

*This opinion is nonprecedential except as provided by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
A21-1013**

Katherine Dillard Rice Hayes,
Respondent,

vs.

Augustus Conrade Thomas,
Appellant.

**Filed April 25, 2022
Affirmed
Wheelock, Judge**

Ramsey County District Court
File No. 62-HR-CV-21-244

Michael P. Boulette, O. Joseph Balthazor Jr., Taft Stettinius & Hollister LLP, Minneapolis,
Minnesota (for respondent)

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Considered and decided by Jesson, Presiding Judge; Bryan, Judge; and Wheelock,
Judge.

NONPRECEDENTIAL OPINION

WHEELOCK, Judge

Appellant challenges the district court's grant of his former girlfriend's petition for a harassment restraining order (HRO) against him. Because the district court did not err by finding that there were reasonable grounds to believe that his behavior objectively constituted harassment, we affirm.

FACTS

The district court granted respondent Katherine Dillard Rice Hayes's petition for an HRO against appellant Augustus Conrade Thomas after he refused to stop contacting her following their breakup. Hayes and Thomas had a romantic relationship from approximately November 2018 to August 2020. For months after their breakup in August, Thomas sent Hayes dozens of emails, messages across various social-media platforms, letters, and gifts, and once arrived at Hayes's house uninvited.

Thomas requested a hearing to contest the HRO, during which both Hayes and Thomas presented evidence. Hayes testified that she was clear at the time of their breakup that she was ending the relationship and from that point forward consistently expressed in no uncertain terms that their relationship was finished. Hayes presented screenshots from her computer and phone supporting her testimony that she did not respond to Thomas's repeated contacts except to reiterate that their relationship was over and that she did not want Thomas to contact her. When Thomas continued to text her, sending at least two dozen additional text messages over the five days immediately following the breakup, she felt "[d]isrespected and unheard" and "frustrated and helpless." She told Thomas that his continuing efforts to communicate with her were "disrespectful and inappropriate." She then blocked his number, after which he began to contact Hayes through Twitter, LinkedIn, Match.com, email, and U.S. mail.

Hayes received multiple emails from Thomas between September and November until she created a rule for her inbox that would screen out emails from Thomas's email addresses. Thomas's emails focused on pleas to reconcile, but some included intimate and

personal material that Hayes described as “really offensive,” including one email that contained naked pictures of an actress. Hayes testified:

[Thomas’s emails made me feel] helpless because he was not listening. And it was as if there was nothing I could do to get him to understand that I did not . . . welcom[e] his communication. I had asked him to stop . . . [a]nd it just felt like he . . . had a complete disregard for anything I might be experiencing.

Hayes also testified that Thomas told her that he had received a threatening voicemail, that he suspected it was from her or someone on her behalf, and that, even though she denied it, he would tell the police that it was related to their breakup.

In October, Thomas mailed Hayes a scrapbook of their romantic relationship that contained, among other things, correspondence, intimate pictures, and childhood photos. Hayes found this “exceptionally threatening” and “really scary.” Thomas then sent flowers, a spoon, a photo album, a framed map, a key chain, candy, and photographs. Hayes described the arrival of these gifts as “an invasion of my privacy and my home” that was “frustrating” and made her feel “helpless” and “very powerless” to the point that she “developed a fear of getting the mail.” Thomas also sent Hayes letters, including an 18-page letter that she only read so that she “could protect [herself]” because she was “fearful of what might come next.”

Hayes testified that Thomas arrived uninvited at her home on November 1, 2020. Hayes and her daughter were in the home at the time. Hayes testified that she told him to leave and to stop contacting her and that she said, “If you contact me again, I will file for harassment.” Hayes described the situation as “really scary” and stated that she felt

“powerless” and “terrified.” Hayes also described the negative impact of Thomas’s appearance and behaviors on her daughter. Hayes installed cameras in her home and felt fearful in her home and in public.

When Thomas continued to contact her, Hayes sent him a letter by certified mail that stated that coming to her house was “unacceptable and threatening,” that it scared her, and that his disrespect for her boundaries had caused her “stress and fear.” She wrote:

If you contact me, my children, or my friends, in any way, or if you come to my house, or deliver anything to me anywhere, I have no choice but to request protection in the form of a Harassment Restraining Order.

Please move on with your life and respect that I do not want to hear from you again.

Upon learning from the carrier service that the certified letter was not delivered, Hayes sent Thomas the letter via email.

