STATE OF MINNESOTA
IN COURT OF APPEALS
A18-1920

State of Minnesota,
Respondent,

vs.

Charlene Marie Nelson,
Appellant.

Filed December 30, 2019
Affirmed in part, reversed in part, and remanded
Ross, Judge

Itasca County District Court
File Nos. 31-CR-16-3158,
31-CR-16-3173

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

Matti R. Adam, Itasca County Attorney, Nichole J. Carter, Assistant County Attorney, Grand Rapids, Minnesota (for respondent)

Cathryn Middlebrook, Chief Appellate Public Defender, Jodi L. Proulx, Assistant Public Defender, St. Paul, Minnesota (for appellant)

Considered and decided by Slieter, Presiding Judge; Ross, Judge; and Reilly, Judge.

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

ROSS, Judge

The state charged Charlene Nelson in three complaints each with one count of violating the same HRO for failing to remove internet postings that implied that her former husband sexually and physically abused their three children. A jury found Nelson guilty on

each count, and the district court entered three judgments of conviction. Nelson appeals from two of the convictions, arguing that enforcement of the HRO is unconstitutional because it restrains her from engaging in protected speech. She argues alternatively that either the district court should have convicted her of only one offense because the other two are included offenses or the district court erred by sentencing her for three offenses that comprise a single behavioral incident. We reverse and remand with instructions to vacate two of Nelson's convictions and sentences because only one conviction can stand.

FACTS

J.D.W. petitioned the Itasca County District Court in June 2016 for a harassment restraining order (HRO) against his former wife, Charlene Nelson, on behalf of their three minor children. The petition alleged that Nelson had posted statements and videos on social media, falsely asserting that the children had been sexually and physically abused.

The district court granted the HRO on October 3, 2016, concluding that Nelson had engaged in harassing conduct and requiring Nelson to remove all internet postings that adversely affected the children's safety and privacy interests. The order directed Nelson to remove any references to claims that the children had been abused and any references to the children's home and school addresses. The order required Nelson to comply within seven days.

J.D.W. reported to police on October 14, 2016, that Nelson had failed to remove the YouTube videos that claimed child abuse. Officers viewed the videos and saw that Nelson had failed to remove the material specified in the HRO.

J.D.W contacted the police a second time on October 28, 2016, reporting that Nelson had still failed to remove the postings. Officers viewed the videos and other postings and again saw that Nelson had not complied with the HRO.

J.D.W. called police a third time on November 8, 2016, again reporting Nelson's failure to remove the postings. Police saw that the offending material remained online.

The state charged Nelson in three complaints alleging that she violated the HRO, with one complaint for each date police saw that the material had not been removed. Nelson moved to dismiss the charges on First Amendment grounds but the district court denied her motion. After a consolidated trial on all three charges, a jury found Nelson guilty, and the district court imposed a suspended sentence of one year in jail for each violation, to be served concurrently.

Nelson appeals her convictions and sentences related to her October 14 and November 8 offenses.

D E C I S I O N

Nelson challenges her convictions and sentences on two theories. She maintains first that enforcing the HRO punishes her for engaging in constitutionally protected speech. She maintains second that either the district court improperly entered judgments on all three convictions when two offenses were included in the other or it improperly sentenced her for all three violations when they were all part of a single behavioral incident. Nelson's HRO challenge fails but her included-offense argument prevails.

I

We must first decide what we can decide: Nelson argues that we should hold that enforcing the HRO unconstitutionally prohibited her from exercising free speech; the state argues that we should not address Nelson's constitutional argument because Nelson forfeited the opportunity to challenge the HRO's validity (and is collaterally prohibited from doing so now) by her failure to challenge the order during the HRO proceeding; and Nelson argues that we should not address the state's collateral-attack argument because the state forfeited the opportunity to raise the argument on appeal by its failure to raise it in the district court. Nelson is wrong about the state's argument, and the state is wrong about Nelson's argument. We therefore reach the matryoshka's center and decide the constitutional issue.

