NOT DESIGNATED FOR PUBLICATION

No. 119,983

IN THE COURT OF APPEALS OF THE STATE OF KANSAS

B.Y.,
*Appellant*,

v.

D.M.,
*Appellee*.

MEMORANDUM OPINION

Appeal from Shawnee District Court; THOMAS G. LUEDKE, judge. Opinion filed May 31, 2019. Affirmed in part, reversed in part, and remanded with directions.

*Ryan M. Brungardt*, of Sloan, Eisenbarth, Glassman, McEntire & Jarboe, L.L.C., of Topeka, for appellant.

*Thomas G. Lemon*, of Cavanaugh, Biggs & Lemon, P.A., of Topeka, for appellee.

Before MALONE, P.J., SCHROEDER, J., and MCANANY, S.J.

PER CURIAM: B.Y. appeals the dismissal of her petition for protection from stalking or sexual assault against D.M. B.Y. claims the district court erred because: (1) she proved that D.M. committed a sexual assault against her, and (2) she proved that D.M. engaged in a course of conduct to support a protection from stalking order. Based on the evidence presented at the hearing and applying our standard of review, we find that the district court did not err in dismissing B.Y.'s petition for a protection from stalking order. But we find that the district court erred in dismissing the petition for protection from sexual assault because the district court misapplied the statutory

definition of sexual assault. Thus, we affirm in part, reverse in part, and remand for further proceedings consistent with this opinion.

## FACTUAL AND PROCEDURAL BACKGROUND

On May 3, 2018, B.Y. filed a pro se petition for protection from stalking or sexual assault against D.M. Although not in the record on appeal, B.Y. also filed a protection from stalking petition against D.M.'s girlfriend, L.G.

At the hearing on August 2, 2018, B.Y. testified that she moved to Topeka in September 2017 to flee from her ex-partner's domestic violence, with whom she shared one child and was then pregnant with a second child. B.Y. is a veteran of the United States Navy and she obtained a job at Veterans Affairs in Topeka, Kansas. Eventually, B.Y. became involved with the Combat Veterans Motorcycle Association (CVMA) in which D.M. was an active member. In February 2018, B.Y. attended a CVMA meeting along with J.S., her daughter's Girl Scout troop leader, at D.M.'s invitation.

### *Alleged sexual assault on February 24, 2018*

On February 24, 2018, J.S. invited the Girl Scout troop mothers over to her house for a "wine night." B.Y. attended and had a babysitter watch her children. She brought two bottles of wine; she drank one bottle and opened the second but was unsure how much wine she drank from the second bottle. After a few hours, J.S., her husband, and B.Y. went to a local bar located about a block from B.Y.'s home. J.S. testified that she invited D.M. to join them because she did not want her husband to feel like a third wheel. B.Y. also admitted that she texted D.M. to come to the bar after J.S. had invited him. B.Y. denied having a romantic interest in D.M.

B.Y. testified that she drank two shots of alcohol and five rum and cokes at the bar. J.S. and her husband left B.Y. and D.M. at the bar at about 12:30 a.m. J.S. testified that when she left, B.Y. appeared sloppy drunk, was slurring her words, and had trouble following B.Y.'s conversation. Originally, B.Y. had planned to walk home from the bar or use a ride-sharing service. But D.M. told J.S.'s husband that he would make sure B.Y. made it home.

B.Y. left the bar around 2 a.m., and she remembered getting money from an ATM. The next thing B.Y. remembered was waking up to her daughter opening her bedroom door while D.M. was performing oral sex on her. On cross-examination, B.Y. stated that D.M. also had sexual intercourse with her. B.Y. testified that she did not consent to having sex with D.M. B.Y. also confirmed on cross-examination that she went to a doctor three days after the incident because she started bleeding. B.Y. admitted that she told the doctor that she had not had sex since October of the previous year. B.Y. testified that she did not tell the doctor about the assault because she did not want to report a sexual assault or have the doctor report a sexual assault.

B.Y. filed a police report in April 2018. She testified that she waited because she was afraid that a police report would allow her ex-partner to find her and because she felt that she had drank too much alcohol that night. B.Y. testified that she changed her mind when D.M. became obsessive and started to retaliate against her at her work and within the CVMA after she told a few leaders what had happened. B.Y. also stated that D.M. acted like they were in a romantic relationship, while she tried to keep their relationship professional.

