intrusive or intended to adversely affect the safety, security, or privacy of another." Based on the record before us, we cannot conclude that the district court's decision to deny the HRO constitutes an abuse of discretion. Barnes testified that she found Lee's conduct "offensive" and that it made her feel "[d]isgusted" and "disrespected." These sentiments do not rise to the requisite level of "a substantial adverse effect on [Barnes's] safety, security, or privacy." Minn. Stat. § 609.748, subd. 1(a)(1). Barnes was asked directly if she felt threatened by one of the emails with a sexually explicit video attached and responded, "I think [Lee] sending multiple [sexually explicit] messages. . . just shows that, you know, he's going to keep doing it whenever I don't do whatever he wants." But Barnes acknowledged that Lee stopped sending her sexually explicit videos after she told him not to, which occurred more than seven weeks before the

[3] Harassment may also include "a single incident of nonconsensual dissemination of private sexual images under section 617.261." Minn. Stat. § 609.748, subd. 1(a)(1). Although Lee sent sexually explicit videos to Barnes, the parties do not dispute that Lee's conduct did not constitute dissemination of private sexual images under Minn. Stat. § 617.261 (2022) because he did not send any of the videos to a third party. Barnes's argument that Lee's conduct constitutes harassment is based on the assertion that it meets the more general repeated-incidents definition of harassment quoted above.

hearing on the petition. And as noted above, the district court admonished Lee that if he continued to send such messages, "it's going to be real easy for [Barnes] to get an order."

Barnes cites to a nonprecedential opinion from this court to support her argument that Lee's conduct in sending the videos should be considered harassment. *Gornovskaya v. Ponkin*, No. A14-0147, 2014 WL 6609734 (Minn. App. Nov. 24, 2014). In *Gornovskaya*, the district court issued an HRO in favor of a woman against her former partner after determining there were "reasonable grounds to believe that [the former partner] harassed [the woman] by texting a 'semi-nude' picture of her and threatening to publish pictures of her." *Id.* at *2. This court affirmed and determined that both sending the revealing photograph and threatening to publish personal photographs was objectively unreasonable conduct. *Id.* at *5. But *Gornovskaya* is distinguishable because the district granted the HRO, and therefore this court was tasked with determining if the decision to grant an HRO under similar facts was an abuse of discretion. That a different court may have granted an HRO based on similar conduct does not compel the decision that here the district court's decision not to grant the HRO was an abuse of discretion.[4]

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[4] We note that arguments asserting that a district court abused its discretion have limited weight when the argument is based on an analogy to an opinion affirming another district court's exercise of its discretion:

> When two cases have allegedly similar facts, the trial court in the first may properly exercise its discretion to achieve a particular result, while the trial court in the second, with an equally proper exercise of discretion, nevertheless achieves a different result. It may be appropriate to affirm both trial courts because recognition and deference are granted to broad trial court discretion. However, it is inappropriate either to label

Moreover, although some of Lee's comments in the emails could be interpreted as threatening—such as his statement that sometimes he thinks he should have abused Barnes—Barnes did not testify about these statements or their impact on her at the hearing. Rather, when asked if "anything happen[ed] that caused [her] to feel threatened, harassed, or concerned," Barnes testified about the altercation at the football game. The district court heard competing testimony about the incident from the parties, but despite the fact that both parties called the police and the incident occurred in public, there were no police reports or other witness testimony. The district court could have credited Barnes's testimony and concluded an act of physical assault occurred, but it chose not to, and we give due regard to the district court's credibility determinations. *Peterson*, 755 N.W.2d at 761.

Finally, in addition to our deferential standard of review, the statute itself gives the district court discretion to determine whether to grant an HRO. The statute provides that "[t]he court *may* issue an order" if the court finds "there are reasonable grounds to believe that the respondent has engaged in harassment." Minn. Stat. § 609.748, subd. 5(b)(3) (2022) (emphasis added). Accordingly, a district court is not required to grant an HRO even if it determines that harassment has occurred. *Compare* Minn. Stat. § 645.44, subd. 15 (2022) ("'May' is permissive."), *with* Minn. Stat. § 645.44, subd. 15a (2022) ("'Must'

> such affirmances "contradictory" or to urge that they be given precedential value.

Doris Ohlsen Huspeni, *Family Law: Appellate Opinions On Trial,* Bench and Bar of Minnesota, August 1990, at 20.

is mandatory."), *and* Minn. Stat. § 645.44, subd. 16 (2022) ("'Shall' is mandatory."). We are constrained by the discretion afforded to the district court and cannot substitute our own judgment for that of the district court. We therefore affirm the district court's denial of the HRO petition.

Affirmed.

SEGAL, Chief Judge (dissenting)

I respectfully dissent because I conclude that the district court abused its discretion by misapplying the law in two respects. First, the district court erred in determining that the bulk of the allegations made by appellant Mikesha Pauline Barnes failed to meet the legal definition of harassment and summarily dismissed them by granting what the district court termed a "partial directed verdict." Second, the district court misapplied the law when it failed to consider whether respondent Andrew Christopher Lee's act of twice sending a sexually explicit video to Barnes served as evidence of harassment under the "repeated incidents" portion of the statute. Minn. Stat. § 609.748, subd. 1(a)(1) (2022). The district court rejected the evidence because the videos were not sent to a third party and thus did not constitute harassment under the portion of the harassment restraining order (HRO) statute that defines harassment as including a violation of Minn. Stat. § 617.261 (2022) for "nonconsensual dissemination of private sexual images" to a third party. Minn. Stat. § 609.748, subd. 1(a)(1). For these reasons, I would reverse and remand this case for the district court to reconsider the evidence under the correct legal standard.

