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**STATE OF MINNESOTA
IN COURT OF APPEALS
A13-1146**

Taryn Emery, petitioner,
Respondent,

vs.

Joshua Bryand,
Appellant.

**Filed December 30, 2013
Affirmed
Smith, Judge**

Freeborn County District Court
File No. 24-CV-13-592

Crysta L. Parkin, Southern Minnesota Regional Legal Services, Rochester, Minnesota
(for respondent)

Eric J. McCloud, McCloud Law Firm, PLLC, St. Paul, Minnesota (for appellant)

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

UNPUBLISHED OPINION

SMITH, Judge

We affirm the district court's grant of a harassment restraining order because the district court (1) did not abuse its discretion by finding reasonable grounds to believe that the relevant act was nonconsensual and (2) did not commit error by not requiring proof of an immediate and present danger of harassment.

FACTS

On April 4, 2013, respondent Taryn Emery petitioned the district court for a harassment restraining order (HRO), alleging that, after appellant Joshua Bryand sexually assaulted her, he also took photographs of her. The district court granted a temporary restraining order (TRO). At the hearing that followed, Emery testified that she spent the evening of Friday, March 22, with a male friend, Bryand, and Bryand's wife, primarily at the Bryand home. The group socialized until approximately 3:15 a.m. By 3:30 a.m., Emery was asleep on the living room couch, her male friend was on the basement couch, and Bryand and his wife were upstairs.

Emery testified that, shortly thereafter, she woke up to somebody touching her upper leg and "front private areas." She realized it was Bryand and was "so intimidated and so scared" that she "pretended to be asleep." Without revealing that she was awake, she "brush[ed] [Bryand's] hands off [her] leg and turn[ed] to [her] side, hoping that he would leave." She testified that in response, Bryand "waited a few seconds and then flipped [her] back onto [her] back." Bryand continued to "touch" and "rub" her, removed her clothing, penetrated her, and "moved" and "pushed" her into multiple positions. Emery testified that, at one point, she "tried making noise like [she] was . . . waking up," so Bryand would stop, but Bryand "covered [her] mouth with his hands and said, Sh – sh – sh." Once she was quiet, Bryand resumed the sexual assault. When he was done, but before re-dressing her, Bryand used his cell phone to take three photographs of her. Emery testified that after Bryand returned upstairs, she fled from the Bryand home and went to the hospital. The following Monday, she reported the incident to the police.

Emery was the only person to testify at the hearing. The district court found her testimony credible and granted an HRO.

DECISION

I.

We review the district court's grant of an HRO for an abuse of discretion. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008). In doing so, we review the district court's findings of fact for clear error, giving due regard to the district court's opportunity to judge witness credibility. *Id.* But whether the facts found by the district court satisfy the statutory elements of harassment is a question of law, which we review *de novo*. *See id.*

An HRO requires a finding of reasonable grounds to believe that respondent engaged in harassment. Minn. Stat. § 609.748, subd. 5(b)(3) (2012). Harassment includes “a single incident of physical or sexual assault.” *Id.*, subd. 1(a)(1) (2012). Under Minnesota law, sexual assault encompasses multiple degrees of criminal sexual conduct. *See* Minn. Stat. § 145.4711, subd. 5 (2012) (defining “sexual assault” as incest or first-degree through fourth-degree criminal sexual conduct). Except under certain circumstances, consent is a defense to such conduct. *See* Minn. Stat. §§ 609.342-.345 (2012); *State v. Saldana*, 324 N.W.2d 227, 229, 232 (Minn. 1982). “Consent means words or overt actions by a person indicating a freely given present agreement to perform a particular sexual act with the actor. Consent does not mean . . . that the complainant failed to resist a particular sexual act.” Minn. Stat. § 609.341, subd. 4(a) (2012).

Bryand asserts that an alleged victim has an affirmative “duty to express, in some meaningful form that a normal person would understand, that she wishes to reject having a sexual encounter.” Because Emery did not “signal [to Bryand] that his advances were unwanted,” Bryand argues that the record demonstrates a consensual, legal act. But failure to resist a particular sexual act does not constitute consent. *Id.* Moreover, Emery testified that while pretending to be asleep, she brushed Bryand’s hands away and attempted to protect her body by rolling from her back to her side. These acts indicate that Bryand’s actions were unwelcome.

Bryand also argues that Emery’s overt actions establish consent. But his argument is grounded in a mischaracterization of Emery’s uncontroverted testimony, which the district court found credible.

The district court did not abuse its discretion by finding reasonable grounds to believe that Bryand sexually assaulted Emery, thereby harassing her. Bryand is not entitled to relief on this ground.

II.

Byrand next argues that, because the HRO is based on a single incident of physical or sexual assault, the district court erroneously failed to find “an immediate and present danger of harassment.” Bryand acknowledges that this finding is not expressly required for issuance of an HRO, but argues that, because it is required for issuance of a TRO, its necessity for an HRO is implied.

The interpretation of a statute presents a question of law, which we review *de novo*. *Halvorson v. Cnty. of Anoka*, 780 N.W.2d 385, 389 (Minn. App. 2010). When

interpreting a statute, we “ascertain and effectuate the intention of the legislature.” Minn. Stat. § 645.16 (2012). In doing so, we determine whether the statute’s language, on its face, is ambiguous. *Am. Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 312 (Minn. 2001). A statute’s language is ambiguous only when it is subject to more than one reasonable interpretation. *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999). We construe words and phrases according to their plain and ordinary meaning. *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980); *see also* Minn. Stat. § 645.08(1) (2012) (providing that words and phrases are construed according to their common usage). When the legislature’s intent is clearly discernible from a statute’s plain and unambiguous language, we interpret the language according to its plain meaning without resorting to other principles of statutory construction. *State v. Anderson*, 683 N.W.2d 818, 821 (Minn. 2004).

When a person petitions for an HRO and proper service has been made, the district court may issue an HRO if it “finds at the hearing that there are reasonable grounds to believe that the respondent has engaged in harassment.” Minn. Stat. § 609.748, subd. 5(b)(3). Before the hearing, and without prior notice to the respondent, the district court may also issue a *temporary* restraining order. *Id.*, subd. 4 (2012). A TRO based on a single incident of physical or sexual assault requires both a finding of “reasonable grounds to believe that the respondent has engaged in harassment” and an allegation of “an immediate and present danger of harassment.” *Id.*, subd. 4(b).

First, we note that Bryand misconstrues the TRO statute. For a TRO based on a single incident of physical or sexual assault, the petition must *allege* “an immediate and

present danger of harassment.” *Id.* The TRO statute does not require a *finding* of such danger. *See id.* Second, under the plain meaning of the HRO statute, an HRO does not require a finding—or an allegation—of “an immediate and present danger of harassment.” *See id.*, subd. 5(b). Because the statute’s language is unambiguous, we need not employ other principles of statutory construction. *See Anderson*, 683 N.W.2d at 821. Bryand’s argument is without merit, and he is not entitled to relief.

Affirmed.