STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1045

Jake Anthony Scharber-Pikula, petitioner,
Respondent,

vs.

Sharon Renee Wynn,
Appellant.

Filed December 26, 2017
Affirmed
Larkin, Judge

Crow Wing County District Court
File No. 18-CV-17-1600

Lynne Torgerson, Minneapolis, Minnesota (for respondent)

Daniel M. Hawley, Conrad C. Kragness, Gammello-Pearson PLLC, Baxter, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Peterson, Judge; and Larkin, Judge.

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

LARKIN, Judge

Appellant challenges the district court's issuance of a harassment restraining order (HRO) on behalf of respondent. Appellant contends that the district court violated her right to due process by questioning respondent and his witness and by establishing foundation

for respondent's exhibits. Because appellant's due-process challenge was not raised and determined in district court and because even if it had been raised, it would not provide a basis for relief, we affirm.

FACTS

Respondent Jake Anthony Scharber-Pikula (Pikula) and appellant Sharon Renee Wynn resided together for approximately seven months. After they parted ways in 2017, Pikula petitioned the district court for an HRO against Wynn, and Wynn petitioned the district court for an order for protection (OFP) against Pikula. The district court granted each party ex parte temporary relief pending an evidentiary hearing on the competing petitions.

Pikula appeared pro se at the hearing. Wynn was represented by counsel. The district court proceeded with Pikula's petition first, because it was filed first. The district court asked Pikula questions regarding the basis for his petition and explained that it was doing so "[t]o move this along and just to try to be efficient with our time." When Pikula attempted to offer exhibits for the district court's consideration during his testimony, such as publicly-posted Facebook messages printed from a computer, Wynn's attorney objected on foundation and hearsay grounds. The district court questioned Pikula and his witness, satisfied itself that foundation was adequate, and received the exhibits. In doing so, Pikula's witness testified out of order, during Pikula's testimony. Although Wynn's attorney objected to the admissibility of the proffered evidence, he never objected to the district court's questioning of Pikula and his witness.

The district court invited Wynn's attorney to cross-examine Pikula and his witness. During Wynn's cross-examination of Pikula, the district court again mentioned its desire to be efficient. The district court instructed Wynn's attorney, "We have like four hearings in four different cases this afternoon. So, why don't you show those [phone call logs] to [Pikula] so that we don't have him searching his memory. Show him the phone logs, if you will, that you want him to talk about." The district court then asked Wynn's attorney if he wanted to have the phone logs marked. Counsel had the logs marked and responded, "I'll try to speed up the process here, Your Honor." The district court said, "I appreciate that. At some point we may take a recess on this so I can let everybody else know the status of this case. It looks like it's going [to be] a while here." Counsel responded, "That's understandable, Your Honor, and I won't object to a recess." The district court stated, "But, you've got to take the time that you need to do this right, so go ahead."

After Wynn's attorney cross-examined Pikula and his witness, Wynn provided testimony in support of her petition. At one point, Wynn apparently became upset. Her attorney asked the district court for tissues on her behalf. The district court stated, "Ms. Wynn, why don't you just take a short break here and go sit next to [your attorney] for a moment." At this point, the district court reviewed the procedural history of the case with the parties on the record and acknowledged each party's request for relief. The district court stated, "And now we've had a hearing for close to two hours on this issue. . . . Both parties have a right to pursue the relief they're seeking." But the district court suggested, "One option that the parties could always consider is each agreeing that the other has such an order against the other party, without there being any findings of wrongdoing by either

party." The district court explained how such an agreement would work and the possibility of criminal charges for violating any order resulting from the agreement. Ultimately, the district court said,

> I don't want to sound coercive on this at all. It's totally up to the parties. But, what we're going to do is if we don't have some sort of an agreement on this, then we're going to have Ms. Wynn come to the stand, and then you can continue testifying. And I'll make a decision on both parties' cases once all these proceedings are over.

Wynn agreed to the proposed resolution, but Pikula did not.

Wynn was recalled to the witness stand and continued her testimony in support of her petition. Pikula declined the district court's invitation to cross-examine Wynn, but he offered testimony in rebuttal. The district court asked Wynn's counsel if he wanted to cross-examine Pikula regarding his rebuttal testimony, and counsel declined. Next, the district court invited the parties to make closing statements. Wynn's attorney went first, followed by Pikula. The district court allowed Wynn's attorney to respond to Pikula's closing remarks. The district court took the matter under advisement, recessed the hearing, and told the parties to take a ten-minute break.

