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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-1805**

Randall Tague and obo Minor, petitioner,
Respondent,

vs.

Bernard Menge,
Appellant.

**Filed July 2, 2018
Affirmed
Larkin, Judge**

Chisago County District Court
File No. 13-CV-17-405

Randall Tague, Wyoming, Minnesota (pro se respondent)

Daniel Charles Guerrero, Meshbesh & Spence, Ltd., Minneapolis, Minnesota (for
appellant)

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

UNPUBLISHED OPINION

LARKIN, Judge

Appellant challenges the district court's issuance of a harassment-restraining order
(HRO) on behalf of respondent's minor child, arguing that the HRO was not supported by

sufficient evidence. Appellant also argues that the district court erred by determining that it did not have authority to modify the HRO. We affirm.

FACTS

On June 21, 2017, respondent Randall Tague petitioned for an HRO against appellant Bernard Menge. Tague included a request for relief on behalf of his nine-year-old child, K.T. Menge is K.T.'s grandfather and Tague's former father-in-law. Tague's petition alleged that on June 14, Menge "came into the Forest Lake library at 12:15 to remove [K.T.] from her court ordered 'play attention' session." When Tague saw Menge approach, Tague "stepped into the doorway, put [his] arm across the door, and asked him to wait [until] the proper time."

Tague alleged that Menge "said something about how it's his daughter's ([Tague's ex-wife's]) parenting time," "opened the door, pushed [Tague] against the door jamb, and ordered [K.T.] to go with him." Tague further alleged that he told Menge that Menge "had no right to touch [him]" and to "back away" and that Menge responded by "lean[ing] harder into [Tague's] arm, pushing [him] harder into the door, and again ordered [K.T.] to go with him." K.T.'s "face had a look of confusion, fear, and sadness." K.T. put her hand out, and Menge grabbed her hand, "dr[agged] her out of the room, under [Tague's] arm," and walked out of the library, threatening to "call the police on [Tague] and to take [him] to court." Tague also alleged that "during a session on 6-19 [Menge] took pictures without [Tague's] permission."

Tague alleged that the incident "was the first time he saw [Menge] pull [K.T.] from a session like that," but that K.T.'s therapist told Tague that "this is the norm" and that

Menge had “acted aggressively in the past, causing a scene at [K.T.’s] other therapist . . . in front of [K.T.] and other children 3 years ago, and has been asked not to be present there.” Tague alleged that K.T. is “autistic, her main issues being social cues” and that he was “terrified [K.T.] will believe this type of bullying behavior is ok, and will do this kind of stuff at school.” Tague further alleged that he believed that Menge would continue to harass him “because it has gotten worse, and [Menge] believes himself justified.”

The district court denied Tague’s request for an ex parte HRO, finding that “[t]here is not an immediate and present danger of harassment to justify temporary relief.” Upon Tague’s request, the district court held a hearing on the HRO petition on July 10, 2017. Tague appeared pro se at the hearing. Menge received notice of the hearing, but he did not appear. Tague testified regarding the incident at the library as follows:

[Menge had] been taking [K.T.] out of her therapies up to a half an hour early each day, and the therapies are Court ordered. And, I—he came one day and I stepped in the way of the door and said listen she has another half hour—you know, this is Court ordered, let the time go through. And, he opened the door and pushed me against it, leaned through and ordered my daughter to come with him. And, I told him, “Hey you have no right to touch me, please stop.” And he again just continued pushing me against the door, tried to push[] into the room. And, started yelling louder for my daughter to come with him, and finally she looking very terrified and very upset she did. And he grabbed her by the hand and yanked her out of the little room they were in, and drug her outside of the library.

Tague testified that K.T.’s reaction was “[s]hocked and scared” and that she started crying in response to the incident. Tague testified that he attempted to visit K.T. during therapy again the next day and that Menge “started taking photos” of him and was “very intimidating.” Tague also testified that after he filed and served the HRO petition, he again

attempted to visit K.T. during therapy and Menge “hid[] in the stacks with his hat down and his jacket up around his face” and “glare[d] at [Tague] the whole time [Tague] was there.”

The district court granted Tague’s request for an HRO for a period of two years.

