

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0571**

Breanna Marie Borth,
Appellant,

vs.

Matthew Joseph Borth,
Respondent.

**Filed January 10, 2022
Reversed and remanded
Cochran, Judge**

Olmsted County District Court
File No. 55-CV-21-651

Danielle L. DiFiore, Anderson Law Firm, Rochester, Minnesota (for appellant)

Christopher W. Coon, Restovich Braun & Associates, Rochester, Minnesota (for respondent)

Considered and decided by Segal, Chief Judge; Cochran, Judge; and Klaphake, Judge.*

SYLLABUS

When a harassment restraining order is sought under Minn. Stat. § 609.748 (2020) based on “harassment” involving “a single incident of nonconsensual dissemination of private sexual images under section 617.261,” proof of intent “to have a substantial adverse effect on the safety, security, or privacy of another” is not required.

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

OPINION

COCHRAN, Judge

This appeal arises from the district court's dismissal of appellant's petition for a harassment restraining order (HRO). On appeal, appellant contends that the district court erred when it interpreted the definition of "harassment" provided in the HRO statute, Minn. Stat. § 609.748, and thereby abused its discretion when it dismissed appellant's HRO petition. Because we agree with appellant that the district court misapplied the law when it dismissed the HRO petition, we reverse and remand for reconsideration of the petition.

FACTS

In February 2021, appellant Breanna Marie Borth filed a petition for an HRO against respondent Matthew Joseph Borth. Among other allegations, appellant's HRO petition alleged that respondent sent a private sexual image of appellant to a third party without appellant's permission. The district court issued an ex parte HRO. Respondent then requested a hearing on the matter.

At the HRO hearing, the district court heard testimony from appellant as well as from the third party who allegedly received the private sexual image from respondent. The following summarizes the testimony relevant to this appeal.

In January 2021, appellant took a photo of herself in which she was partially nude and sent the photo to respondent, who is appellant's ex-husband. Appellant intended for respondent alone to receive the photo, sending it through a cell-phone application called Snapchat. According to appellant, respondent took a screenshot of the photo and

threatened to send it to appellant's current significant other to "blackmail" appellant into giving respondent "what he wanted with [their] kids."

Appellant's current significant other, M.P., testified to later receiving a text message from respondent that included the partially nude photo of appellant. According to M.P., appellant did not intend for M.P. to receive the photo.

At the conclusion of the hearing, the district court determined that the evidence did not support issuing an HRO. With regard to the allegations relating to the photo, the district court ruled that dissemination of a private sexual image could be a basis for an HRO but concluded that the dissemination "has to be done with the intention of having a substantial adverse effect on the safety, security, or privacy of another." The district court then found that respondent did not disseminate the photo "for the purpose of adversely affecting the privacy or security of [appellant]" and accordingly the dissemination of the photo did not support issuance of an HRO.

Following the hearing, the district court issued a written order dismissing the petition. The written order reiterated the district court's conclusion that respondent did not have the requisite intent, stating "[t]he dissemination of private sexual images was not done with the intention of having a substantial adverse effect on the safety, security or privacy of another." On that basis, the district court concluded that respondent's dissemination of the photo did not constitute "harassment" under the HRO statute. In the order, the district court also found that the evidence did not support the other basis for an HRO alleged in the petition.

This appeal follows.

ISSUES

- I. Did the district court err in its interpretation of the term “harassment” under Minn. Stat. § 609.748, subd. 1(a)?
- II. Does the district court’s misapplication of the law require reversal and remand to the district court?

ANALYSIS

We review a district court’s decision whether to issue an HRO for an abuse of discretion. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008). A district court abuses its discretion “if it makes findings of fact that are not supported by the record, misapplies the law, or resolves the matter in a manner that is contrary to logic and the facts on record.” *Madden v. Madden*, 923 N.W.2d 688, 696 (Minn. App. 2019).