When the case was recalled, the district court announced its decision on the record. The district court granted Pikula's request for an HRO against Wynn and dismissed Wynn's petition for an OFP against Pikula, finding that the allegations in support of Wynn's petition were not proved.

Wynn appeals.

D E C I S I O N

Wynn's statement of the case on appeal included the following two issues: whether the district court erred by not conducting a hearing that meets the due-process requirements of Minn. Stat. § 609.748 (2016 & Supp. 2017) and whether the district court erred by issuing an HRO without finding harassment occurred under Minn. Stat. § 609.748, subd. 1(a). Wynn abandoned the second issue after receipt and review of the transcript. Thus, she does not challenge the district court's factual findings in support of the HRO or the adequacy of those findings to support the HRO. Nor does she challenge the district court's denial of her petition for an OFP.

Instead, Wynn seeks reversal of Pikula's HRO on one theory: The district court erred in conducting a hearing that failed to meet the express and implied due-process requirements of Minn. Stat. § 609.748. Specifically, Wynn argues that the district court inappropriately became an advocate for Pikula by eliciting all of his testimony and his witness's testimony, and by laying proper foundation for exhibits over Wynn's attorney's objections. Essentially, Wynn challenges the district court's impartiality.

"A judge must act at all times in a manner that promotes public confidence in the independence, integrity, and impartiality of the judiciary, and must avoid impropriety and the appearance of impropriety." Minn. Code Jud. Conduct Rule 1.2. The code of judicial conduct defines "impartial" and "impartiality" as the "absence of bias or prejudice in favor of, or against, particular parties or classes of parties, as well as maintenance of an open mind in considering issues that may come before a judge." Minn. Code Jud. Conduct,

Terminology. Under Minn. R. Crim. P. 26.03, subd. 14(3), "[a] judge must not preside at a trial or other proceeding if disqualified under the Code of Judicial Conduct."

Pikula responds that Wynn's due-process theory is not properly before this court on appeal because she did not object to the district court's questioning at the hearing. A reviewing court generally does not consider issues that were not presented to and decided by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). This rule applies in the context of judicial-bias claims. *See Braith v. Fischer*, 632 N.W.2d 716, 724-25 (Minn. App. 2001) (declining to address judicial-bias claim that was not presented to the district court), *review denied* (Minn. Oct. 24, 2001). Although the supreme court has "stressed the importance of protecting the constitutional right of litigants to a fair and impartial trial," it has stated that "[t]he protection of that right is the duty and obligation of the lawyer as an officer of the court." *Jones v. Jones*, 242 Minn. 251, 262, 64 N.W.2d 508, 515 (1954). "It is . . . [counsel's] duty to assert such right in timely fashion to the end that there be no unnecessary delay in the orderly administration of justice. This fundamental right may be waived by failure to seasonably assert it." *Id.*; *see Baskerville v. Baskerville*, 246 Minn. 496, 501, 75 N.W.2d 762, 766 (1956) ("A litigant who, in the absence of fraud or other controlling circumstance, elects to go to trial without taking timely and appropriate action to disqualify a judge for bias waives his right to assert such bias.").

Although Wynn's attorney objected to the admissibility of some of Pikula's evidence on foundation and hearsay grounds, he never objected to the district court questioning Pikula or his witness. Nevertheless, Wynn seeks appellate relief based on that questioning. She argues that "the objections to hearsay and foundation were to [the district

court's] questions themselves, and thereby his conduct. Accordingly, the objections were sufficient to preserve the issue for appeal."

"An objection must be specific as to the grounds for challenge." *State v. Rodriguez*, 505 N.W.2d 373, 376 (Minn. App. 1993) (holding that an objection on grounds of legal conclusion did not alert district court to hearsay and Confrontation Clause issues), *review denied* (Minn. Oct. 19, 1993). A party does not preserve an objection for appeal if she objects in district court on grounds different from those argued on appeal. *Id.*; *see also Tagtow v. Carlton Bloomington Dinner Theatre, Inc.*, 379 N.W.2d 557, 561 (Minn. App. 1985) (declining to consider objections regarding damage calculation evidence because the "only objection which was preserved for appeal was the foundation objection"). Wynn's objections to the admissibility of certain evidence on foundation and hearsay grounds was entirely inadequate to alert the district court that Wynn also objected, on due-process grounds, to its questioning of Pikula and his witness. Wynn's objections simply did not alert the district court to the serious charge that it had abandoned its role as an impartial judicial officer by acting as an advocate for Pikula, thereby violating her right to due process. Because the grounds for Wynn's evidentiary objections in district court were different from the due-process grounds argued on appeal, they were not sufficient to preserve her due-process challenge for appeal.