A. We will consider the state's collateral-attack argument.

Nelson is correct that a party generally may not raise on appeal an issue not argued to or considered by the district court. *See Roby v. State*, 547 N.W.2d 354, 357 (Minn. 1996). But the supreme court has held that this court erroneously refused to address a respondent's previously unraised argument on appeal where the argument supported the district court's decision and "there are sufficient facts in the record for the appellate court to consider the alternative theories, there is legal support for the arguments, and the alternative grounds would not expand the relief previously granted." *State v. Grunig*, 660 N.W.2d 134, 137 (Minn. 2003). We recognize that the *Grunig* court based its holding entirely on a rule whose terms apply expressly to supreme court review rather than to review in appellate courts generally and that it did not give a reason for applying the rule to appeals to this court. *See id.* (reversing when this court did not accept a new argument under Minn. R. Crim. P.

29.04, subd. 6, which governs cross-petitions "for review to the Supreme Court"). But because the *Grunig* court held that we erred by failing to apply that supreme court rule to a court of appeals proceeding, we will follow the holding. *See State v. Curtis*, 921 N.W.2d 342, 346 (Minn. 2018) ("The court of appeals is bound by supreme court precedent."). We therefore conclude that, because there are sufficient facts in the record and legal support for the state's argument, and because crediting the argument would not expand the district court's decision, we will address the state's previously unraised argument that Nelson cannot collaterally challenge the HRO's constitutionality in this criminal proceeding.

B. We will also consider Nelson's constitutional argument.

The state unpersuasively argues that Nelson's challenge to the HRO is collaterally barred by her having failed to challenge the HRO in a direct appeal in the civil proceeding that produced the HRO. Whether Nelson's argument is barred as a collateral attack is a legal question that we review de novo. *See State v. Ness*, 819 N.W.2d 219, 222 (Minn. App. 2012), *aff'd on other grounds*, 834 N.W.2d 177 (Minn. 2013). The state cites an opinion of this court for the broad proposition that "a defendant who failed to appeal a harassment restraining order in the case in which it was issued could not challenge the constitutionality of that order in a subsequent criminal prosecution for violating the order." The state bases this proposition on *State v. Harrington*, which included a statement that on the surface seems to support the state's argument: "Appellants did not appeal the validity of the [HRO], and thus are precluded from attacking it in this subsequent [criminal] action." 504 N.W.2d 500, 503 (Minn. App. 1993), *review denied* (Minn. Sept. 30, 1993). The state takes that statement out of context by assuming that it applies to every criminal defendant appealing

from a conviction for violating an HRO that she failed to appeal during the HRO proceeding.

It is true that we have cited *Harrington* as if it stands for that proposition without offering any qualification. *See State v. Romine*, 757 N.W.2d 884, 889–90 (Minn. App. 2008) (citing *Harrington* as support for a "general rule" that "a party's failure to appeal the issuance of a court order precludes a collateral attack on that order in a subsequent proceeding"), *review denied* (Minn. Feb. 17, 2009). But it is clear on a careful reading of *Harrington* that its pronouncement must be read with an important qualification that distinguishes that case from this one.

Like this case, *Harrington* involved defendants who became the subjects of an HRO that restrained them from engaging in specified conduct, failed to directly appeal the validity of the HRO, were later criminally charged with and convicted of violating the HRO, and then challenged their convictions on the theory that enforcing the HRO unconstitutionally punished them for exercising First Amendment rights. 504 N.W.2d at 502–03. But unlike this case, the defendants in *Harrington* had in fact raised their First Amendment challenge to the HRO during the HRO proceeding, and the district court issuing the HRO had "incorporated a detailed memorandum" on the issue concluding that "the restraining order did not unconstitutionally infringe upon their First Amendment rights to free speech." *Id.* at 501. It was in those specific procedural circumstances that this court made the statement about the appellants being precluded from raising the challenge later, after having failed to appeal the HRO directly. And we followed that statement immediately with these two statements: "The constitutional validity of the restraining order

stands as law of the case. Thus, we will not consider appellants' claims that the restraining order is vague, overbroad, or that it violates their First Amendment rights to free speech." *Id.* (internal citation omitted).