I. The district court erred in its interpretation of the term “harassment” under the HRO statute.

Appellant raises a single issue on appeal. Appellant argues that the district court misapplied the law when it interpreted the definition of “harassment” in the HRO statute, Minn. Stat. § 609.748, subd. 1(a), and therefore abused its discretion when it dismissed her HRO petition. More specifically, she contends that the district court erred when it concluded that section 609.748, subdivision 1(a)(1), provides that the nonconsensual dissemination of a private sexual image can support an HRO *only if* the dissemination of the image was done with the “intent to have a substantial adverse effect on the safety, security, or privacy of another.” She argues that the intent language cited by the district

court does not apply to the nonconsensual dissemination of a private sexual image and instead applies to other conduct listed in subdivision 1(a)(1). We agree.

The issue raised by appellant presents a question of statutory interpretation. Appellate courts review questions of statutory interpretation *de novo*. *State by Smart Growth Minneapolis v. City of Minneapolis*, 954 N.W.2d 584, 590 (Minn. 2021); *see Fiduciary Found., LLC ex rel. Rothfusz v. Brown*, 834 N.W.2d 756, 760 (Minn. App. 2013) (invoking *de novo* review when construing Minn. Stat. § 609.748 (2012)), *rev. denied* (Minn. Sept. 17, 2013). The goal of statutory interpretation is to “ascertain and effectuate the intention of the legislature.” *Smart Growth*, 954 N.W.2d at 590 (quoting Minn. Stat. § 645.16 (2020)). “The first step of statutory interpretation is to determine whether the statute’s language, on its face, is ambiguous.” *Hagen v. Steven Scott Mgmt., Inc.*, 963 N.W.2d 164, 169 (Minn. 2021) (quotation omitted). A statute is ambiguous only “if its language is subject to more than one reasonable interpretation.” *Id.* (quotation omitted). To make this determination, we “analyze the statute’s text, structure, and punctuation and use the canons of interpretation.” *Id.* at 170 (quotation omitted). We must construe statutory words and phrases “according to the rules of grammar and common usage.” *Larson v. State*, 790 N.W.2d 700, 703 (Minn. 2010). “If a statute, construed according to ordinary rules of grammar, is unambiguous, a court may engage in no further statutory construction and must apply its plain meaning.” *In re Custody of A.L.R.*, 830 N.W.2d 163, 169 (Minn. App. 2013).

We begin our statutory analysis by examining the language of the HRO statute. Under section 609.748, a court may issue an HRO in response to a petition that has been

properly served if it finds “that there are reasonable grounds to believe that the respondent has engaged in harassment.” Minn. Stat. § 609.748, subd. 5(b). The term “harassment” as used in the HRO statute is defined, in relevant part, as:

a single incident of physical or sexual assault, a single incident of harassment under section 609.749, subdivision 2, clause (8), a single incident of nonconsensual dissemination of private sexual images under section 617.261, *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, regardless of the relationship between the actor and the intended target[.]

Id., subd. 1(a)(1) (emphasis added).

As quoted above, subdivision 1(a)(1) sets forth four alternative types of conduct that can constitute harassment. The first three types of conduct listed all involve “a single incident”—a single incident of physical or sexual assault, a single incident of harassment under section 609.749, subdivision 2, or a single incident of nonconsensual dissemination of a private sexual image under section 617.261. *Id.* The fourth type of conduct involves “repeated incidents of intrusive or unwanted acts, words, or gestures.” *Id.* Following the fourth type of conduct, subdivision 1(a)(1) includes the qualifying phrase: “*that have a substantial adverse effect or are intended to have a substantial adverse effect on the safety, security, or privacy of another.*” *Id.* (emphasis added). The dispute in this case centers on that qualifying phrase and what language it modifies.

Appellant argues that the qualifying phrase is specific only to the final type of conduct, “repeated incidents of intrusive or unwanted acts, words, or gestures.” Respondent argues that the qualifying phrase modifies all four types of conduct listed in

subdivision 1(a)(1), including “a single incident of nonconsensual dissemination of private sexual images.” We agree with appellant.

