

*This opinion is nonprecedential except as provided by  
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA  
IN COURT OF APPEALS  
A21-0828**

Elizabeth Annette Robyn Wolter, OBO A. R. W.,  
Respondent,

vs.

Nicholas John Wolter,  
Appellant.

**Filed March 7, 2022  
Reversed  
Slieter, Judge**

Olmsted County District Court  
File No. 55-CV-21-2823

Elizabeth A. Wolter, Dover, Minnesota (*pro se* respondent)

Thomas R. Braun, Lisa K. Stevens, Restovich • Braun & Associates, Rochester, Minnesota  
(for appellant)

Considered and decided by Florey, Presiding Judge; Slieter, Judge; and Gaïtas,  
Judge.

**NONPRECEDENTIAL OPINION**

**SLIETER**, Judge

Appellant challenges the district court's decision to issue a harassment restraining order (HRO) against him in proceedings commenced by respondent on behalf of the parties' minor daughter. Appellant argues that the district court abused its discretion by admitting hearsay testimony and taking judicial notice of the parties' dissolution court file,

and that the record does not support the district court's determination that he engaged in harassment. Because the district court made no factual findings that the purported second incident of harassment resulted from objectively unreasonable conduct, and our review precludes independent fact-finding, we reverse the issuance of the HRO. We do not consider father's evidentiary arguments.

## FACTS

The following factual summary is predicated upon evidence presented during the HRO hearing. Respondent-mother Elizabeth Annette Robyn Wolter's and appellant-father Nicholas John Wolter's marriage was dissolved on January 3, 2020. On May 18, 2021, mother petitioned for an HRO on behalf of the parties' then 14-year-old daughter against father. The district court<sup>1</sup> granted an *ex parte* HRO and father requested a contested hearing.

The record reveals a tumultuous marriage and dissolution. Daughter last had parenting time with father in 2019 and has made clear to her parents that she wants no contact from father. Still, both parents can attend daughter's extracurricular activities pursuant to the parties' stipulated findings of fact, conclusions of law, order for judgment and judgment and decree (J&D) dissolving their marriage. The district court, in its order granting the HRO following the contested hearing, identified two incidents of harassment which formed the basis for granting the HRO.

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<sup>1</sup> This case was heard by a referee who recommended findings and an order to the district court. Once the district court confirms the referee's findings, the findings become the order of the court, Minn. Stat. § 484.70, subd. 7(c) (2020), and we review the order like any other district court order.

### ***Softball Game Incident***

In May 2021,<sup>2</sup> father yelled to daughter, “Come on, . . . you’ve got this,” while she was at-bat in the first game of a softball double-header. Father testified that daughter’s reaction “was just still,” and he “didn’t know what exactly happened.” He saw “three coaches [take] her back” to the dugout afterward. Daughter is diagnosed with general anxiety disorder and has panic attacks.

Daughter’s coach testified that he “noticed that she was in some type of distress,” “was a little pale,” and “looked to be staggering just a little bit.” It was “really apparent” that daughter was experiencing “a panic attack where she was in some type of respiratory distress.” The coaches tried to calm her down and asked her what was wrong, but daughter “was silent” and she wanted to “come out of the game.” Before the second game began, daughter called mother, told her about the incident, and asked mother to come and get her.

Daughter later told mother that “she felt she couldn’t play” because “her dad was there.” Mother asked whether father merely cheered for her, and daughter responded, “it didn’t matter what he said.” She explained that father “was shouting out to her,” “she froze in place,” and “her coaches . . . walk[ed] her to the dugout” where “she felt safe.”

### ***Hardware Store Incident***

In June 2021, after the *ex parte* HRO was issued but before the contested hearing, mother received a telephone call from daughter who was at her place of employment.

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<sup>2</sup> Mother and father testified that this event occurred on May 20, 2021, however, the HRO petition was filed on May 18, 2021. Based on the petition, the events from the softball game occurred the same day that the petition was filed. The exact date the event occurred is not material to the resolution to this case.

Daughter told mother, “He’s here.” Her voice sounded “shaky” and “upset,” and she “was stumbling over her words.” Mother asked daughter “who she was talking about” and she said, “It’s Nick,” her father, and he was “at Ace Hardware and he is standing there watching me.” Mother testified that she was able to “calm” daughter “down” during the call.

### ***HRO Hearing***

Daughter did not testify during the hearing and mother was allowed, over father’s objection, to testify about statements daughter made to her following the two incidents. During the hearing, the district court announced that it would take judicial notice of the parties’ family court file and specifically took notice of “orders” from “January 3, 2020, on,” which included three orders: the January 3, 2020 J&D, the October 6, 2020 order, and the December 16, 2020 amended order.

In its order granting the HRO, the district court found that “[f]rom the testimony, two incidents are the basis of the harassment restraining order.” First, father “called out to [daughter] while she was batting. Second, Father allegedly was across the street from [daughter]’s place of work.” Father appeals.

### **DECISION**

Father argues that there was insufficient evidence to prove that his conduct was “objectively unreasonable” and “had a substantially adverse effect on [daughter]’s safety, security, or privacy, or that [daughter] had an objectively reasonable belief of such an effect.”

