STATE OF MINNESOTA
IN COURT OF APPEALS
A14-0147

Irina N. Gornovskaya,
Respondent,

vs.

Dmitrij Ponkin,
Appellant.

Filed November 24, 2014
Affirmed
Hooten, Judge

Dakota County District Court
File No. 19AV-CV-13-2701

Dmitrij Ponkin, Orlando, Florida (pro-se appellant)

Irina N. Gornovskaya, Burnsville, Minnesota (pro-se respondent)

Considered and decided by Hooten, Presiding Judge; Connolly, Judge; and Johnson, Judge.

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

HOOTEN, Judge

On appeal from the district court's grant of a harassment restraining order (HRO) to respondent, appellant argues that the HRO should be reversed. Because there was substantial evidence in the record supporting a finding of harassment, and the district

court did not abuse its discretion by issuing an HRO in favor of respondent against appellant, we affirm.

FACTS

Appellant Dmitrij Ponkin and respondent Irina N. Gornovskaya were in a romantic relationship from 2007 to 2010, were married for part of that time, and had a son together. They separated in 2010 and divorced in 2011. The dissolution judgment and decree granted respondent sole physical custody of their son and granted appellant supervised visitation.

In 2011, respondent obtained an order for protection (OFP) against appellant. Respondent testified that, after the OFP expired, appellant began to harass her again by gaining unauthorized access to her e-mail and her "accounts," as well as "creating [online] profiles on behalf of [her] relatives" and trying to convince her to reconcile with him. In addition, appellant maintained an online "profile with [their] mutual pictures as a family," despite the fact that appellant had remarried. Respondent testified that appellant has a history of "blackmailing" her and making indirect threats to her and her friends.

On April 20–21, 2012, respondent and appellant exchanged e-mails regarding appellant's upcoming visit with their son, and the two disagreed about the person who would supervise appellant's visit. Respondent suggested that one of her close friends would supervise the visit. Appellant replied, "Nobody else can be a middle man between me and my son. You should understand the consequences for those people." When respondent insisted, appellant wrote:

> It looks like you forgot that I have copies of all [your] fake documents and [your] Abkhazian passport that you provide[d] to USCIS. Do you think that there are some discrepancies in your statement to immigration[?] It is your business, but remember you create obstacles for me to see my son. What does Daddy usually do in such cases? This is . . . home work for you. Think about it.

To respondent, these statements signified that every time they had disagreements about their son, appellant would "threate[n]" her. After this e-mail exchange, respondent petitioned for another OFP, but it was denied.

In early September 2013, appellant arranged to visit their son. On September 7, respondent called appellant's mother to discuss an issue related to respondent and appellant's son. In response to her telephone call, appellant texted respondent, calling her "Kusia," which is an affectionate Russian term that roughly translates into English as "sweetie" or "honey." Respondent texted back, "Why are you writing to me? I'm not your Kusia." Appellant texted, "Who cares? . . . What's the difference? I call you what I want." Appellant then texted, "I even have a photo [of you] in my contacts," and he texted a "revealing" picture of respondent from when they were in a relationship.

Later on September 7, respondent called appellant to discuss their text-message exchange. According to respondent, appellant told her that he "[has] lots of [her] pictures" from when they were in a relationship, including other revealing pictures. He also stated, "Just . . . imagine what I can do with all of [these pictures]."

On September 10, 2013, respondent filed a petition for an HRO against appellant. The district court issued a temporary restraining order, and on November 21, 2013, held an evidentiary hearing on the petition. During the hearing, respondent testified about the

April 20–21 e-mails and the September 7 text messages and telephone call, including the text message she received from appellant with the revealing picture of her. She indicated that she was embarrassed about showing the picture to the district court, but demonstrated what part of her body the picture revealed. Respondent testified that she "just got scared that if he started doing this, what can be next?" Respondent testified that "four years [has passed]" since their relationship ended, and yet appellant "keeps my pictures, threaten[s] me with my pictures." She added that appellant has posted pictures of her online in the past, and he possesses "naked" pictures of her. She also testified that, on September 7, appellant was threatening to post these pictures in order to "blackmail" her regarding a dispute involving their son.

