STATE OF MINNESOTA
IN COURT OF APPEALS
A12-2282

Arnold Koenig, et al., petitioners,
Respondents,

vs.

Michael Arnold Koenig,
Appellant.

Filed September 3, 2013
Reversed
Hudson, Judge
Concurring specially, Ross, Judge

McLeod County District Court
File No. 43-CV-12-1602

Daniel B. Honsey, Kraft Walser Law Office, PLLP, Hutchinson, Minnesota (for respondents)

Kenneth Hertz, Hertz Law Offices, P.A., Columbia Heights, Minnesota (for appellant)

Considered and decided by Hudson, Presiding Judge; Ross, Judge; and Stauber, Judge.

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

HUDSON, Judge

The district court granted respondents' petition for a harassment restraining order (HRO) following an incident in which appellant video recorded respondents for an extended period of time to document what appellant alleged was destruction of his

property. Appellant challenges the order, arguing that his conduct did not constitute harassment and that there were not multiple incidents of harassment, as required by Minn. Stat. § 609.748 (2012), before the court may issue an HRO. Because appellant's conduct did not satisfy the statutory definition of harassment, we reverse.

FACTS

Respondents Arnold and Andrea Koenig, ages 74 and 66 respectively, are the married parents of appellant Michael Koenig, age 43. Arnold and Andrea formed the Koenig Farm Corporation in 1970. Arnold owns 75 percent of the shares of the corporation, Andrea owns 13 percent of the shares, and Michael owns the remaining 12 percent. The corporation owns an 80-acre tract of land that is used for various farming operations. From that tract, a three-acre plot was carved out and sold to Michael, who built a house there. Michael must cross corporate property to access his house by vehicle.

The parties have been involved in extensive disputes and litigation since 2007. The first lawsuit related to the termination of Michael's farm lease with the corporation and Arnold and Andrea's subsequent motion to evict Michael from property owned by the corporation. *See Koenig v. Koenig*, No. A11-920, 2012 WL 762306, at *1–*3 (Minn. App. Mar. 12, 2012), *review denied* (Minn. May 30, 2012). The district court granted summary judgment for Arnold, Andrea, and the corporation, and granted a motion for eviction and a writ of recovery of the premises, and this court affirmed that determination. *Id.* at *3, *9–*10. Although Michael was subsequently required by the district court to remove property and equipment from a portion of the tract, as of October

2012 there was no court order prohibiting him from being on corporate property or restricting his access to buildings on the corporation's property.

A second lawsuit arose from a 2011 collision between a tractor Michael was operating and a pickup truck in which Arnold was a passenger. As of October 2012, two lawsuits brought by Michael and his wife were pending against Arnold, Andrea, and the corporation alleging that Arnold and Andrea misappropriated corporate assets.

On October 1, 2012, Arnold went to corporation property to "take possession of the power panel" by cutting off the padlock on the electrical panel and removing all the fuses. The panel controls electricity for farm operations and Michael's home, and years earlier Michael had placed a padlock on the panel purportedly to protect his small children, though Arnold claimed the padlock was designed to prevent him from accessing the panel. Ownership of the panel is disputed, although the parties agree that Michael paid for it.

Michael saw Arnold accessing the electrical panel and drove his pickup near the panel. While remaining in his vehicle, Michael used his phone to photograph and video record Arnold's actions. At one point Arnold approached Michael's vehicle to engage him, but Michael responded by backing his vehicle away while continuing to record Arnold. Michael alleged that Arnold approached him aggressively and slapped Michael's vehicle, though Arnold denied both.

Arnold called Andrea to describe what was happening, and Andrea called 911 because "[the police] are very familiar with our problems." Three officers arrived, and Michael continued to record his parents for the next half hour while the officers

conversed with Arnold and Andrea, despite the fact that one of the officers told Michael that he could stop recording the incident "because nothing was going to happen . . . in the next half hour or so." According to Arnold, Michael was recording him for "nearly an hour and a half" in total. Eventually the deputies escorted Arnold and Andrea from the property. Michael stayed on the corporation's property throughout the incident and was the last to leave. Both Arnold and Andrea testified that they were intimidated by Michael's actions during the incident, and Andrea testified that she was scared of him. Michael stayed in his vehicle throughout the incident, never approaching his parents, saying anything to them, or gesturing to them.

Michael claimed that he was recording the incident because his attorney had advised him to document incidents of vandalism following what Michael claimed were other incidents of vandalism perpetrated by Arnold. Michael supported this claim by presenting photographic evidence. Arnold in fact admitted to breaking the windows of a building on corporate property and removing fuses from a power panel, claiming the actions were taken because "my attorney . . . told me I had the right to do that." Michael claimed that Arnold's actions caused $500 of damage to the electrical panel, because in order to remove the padlocks, Arnold was grinding off the panel's handle. Arnold conceded that he did damage to the panel beyond merely cutting off a padlock, but claimed he damaged only a $5 part.