Wynn alternatively argues that, even if her challenge to the district court's actions was not raised in district court, this court may consider the challenge under its "supervisory authority." "Supervisory authority is vested solely in the Minnesota Supreme Court. Any argument that this court should rule in an anticipatory manner must fail." *Thole v. Comm'r*

of Pub. Safety, 831 N.W.2d 17, 21 (Minn. App. 2013) (citation omitted), *review denied* (Minn. July 16, 2013). Because this court has no supervisory authority, Wynn's argument is unavailing.

Wynn next argues that we should apply an exception to the general rule precluding consideration of an issue for the first time on appeal. The exception is as follows:

> An appellate court may base its decision upon a theory not presented to or considered by the [district] court *where the question raised for the first time on appeal is plainly decisive of the entire controversy on its merits, and where,* as in a case involving undisputed facts, *there is no possible advantage or disadvantage to either party in not having had a prior ruling by the* [district] *court on the question.*

Watson v. United Servs. Auto. Ass'n, 566 N.W.2d 683, 687 (Minn. 1997) (quotation omitted). Because Wynn asks us to reverse and remand for a new evidentiary hearing, a ruling in Wynn's favor on the due-process theory raised in this appeal is not "plainly decisive of the entire controversy on its merits." *Id.* at 688. We therefore decline to apply the exception.

In sum, the issue in this appeal is not properly before us because it was not raised in district court. However, even if it were properly before us, Wynn would not be entitled to relief. Our review of the transcript does not reveal any obvious due-process violation or obviously improper judicial conduct. Wynn argues that she has a right to a hearing under Minn. Stat. § 609.748, subd. 5(a), and that "[t]he hearing requirement includes the 'right to examine and cross-examine witnesses, and to produce documents,'" quoting *Anderson v. Lake*, 536 N.W.2d 909, 911 (Minn. App. 1995). These rights were vindicated. The

district court allowed Wynn to cross-examine Pikula and his witness, to present direct testimony, and to present other evidence. Wynn's assertion that the district court infringed on her right to cross-examine Pikula by allowing his witness to testify out of order during Pikula's testimony is unpersuasive. Wynn cross-examined Pikula and his witness, and the district court did not limit or restrict that cross-examination.

Wynn further argues that although a district court has "some discretion to question witnesses, only exceptional conditions will justify a judge examining a witness extensively" and that "[t]his case is not one of those exceptional circumstances." Wynn relies on *State v. Sandquist*, 146 Minn. 322, 325, 178 N.W. 883, 884 (1920), and *State ex rel. Hastings v. Denny*, 296 N.W.2d 378, 379 (Minn. 1980).

In *Sandquist*, a criminal defendant appealed from his conviction of "carnal knowledge of a female under the age of 18 years." 146 Minn. at 323, 178 N.W. at 884. The case had been tried to a jury. *Id.* at 325, 178 N.W. at 884. At trial, the district court questioned a witness who had procured an affidavit from the victim exonerating the defendant. *Id.* at 324, 178 N.W. at 884. Unlike this case, defense counsel objected to the district court's examination of this witness on the ground that it was "prejudicial to the interest of the defendant." *Id.* On appeal, the defendant argued that

> an inference which the jury might draw from the court's questioning of the witness was that [the witness] had employed the arts of a life insurance solicitor and traveling salesman in persuading the [victim] to sign the affidavit; that he had talked her into it, and that the statements contained in the affidavit should not be credited.

Id.