Based on the plain language of subdivision 1(a)(1) and the application of rules of grammar, we conclude that appellant’s interpretation is the only reasonable interpretation of subdivision 1(a)(1). We first note that, of the four types of conduct listed in subdivision 1(a)(1), the first three are described by singular noun phrases—“a single incident of . . .”—while the final type of conduct is described by a plural noun phrase—“repeated incidents of . . .” *Id.* Those four noun phrases are separated by the word “or.” *Id.* And the final, plural noun phrase is immediately followed by the qualifying phrase. *Id.* “Or” is used as a disjunctive conjunction, meaning that it distinguishes the elements in a sentence. *The Chicago Manual of Style* § 5.205 (Univ. of Chicago Press ed., 17th ed. 2017).¹ Because the word “or” is disjunctive, a *singular* verb must be used in order for the qualifying phrase to modify the conduct involving “a single incident.” *Id.* Here, however, the qualifying phrase contains *plural* verbs: “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. 1(a)(1) (emphasis added). Given the use of the disjunctive word “or,” and because the qualifying phrase contains plural verbs, rules of grammar

¹ The Minnesota Supreme Court has recognized that, in some circumstances, “or” may be conjunctive. *See State v. Nelson*, 842 N.W.2d 433, 440-41 (Minn. 2014) (noting that when a proposition is phrased in the negative, use of “or” may allow an interpretation that “or” is conjunctive), *superseded by statute on other grounds*, 2014 Minn. Laws ch. 242, § 3, at 804 (codified as amended at Minn. Stat. § 609.375 (2020)); *Binkley v. Allina Health Sys.*, 877 N.W.2d 547, 552 n.5 (Minn. 2016) (citing this aspect of *Nelson*). Those circumstances, however, are not present here.

dictate that the qualifying phrase cannot grammatically modify the *singular* “single incident of” phrases listed in subdivision 1(a)(1) including “a single incident of nonconsensual dissemination of private sexual images under section 617.261.” Instead, the qualifying phrase must modify only the plural phrase “repeated incidents of intrusive or unwanted acts, words, or gestures.”

This interpretation of subdivision 1(a)(1) is also supported by application of the well-accepted rule of grammar known as the “last-antecedent rule.” Under the last-antecedent rule, “a concluding modifier in a series applies only to the nearest reasonable element in the series, rather than to every element in the series.” *State v. Pakhnyuk*, 926 N.W.2d 914, 921 (Minn. 2019) (*Pakhnyuk II*). The rule “reflects the basic intuition that when a modifier appears at the end of a list, it is easier to apply that modifier only to the item directly before it.” *State v. Stay*, 935 N.W.2d 428, 432 (Minn. 2019) (quotation omitted). The last-antecedent rule applies where the concluding modifier is a pronoun, relative pronoun, or demonstrative adjective. *State v. Pakhnyuk*, 906 N.W.2d 571, 577 (Minn. App. 2018) (*Pakhnyuk I*), *aff’d*, 926 N.W.2d 914 (Minn. 2019). “A relative pronoun is one that introduces a dependent (or *relative*) clause and relates it to the independent clause.” *Chicago Manual*, *supra*, § 5.56.

The last-antecedent rule by its terms applies to subdivision 1(a)(1). The word “that” in the qualifying phrase functions as a relative pronoun, which introduces the relative clause “*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. 1(a)(1) (emphasis added). The rule’s application to subdivision 1(a)(1) is further supported by the

absence of a comma between the qualifying phrase and the last type of conduct listed in subdivision 1(a)(1). *Cf.* 2A Norman J. Singer & Shambie Singer, *Sutherland Statutes and Statutory Construction* § 47.33 (7th ed. 2021) (describing an exception to the last-antecedent rule under which “[a] qualifying phrase separated from antecedents by a comma is evidence that the qualifier is supposed to apply to all the antecedents instead of only to the immediately preceding one”); *State v. Khalil*, 956 N.W.2d 627, 635 (Minn. 2021) (applying the exception to statutory language where the qualifier is set off by a comma). Applying the last-antecedent rule, then, the qualifying phrase applies *only* to the last item in the list: “repeated incidents of intrusive or unwanted acts, words, or gestures.”