Thomas continued to contact Hayes by sending her a card in the mail in December, a birthday card in January, and flowers in January. He commented on all of Hayes’s photos in her Match.com profile and sent her messages on that platform. Thomas sent Hayes a letter in March 2021 that stated, among other things, “I won’t give up on us,” and “There is still hope and I’m clinging to that. I won’t let go.” He stated toward the end of the letter that he did not receive the certified letter in which she warned him she would request an HRO and that he had “shut [her] out” of his email because he “wasn’t in a mindset to try and communicate.” Hayes did not believe Thomas’s excuses for not receiving her messages that she would file for an HRO and felt “[a]ngry and frustrated and helpless.” Hayes said she filed for an HRO because she did not “want [to] live in fear.”

At the district court hearing, Thomas admitted that he sent the communications, cards, and gifts that Hayes described and produced as evidence. He said he sent them “with great humility . . . with the thought that [he and Hayes] could reconcile.” He testified that he did not think there was anything wrong with his communication with Hayes and that “[t]here was no intent to threaten, scare, or fear anybody whatsoever.” He recounted that the thing that “really hit home” to stop him from continuing his efforts to reconcile the relationship was “the harassment order” because he feared that could jeopardize his immigration status in the United States. He also said that he blocked Hayes from his social media profiles in early November after he went to Hayes’s house uninvited.

The district court granted Hayes’s petition because it found that reasonable grounds existed to believe that Thomas “engaged in harassment which has or is intended to have a substantial adverse effect on safety, security, or privacy of [Hayes].” On the form order granting the HRO, the district court checked the boxes for the following acts: (1) “Made uninvited visits to the Petitioner,” citing the November 1, 2020 uninvited visit to Hayes’s home; (2) “Made harassing phone calls or sent harassing text messages to the Petitioner,” citing messages via social media, Match.com, and U.S. mail; (3) “Frightened Petitioner with threatening behavior,” citing the November 1 uninvited visit; and (4) “Used social media to harass Petitioner,” citing Thomas using Twitter and Match.com to contact Hayes after she blocked his number. Thomas appeals.

DECISION

If the respondent has exercised their right to request a hearing in response to a petitioner's properly served petition for an HRO, the 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) (2020). In relevant part, the statute defines harassment 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, regardless of the relationship between the actor and the intended target." *Id.*, subd. 1(a)(1) (2020).

We review "a district court's grant of a[n HRO] under an abuse-of-discretion standard." *Kush v. Mathison*, 683 N.W.2d 841, 843 (Minn. App. 2004), *rev. denied* (Minn. Sept. 29, 2004). "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.'" *Borth v. Borth*, 970 N.W.2d 699, 701 (Minn. App. 2022) (quoting *Madden v. Madden*, 923 N.W.2d 688, 696 (Minn. App. 2019)). We will only set aside a district court's findings of fact if they are clearly erroneous. *Witchell v. Witchell*, 606 N.W.2d 730, 732 (Minn. App. 2000); *see* Minn. R. Civ. P. 52.01 (reciting clear-error standard); *see also In re Civ. Commitment of Kenney*, 963 N.W.2d 214, 221-22 (Minn. 2021) (noting that the clear-error standard of review "applies across many contexts" and discussing, in detail, its application).

Thomas argues that his communications did not threaten Hayes's safety, security, or privacy and that a restraining order against him unduly harms him and provides

“negligible protection” for Hayes. Thomas further argues that the district court erred by considering improper evidence outside of the record and denying Thomas the right to adequately cross-examine Hayes.¹

A. Thomas’s behavior threatened Hayes’s safety, security, or privacy.

Minnesota Statutes section 609.748, subdivision 1(a)(1), establishes that harassment occurs when a person engages in repeated “intrusive or unwanted acts, words, or gestures” and those actions either have a substantial adverse effect on another person’s safety, security, or privacy, or were intended to do so. “[S]ection 609.748 requires both objectively unreasonable conduct or intent on the part of the harasser and an objectively reasonable belief on the part of the person subject to harassing conduct.” *Dunham v. Roer*, 708 N.W.2d 552, 567 (Minn. App. 2006), *rev. denied* (Minn. Mar. 28, 2006); *see also Kush*, 683 N.W.2d at 845 (“The determination of whether certain conduct constitutes harassment may be judged from both an objective standard, when assessing the effect the conduct has on the typical victim, and a subjective standard, to the extent the court may determine the harasser’s intent.”).

¹ Thomas does not cite the record for the facts section in his brief and repeatedly includes facts outside the record. *See* Minn. R. Civ. App. P. 110.01 (defining the record on appeal as the record that was presented to the district court); *see also* Minn. R. Civ. App. P. 128.03 (requiring statements in a brief to be accompanied by references to the record); *Brett v. Watts*, 601 N.W.2d 199, 202 (Minn. App. 1999) (noting both that a brief’s “[f]ailure to cite to the record is a violation of Minn. R. Civ. App. P. 128.03” and that a party’s “flagrant violation” of the obligation to cite to the record “may lead to non-consideration of an issue or dismissal of an appeal”), *rev. denied* (Minn. Nov. 17, 1999). Thomas, however, does not directly challenge any of the facts supporting the district court’s findings and decision.