After B.Y.'s direct examination, the district court dismissed the protection from stalking petition against L.G. for insufficient evidence. And at D.M.'s request, the district court dismissed the protection from stalking petition against D.M., finding that B.Y. had not presented sufficient evidence to support an order. After these two rulings, D.M.

proceeded to cross-examine B.Y., and B.Y. called J.S. to testify. D.M. did not present any additional evidence other than some exhibits.

At the end of the hearing, the district court denied B.Y.'s protection from sexual assault petition against D.M. In reaching its decision, the district court reasoned that while a crime may have been committed, the statute dealt with protection from a continuing conduct and no evidence showed that B.Y. feared a future sexual assault or that D.M. had engaged in a continuing course of sexual assault against B.Y. The district court entered a written order of dismissal finding that B.Y. had not met her burden by a preponderance of the evidence. B.Y. timely appealed.

On appeal, B.Y. first argues that the district court erred in dismissing her protection from stalking action for failure to establish the statutory "course of conduct" requirement. She next argues that the district court erred in dismissing her protection from sexual abuse case by requiring two or more instances of sexual abuse. We will address these claims in reverse order.

Generally, a challenge to the sufficiency of the evidence requires an appellate court to review the district court's factual findings to determine whether substantial competent evidence supports the legal conclusions. *Wentland v. Uhlarik*, 37 Kan. App. 2d 734, 736, 159 P.3d 1035 (2007). Appellate courts exercise unlimited review when reviewing the district court's conclusions of law. 37 Kan. App. 2d at 736. "'Substantial evidence is such legal and relevant evidence as a reasonable person might accept as sufficient to support a conclusion.'" *Gannon v. State*, 298 Kan. 1107, 1175, 319 P.3d 1196 (2014). "We do not reweigh the evidence or make our own credibility determinations, and we generally view the evidence in the light most favorable to the party who prevailed in the district court." *Kerry G. v. Stacy C.*, 53 Kan. App. 2d 218, 221-22, 386 P.3d 921 (2016).

## DID THE DISTRICT COURT ERR IN DISMISSING THE PROTECTION FROM SEXUAL ASSAULT PETITION?

In denying B.Y.'s protection from sexual assault petition against D.M., the district court reasoned that while a crime may have been committed, the statute dealt with protection from a continuing conduct and no evidence showed that B.Y. feared a future sexual assault or that D.M. had engaged in a continuing course of sexual assault against B.Y. The district court entered a written order of dismissal finding that B.Y. had not met her burden of proof by a preponderance of the evidence.

Resolving whether the district court erred in dismissing the protection from sexual assault petition largely centers upon the statutory interpretation of the Protection from Stalking or Sexual Assault Act (the Act). See K.S.A. 2017 Supp. 60-31a01. K.S.A. 2017 Supp. 60-31a01(b) requires Kansas courts to liberally construe the Act "to protect victims of stalking and sexual assault and to facilitate access to judicial protection for stalking and sexual assault victims, whether represented by counsel or proceeding pro se." This court exercises unlimited review over questions of statutory interpretation. *Nauheim v. City of Topeka*, 309 Kan. 145, Syl. ¶ 1, 432 P.3d 647 (2019).

> "The fundamental rule of statutory interpretation to which all other rules are subordinate is that the intent of the legislature governs if that intent can be ascertained. Its intent is to be derived in the first place from the words used. When statutory language is plain and unambiguous, there is no need to resort to statutory construction. An appellate court merely interprets the language as it appears; it is not free to speculate and cannot read into the statute language not readily found there." *State ex rel. Schmidt v. City of Wichita*, 303 Kan. 650, Syl. ¶ 4, 367 P.3d 282 (2016).

The Kansas Legislature amended the Protection from Stalking Act in 2017 to include protection from sexual assault orders, and the Act became the Protection from Stalking or Sexual Assault Act. See K.S.A. 2017 Supp. 60-31a01(a); L. 2017, ch. 66, § 3.