To support his assertion that the qualifying phrase applies to all four types of conduct described in subdivision 1(a)(1) and not just to “repeated incidents of intrusive or unwanted acts, words, or gestures,” respondent urges us to apply a different rule of grammar known as the “series-qualifier rule.” The series-qualifier rule provides that “when several words are followed by a clause which is applicable as much to the first and other words as to the last, the natural construction of the language demands that the clause be read as applicable to all.” *Pakhnyuk II*, 926 N.W.2d at 921 (quotation omitted). The series-qualifier rule, however, typically applies only “when there is a straightforward, parallel construction that involves all nouns or verbs in a series.” *Pakhnyuk I*, 906 N.W.2d at 577 (quotation omitted). “Parallel construction means that words or phrases are arranged so that *every element* of the parallel series is a functional match of the others and serves the same grammatical function in the sentence.” *Id.* (quotation omitted).

Here, the first three elements in the series do not share enough grammatical similarity with the fourth element to qualify as a straightforward, parallel construction. The first three elements all describe “a single incident of” whereas the fourth element describes “repeated incidents.” The three “single incident of” elements are clearly parallel to one another—they each begin with the phrase “a single incident of” and then name a criminal offense. *See* Minn. Stat. § 609.748, subd. 1(a)(1). The phrase “repeated incidents of intrusive or unwanted acts, words, or gestures” does not follow that same formula. Instead, the phrase references a general category of acts that do not necessarily constitute a criminal offense. And the “single incident of” elements are singular, while the “repeated incidents” element is plural. Because the paragraph includes the disjunctive “or,” those singular elements are *not* a functional match of the plural element relative to the qualifying phrase.

Respondent also argues that the series-qualifier rule applies because the components of subdivision 1(a)(1) are separated only by commas, rather than semicolons. But Minnesota appellate courts have tended to conclude that the series-qualifier rule does *not* apply where semicolons and line breaks are absent from a statutory provision. *See Stay*, 935 N.W.2d at 432 (“[B]ecause section 609.20(2) does not contain semicolons or line breaks, the structure does not support application of the series-qualifier rule.”); *City of Oronoco v. Fitzpatrick Real Estate, LLC*, 883 N.W.2d 592, 595 (Minn. 2016) (“A semicolon or a line break might signify that the third-party clause modifies all that goes before, but there is no such signal.”). Moreover, as with any grammatical rule, the series-qualifier rule “can be defeated by other indicia of meaning, including competing canons.” *Pakhnyuk II*, 926 N.W.2d at 922. Given the grammar and structure of

subdivision 1(a)(1), we conclude that the series-qualifier rule does not apply and the only reasonable interpretation of the plain language of subdivision 1(a)(1) is that the qualifying phrase modifies only the last type of conduct listed—“repeated incidents of intrusive or unwanted acts, words, or gestures.”

We are not persuaded otherwise by respondent’s suggestion that the text of Minn. Stat. § 617.261 (2020), which governs the criminal offense of nonconsensual dissemination of private sexual images, supports his interpretation of subdivision 1(a)(1). Specifically, respondent emphasizes that section 617.261 defines the word “harass” using similar language to the qualifying phrase in section 609.748, subdivision 1(a)(1). *See* Minn. Stat. § 617.261, subd. 7(c) (defining “harass” as “an act that would cause a substantial adverse effect on the safety, security, or privacy of a reasonable person”). Respondent appears to argue that, because the criminal statute contains similar language, the legislature must have intended to require a finding of intent “to have a substantial adverse effect on the safety, security, or privacy of another” when an HRO is sought on the basis of nonconsensual dissemination of private sexual images. Respondent’s argument is unavailing.