Here, the district court did not clearly err by determining that Thomas's conduct was objectively unreasonable and "either gave Ms. Hayes reasonable grounds to believe that [Thomas was] engaging in harassing behavior that . . . adversely affected her safety, security, and privacy; or, [Thomas] intended as much." Thomas argues that his conduct was normal for his relationship with Hayes and was merely "annoying" or "inappropriate" and that therefore, it did not constitute harassment. Even if the district court had found that this conduct was typical in this specific relationship, the conduct was sufficiently objectively unreasonable for the district court also to find that Hayes experienced a substantially adverse effect on her safety, security, or privacy or that a reasonable person would have in these circumstances.²

After their relationship ended, Thomas continued to contact Hayes—even after she told him to stop, blocked him from contacting her through various media, and did not respond to the vast majority of his messages. Thomas continued to contact Hayes for several months notwithstanding her repeated and firm statements that she had no interest in reuniting or communicating with him in any manner. Thomas did not listen to Hayes's requests and repeatedly sent intimate and private messages and mail to her. Hayes described feeling helpless to stop Thomas's advances because he would not listen to her requests that he stop, and, after seven months of persistent contacts, she became "fearful

² The district court did not determine Thomas's repeated contacts were normal for the relationship, and Hayes testified that when the two had previously split up and Thomas had mailed daily notes to her, those acts were "breaching her boundaries" and that "he hadn't listened to [her]."

of what might come next.” The district court did not clearly err by finding that Thomas’s unrelenting contacts, the messages, mail, gifts, and his arriving in person at her door unannounced, would cause an objectively reasonable person to suffer an adverse impact on her safety, security, and privacy.

Thomas argues that he did not intend to have an adverse impact on Hayes’s safety, security, or privacy. However, the district court determined that Thomas “engaged in harassment which has or is intended to have a substantial adverse effect on [Hayes’s] safety, security, or privacy,” and that determination is supported by the record, as detailed above. Furthermore, a finding that the alleged harasser subjectively intended to have an adverse impact is not required if they engaged in objectively unreasonable conduct. Section 609.748, subdivision 1(a)(1), establishes a disjunctive rule for its first prong; that is, the actions may constitute harassment if they *either* were objectively unreasonable or were intended to have a substantial adverse effect on another’s safety, security, or privacy.

To the extent that Thomas argues that the district court clearly erred by finding that Thomas “[m]ade uninvited visits to the Petitioner” because both parties agree that Thomas only made one such visit, this argument is unavailing. First, Thomas’s argument is based on his citation to a nonprecedential opinion that is not persuasive here. Nonprecedential opinions have only limited weight. Minn. R. Civ. App. P. 136.01, subd. 1(c) (“Nonprecedential opinions and order opinions are not binding authority except as law of the case, res judicata or collateral estoppel, but nonprecedential opinions may be cited as persuasive authority.”). Second, while a single incident of “intrusive or unwanted acts, words or gestures” alone does not constitute harassment within the meaning of the statute,

here the uninvited visit was not the only incident of harassing conduct. *See* Minn. Stat. § 609.748, subd. 1(a)(1). The record is replete with incidents of harassing conduct.

B. The district court was not required to consider potential consequences to the alleged harasser or to engage in a balancing test.

Thomas argues that the district court erred by failing to consider potential negative consequences to Thomas that may result from an HRO against him, including consequences related to his immigration status, his business, and his reputation. Thomas fails to cite any legal support for this proposition. Thus, this question is not properly before this court, and we need not address it: “An assignment of error based on mere assertion and not supported by any argument or authorities in appellant’s brief is waived and will not be considered on appeal unless prejudicial error is obvious on mere inspection.” *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971); *see Minn. Dep’t of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (declining to address an inadequately briefed question). Were we to address the question, we would note that the law does not require that the district court balance the potential harm—and in this case, the potential immigration consequences—that an HRO might have on the alleged harasser with the potential benefit that an HRO might have for the person being harassed. Nor is there a requirement that the district court consider potential consequences of an HRO for the alleged harasser in any manner or for any purpose. Because a district court is not required to consider potential consequences for the person who is restrained after it finds that there are reasonable grounds to believe that person has

engaged in harassment, and because the court is also not required to apply a balancing test to the facts, Thomas's argument fails.