Effective July 1, 2018, the Legislature amended the Act to include orders for protection from human trafficking, changing the name of the Act to the Protection from Stalking, Sexual Assault, or Human Trafficking Act. See K.S.A. 2018 Supp. 60-31a01(a); L. 2018, ch. 110, § 4. Because B.Y.'s petition covers allegations of stalking and sexual assault before July 1, 2018, we will interpret her claims under the 2017 amendments to the Act.

The Act defines a sexual assault as: "(1) A nonconsensual sexual act; or (2) an attempted sexual act against another by force, threat of force, duress or when the person is incapable of giving consent." K.S.A. 2017 Supp. 60-31a02(a)(1)-(2). The Act defines stalking with three interrelated definitions of stalking, harassment, and course of conduct. See *C.M. v. McKee*, 54 Kan. App. 2d 318, 321, 398 P.3d 228 (2017). K.S.A. 2017 Supp. 60-31a02 states in relevant part:

> "(b) 'Stalking' means an intentional harassment of another person that places the other person in reasonable fear for that person's safety.
>
> "(c) 'Harassment' means a knowing and intentional course of conduct directed at a specific person that seriously alarms, annoys, torments or terrorizes the person, and that serves no legitimate purpose. . . .
>
> "(d) 'Course of conduct' means conduct consisting of two or more separate acts over a period of time, however short, evidencing a continuity of purpose which would cause a reasonable person to suffer substantial emotional distress. Constitutionally protected activity is not included within the meaning of 'course of conduct.'"

In dismissing B.Y.'s petition for protection from sexual assault, the district court reasoned that while a crime may have been committed, the statute dealt with protection from a continuing conduct and no evidence showed that B.Y. feared a future sexual assault or that D.M. had engaged in a continuing course of sexual assault against B.Y. This reasoning reflects that the district court erred in interpreting the definition of sexual assault in K.S.A. 2017 Supp. 60-31a02(a). From the language in the statute, the Legislature has defined a sexual assault as requiring proof of one sexual assault. The

definition contains no language requiring a future fear or a course of conduct. Unlike the stalking definition—that incorporates three terms into one definition—the definition of sexual assault incorporates no other terms. Instead, K.S.A. 2017 Supp. 60-31a02(a)(1)-(2) alone defines the elements of a sexual assault.

Thus, the district court erred in finding that B.Y. needed to show a fear of a future sexual assault or that D.M. had engaged in a course of conduct of sexual assault against her. The unambiguous language of K.S.A. 2017 Supp. 60-31a02(a) requires proof of one act of sexual assault—a nonconsensual sexual act or an attempted sexual act against another by force, threat of force, duress, or when the person is incapable of giving consent. K.S.A. 2017 Supp. 60-31a02(a)(1)-(2); see K.S.A. 2017 Supp. 60-31a05.

B.Y. claims the district court erroneously dismissed her petition based solely on a lack of evidence showing two or more instances of sexual assault, while D.M. argues that B.Y. failed to present sufficient evidence to support even one instance of sexual assault. This is an issue we cannot resolve on appeal without reweighing the evidence. There was some evidence at the hearing to support D.M.'s assertion that B.Y. failed to present sufficient evidence to support even one instance of sexual assault. For instance, B.Y. confirmed that she went to a doctor three days after the February 24, 2018 incident, and she did not tell the doctor about the assault. Likewise, B.Y. did not file a police report until April 2018. It is not clear from the record whether the district court would have granted B.Y.'s petition for protection from sexual assault against D.M. even if the district court had applied the correct statutory definition of sexual assault.

Thus, we find that the district court erred in dismissing B.Y.'s petition for protection from sexual assault for the reasons given by the district court at the hearing. We reverse the district court's order denying the petition for protection from sexual assault and remand with directions for the district court to reevaluate the evidence based on the correct statutory definition of sexual assault in K.S.A. 2017 Supp. 60-31a02(a).

## DID THE DISTRICT COURT ERR IN DISMISSING THE PROTECTION FROM STALKING PETITION?

B.Y. argues that she presented sufficient evidence that D.M. engaged in a course of conduct to support her stalking allegation. As we have already discussed, the statutory definition of a sexual assault does not require a course of conduct but the statutory definition of stalking incorporates "harassment," which requires a course of conduct. See K.S.A. 2017 Supp. 60-31a02(b), (c), (d).

