STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0108

Joel Leslie Wells,
Appellant,

vs.

Jeffrey Fischbach,
Respondent.

Filed August 23, 2021
Affirmed
Jesson, Judge

Dakota County District Court
File No. 19AV-CV-17-1678

Daniel L. Gerdts, Minneapolis, Minnesota (for appellant)

Jared M. Reams, Eckland & Blando LLP, Minneapolis, Minnesota (for respondent)

Considered and decided by Florey, Presiding Judge; Jesson, Judge; and Smith, Tracy M., Judge.

NONPRECEDENTIAL OPINION

JESSON, Judge

Appellant Joel Wells sought a harassment restraining order after respondent Jeffrey Fischbach contacted Wells's probation officer and authored social media posts in which Fischbach complained about the Minnesota court system's handling of past cases involving Wells. The district court denied the petition. Wells appeals, arguing that Fischbach's

contacts with law enforcement were objectively unreasonable and that Fischbach's online posts were defamatory and therefore unprotected speech. We affirm.

FACTS

Appellant Joel Wells was convicted for possession of child pornography in 2003. Wells was charged again with possession of child pornography in 2007. When charged in 2007, Wells initially claimed that he was not aware of the illicit files on his computer and asserted that they were planted there. In an attempt to prove this, Wells hired respondent Jeffrey Fischbach, a forensic technologist based in California, to perform an examination. Fischbach did not find evidence to support Wells's theory. Wells ultimately pleaded guilty, was convicted for possession of child pornography and sentenced to 84 months' imprisonment.

After serving his prison sentence, Wells demanded that Fischbach return Wells's "file" as well as a portion of the payment Fischbach received in exchange for his services. Fischbach believed that the "file" in question was the pornographic material removed by the FBI. Fischbach simply told Wells that those files were in the FBI's possession and that they would remain there.

History of Disputes

When Wells did not receive the disputed files, he sued Fischbach for the return of both the files and his payment for forensic services. The matter ultimately settled, but during the process Wells allegedly commented that "he was aware [Fischbach] had moved homes during his incarceration, that [Fischbach's] children had grown, and that [Fischbach's] 11-year old daughter was a 'real cutie.'" And shortly after a hearing in the

matter, Fischbach received mail from Wells at his home address, a location that Fischbach never disclosed to Wells. This unsolicited mail, in tandem with the "real cutie" comment about his daughter, made Fischbach believe that Wells was a threat to his family. Additionally during this time, Fischbach received several unwanted emails from Wells.

Because Fischbach knew that a condition of Wells's release from prison was a prohibition against using a computer or having online access without permission from the U.S. Probation Office, Fischbach believed that Wells was violating his probation terms. Fischbach contacted both the Eagan and Los Angeles police departments by email to report the threat. He also reported the possible violation to Wells's probation officer.

Around this time, Fischbach sought a harassment restraining order (HRO) against Wells based upon the perceived threat. He withdrew the petition initially filed in Minnesota, but then filed a petition in California. A California court dismissed the action shortly thereafter. Separately, Wells sought an HRO in a Minnesota district court against Fischbach but that petition was dismissed pursuant to a settlement agreement reached in March 2017. Both parties later claimed that the other breached the settlement agreement.

The Present HRO Proceeding

The underlying bases for the HRO at issue here began while the other legal actions were ongoing. During the various legal challenges between Fischbach and Wells, Fischbach began to post to social media and his blog to complain primarily about the Minnesota legal system and how it handled Wells's cases. Due to these posts, as well as Fischbach's contacts with the Los Angeles Police Department, Eagan Police Department, and his probation officer, Wells filed a petition for an HRO in Minnesota against

Fischbach.[1] Wells asked the district court for a two-year ban on Fischbach contacting Wells or visiting his Eagan home.

At a hearing on his HRO petition, Wells testified that after Fischbach posted the social media messages and blog post online, none of his college classmates would sit by him.[2] He also said that there were many instances of his home being vandalized, including bricks thrown through his windows, which he attributed to the publicity from Fischbach's blog. Wells further explained that he regained his internet privileges in December 2016—months before his letter and emails to Fischbach which raised the suspicions about a probation violation. Overall, Wells stated that he was worried that Fischbach was trying to get him back in prison based on false accusations.

