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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-0381**

Linde Sayen,
Respondent,

vs.

Michael Sayen,
Appellant.

**Filed December 16, 2019
Affirmed
Hooten, Judge**

Washington County District Court
File No. 82-CV-18-5082

Samantha J. Graf, Forest Lake, Minnesota (for respondent)

Michael S. Sayen, Forest Lake, Minnesota (pro se appellant)

Considered and decided by Hooten, Presiding Judge; Smith, Tracy M., Judge; and
Kirk, Judge.*

UNPUBLISHED OPINION

HOOTEN, Judge

This appeal follows an order denying a request for hearing on a harassment restraining order (HRO) and the granting of an HRO that prevents appellant father from

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

contacting respondent mother and the couple's then six-year-old child outside of approved therapy sessions. Father argues that the district court abused its discretion when it issued an HRO that is too vague and effectively terminates his parental rights for the duration of the HRO. Father also argues that the district court abused its discretion when it issued an order denying father's motion to "change" the HRO and "canceled" an evidentiary hearing on his amended motion to "change" the HRO. We affirm.

FACTS

On October 8, 2018, appellant Michael Sayen (father), paced outside of the home of respondent Linde Sayen (mother) in order to accost their child as she waited for the school bus. He approached the child, in violation of the custody arrangement established after father and mother's divorce, hugged her, and told her he loved her. Mother called the police who promised to increase their patrols of the area. That night, father messaged mother, "you have been irresponsible with my child, I am taking her back." Father's messages to mother escalated over the next few days, including the statement, "Nobody can take my child from me, especially you. Any state law that says that they can is an unlawful order that does not need to be obeyed. This is my right, both by the Declaration of Independence and protected by God."

On October 26, 2018, mother filed a petition with the district court for an ex parte HRO under Minn. Stat. § 609.748 (2018). In her petition, mother alleged that father stalked, made uninvited visits, and threatened her and their child. The district court granted mother's petition (October HRO) and prohibited father from: (1) having any direct or

indirect contact with mother; (2) being within 20 yards of mother's home; and (3) limiting his contact with the child to joint therapy sessions described in the custody agreement.

Father and mother both requested a hearing after father was served with the ex parte HRO. The request was granted and the hearing was held on November 15, 2018. Mother appeared, but father did not. The district court granted an HRO prohibiting father from being within 20 yards of the child's school and added a provision to the HRO that if father was "visibly present" to mother or the child, regardless of how many yards actually separated the parties, father would be in violation of the HRO (November HRO). The HRO did not provide that father was permitted limited contact with the child in joint therapy as the October HRO had. On the same day as the hearing, father filed a letter with the district court stating that he did not appear because he mistakenly believed that the hearing was scheduled for the next day.

At a family court hearing on November 26, 2018, mother and father informed the district court that an agreement to modify the November HRO had been made so as to allow father to attend therapy sessions with the child but not be in violation of the order. Following this hearing, the district court instructed mother to submit a proposed order to modify the November HRO and father could file a motion to address any perceived discrepancies between the proposed order and the agreement.

Nevertheless, on November 29, 2018, father filed a motion to "change" the HRO. However, father did not seek to modify the terms of the HRO, but rather requested a retrial or vacation of the HRO. Father repeated that his absence from the November 15, 2018 hearing was an accident and he did not believe that the HRO was in the child's best interest.

In December of 2018, the parties filed a signed stipulation to modify the HRO to allow father to attend therapy/parental coaching with the child without incurring a violation. The district court noted that because of this stipulation, it did not rule on the father's first motion to "change" the HRO.

On January 17, 2019, father filed a second motion to "change" the HRO. The motion was on a copy of the same motion father filed on November 29, 2018, stamped with a "Filed in District Court on November 29, 2018" on the cover, but with an "amended" handwritten above the caption. Father's second motion to "change" the HRO requested the same relief as the first motion: a retrial or a vacation of the November HRO.

A hearing was set for February 15, 2019 on father's amended motion. Mother objected to the scheduling of the hearing arguing that father did not allege sufficient grounds for the court to vacate the November HRO. The district court canceled the hearing and noted that the "hearing was set in error" after it "had directed that no hearing be scheduled" to vacate the November HRO in light of the December stipulation. The next day, the district court filed an order denying father's amended motion. In doing so, the district court instructed father that all future correspondence with the district court had to be in the form of a motion accompanied by appropriate fees.