Appellant testified that, in his cell phone directory of contacts, the name for respondent was "Kusia," and the picture he sent was the picture associated with her phone contact. He explained, "I'm a friendly person, so I just called [her] as I used to call [her] in the past." He admitted sending the text messages and picture on September 7, but denied that they were threatening in nature. He admitted he possessed other pictures of respondent from when they were in a relationship. He denied possessing any other "inappropriate picture[s]" of respondent and stated that he had "no intent to publish" any pictures of her.

The district court issued an HRO against appellant for a period of two years, finding that there were reasonable grounds to believe that appellant harassed respondent by texting a "semi-nude" picture of her and threatening to publish pictures of her. Appellant appeals from the HRO.

D E C I S I O N

An HRO may be granted if "there are reasonable grounds to believe that the [actor] has engaged in harassment." Minn. Stat. § 609.748, subd. 5(b)(3) (2012). Harassment includes "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." *Id.*, subd. 1(a)(1) (2012). To sustain an HRO petition, the petitioner must prove (1) "'objectively unreasonable conduct or intent on the part of the harasser'" and (2) "'an objectively reasonable belief on the part of the [harassed] person'" of a substantial adverse effect on the person's safety, security, or privacy. *Peterson v. Johnson*, 755 N.W.2d 758, 764 (Minn. App. 2008) (quoting *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006)).

We review the district court's grant of an HRO for an abuse of discretion. *Kush v. Mathison*, 683 N.W.2d 841, 843 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). We review the district court's factual findings for clear error and defer to the district court's judgments regarding witness credibility. Minn. R. Civ. P. 52.01; *Kush*, 683 N.W.2d at 843−44. "But this court will reverse the issuance of [an HRO] if it is not supported by sufficient evidence." *Kush*, 683 N.W.2d at 844.

I.

Appellant challenges the district court's factual findings and objects to the district court's admission of evidence of the April 20–21, 2012 e-mail exchanges. Appellant notes that respondent previously submitted these e-mails as part of her 2012 petition for

an OFP, which was dismissed. Therefore, he argues, "no threats have been found in the submitted message[s]." However, appellant did not object at the evidentiary hearing to the district court's receipt of evidence of the April 20–21 e-mail exchanges. Therefore, appellant has waived his objection and cannot raise this argument for the first time on appeal. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) ("A reviewing court must generally consider only those issues that the record shows were presented and considered by the trial court in deciding the matter before it.") (quotation omitted). In support of his argument that the e-mails were not threatening, appellant submitted respondent's affidavit and petition for OFP, dated April 24, 2012, and the district court's domestic abuse order for dismissal, dated June 13, 2012. However, this court "may not consider matters not produced and received in evidence below." *Id.* at 582–83.

Moreover, the district court's findings of harassment were based on the September 7, 2013 text messages and the subsequent telephone call between the parties. The district court found reasonable grounds to believe that appellant harassed respondent because he texted a "semi-nude picture of [respondent] with [the] assertion that he may publish [it] or make other use" of it, and he threatened her with the "potential publication of photographs." There is substantial evidence in the record supporting these findings. Respondent testified regarding appellant's ongoing threats against her, including his threat that he would publish pictures of her. She noted that appellant had published some of her pictures online in the past and has "some naked pictures" of her. And, appellant admitted that he texted the revealing picture to respondent, possessed other pictures of respondent, and referred to her as "Kusia." Based upon this record, the district court's

finding that appellant texted respondent a revealing picture of her is not clearly erroneous.

While appellant made numerous admissions regarding respondent's claims, he denied having any other "inappropriate" pictures of her and stated that he had "no intent to publish" any pictures of her. Also, the parties sharply dispute what appellant said during the September 7 telephone call. But, "[c]redibility determinations are the province of the trier of fact." *Peterson*, 755 N.W.2d at 763. The district court found respondent's version of appellant's statements during the telephone call to be more credible than appellant's version, and we will not disturb that determination on appeal.[1] The district court's finding that appellant threatened to publish pictures of respondent is not clearly erroneous. While the district court heard testimony and received documents into evidence regarding events that occurred in early 2012, including the April 20–21 e-mail exchanges, these events did not form the basis of the district court's grant of the HRO.

II.

Appellant also challenges the district court's conclusion that his conduct satisfies the statutory definition of harassment. The HRO statute "requires both (1) *repeated* intrusive or unwanted acts, words, or gestures[;] and (2) a *substantial* adverse effect or an intent to adversely [a]ffect the safety, security, or privacy of another." *Dunham*, 708 N.W.2d at 566.