We are confident that a more precise summary of our *Harrington* reasoning must incorporate all of its legal statements and relevant facts. Because the HRO itself addressed and rejected the First Amendment issues and the appellants did not directly appeal the HRO's validity, the HRO's First Amendment holding became the law of the case, and appellants were therefore precluded from attacking the HRO's validity on that basis in a subsequent criminal action.

This summary of *Harrington* comprehensively includes all four points we made in formulating the holding. We said that the restraining order itself had determined that it "did not unconstitutionally infringe . . . First Amendment rights"; that the appellants "did not appeal the validity of the order"; that the order's constitutional validity "stands as law of the case"; and that we "[t]hus" would not consider in the criminal proceeding for violating the order whether the order "is vague, overbroad, or . . . violates their First Amendment rights to free speech." *Id.* at 501, 503. Looking to only one of the four statements in isolation misses the nuance they convey when read together.

Applying *Harrington*, we will not reject Nelson's constitutional argument as having been forfeited. The HRO here nowhere addressed or purported to decide any First Amendment issue, and it therefore establishes no First Amendment "law of the case" barring Nelson from raising a First Amendment challenge to her conviction. We will therefore address the merits of Nelson's First Amendment challenge.

C. Nelson's constitutional argument fails on the merits.

Nelson argues that we must reverse her conviction because "the speech for which she was criminally charged and convicted was protected under the First Amendment." We will review the constitutionality of the district court's application of the HRO statute de novo. *See Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 657 (Minn. 2012). The Constitution certainly protects Nelson's right to free speech. U.S. Const. amend. I. But the right is not absolute. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 383, 112 S. Ct. 2538, 2543 (1992) (listing exceptions to First Amendment protection). Rather, there are certain categories of speech whose "prevention and punishment . . . have never thought to raise any Constitutional problem," *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72, 62 S. Ct. 766, 769 (1942), because the content of the speech is wholly "proscribable." *R.A.V.*, 505 U.S. at 383, 112 S. Ct. at 2543. We have already held that the HRO statute covers only those categories of proscribable speech. By authorizing district courts to issue orders restraining "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," Minn. Stat. § 609.748, subd. 1(a)(1) (2018), the HRO statute is sufficiently tailored under the First Amendment and is constitutional.

> [T]he language of the statute is directed against constitutionally unprotected "fighting words" likely to cause the average addressee to fight or protect one's own safety, security, or privacy; "true threats" evidencing an intent to commit an act of unlawful violence against one's safety, security or privacy; and speech or conduct that is intended to have a substantial adverse effect, *i.e.*, is in violation of one's right to privacy.

Dunham v. Roer, 708 N.W.2d 552, 566 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006).

Nelson concedes that the HRO statute is facially constitutional, but she argues that the district court's application of the statute by enforcing it to punish her for maintaining her social-media postings is not. She contends that her postings were merely expressions of her frustration with child-protection workers who failed to appropriately address her allegations of abuse, and that the postings were not intended to invade the children's privacy. The contention is unpersuasive because it fails to fully identify the right she implicitly asserts.

The right that Nelson actually asserts, by virtue of the HRO-granting court's presently uncontested fact finding that her abuse allegations are false, is the right to post *false* claims of sexual and physical abuse against alleged child victims and to reveal the identity of those children along with where they live and attend school. Nelson nowhere cites any case that attempts to balance free-speech rights against privacy rights in a fashion that supports the notion that the Constitution protects speech of this nature. *See Florida Star v. B.J.F.*, 491 U.S. 524, 541, 109 S. Ct. 2603, 2613 (1989) (holding that newspaper had a First Amendment interest in publishing lawfully obtained "*truthful* information" revealing sexual assault victim's identity (emphasis added)); *State v. Crawley*, 819 N.W.2d 94, 107 (Minn. 2012) (holding the unlawful-reports-of-police-misconduct statute constitutional under the First Amendment by construing it to punish only those who report information "knowing that the information is false"). The HRO's restraint on Nelson's internet postings arose from her "false[] allegations that the children are the victims of