While section 617.261 does include its own definition of “harass,” that definition relates solely to a factor used to enhance the criminal penalty and not to the offense itself. *See* Minn. Stat. § 617.261, subd. 2(b)(5) (enhancing the criminal penalty if “the actor disseminates the image with intent to harass the person depicted in the image”). The criminal offense of nonconsensual dissemination of private sexual images *does not* include an intent-to-harass element. *See* Minn. Stat. § 617.261, subd. 1; *State v. Casillas*,

952 N.W.2d 629, 641 n.7 (Minn. 2020) (“The nonconsensual dissemination of private sexual images statute does not require personal vengeance as a motive.”). Because section 617.261 does not require a finding of intent to harass to satisfy the criminal offense of nonconsensual dissemination of private sexual images, respondent’s reliance on the definition of “harass” in that statute does not support his argument that section 609.748, subdivision 1(a)(1), requires a finding of intent to harass in order for an HRO to issue based on the nonconsensual dissemination of a private sexual image.

To the contrary, a comparison of sections 617.261 and 609.748, subdivision 1(a)(1), actually provides further support for appellant’s interpretation of subdivision 1(a)(1). Subdivision 1(a)(1) provides that harassment includes “a single incident of nonconsensual dissemination of private sexual images *under section 617.261*.” Minn. Stat. § 609.748, subd. 1(a)(1) (emphasis added). This language indicates that an HRO may be issued where the elements of the criminal offense, as provided in section 617.261, are met. Given that section 617.261 does not include intent to harass as an element of the criminal offense of nonconsensual dissemination of private sexual images, it follows that an HRO based on nonconsensual dissemination of private sexual images does not require a finding of such intent. Respondent’s alternative interpretation of section 609.748, subdivision 1(a)(1), based on section 617.261 is not reasonable.

In sum, applying well-accepted rules of grammar and considering the punctuation and syntax of section 609.748, subdivision 1(a)(1), we conclude that the qualifying phrase “inten[t] to have a substantial adverse effect on the safety, security, or privacy of another” unambiguously modifies only the immediately preceding conduct involving “repeated

incidents of intrusive or unwanted acts, words, or gestures.” The qualifying phrase does not modify the phrase “a single incident of nonconsensual dissemination of private sexual images under section 617.261.” Accordingly, when an HRO is sought based on “a single incident of nonconsensual dissemination of private sexual images,” the petitioner is not required to demonstrate that the dissemination was done “with the intention of having a substantial adverse effect on the safety, security, or privacy of another” as required by the district court. The district court therefore misapplied the law when it dismissed appellant’s HRO petition on the ground that respondent did not have the requisite intent.

II. The district court’s misapplication of the law requires reversal and remand of the matter to the district court.

Respondent argues that even if the district court misapplied the law, we should affirm the district court’s dismissal of the petition because section 609.748 gives the district court the discretion to grant or deny an HRO petition. Respondent emphasizes that section 609.748, subdivision 5, provides that the district court “*may* issue a restraining order that provides any or all of the following” (Emphasis added.) But misapplication of the law constitutes an abuse of discretion. *Madden*, 923 N.W.2d at 696. And, in this case, the district court’s abuse of discretion was not harmless. The district court denied the HRO based on its erroneous interpretation of the law. Therefore, we reverse and remand for the district court to determine whether an HRO should be issued based on a proper application of the law. *See In re Welfare of M.F.*, 473 N.W.2d 367, 370 (Minn. App. 1991) (reversing and remanding after the district court erroneously interpreted the law in a matter

involving the district court's exercise of its discretion). Whether to reopen the record on remand shall be discretionary with the district court.²

DECISION

We conclude that when an HRO is sought under Minn. Stat. § 609.748 based on “a single incident of nonconsensual dissemination of private sexual images under section 617.261,” proof of intent “to have a substantial adverse effect on the safety, security, or privacy of another” is not required. Here, the district court abused its discretion by dismissing appellant’s HRO petition based on an erroneous determination that appellant was required to make such a showing. Accordingly, we reverse and remand the matter to the district court to determine whether to grant appellant’s petition for an HRO in light of a correct understanding of the law.

Reversed and remanded.

² Appellant requested that we reverse and remand for a new hearing on her HRO petition. We defer to the district court as to whether to reopen the record.