Father protested the district court's decision to cancel the hearing in light of the stipulation and appealed to this court. We agreed with father and issued an order holding that father's stipulation was a knowing waiver of neither of his right to appeal nor his right to seek vacation of the November HRO and he could proceed in an appeal on the merits of

the HRO. *Sayen v. Sayen*, A19-0381 (Minn. App. Apr. 9, 2019). This appeal on the merits follows.

DECISION

Father appeals from the entry of the district court's November HRO against him and from the district court's February order denying his amended motion to "change" the November HRO. Father argues that the district court abused its discretion when it issued the November HRO by: (1) not allowing him any contact with the child, effectively terminating his parental rights for the duration of the HRO, and (2) adding a provision that is too vague and can be misinterpreted. Father also argues that the district court abused its discretion when it issued the February order denying father's amended motion, and "canceled" a scheduled hearing on the January motion.

"While an appellant acting pro se is usually accorded some leeway in attempting to comply with court rules, he is still not relieved of the burden of, at least, adequately communicating to the court what it is he wants accomplished and by whom." *Carpenter v. Woodvale, Inc.*, 400 N.W.2d 727, 729 (Minn. 1987); see *Gruenhagen v. Larson*, 246 N.W.2d 565, 569 (Minn. 1976) (stating that, generally, a court will not modify ordinary rules and procedures because a pro se party lacks the skills and knowledge of an attorney); *Fitzgerald v. Fitzgerald*, 629 N.W.2d 115, 119 (Minn. App. 2001) (stating that "[a]lthough some accommodations may be made for pro se litigants, this court has repeatedly emphasized that pro se litigants are generally held to the same standards as attorneys and must comply with court rules").

“An assignment of error based on mere assertion and not supported by any argument or authority . . . is waived unless prejudicial error is obvious on mere inspection. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971); *see also State v. Andersen*, 871 N.W.2d 910, 915 (Minn. 2015) (applying *Schoepke*). We hold that father has failed to support his assertions that the district court abused its discretion with any applicable legal authority and therefore his assignments of error are waived. However, even if we were to address his arguments on the merits, we would hold that the district court’s actions do not constitute an abuse of discretion.

1. The district court did not abuse its discretion when it entered the November HRO.

Just as a victim of harassment may seek a restraining order from the district court, “[t]he parent . . . of a minor who is a victim of harassment may seek a restraining order from the district court on behalf of the minor.” Minn. Stat. § 609.748, subd. 2 (2018). The district court may issue a restraining order if it has “reasonable grounds to believe that the respondent has engaged in harassment.” Minn. Stat. § 609.748, subd. 5(b)(3) (2018). We review a district court’s decision on whether to grant 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).

Harassment is a broad term and includes “marching, standing, or patrolling by one or more persons directed solely at a particular residential building in a manner that adversely affects the safety, security, or privacy of an occupant of the building,” Minn. Stat. § 609.748, subd. 1(c)(1) (2018), as well as “a pattern of attending public events after

being notified that the actor's presence at the event is harassing to another." Minn. Stat. § 609.748, subd. 1(a)(3).

The district court issued the ex parte October HRO based on a list of approximately 50 incidences of father's unwanted contact, attendance at public events, and patrolling-like behaviors. The district court held that these behaviors constituted reasonable grounds to support a finding that father harassed mother and their child. At the subsequent hearing, mother affirmed that the incidences listed were true and correct. Father failed to attend the hearing despite notice that failure to make an appearance may result in a default order. Accordingly, the district court entered the November HRO to prohibit father from having contact with mother and their child for two years.

A. Father's parental rights were not effectively terminated by the November HRO.

Father does not dispute that he has the right to visit with the child at therapy. But, he argues that the district court abused its discretion when it issued the November HRO because it prevented him from having "maximum time" with the child. Father bases his assertion on Minn. Stat. § 260C.301 (2018) (termination of parental rights) and Minn. Stat. § 518.17, subd. 1(10) (2018) (listing maximizing parenting time with both parents as a factor in determining the best interests of the child). He states that absent a "high level of evidence that a child is in direct danger," the child should have the "maximum time" possible with father and anything less is a termination of his parental rights.