On July 28, Menge requested a hearing regarding the HRO. On August 14, Menge filed a motion to dismiss the HRO, arguing that he “was informed by the sheriff’s deputy that this was dismissed on June 21st,” that the deputy told him that he would be contacted by the court, and that he had been fulfilling a “court decree of taking [his] granddaughter to school” at the time of the hearing and was unaware of it. Menge also contested the allegations in the petition. The district court held a hearing on Menge’s motion to dismiss on August 30 and denied Menge’s motion, finding that Menge failed to establish a basis for dismissal.

On September 28, Menge moved to modify the HRO to remove K.T. as a protected party. Menge argued that K.T. should not be subject to the HRO because K.T.’s mother lives with Menge and his wife, “[w]hen KT is with her mother during the week, and every other weekend, she too resides with the Menges,” and “[a]s a result of the current HRO . . . he has been forced from his own home” when K.T. visits her mother. Menge argued that “[n]either KT nor her mother . . . want or need protection from [him].”

On October 18, the district court held a hearing regarding Menge’s modification request. The district court denied Menge’s motion to modify without allowing him to present testimony or other evidence, reasoning that (1) the district court had held an HRO hearing and taken testimony on July 10, 2017, (2) Menge failed to appear at the July

hearing, (3) Menge's request to dismiss the HRO had been denied after a hearing at which Menge appeared, and (4) "Minn. Stat. § 609.748 does not specifically allow for modifications of HROs under these circumstances." Menge appeals.¹

DECISION

I.

Menge contends that the district court erred by "includ[ing K.T.] in the HRO when there was no evidence to support harassment" of K.T. Menge argues that because "K.T. was not the subject of [the] alleged physical assault," she should not have been included in the HRO. Menge further argues that because "the incident at the library [was] not objectively unreasonable and there was no allegation that [he] 'harassed' K.T. more than once, nor evidence to show repeated instances of harassment, this Court should vacate the HRO as it concerns K.T."

The district court may grant an HRO if "the court finds . . . that there are reasonable grounds to believe that the respondent has engaged in harassment." Minn. Stat. § 609.748, subd. 5(3) (Supp. 2017). Harassment includes "a single incident of physical or sexual assault." *Id.*, subd. 1(a)(1) (2016). "The parent . . . of a minor who is a victim of harassment may seek a restraining order from the district court on behalf of the minor." *Id.*, subd. 2 (2016).

¹ Tague did not file a brief, and this court ordered the appeal to proceed under Minn. R. Civ. App. P. 142.03 (providing that if a respondent fails to file a brief, the case shall be determined on the merits).

“[T]he issuance of an HRO is reviewed for abuse of discretion.” *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008). The district court’s findings of fact “will not be set aside unless clearly erroneous, and due regard is given to the district court’s opportunity to judge the credibility of witnesses.” *Kush v. Mathison*, 683 N.W.2d 841, 843-44 (Minn. App. 2004), *review denied* (Minn. Sept. 29, 2004). “[T]his court will reverse the issuance of a restraining order if it is not supported by sufficient evidence.” *Id.* at 844.

The district court’s HRO indicates that its finding of harassment regarding K.T. was based on a determination that Menge physically “assaulted” K.T. at the library on June 14, 2017. The district court described that incident as follows:

On June 14, 2017, [Menge] came into the Forest Lake Library to remove [K.T.] from her court ordered “play attention” session. [Tague] stepped into the doorway and asked [Menge] to wait for the proper time. [Menge] said it was his daughter’s ([Tague’s] ex-wife’s) parenting time. [Menge] opened the door, pushed [Tague] against the door jamb, and directed [K.T.] to go with [Menge]. [Menge] leaned harder into [Tague]’s arm, pushing [Tague] into the door, and again ordered [K.T.] to go with [Menge]. [K.T.] put her hand out, and [Menge] grabbed it and dragged her out of the room, and then walked out of the library, threatening to call the police on [Tague] and take him to Court.

To establish “harassment” by proof of a physical assault, “a petitioner must prove that the respondent intentionally inflicted or attempted to inflict bodily harm upon another person.” *Peterson*, 755 N.W.2d at 760. “Bodily harm” means “physical pain or injury, illness, or any impairment of physical condition.” Minn. Stat. § 609.02, subd. 7 (2016).