After B.Y.'s direct examination, the district court dismissed the protection from stalking petition, finding that B.Y. had not presented sufficient evidence to support an order. A finding that a party did not meet its burden of proof is a negative factual finding. In reviewing a negative factual finding, the appellate court must consider whether the district court arbitrarily disregarded undisputed evidence or relied on some extrinsic consideration such as bias, passion, or prejudice to reach its decision. *Cresto v. Cresto*, 302 Kan. 820, 845, 358 P.3d 831 (2015).

The district court did not make specific findings of fact in concluding that B.Y. did not meet her burden of proving the stalking allegation. But B.Y. lodged no objection below to the lack of factual findings. "Where no objection is made, this court will presume the trial court found all facts necessary to support its judgment. However, this court may still consider a remand if the lack of specific findings precludes meaningful review." *Dragon v. Vanguard Industries*, 282 Kan. 349, 356, 144 P.3d 1279 (2006).

B.Y. asserts that she established a course of conduct to prove stalking because, in addition to her testimony about nonconsensual oral sex, she also alleged that nonconsensual intercourse occurred on February 24, 2018. But we note that B.Y. did not testify about the alleged nonconsensual intercourse until her cross-examination which was *after* the district court had dismissed the protection from stalking petition. In any

event, we find that one instance of sexual assault involving both nonconsensual oral sex and nonconsensual intercourse does not constitute a "course of conduct" to establish stalking within the meaning of K.S.A. 2017 Supp. 60-31a02(b), (c), and (d).

B.Y. also asserts that she established a course of conduct to support stalking based on her testimony about workplace harassment and harassment within the CVMA together with the alleged sexual assault. We agree with B.Y. that the allegation of workplace harassment and harassment within the CVMA together with the allegation of the sexual assault would constitute a course of conduct to support a stalking petition if the claims were supported by sufficient evidence.

In *Smith v. Martens*, 279 Kan. 242, 251, 106 P.3d 28 (2005), our Supreme Court interpreted the constitutionality of the stalking definition, including the definition of harassment, and explained that the definition had two objective standards:

> "[T]he determination that a person is seriously alarmed, annoyed, tormented, or terrorized is not based solely upon the subjective conclusion of the victim and whether a reasonable person would suffer substantial emotional distress, but also upon the additional objective standard of whether a reasonable person would fear for his or her safety based upon the intentional conduct."

B.Y. testified that D.M. sent emails to her work, so she contacted him and asked him to stop. She also stated that she stopped attending the CVMA events as a result of D.M.'s harassment. But the overall lack of evidence describing D.M.'s retaliation makes it difficult to conclude that his harassment of B.Y. after the alleged sexual assault meets the objective standards to satisfy the definition of stalking—that a reasonable person would suffer substantial emotional distress and would fear for his or her safety based on D.M.'s intentional conduct. See *Martens*, 279 Kan. at 251. And as we have already discussed, it is not clear from the record whether the district court found that B.Y. presented sufficient evidence to establish a sexual assault. The burden was on B.Y. to establish stalking by a

preponderance of the evidence, and the district court found that B.Y. had not presented sufficient evidence to support a protection order.

Finally, in one sentence of her brief, B.Y. asserts that because D.M. chose not to testify and refute her testimony, the district court must construe the evidence against him. B.Y. offers no legal authority to support this claim. A point raised incidentally in a brief and not supported with any authority is deemed abandoned. *Russell v. May*, 306 Kan. 1058, 1089, 400 P.3d 647 (2017). We conclude that the fact that D.M. did not testify does not affect our standard of review in this appeal.

To sum up, the district court dismissed the protection from stalking petition, finding that B.Y. had not presented sufficient evidence to support an order. In making this negative factual finding, the district court did not arbitrarily disregard undisputed evidence and the court did not rely on some extrinsic consideration such as bias, passion, or prejudice to reach its decision. See *Cresto*, 302 Kan. at 845. At the very least, we must view the evidence in the light most favorable to D.M. as the prevailing party. See *Kerry G.*, 53 Kan. App. 2d at 221-22. Based on the evidence presented and our standard of review, we cannot find that the district court erred in dismissing B.Y.'s protection from stalking petition against D.M.

Affirmed in part, reversed in part, and remanded with directions.