physical and sexual abuse," and the HRO directed her to remove those postings along with her "references to the children's home address or school of attendance." By restraining Nelson from posting this specific information and ordering her to remove it, the HRO narrowly proscribed Nelson from infringing the children's right to privacy without substantially interfering with her right to publicly criticize the alleged nonresponsiveness of child-protection workers.

Nelson's claim that her postings "were not directed at specific individuals that would adversely affect the children" reflects a misunderstanding of how expansively viewed internet videos and internet textual postings might become. More importantly, it undervalues the privacy interests of the children, who maintain those interests against even a limited dissemination of privacy-encroaching posts. Nelson's additional claim that her postings "did not share sensitive information that substantially impacted the privacy interests of [the] children" is facially absurd on our review of the record and requires no further discussion.

For these reasons, we hold that Nelson's prosecution for having violated the HRO's requirement that she remove privacy-invading content from her internet posts did not violate her First Amendment rights. We turn to her challenges based on allegedly duplicative convictions and punishment.

II

Nelson next challenges the district court's imposition of multiple convictions and sentences. Nelson maintains that the district court erred under Minnesota Statutes section 609.04, subdivision 1 (2016), by adjudicating her guilty of three separate violations of the

HRO because each of the allegedly separate violations is an included offense of the others. She maintains alternatively that the district court erred under Minnesota Statutes section 609.035, subdivision 1 (2016), by imposing more than one sentence for her convictions because her offending conduct underlying each conviction was part of a single behavioral incident.

Nelson argues persuasively that the district court should have entered a conviction on only a single violation. A defendant may not be convicted of both a crime and an "included offense," which, among other things, is a crime that is "necessarily proved if the crime charged were proved." Minn. Stat. § 609.04, subd. 1(4). Section 609.04 also "bars the conviction of a defendant twice for the same offense . . . on the basis of the same act." *State v. Ture*, 353 N.W.2d 502, 517 (Minn. 1984); *see also State v. Smith*, 299 N.W.2d 504, 506 (Minn. 1980) (same). To prove that Nelson committed the gross-misdemeanor crime of violating the HRO, the state had to establish that an HRO existed prohibiting Nelson from harassing at least one person, that Nelson knew of the order, that Nelson violated the order, and that Nelson's violation occurred within ten years of a previous qualified domestic violence-related offense conviction. *See* Minn. Stat. § 609.748, subd. 6(b)–(c) (2016). For the following reasons, we agree with Nelson that she cannot be convicted on all three complaints.

A district court may issue an HRO that requires a person either "to cease or avoid the harassment of another person." Minn. Stat. § 609.748, subd. (5)(a)(1) (2016). In this case, the HRO both prohibited harassment and required the ceasing of harassment. It directed Nelson to "remove from the internet" any violating postings, and it gave Nelson a

seven-day deadline to comply. The guilty verdicts establish that, by the three reported violation dates after the deadline, Nelson had failed to remove the posts. No complaint alleges that Nelson posted any new material after the HRO, and each alleges only that she had failed to remove the material that led to the HRO. The only material differences between the complaints are the dates identified for each offense.

The jury's findings that Nelson had still not removed the required material by each offense date do not establish that Nelson committed three separate criminal acts. The findings are duplicative, establishing that Nelson committed the *same* criminal act, which was her noncompliance with the HRO by her single omission of failing to remove the offending materials. Because the three convictions rest on her single act, section 609.04 prohibits multiple convictions.