Fischbach's social media posts were central evidence introduced at the hearing. These included social media posts from Fischbach's social media accounts, as well as his blog. Fischbach testified that the posts were about his court history with Wells, and that his motivation for the posts was to "evolve [Minnesota's] laws to protect children." Of the 64 pages of exhibits of social media posts admitted to the district court, Fischbach only typed Wells's name once. None of the posts tagged Wells or otherwise were directed at him. But in one screed Fischbach shared an image of a district court order that included

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[1] This matter was previously before us concerning the district court's decision to deny the HRO due to a lack of personal jurisdiction over Fischbach. *Wells v. Fischbach*, No. A18-0063, 2018 WL 6442174, at *1 (Minn. App. Dec. 10, 2018). We reversed and remanded after concluding that Wells made a prima facie showing that the district court had personal jurisdiction. *Id.* at *4.

[2] Following his release from prison, Wells attended community college. In one class assignment, the instructor asked classmates to search each other online—a search which lead classmates to Fischbach's blog, according to Wells.

Wells's name and address. A blog post further compiled information from several news articles and court documents about Wells's convictions. Fischbach testified about his belief that Wells was violating his probation, as well as the process he took to contact law enforcement in order to reach the probation officer.

The district court denied the HRO for two reasons. First, the court found that contacting law enforcement was objectively reasonable conduct by Fischbach, which did not constitute harassment. Second, because the posts by Fischbach about Wells were all derived from public documents, the district court determined that the posts were protected by the First Amendment, and therefore did not constitute harassment.

Wells appeals.

DECISION

Wells claims that the district court erred in denying his petition for an HRO by (1) determining that it was objectively reasonable for Fischbach to contact law enforcement; and (2) concluding that Fischbach's posts were protected by the First Amendment. We review the denial of a petition for 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). A district court abuses its discretion if it makes findings that are unsupported by the evidence or improperly applies the law. *State v. Underdahl*, 767 N.W.2d 677, 684 (Minn. 2009). We review the district court's factual findings for clear error and defer to its findings regarding witness credibility, *Kush*, 683 N.W.2d at 843–44, but we review de novo the district court's legal conclusion, such as whether the facts

found satisfy the elements of harassment. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008).

I. The district court properly concluded that Fischbach did not commit harassment when he contacted law enforcement because his conduct was objectively reasonable.

In order to prove that harassment occurred,[3] an applicant must prove both (1) objectively unreasonable intent or conduct on the part of the harasser; and (2) an objectively reasonable belief that the respondent engaged in harassment on the part of the person subject to harassment. *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). In *Peterson*, we examined whether someone calling the police to report a possible child-safety-seat violation was objectively unreasonable conduct. 755 N.W.2d at 765. We held that, generally, contacting the police did not amount to harassment, highlighting the public policy that to "report[] violations of law (*or even possible violations of law*) [is] a useful means of promoting public safety, and citizens should not be deterred from making good-faith reports." *Id.* (emphasis added). And should a petitioner attempt to prove that a report to law enforcement is an instance of harassment, a district court "must make sufficiently specific findings of an improper intent" to conclude that the conduct is objectively unreasonable.[4] *Id.* at 766.

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[3] Harassment is defined as either a single act of physical or sexual assault or "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. l(a)(l) (2020).

[4] Wells claims that the district court did not find "sufficiently specific facts," and instead "rested its entire 3-paragraph analysis on whether Fischbach's complaint about annoying emails might constitute harassment." But that is not true. The bases for the HRO application were Fischbach's phone calls, emails, and other reports to the police, all of

Here, the district court compared Fischbach's contacts with law enforcement about Wells's possible probation violation to the phone calls in *Peterson* and found that they had similar intent to prevent wrongdoing, and therefore the contact was presumptively valid. Further, the district court found that Fischbach contacted law enforcement "only after multiple concerning contacts with [Wells] whereby [Fischbach] believed that [Wells] might be in violation of the law." The district court then determined that Fischbach's contact with law enforcement was objectively reasonable conduct. Considering the emails to law enforcement and Wells's probation officer, the contacts between Fischbach and Wells, as well as Fischbach's testimony regarding his motive for contacting law enforcement, we conclude that the record supports the district court's determination.