Arnold and Andrea testified that this was not the only incident in which Michael recorded them, but they gave only vague details regarding one other incident in which Michael allegedly set up a tripod to record their actions. Andrea stated that there were

other incidents when Michael recorded them, but she gave no details, claiming she had "pushed them to the back of [her] mind."

Following a hearing on October 18, the district court granted the petition, concluding that Michael's actions on October 1 constituted harassment under Minn. Stat. § 609.748, subd. 1(a)(1). The district court stated that it was unnecessary and intimidating for Michael to have recorded his parents after the deputies arrived, and that his conduct therefore constituted harassment. The district court stated that multiple instances of harassment had occurred, citing Andrea's unspecific testimony that "she and her husband have been videotaped in the past." The district court order prevented Michael from having contact with his parents and required him to "abide by all orders regarding access to the property" that was the subject of ongoing disputes between the parties. The order was to be in effect until October 18, 2014. This appeal follows.

D E C I S I O N

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 findings for clear error and defer to the district court's assessments regarding witness credibility. *Id.* at 843–44. But whether the facts found by the district court satisfy the statutory elements of harassment is a question of law, which we consider de novo. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008). "Ultimately, the issuance of an HRO is reviewed for abuse of discretion." *Id.*

The district court may issue a harassment restraining order if the court finds "reasonable grounds to believe that the [actor] . . . engaged in harassment." Minn. Stat. § 609.748, subd. 5(a)(3). For statutory purposes, 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).[1] The statute imposes two requirements: proof of (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 harassing conduct." *Peterson*, 755 N.W.2d at 764 (quoting *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006)).

Michael argues that neither of these requirements was satisfied. We agree. As to the first requirement, we find no evidence that Michael engaged in objectively unreasonable conduct. Michael owns 12 percent of the corporation, and he therefore had both a right to be on corporate property and an interest in protecting it from Arnold's actions that were potentially damaging the electrical panel. While Michael had been required to remove much of his personal property from the corporation's land, there was no court order prohibiting him from physically being on the property. And given the multiple past acts of vandalism against corporate property, and Arnold's admission that

[1] The statutory definition of harassment may also be satisfied by "a single incident of physical or sexual assault." Minn. Stat. § 609.748, subd. 1(a)(1). There are no allegations that such an incident occurred.

he was responsible for at least two of those acts, Michael also had reasonable grounds to record the incident.[2]

The district court concluded that it was unreasonable for Michael to continue to record the incident after the police arrived. We disagree. If, as Andrea testified, the police were quite familiar with the dispute between the parties and had frequently been involved, Michael had an interest in the activities of the police officers throughout the incident. Michael was not told to stop recording; instead, an officer suggested that there would be nothing of interest to record. That Michael felt differently and continued recording, from his own vehicle, which was parked on corporate property, does not evidence unreasonable conduct.

As to the second requirement, the evidence does not support a conclusion that Michael's conduct had a "substantial adverse effect on [respondents'] safety, security, or privacy," Minn. Stat. § 609.748, subd. 1(a)(1), or that Arnold and Andrea had an "objectively reasonable belief" of such an effect. *Peterson*, 755 N.W.2d at 764. Michael was on property in which he had an ownership interest and took no actions that would reasonably be construed as aggressive or threatening; the only acts that could be construed as aggressive were taken by Arnold when he approached Michael's vehicle to confront him. Michael's actions therefore had no adverse effect on Arnold and Andrea's

[2] The record is not sufficient to establish the legality or propriety of either party's actions leading up to this dispute. But given the ongoing litigation between the parties and the documented damage to Michael's property for which Arnold may have been responsible, it was objectively reasonable for Michael to record the October 1 incident.

safety or security, and their testimony that they were intimidated by Michael during the incident was not objectively reasonable. *See id.*

Nor did Michael's actions violate Arnold and Andrea's privacy. Michael was recording on corporation property, and therefore Arnold and Andrea did not have a "legitimate expectation of privacy in the premises [they were] using." *Rakas v. Illinois*, 439 U.S. 128, 143, 99 S. Ct. 421, 430 (1978) (explaining that "capacity to claim the protection of the Fourth Amendment depends not upon a property right in the invaded place but upon whether the person who claims the protection of the Amendment has a legitimate expectation in the invaded place"); *cf. Peterson*, 755 N.W.2d at 764–65 (applying Fourth Amendment jurisprudence to conclude that looking into another individual's car did not have a substantial adverse effect on privacy under the harassment statute). We therefore conclude that Michael's conduct on October 1 did not have a substantial adverse effect on Arnold and Andrea's privacy, nor did they have an objectively reasonable belief that Michael's conduct had such an effect.