We are not persuaded otherwise by the state's attempt to characterize Nelson's conduct as her failure to remove specific postings by the first charged date, different postings by the second date, and still other postings by the third date. The state did not charge the case this way in its criminal complaints, choosing instead to describe Nelson's failure to remove the postings more generally and to distinguish them primarily by the date each omission was reported and investigated. Likewise at trial, J.D.W. testified generally that "the stuff was still up," referring to a series of video recordings. The prosecutor tried the case emphasizing the differing dates of the omission, not the differences between the materials that remained online. And again, Nelson committed a single omission. We will not uphold the convictions on a new, untried theory.

The state argues also that setting aside two of Nelson's convictions would undermine the HRO statute by excusing a defendant from following the terms of an HRO every day. But if that rationale justifies convictions on the three separate complaints, it would also theoretically justify a complaint and corresponding conviction every day (or for that matter, every hour) of Nelson's offense. And the state fails to mention *State v. Lawrence*, which teaches, "[A] crime is not continuing in nature if not clearly so indicated by the legislature." 312 N.W.2d 251, 253 (Minn. 1981). The state does not suggest that the legislature has indicated that failing to obey an HRO is a continuing offense allowing for repeated charges and convictions with no intervening court action. The state instead supports its position referring to a "continuous offense" string of cases. The support is unconvincing.

State v. Wood does not support the state's position because *Wood*'s holding that "[t]he offense of nonsupport of wife or children . . . is a continuing one" comes in the context of new support payments becoming periodically due and the court's express understanding in that case: "There is no foundation upon which to rest a plea of former jeopardy, because the facts upon which the second prosecution is based are not the same as those which were the basis for the first prosecution." 209 N.W. 529, 530 (Minn. 1926).

State v. Sweet does not support the state's position because its similar declaration that "[t]he duty of defendant to support the child was a continuing obligation" likewise comes in the context of a case involving two different offenses covering different failures to make child-support payments at different periods. 228 N.W. 337, 337 (Minn. 1929).

Failure to make a payment of a certain sum in one period is not the same offense as failing to make a different payment to cover a period following a conviction.

Nor does the state find reliable support in *State v. Erickson*, where we allowed multiple prosecutions for violating a public-nuisance ordinance. 367 N.W.2d 539, 540 (Minn. App. 1985). There we recognized that nuisance law marks a unique exception to double jeopardy. We said, "Nuisance, however, is a continuing offense. Thus, repeated prosecutions may proceed over claims of double jeopardy until the nuisance is abated." *Id.* (quotation omitted). The state cites no similar recognized "continuing offense" classification for HRO violations committed by the omission of some act.

And *Longoria v. State*, 749 N.W.2d 104 (Minn. App. 2008), *review denied* (Minn. Aug. 5, 2008), also does not support the state's position. That was not a case of repeated prosecutions. It instead involved the appeal of a defendant convicted for having failed to register as a predatory offender and who argued "that the law does not apply to him because the ten-year period of conditional release under the statute became effective only for crimes that occurred on or after August 1, 2005, and he had moved without registering before that date." *Id.* at 105. The *Longoria* court held only that the registration statute at issue in that case was, under *State v. Lawrence*, a statute that the legislature clearly, albeit implicitly, indicated to be a continuing-offense crime. *Id.* at 106–07.

None of the state's cited cases undermines the *Lawrence* court's requirement that "a crime is not continuing in nature if not clearly so indicated by the legislature," 312 N.W.2d at 253, or offers any reason for concluding that the legislature provided a clear indication of such regarding an HRO violation premised on the removal of harassing

content. We hold that only one conviction is appropriate based on the included-offense limitation of Minnesota Statutes section 609.04. Because we hold that only one conviction is appropriate based on section 609.04, we need not analyze Nelson's alternative argument under section 609.035. We observe that Nelson did not notice an appeal from the judgment entered in court file 31-CR-16-3000, citing only court files 31-CR-16-3158 and 31-CR-16-3173. We reverse and remand for the district court to vacate the convictions and sentences in those two cases.

Affirmed in part, reversed in part, and remanded.