[1] Appellant argues that respondent provided "neither records nor [a] transcript" of the telephone call, and therefore there is no actual record evidence of his alleged threat to publish pictures of respondent. This is incorrect. Respondent's in-court testimony, subject to cross-examination, is itself evidence of what appellant said during the phone call. The district court was free to rely on this evidence in making its factual findings.

A.

The district court identified two specific harassing incidents that appellant committed against respondent, both occurring on September 7, 2013: the text-message exchange and the subsequent telephone call. It is unclear from the record how closely these events occurred in time. Regardless of whether the telephone call took place right after the text-message exchange or if there was a gap of several hours, the two incidents were distinct. They involved two different communication mediums and took place consecutively. Therefore, the record supports the district court's conclusion that the statute's repeated-incidents requirement is satisfied.

B.

To establish that appellant's conduct meets the statutory definition of "harassment," respondent must prove (1) "objectively unreasonable conduct or intent on the part of the harasser" and (2) "an objectively reasonable belief on the part of the person subject to the harassing conduct." *Peterson*, 755 N.W.2d at 764 (quotations omitted). Respondent has met her burden of proof as to both harassing incidents.

Appellant's conduct during the text-message exchange was objectively unreasonable. He began by referring to respondent as "Kusia," despite the fact that it had been four years since they were in a relationship, he was married to someone else, and the parties had had periods of intense conflict since their relationship ended. Calling respondent "Kusia," by itself, is not objectively unreasonable. "[I]nappropriate or argumentative statements alone cannot be considered harassment." *Kush*, 683 N.W.2d at 844. However, respondent texted back, indicating that she was uncomfortable with him

using that word. In response, appellant brushed aside her concern and then texted her a revealing picture of her from the days of their relationship. Under these circumstances, texting a revealing picture to an ex-spouse is an intrusive and unwanted act that would likely cause the recipient to feel disturbed and upset. Appellant argues that texting the picture was not harassing because the picture was simply associated with respondent's cell-phone contact. This argument is unpersuasive. Texting the picture was objectively unreasonable because, under these circumstances, any reasonable recipient would find it offensive, and any reasonable sender would know that it would be found offensive.[2]

Appellant argues that he did not *intend* to cause a substantial adverse effect on respondent's privacy, and therefore the district court abused its discretion in granting the HRO. However, to sustain an HRO petition, the petitioner must prove *either* "objectively unreasonable conduct *or* intent on the part of the harasser." *Peterson*, 755 N.W.2d at 764 (emphasis added) (quotation omitted). Because respondent proved, and the district court properly concluded, that appellant's act of texting the revealing picture was objectively unreasonable, respondent did not need to prove that appellant *intended* to harass her.

Respondent proved that she had an objectively reasonable belief that appellant's act of texting the picture had a substantial adverse effect on her privacy. Given the relationship of the parties at the time of the incident and their history of conflict, any

[2] Appellant suggests that texting the picture was not objectively unreasonable because respondent initiated the text-message exchange by first calling appellant's mother. This argument is unpersuasive and has been previously rejected by this court. *See Kush*, 683 N.W.2d at 844 ("We find no authority that excuses [harassing] conduct based upon which party [initiated the conversation].").

reasonable person would feel that her privacy had been violated if her ex-spouse texted her a revealing picture of herself, and any reasonable ex-spouse would know this.

As to the second harassing incident, appellant's conduct during the telephone call was also objectively unreasonable. Threatening to publish an ex-spouse's pictures, including revealing pictures, is objectively unreasonable. Respondent's belief that this threat had a substantial adverse effect on her privacy is objectively reasonable.

Because the record supports the district court's determination that reasonable grounds exist to believe that appellant engaged in harassment, it was within the district court's discretion to issue the HRO.[3]

Affirmed.

[3] Appellant questions respondent's motive in seeking the HRO, arguing that she did so because appellant refused to give their son permission to obtain a passport. Because appellant did not raise this argument before the district court, he is precluded from raising it on appeal. *Thiele*, 425 N.W.2d at 582 ("Nor may a party obtain review by raising the same general issue litigated below but under a different theory."). Furthermore, the HRO statute does not impose a motive or intent requirement on the person seeking the HRO. As long as the person has established, among other things, "reasonable grounds to believe that the [actor] has engaged in harassment," the district court is authorized to issue an HRO. Minn. Stat. § 609.748, subd. 5(b)(3).