Contrary to father's assertion, an HRO that limits contact is not the same thing as a termination of parental rights. This is especially true as father maintains the right to see

the child at the stipulated therapy sessions and the term of the HRO is only two years. Therefore, the statutes to which father cites simply are not applicable.

As the district court had ample evidence in the record to support a finding that father's escalating stalking, threatening, and patrolling behaviors constituted reasonable grounds for harassment, we hold that the district court did not abuse its discretion when it granted the November HRO.

B. The November HRO was not unconstitutionally vague.

"It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S. Ct. 2294, 2298 (1972). An order is unconstitutionally vague if persons of "common intelligence must necessarily guess at its meaning and differ as to its application." *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 127 (1926). An order is not unconstitutionally vague when a reasonable person could not "inadvertently violate the [order] because of an inability to determine what type of conduct is prohibited." *Dunham v. Roer*, 708 N.W.2d 552, 568 (Minn. App. 2006), *review denied* (Minn. Mar. 28, 2006).

The November HRO included four provisions stating: (1) father is not allowed to harass mother and child; (2) father is not allowed any direct or indirect contact with mother and the child; (3) father is not allowed within 20 yards of the home of mother and the child, (4) and father is not allowed within 20 yards of the child's school. The language at issue comes from a handwritten addendum to the second provision stating that if father "is visibly present to petitioner and/or child, it shall be considered a violation."

Father argues that this provision is impermissibly vague because the “visibly present” language subjects father to the threat of violating the HRO by simply being “out in town, grocery store and any other normal place in town where [father and mother] both live.” The only relief, father argues, is a new trial. Mother contends that the “visibly present” language was included due to father’s penchant for prowling outside of mother’s home and following her to other public places even after the ex parte October HRO went into effect. Despite father’s behavior, mother claims police were hesitant to enforce the HRO without some form of distance provision. To account for this reluctance, and to avoid father gaming a stated distance parameter (e.g., standing 21 yards away from the child when the HRO prevents him from entering within 20 yards of the child), the district court approved the “visibly present” provision to clarify the order for the police.

The inclusion of a “visibly present” provision is unusual. A plain reading of the term would suggest father cannot be visible to mother or child—essentially setting the prescribed distance father must maintain from mother as the distance an eye can reasonably see. The district court noted that “visibly present” did not include visible with “telescopes or binoculars.” Father suggests the “visibly present” language is vague and subjects him to significant risk of unintentional violations. And yet, the potential for unintentional violations exists anytime there is a distance term in an HRO. The two parties could be inadvertently walking down two adjacent aisles of a grocery store, or their cars could pass in an intersection. This alone is not sufficient for a party to argue the HRO is invalid.

In light of father’s patrolling behavior outside of mother’s home, a reasonable person would understand that being in the visible presence of mother or the child, which

would include planting oneself in the immediate area of the school bus stop just beyond mother's home, is not permitted conduct. Furthermore, this provision does not prevent father from seeing and interacting with child at the stipulated therapy sessions. It merely conveys to father that any attempts to circumvent the HRO are not permissible.

We hold that, in these circumstances, the provision, while unusual, is not unconstitutionally vague as a person of common intelligence would likely not guess the meaning of 'visibly present' to mean anything other than visible to mother and/or child.

2. The district court did not abuse its discretion when it denied father's amended motion to "change" the November HRO.

An HRO proceeding is not a typical civil matter, but a special proceeding that "confers a right upon an individual" and authorizes a special application to a court to enforce it." *Fiduciary Found., LLC ex rel Rothfusz v. Brown*, 834 N.W.2d 756, 761 (Minn. App. 2013), *review denied* (Minn. Sept. 17, 2013). Though special, proceedings involving the issuance of an HRO are civil in nature. *Dunham*, 708 N.W.2d at 568. They are subject to the rules of civil procedure. See Minn. R. Civ. P. 1 (stating that the rules of civil procedure generally apply in "all suits of a civil nature"); see also *Kush*, 683 N.W.2d at 843–44 (applying the Minnesota Rules of Civil Procedure to an HRO proceeding). We "review a district court's decision on a motion to vacate an order or judgment for an abuse of discretion." *In re Welfare of Children of M.L.A.*, 730 N.W.2d 54, 60 (Minn. App. 2007).