Even if we were to conclude that Michael's conduct on October 1 satisfied the statutory definition of harassment, based upon the record, there were not reasonable grounds to conclude that multiple instances of harassment had occurred. *See* Minn. Stat. § 609.748, subds. 1(a)(1), 5(a)(3); *Peterson*, 755 N.W.2d at 763. The district court concluded that there had been multiple instances of harassment based on testimony that Michael had recorded Arnold and Andrea in the past. But Arnold and Andrea's testimony provided few if any details about these incidents, and therefore neither prong of the harassment statute was satisfied. Absent details in the record showing the

circumstances under which the prior incident occurred, the act of recording Arnold and Andrea was not per se objectively unreasonable. And there is no evidence that the prior acts of recording had a substantial adverse effect on the safety, security, or privacy of Arnold and Andrea, or that they had an objectively reasonable belief of such an effect.

Because the record and the district court's findings of fact do not support the district court's conclusion that Michael's conduct satisfied the statutory definition of harassment under Minn. Stat. § 609.748, the district court erred in granting the petition for an HRO.

Reversed.

ROSS, Judge (concurring specially).

I concur in the court's decision today because I agree that the district court abused its discretion by issuing the harassment restraining order. I write separately to clarify that I think that the district court's error is clearer than and different from what the majority opinion implies.

The district court based its conclusion that Michael Koenig engaged in harassing conduct on his refusal to discontinue video recording after the police arrived and informed him that he should stop. The district court was persuaded that Andrea was reasonably afraid of Michael because he was recording the altercation. I think it is objectively implausible—that is, clearly erroneous for a fact-finder to find—that Michael's continuing his recording after the police arrived caused Andrea Koenig to genuinely fear Michael. Although the record is sketchy, counsel at oral argument confirmed that the first person to express any objection to Michael's recording was a police officer who responded to moderate the family dispute. This fact renders the district court's basis for its harassment order unsustainable. The majority rightly holds that Arnold's and Andrea's claimed fear for their safety is not objectively reasonable, and I add that this is so simply because the district court's reasoning about the effect of police presence renders its decision unconvincingly inconsistent. The district court concluded that Michael was not justified in continuing to record after the police arrived expressly because the protective nature of police presence made his ongoing fear that Arnold would damage his property objectively unreasonable. But the district court apparently failed to recognize that the same circumstance—protective police presence—that made it

unreasonable for Michael to fear harm to his property made it equally unreasonable for Arnold and Andrea to fear harm to themselves.

The majority rightly holds that Michael's refusal was not harassment, but it does so specifically because "Michael was not *told* to stop the recording; instead an officer [merely] *suggested* that there would be nothing of interest to record." Here the majority implies that a material distinction exists between an officer's *ordering* a person to stop recording and his merely *suggesting* that the person stop recording. This is where I depart sharply from the majority's reasoning. To the extent the district court believed, and the majority intimates, that Michael can be the subject of a harassment restraining order if he refused to stop video recording at the directive of police, I believe the underlying premise is flawed. I instead believe, quite firmly, that we should reverse the harassment order because Michael's refusal to comply with the officer's request to stop recording cannot form the basis of judicial restraint on his liberty whether the police authoritatively "told" him to stop recording after they arrived or merely "suggested" that he do so.

Although there might be some extraordinary circumstance in which the police have a legitimate reason to order a person to stop recording, a person generally has a constitutionally protected right to record police activity. *See ACLU v. Alvarez*, 679 F.3d 583, 608 (7th Cir. 2012) (holding that the First Amendment prevents Illinois prosecutors from enforcing an eavesdropping statute against people who openly record police officers in public), *cert. denied*, 133 S. Ct. 651; *Glik v. Cunniffe*, 655 F.3d 78, 85 (1st Cir. 2011) (holding that a person has the First Amendment right to record the activities of police officers engaged in public business in Massachusetts). If the First Amendment prevents

Illinois and Massachusetts from prosecuting persons for openly recording police activity, it also prevents Minnesota from subjecting a person to a harassment restraining order for refusing to stop recording a conflict after police arrive and become involved in resolving the conflict. I believe that Michael had a constitutionally protected right to record both the dispute and the officers' attempts to resolve it. Based on that belief, I would hold that the district court abused its discretion by effectively punishing Michael for refusing to yield to the police preference that he relinquish that right, whether the preference was delivered as a request or as a demand.

For these reasons I agree completely with the result of the majority decision.