The district court’s finding that “[K.T.] put her hand out, and [Menge] grabbed it and dragged her out of the room” is supported by Tague’s testimony that Menge “grabbed [K.T.] by the hand,” “yanked her out of the little room they were in, and dr[agge]d her outside of the library.” Admittedly, the record does not contain direct evidence, and the district court did not make an express finding, that K.T. experienced bodily harm when Menge dragged her out of the therapy room. However, the record circumstantially supports the district court’s implicit finding that K.T. felt physical pain when Menge forcibly dragged her out of the room. The record therefore supports the district court’s finding of harassment by proof of a physical assault against K.T., and the district court did not abuse its discretion in granting the HRO on behalf of K.T. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 100 (Minn. App. 2009) (affirming the grant of an order for protection, noting the deferential abuse-of-discretion standard used to review the issuance of an order for protection and reasoning that “[t]he evidence was sufficient for the district court to infer appellant’s present intent to inflict fear of imminent physical harm, bodily injury or assault based on the totality of the circumstances”).

II.

Menge contends that the district court “erred [by] refus[ing] to modify the HRO to remove [K.T.],” arguing that “the district court abused its discretion in ruling that it was without authority to modify an HRO.”

In its order denying Menge’s motion to modify, the district court stated that it denied Menge’s motion because “two evidentiary hearings have already been held in this matter, and Minn. Stat. § 609.748 does not specifically allow for modifications of HROs under

these circumstances.” Although Minn. Stat. § 609.748 (2016 & Supp. 2017) does not expressly authorize modification of an HRO under the circumstances here,² HRO proceedings are civil in nature. *Dunham v. Roer*, 708 N.W.2d 552, 568 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006). They are subject to the rules of civil procedure, including Minn. R. Civ. P. 60.02(e), which allows the district court to grant relief from a final judgment on a number of grounds, including that it is “no longer equitable that the judgment should have prospective application.” See Minn. R. Civ. P. 1 (stating that the rules of civil procedure generally apply in “all suits of a civil nature”); Minn. R. Civ. P. 81.01(a) (stating that the rules of civil procedure do not apply to certain proceedings); Minn. R. Civ. P. App. A. (excluding HRO proceedings from a list of proceedings to which the rules of civil procedure do not apply); *see also Kush*, 683 N.W.2d at 843-44 (applying Minn. R. Civ. P. 52.01 to HRO proceeding).

In denying Menge’s motion, the district court reasoned that it had previously held two evidentiary hearings regarding the HRO.³ Menge received notice of the first hearing,

² Minn. Stat. § 609.748, subd. 5(d) (Supp. 2017), expressly authorizes a named respondent to request that the district court vacate or modify an HRO if the court ordered relief for a period of up to 50 years, the HRO has been in effect for at least five years, and the respondent has not violated the HRO.

³ The district court’s order denying Menge’s motion to modify states that the district court held “two evidentiary hearings” in this matter. At the hearing on Menge’s motion to modify, the district court stated that there was “testimony at the second hearing.” During oral argument to this court, Menge’s counsel disputed whether the second hearing was an evidentiary hearing. But Menge’s counsel was not present at the second hearing, and he did not order a transcript of that hearing. As the appellant, Menge had the burden to order the transcripts necessary for this appeal. See Minn. R. Civ. App. P. 110.02, subd. 1 (stating that it is the appellant’s duty to order a transcript of those parts of the proceedings which are deemed necessary for inclusion in the record). In the absence of a transcript of the second hearing, we accept the district court’s description of the hearing as an evidentiary

but he did not attend. The district court held the second evidentiary hearing in response to Menge's motion to dismiss. Menge attended that hearing, and the district court denied his motion to dismiss on the merits. One month later, Menge once again challenged the HRO—this time in a motion to modify—but he did not assert a change in circumstances as a basis for modification.

In sum, when the district court refused to modify the HRO, Menge had had two opportunities to present evidence regarding the need for an HRO and the district court had already considered and denied Menge's motion to dismiss the HRO on the merits. Under the circumstances, we cannot say that the district court's refusal to modify the HRO constitutes reversible error, even if the district court erroneously reasoned that it was without authority to modify the HRO. *See* Minn. R. Civ. P. 61 ("The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.").

Affirmed.

hearing. *See Duluth Herald & News Tribune v. Plymouth Optical Co.*, 286 Minn. 495, 498, 176 N.W.2d 552, 555 (1970) (noting lack of a transcript precludes review of factual questions); *Waters v. Fiebelkorn*, 216 Minn. 489, 495, 13 N.W.2d 461, 464-65 (1944) ("[O]n appeal error is never presumed. It must be made to appear affirmatively before there can be reversal . . . [and] the burden of showing error rests upon the one who relies upon it.").