Still, Wells argues that Fischbach's contacts with law enforcement were not made in good faith because he knew his reports were false. But the findings regarding Fischbach's motives were based on the district court's credibility determination, to which we must defer.[5] *Kush*, 683 N.W.2d at 843-44. Here, the district court found that Fischbach

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which were addressed by the district court. While Wells may have preferred a longer facts section, the district court is only required to find "sufficiently specific facts," of an improper purpose, not facts ad nauseam. *Peterson*, 755 N.W.2d at 766.

[5] Wells also claims that the district court erred because some of the factual findings are not in chronological order, such as which law enforcement officer Fischbach contacted first. We reject Wells's claims on this point for two reasons. First, on this record, the relevant findings simply are not clearly erroneous. *See Vangsness v. Vangsness*, 607 N.W.2d 468, 472 (Minn. App. 2000) (noting that a district court's findings of fact are clearly erroneous if the reviewing court is left with the definite and firm conviction that a mistake has been made, and that, when addressing whether a district court's findings of fact are clearly erroneous, an appellate court both "views the record in the light most favorable to the trial court's findings[,]" and "defer[s] to [the district court's] court credibility determinations"). Second, any purported error in the chronological order of these events was clearly immaterial to the district court's decision. Thus, even if the findings Wells challenges are

had a reasonable and good-faith belief that Wells violated his probation when he contacted law enforcement. We will not upset that finding.

In sum, because the district court properly applied the law and because its findings of fact are not clearly erroneous, it did not abuse its discretion when concluding that Fischbach's contacts with law enforcement were objectively reasonable conduct.

II. The district court did not abuse its discretion by concluding that the social media posts did not constitute harassment.

Next, Wells argues that the district court erred by concluding that because Fischbach's statements and social media posts were protected by the First Amendment they did not constitute harassment.

The United States and Minnesota Constitutions guarantee the right to free speech. U.S. Const. amend. I; Minn. Const. art. I, § 3. But this right is not unlimited. *Dunham*, 708 N.W.2d at 562 (Minn. App. 2006). In the context of HROs, the Minnesota Supreme Court has held that an order for protection proscribing communication with a person is not a prior restraint because it does not prohibit a person from expressing ideas in general, but rather narrowly prohibits the expression of those ideas to the specific person protected by the order. *Rew v. Bergstrom*, 845 N.W.2d 764, 777 (Minn. 2014). Further, speech that communicates readily available public information is protected speech. *Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308, 310, 97 S. Ct. 1045, 1046 (1977). These First Amendment

clearly erroneous, we would still have to ignore any error in those findings as harmless. *See* Minn. R. Civ. P. 61 (requiring harmless error to be ignored).

principles apply to online speech just as much as any other form of speech. *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 870, 117 S. Ct. 2329, 2344 (1997).

Here, the district court concluded that the posts did not constitute harassment because they reiterated readily available information, including Wells's name and address, and the comments never urged others to target Wells. The evidence supports the district court's assessment. Only one of the social media posts mentions Wells's name. And although one of Fischbach's blog posts—titled "How a Twice-Convicted Pedophile Brought Minnesota Justice to His Knees"—mentioned Wells by name, that post generally sums up Wells's criminal history. This blog post did not include any other private personal information, relied on news articles and other publicly available information, and did not demand action against Wells from readers. Because the posts were derived from readily available public information, the posts are protected speech, and the district court did not err by concluding the same. *Okla. Publ'g Co.*, 430 U.S. at 310, 97 S. Ct. at 1046.

To convince us otherwise, Wells argues that Fischbach's posts were defamatory and could not be protected speech. In particular, he points to the reference to Wells as a "pedophile." But the district court implicitly rejected this argument because Wells's two convictions for possessing child pornography are public information. The record supports that conclusion. And further, this is not a defamation case. Wells did not prove that any statement was false or defamatory before the district court, and it would be inappropriate to begin that fact finding on appeal. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court will generally not consider matters not presented to and considered by the district court).

Because Fischbach's speech was not harassment, and the district court did not err by finding Fischbach's speech to be protected by the First Amendment, denying an HRO on this reasoning was not an abuse of discretion.

Affirmed.