After Barnes presented her case, and before Lee testified, the district court granted a "partial directed verdict." The district court determined that all but one of Barnes's allegations failed to state a claim of harassment under the HRO statute, Minn. Stat. § 609.748 (2022). The only allegation not dismissed as part of the "partial directed verdict" was Barnes's claim that Lee shoved her to the ground at one of their children's football games. The district court stated that it wanted to hear testimony from Lee before making any findings related to the shoving allegation.

The district court explained that it was granting a "partial directed verdict" because, while the conduct complained of by Barnes was "stupid" and an "issue of trying to grab more power," it was "not harassment." As to the undisputed fact that Lee twice sent Barnes explicit sexually oriented videos apparently recorded of the two of them during their marriage, the district court stated that "so long as those images aren't displayed to people other than the people in the photo, it's [also] not harassment."

Assuming without deciding that the analysis for a directed verdict applies to proceedings for an HRO, a district court "may grant a directed verdict when the evidence is insufficient as a matter of law to present a fact question for the jury." *Kaiser-Bauer v. Mullen*, 609 N.W.2d 905, 910 (Minn. App. 2000). We review a grant of a directed verdict de novo, viewing the evidence in the light most favorable to the party who was the subject of the directed verdict. *Id.* And to the extent that the district court's order is subject to an abuse-of-discretion standard of review, it is an abuse of discretion to misapply the law. *See Borth v. Borth*, 970 N.W.2d 699, 701, 706 (Minn. App. 2022) (reversing and remanding the denial of an HRO based on the district court's misapplication of the law).

The allegations dismissed by the district court as failing to state a claim under the HRO statute include the following:

- Barnes testified that she had created an email address just for communications with Lee about their two children and sent an email to Lee stating: "[P]lease keep conversations limited to our children, in email and in person . . . . I have no interest in speaking with you outside of what is absolutely necessary with the boys."

  Lee answered by email "No" and then sent a series of additional negative emails to Barnes.

- Lee sent another series of emails with the subject line "you know you f--ked up right" that included explicit sexual accusations and other derogatory comments. In one of these emails, Lee stated that maybe Lee "should've abused [her] like [another male] did because [she] still showed more loyalty to him by [sexual reference] when [she was] married to [Lee]."

  Another email in this same string stated: "Always remember, you can't war with me, how many losses you want to take? HRO and Divorce I'm up 2-0.[[1]] You can't beat me, just join me baby girl. Just know, if you bring any man into my boys['] life that disrespect[s] them in the slightest way a bare hell dem haffi pay." This is followed by two devil emojis and a skull emoji and Lee's statement that "You never met Drew-L. I only showed you Andrew."

- On two different occasions, Lee emailed Barnes a sexually explicit video apparently recorded during their marriage, along with sexual comments.

When viewed in the light most favorable to Barnes, this series of communications is more than "stupid" conduct; the emails contain threatening language and fall well within the type of conduct that could constitute harassment under the HRO statute, Minn. Stat. § 609.748, subd. 1(a)(1).

In addition, the district court erred in dismissing the sexually-explicit-video evidence when it concluded that sending the videos was not harassment because they were not "displayed to people other than the people in the [videos]." The definition of harassment in the HRO statute includes "a single incident of nonconsensual dissemination of private sexual images under section 617.261," which makes it a crime to share such images with a third party without consent of the persons depicted in the images. The district court summarily dismissed the allegation solely on the ground that Lee only sent

[1] Before the parties' divorce was finalized, Barnes had brought an earlier petition for a harassment restraining order, which was denied by the district court. Presumably, that is the "HRO" case referenced in this email.

the videos to Barnes and not to a third party. But just because Lee did not share the videos with a third party, Lee's act of sending the videos to Barnes could still serve as evidence of harassing conduct under the "repeated incidents of . . . unwanted acts, words, or gestures" part of the definition. Minn. Stat. § 609.748, subd. 1(a)(1); *see, e.g.*, *Gornovskaya v. Ponkin*, No. A14-0147, 2014 WL 6609734, at *5 (Minn. App. Nov. 24, 2014) (nonprecedential opinion of this court cited for its persuasive value, stating that the party seeking the HRO "proved that she had an objectively reasonable belief that [the other party's] act of texting her the [semi-nude] picture had a substantial adverse effect on her privacy"). The district court misapplied the law when it failed to consider the evidence under the "repeated incidents" portion of the statute.

The standard of proof to make out a claim of harassment requires evidence of "objectively unreasonable conduct or intent on the part of the harasser" and an "objectively reasonable belief on the part of the person subject to harassing conduct" that the conduct or intent had a substantial adverse effect on the safety, security, or privacy.[2] *Peterson v. Johnson*, 755 N.W. 2d 758, 764 (Minn. App. 2008) (quotation omitted). When viewed as a whole, I believe Barnes's allegations fall squarely within the statute's definition of harassment. This is particularly true when, as here, the communications occurred after their divorce was finalized and after Barnes had already filed one petition for an HRO, putting Lee on notice that she found his conduct or communications unwelcome.

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[2] On the question of the impact of the conduct on Barnes, she advised Lee that the communications were not wanted and she also testified that she "no longer fe[lt] safe exchanging [the] kids" and felt harassed by the conduct.

I conclude that Barnes thus made out a prima facie case of harassment and that the district court erred in summarily dismissing her allegations. I would therefore reverse the district court's denial of the HRO and remand to the district court to make findings and a determination applying the correct legal standard.