We review the district court’s decision to grant 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 factual findings for clear error. *Id.*

[C]lear-error review does not permit an appellate court to weigh the evidence as if trying the matter *de novo*. Neither does it permit an appellate court to engage in fact-finding anew, even if the court would find the facts to be different if it determined them in the first instance. Nor should an appellate court reconcile conflicting evidence. Consequently, an appellate court need not go into an extended discussion of the evidence to prove or demonstrate the correctness of the findings of the trial court.

*In re Commitment of Kenney*, 963 N.W.2d 214, 221-22 (Minn. 2021) (quotations and citations omitted). We are limited to identifying and correcting errors, and we may not reweigh the evidence and find our own facts. *See Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988).

In our review, we also give the district court due regard for its opportunity to judge witness credibility. *Peterson*, 755 N.W.2d at 761. Whether the facts found by the district court satisfy the statutory definition of harassment is a question of law that we review *de novo*. *See id.* But “[c]redibility determinations are the province of the trier of fact.” *Id.* at 763. We may consider the district court’s implicit credibility findings of fact as well as its explicit findings. *See Pechovnik v. Pechovnik*, 765 N.W.2d 94, 99 (Minn. App. 2009) (considering implicit credibility findings on appeal from district court’s grant of an order for protection).

Harassment, if not based on a single incident of physical or sexual assault, stalking, or dissemination of private sexual images, is defined as “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.” Minn. Stat. § 609.748, subd. 1(a)(1) (2020); *Peterson*, 755 N.W.2d at 766. Two or more instances of harassing conduct constitute “repeated incidents.” *Kush v. Mathison*, 683 N.W.2d 841, 844 (Minn. App. 2004), *rev. denied* (Minn. Sept. 29, 2004).

Conduct is harassing if (1) it is objectively unreasonable conduct, and (2) either the petitioner has an objectively reasonable belief that the conduct has a substantial adverse effect on the safety, security, or privacy of another, or the respondent subjectively intends the conduct to have a substantial adverse effect on the safety, security, or privacy of another. *Dunham v. Roer*, 708 N.W.2d 552, 566-67 (Minn. App. 2006); *see* Minn. Stat. § 609.748, subd. 1(a)(1).

Before we begin our analysis, we note that the district court made multiple findings of fact about each of the incidents of purported harassment that merely summarized the testimony without making credibility and weight determinations. This makes our review of the record to determine whether a factual finding is clearly erroneous difficult.

When factual findings are required for a legal ruling, they must be affirmatively stated as findings of the district court. *Dean v. Pelton*, 437 N.W.2d 762, 764 (Minn. App. 1989) (noting that statements prefaced with phrases such as “petitioner claims,” “according to petitioner’s application,” and “respondent asserts” are not proper findings); *see In re Civ. Commitment of Spicer*, 853 N.W.2d 803, 810 (Minn. App. 2014) (applying *Dean*, 437 N.W.2d at 764). Although we may consider the district court’s implicit credibility findings to the extent possible based on its decision to grant the HRO, *see Pechovnik*, 765 N.W.2d

at 99, we cannot conduct our own fact-finding. *Kenney*, 963 N.W.2d at 221-22; *Sefkow*, 427 N.W.2d at 210. When a critical element of harassment is not found by the district court, issuance of the HRO is an abuse of discretion. *See Peterson*, 755 N.W.2d at 766. We now analyze the two incidents of harassment found by the district court.

### ***Softball Game Incident***

Although the district court made no explicit findings as to what occurred during this first incident, we can discern what occurred from the following findings summarizing the testimony, together with the district court's implicit credibility findings.

The district court summarized the testimony of daughter's coach, following father yelling to daughter as she was batting: "she appeared to be in distress, pale, and was staggering," which her coach "perceived [] as a panic attack. When he asked her what was wrong, she did not respond and elected to sit out the rest of the game and stayed in the dugout with her teammates." The district court also found that daughter "had no reported incidents of shutting down prior to Father calling out to her at the game."

The record supports these findings and that this incident had a "substantial adverse effect" on daughter and that father's conduct was "objectively unreasonable," based on the district court's findings that daughter wants no contact from father. Minn. Stat. § 609.748, subd. 1(a)(1); *Dunham*, 708 N.W.2d at 566-67.

### ***Hardware Store Incident***

The district court summarized this second incident of purported harassment with the following finding: "[a]ccording to Mother," daughter called her from work and said, "He's here. It's Nick [Father]. He is at ACE Hardware and he's watching me." The district court

also found that “Father denied ever standing outside of the child’s workplace but did acknowledge he lives close to the child’s workplace.” Because the district court did find the second incident to support the HRO, we conclude that the district court made implicit credibility findings that it believed mother’s testimony over father’s and that father therefore was at the hardware store watching daughter. *Pechovnik*, 765 N.W.2d at 99.

However, although the district court found that daughter wants no contact from father, the district court made no factual findings on whether father staring at daughter from the hardware store was objectively unreasonable and the record is silent on this element. Ultimately, we cannot find facts and decline to do so. *Kenney*, 963 N.W.2d at 221-22; *Sefkow*, 427 N.W.2d at 210.

From our review of the record and the district court’s scant factual findings, we conclude there is insufficient evidence for the second incident of harassment. Thus, the HRO is not properly based on the “repeated incidents” prong of Minn. Stat. § 609.748, subd. 1(a)(1). Absent the statutory prerequisites for the issuance of an HRO, the district court abused its discretion, and therefore, we reverse the issuance of the HRO.

**Reversed.**