The supreme court reversed the defendant's conviction and remanded for a new trial, based in part on the district court's questioning of the witness.[1] *Id.* at 327, 178 N.W. at 885. The supreme court explained:

> It is within the discretion of the trial judge to question a witness . . . and ordinarily a court of review will not scrutinize his conduct in this respect very closely. The exercise of this power, if the questions are directed to the vital issues in the case, may be of serious consequence to the defendant in a criminal prosecution. . . . [I]t is difficult for a presiding judge so to conduct the examination of a witness [such] that nothing in the tone of the voice, the play of the features, the manner of framing or propounding the questions, or the course of the investigation pursued in the examination, will indicate to the jury the trend of the judge's mind. . . . [T]he examination of the witnesses is the more appropriate function of counsel, and . . . the instances are rare and the conditions exceptional that will justify the judge in conducting an extended examination of a witness.

Id. at 324, 178 N.W. at 884 (citation omitted).

The supreme court concluded:

> We discover nothing in the record which required the trial judge to take part in the cross-examination of [the witness] in order to lay before the jury the circumstances under which he procured the signature of the [victim] to her affidavit. The affidavit went directly to the truthfulness of her testimony, and it should have been left to the jury to give such weight to it as they saw fit, uninfluenced by any opinion the judge may have entertained as to its weight or as to [the witness's] ability as a talker.

[1] The district court judge also "called the clerk of court as a witness and examined him concerning the time when the affidavit was filed in his office, and by whom and in what proceeding it was presented." *Id.* at 325, 178 N.W. at 884. "The judge then offered himself as a witness, was sworn, and testified on the same subject . . . ." *Id.* This conduct was also a basis for the reversal. *Id.* at 326-27, 178 N.W. at 885.

Id. at 325, 178 N.W. at 884.

In *Hastings*, a jury found a defendant to be the natural father of the plaintiff's child in a paternity action. 296 N.W.2d at 379. At trial, a defense witness testified that "he had intercourse with [the] plaintiff in early May 1974 during a party at [the] defendant's residence." *Id.* After the plaintiff's attorney impeached the witness by a prior inconsistent statement, the district court cross-examined the witness about the statement. *Id.* The defendant appealed on the ground that the district court's questioning denied him a fair trial. *Id.* The supreme court reversed and remanded for a new trial, explaining:

> The Minnesota Rules of Evidence authorize the examination of witnesses by the [district] court. This prerogative, however, should be exercised with great caution, particularly when the credibility of key witnesses is at issue. This need for caution is based on the recognized extraordinary prestige of the trial judge. Thus, in order to secure a fair trial for the parties, the court should refrain from any act, word, sign, gesture, or inflection of voice, the effects of which would be to emphasize a predisposition on the part of the court toward one side or the other in connection with the legal controversy. The restraint by the [district] court is of unusually crucial significance in paternity cases, such as this one, where credibility of witnesses is at issue. Thus, in this case, it would have been better practice for the court not to have engaged in interrogation that reflected on the credibility of a key defense witness in the presence of the jury. Since the court's conduct could have influenced the jury on such a closely contested issue as that arising on the facts of this case, we hold that [the] defendant should be allowed a new trial.

Id. at 379-80 (quotation and citations omitted).

Sandquist and *Hastings* establish that a district court must exercise its authority to question witnesses cautiously and that its failure to do so may prejudice a party and

necessitate a new trial. However, the questioning in those cases occurred during *jury* trials, and raised concerns that the questioning improperly influenced the juries.

> The distinction between a jury trial and a bench trial is important. The risk of unfair prejudice [to a defendant] is reduced [in a bench trial] because there is comparatively less risk that the district court judge, as compared to a jury of laypersons, would use the evidence for an improper purpose or have his sense of reason overcome by emotion.

State v. Burrell, 772 N.W.2d 459, 467 (Minn. 2009).

Because the questioning in this case did not occur in the presence of a jury, *Sandquist* and *Hastings* are not dispositive. We recognize that public confidence in the integrity and impartiality of the judiciary could be harmed if a judicial officer were to appear biased as a result of questioning witnesses, even in the absence of a jury. But we have little concern regarding such harm in this case because the district court judge explained that his actions were motivated by his need to be efficient given the number of cases on his calendar that afternoon. Moreover, it is difficult to conclude that the district court's actions showed an appearance of bias when Wynn's perception of those actions did not prompt an objection by her attorney.

In conclusion, Wynn's due-process challenge is not properly before this court on appeal because it was not considered and determined in district court. Even if it were properly before us, it would not provide a basis for relief. Because Wynn does not otherwise challenge the district court's findings in support of the HRO or issuance of the HRO, we affirm.

Affirmed.