C. The district court did not improperly consider outside evidence or deny Thomas the right to cross-examine Hayes.

Thomas raises two issues with the HRO hearing: first, he argues that the district court denied him the right to adequately cross-examine Hayes by rushing his questioning; and second, he argues that the district court considered outside evidence when issuing the HRO. Thomas raises these issues for the first time in this appeal. Generally, "litigants are bound [on appeal] by the theory or theories, however erroneous or improvident, upon which the action was actually tried below," *Annis v. Annis*, 84 N.W.2d 256, 261 (Minn. 1957). An appellate court will not consider matters not argued to and considered by the district court. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988); *see also Fiduciary Found., LLC v. Brown*, 834 N.W.2d 756, 762 (Minn. App. 2013) (applying *Thiele* in an HRO appeal). Therefore, these issues are not properly before us, and we need not consider them.

Even if we reach the merits of Thomas's arguments, we conclude the district court did not err. In ruling on a petition for an HRO, a district court "must base its findings upon testimony and any documents properly introduced into evidence." *Anderson v. Lake*, 536 N.W.2d 909, 911-12 (Minn. App. 1995); *accord. Kush*, 683 N.W.2d at 844. This court reviews the district court's findings of fact for clear error. *Peterson v. Johnson*, 755 N.W.2d 758, 761 (Minn. App. 2008).

Thomas's attorney cross-examined Hayes for 20 pages of transcript before the district court noted that several of Thomas's questions had already been asked and answered, but Hayes had failed to object to them. Subsequently, Thomas's attorney asked Hayes several more questions until Hayes objected to a question as asked and answered. After the court sustained Hayes's objection, Thomas's attorney looked through his notes, then said, "I have nothing further, Your Honor."

Thomas alleges that by encouraging him to move on to a topic other than Hayes's mental health and by noting that Thomas was asking questions that had already been answered, the district court impeded his right to cross-examine Hayes. This argument is unavailing. Not only did the district court allow Thomas to ask Hayes questions about her mental health, but Thomas's attorney was not forced to end his questioning before he was ready. Instead, Thomas's attorney voluntarily ended his cross-examination of Hayes.

Finally, Thomas argues that the district court's remarks when issuing the HRO constituted consideration of evidence outside of the record and violated the Minnesota Code of Judicial Conduct. "There is the presumption that a judge has discharged his or her judicial duties properly." *State v. Mems*, 708 N.W.2d 526, 533 (Minn. 2006); *see also Van Ryswyk v. Van Ryswyk*, No. A20-1360, 2021 WL 3027272, at *4 (Minn. App. July 19, 2021) (nonprecedential opinion persuasively applying this rule to an HRO hearing); *Olson v. LaBrie*, No. A11-558, 2012 WL 426585, at *3 (Minn. App. Feb. 13, 2012) (same), *rev. denied* (Minn. Apr. 17, 2012). We review whether a judge was impartial by asking from the perspective of an objective, unbiased layperson "whether a reasonable examiner, with

full knowledge of the facts and circumstances, would question the judge's impartiality.”
State v. Reek, 942 N.W.2d 148, 156 (Minn. 2020) (quotations omitted).

Here, the district court issued thorough findings following the parties' presentation of evidence. The court stated that it was granting the HRO because

that behavior that you engaged in, Mr. Thomas, was one of two things: It either gave Ms. Hayes reasonable grounds to believe that you were engaging in harassing behavior that—and no question in this court's mind—adversely affected her safety, security, and privacy; or, you intended as much.

Ms. Hayes testified creditably [sic] in this court's view that, you know, she installed cameras in her home. She was afraid and anxious to receive her mail because she didn't know whether there were something else coming from Mr. Thomas, the guy that she has tried to break up with. And she testified about constantly looking over her shoulder even when she was out and about.

. . . .

I can very readily understand why after all that—all of the efforts that have been made, Ms. Hayes would feel threatened by that behavior.

Unfortunately, you know, all you got to do is open the paper, turn the news on, you see those relationships that have gone sour and the next thing you know, somebody is pulling out a gun and shooting themselves and their lovers.

Now, I'm not suggesting that that's what you were intending to do. But the fact is by your continuing to ignore this woman's messages to you that she's done, the mind can start to condor [sic] a whole lot of things. And I'm here to [say] that that's [r]easonable for her to start thinking that way, given the behavior that you engaged in.

(Emphasis added.) Thomas argues that the district court's reference to the media's coverage of domestic violence shows that the district court considered evidence outside of

the record and that the district court was biased in favor of Hayes in violation of the Minnesota Code of Judicial Conduct. Because the district court expressly stated that it was “not suggesting that that’s what [Thomas was] intending to do” and otherwise gave detailed support for its decision based on the evidence presented during the hearing, Thomas does not overcome the presumption that the district court discharged its duties properly. It is unlikely that a reasonable examiner, with full knowledge of the facts and circumstances, would question the judge’s impartiality based on one comment about current events.

Affirmed.