Father is not entitled to a new trial under Minn. R. Civ. P. 59.01(c).

Father contends that it was an abuse of discretion by the district court to deny his January motion to “change” the November HRO as he was entitled to a “new trial” under Minn. R. Civ. P. 59.01(c).

The district court granted both parties’ request for a hearing on the October HRO and set a hearing date for November 15, 2018. Father failed to attend that hearing because “he works nights,” was at a free legal clinic at the court of appeals researching a separate issue, and mixed up the day on which his hearing was held. When father requested a second hearing without providing a legal basis for his entitlement to a retrial, the district court denied his request. Father now claims he is entitled to a new trial under Minn. R. Civ. P. 59.01(c).

Generally, HRO proceedings are special proceedings. *Fiduciary Found., LLC ex rel. Rothfusz*, 834 N.W.2d at 761. Unless the statute authorizing a particular special proceeding states otherwise, if a special proceeding does not include a trial, a motion for a new trial is not authorized in that special proceeding. *Schlitz v. City of Duluth*, 449 N.W.2d 439, 441 (Minn. 1990); see *Parson v. Argue*, 344 N.W.2d 431, 431 (Minn. App. 1984) (noting that if there was no trial, a motion for a new trial is an “anomaly”). Minn. Stat. § 609.748, which authorizes HROs and their related proceedings, does not include any reference to a “trial” and does not authorize a “motion for a new trial.” Therefore, in a proceeding related to an HRO, a motion for a new trial under Minn. R. Civ. P. 59.01(c) is not an authorized form a relief. Accordingly, the district court did not err when it denied father’s request.

Even if Minn. R. Civ. P. 59.01 applied, Minn. R. Civ. P. 59.01(c) provides that a district court may grant a new trial on account of an “[a]ccident or surprise which could not have been prevented by ordinary prudence.” Minn. R. Civ. P. 59.01(c).

Father missed the hearing because he marked his calendar incorrectly. Had father exercised ordinary prudence, he would have marked the hearing on the correct day. There was nothing inevitable or unpreventable about father’s absence at the hearing. Father presents no other grounds by which the district court abused its discretion when it denied father’s amended motion.

As Minn. R. Civ. P. 59.01 does not apply to the November HRO hearing, and even if it did, father’s absence could have been prevented by ordinary prudence, the district court did not abuse its discretion when it denied father’s amended request to modify the HRO through a “new trial.”

3. The district court did not abuse its discretion when it canceled a hearing on father’s amended motion to “change” the HRO.

Though difficult to follow, father apparently argues that the district court abused its discretion when it canceled a scheduled hearing on his amended motion to modify the HRO as the cancelation was a “clerical mistake” under Minn. R. Civ. P. 60.01.

Minn. R. Civ. P. 60.01 allows a district court to correct an error or oversight in a proceeding at any time on its own initiative. *See* Minn. R. Civ. P. 60.01. The district court scheduled a hearing on the amended motion to “change” even though the district court previously stated that father had his opportunity and no such hearing should be scheduled. In recognizing that the hearing was scheduled in error, the district court struck the hearing

from the calendar. This action is permitted under Minn. R. Civ. P. 60.01. Furthermore, the relief sought by father, a “re-trial or vacation of the HRO,” is not an authorized form of relief under Minn. Stat. § 609.748.

Although the district court was incorrect in its assertion that the rules of civil procedure do not apply to HRO proceedings, as father failed to request a recognized form of relief under Minn. Stat. § 609.748, and the district court is authorized to correct errors and oversights under Minn. R. Civ. P. 60.01, we hold that the district court did not abuse its discretion when it struck the erroneously scheduled hearing on the amended motion to modify the HRO from the district court’s calendar.

Minn. R. Civ. P. 60.02 provides that a party may seek relief from an order for various reasons including mistake, new evidence, and fraud. Minn. R. Civ. P. 60.02(a)–(c). We decline to address any entitlement to relief under Minn. R. Civ. P. 60.02 as father failed to ask for relief under this rule. *See, e.g., Ganguli v. Univ. of Minn.*, 512 N.W.2d 918, 919 n.1 (Minn. App. 1994) (noting that the court of appeals declines to address allegations unsupported by legal analysis or citation).

Affirmed.