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See Ariz. R. Supreme Court 111(c); ARCAP 28(c);
Ariz. R. Crim. P. 31.24



DIVISION ONE
FILED: 11/15/2012
RUTH A. WILLINGHAM,
CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

KAREN HELLER,) 1 CA-CV 11-0822
)
Plaintiff/Appellee,) DEPARTMENT B
)
v.) **MEMORANDUM DECISION**
) (Not for Publication -
MARCELO GAITAN,) Rule 28, Arizona Rules
) of Civil Appellate
Defendant/Appellant.) procedure)
)
_____)

Appeal from the Superior Court in Maricopa County

Cause No. FN2011-052374

The Honorable Julie P. Newell, Judge Pro Tempore

AFFIRMED

Karen Heller Phoenix
Plaintiff/Appellee

Burns Nickerson & Taylor, PLC Phoenix
By Darius M. Nickerson, VI
Attorneys for Defendant/Appellant

O R O Z C O, Judge

¶1 Marcelo Gaitan appeals the trial court's order affirming an order of protection that prohibits him from having

any contact with Karen Heller. For the following reasons, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

¶2 Heller and Gaitan were involved in a long distance relationship for a year and a half.¹ On October 20, 2011, Heller petitioned for an order of protection against Gaitan based on the following events.

¶3 On October 17, 2011, Heller attended a parent-teacher conference at her daughter's school in Phoenix and afterwards went grocery shopping. Gaitan called Heller while she was on her way home. When Heller told him what she had done that evening, Gaitan did not believe her, so he decided to drive from Prescott to Phoenix so he could see proof, such as a grocery store receipt. The couple spoke again while Gaitan was driving to Phoenix and Heller told him repeatedly to turn around and that what he was doing was ridiculous; however, Gaitan arrived at Heller's apartment around midnight.

¶4 After Heller let Gaitan in her apartment, he demanded to see the grocery store receipt. When Heller refused to show him the receipt, Gaitan became upset and eventually left the apartment. Once Heller locked the door, however, Gaitan decided he wanted to talk more. He sat outside Heller's door and

¹ Heller lived in Phoenix and Gaitan lived in Prescott.

knocked, called, and sent text messages requesting that she let him back inside the apartment. Heller sent Gaitan several text messages requesting that he leave. Heller eventually sent a message to him in which she threatened to call police. When Gaitan did not leave, Heller contacted police.

¶15 Gaitan was about to leave the apartment complex when police arrived. After confirming with Heller that no physical violence had occurred, the police officer told Gaitan to leave.

¶16 Over the next two days, Gaitan sent Heller approximately eighty text messages without receiving any response from Heller. In one of those messages, Gaitan informed Heller that he had returned to Phoenix in order to deliver computer parts to her and wanted to talk. Heller was getting ready to leave work when she learned that Gaitan was in Phoenix, and she became nervous and asked her supervisor to walk her to her car. When she saw Gaitan sitting in the parking lot waiting for her, Heller returned inside and called security and police.

¶17 Meanwhile, one of Heller's co-workers spoke with Gaitan and told him that Heller was crying and that a supervisor was going to call police if he did not leave. By the time police arrived, Gaitan had left the area. One of the police officers suggested that Heller file a petition for an order of protection, which she did the following day.

¶18 After being served with the order of protection, Gaitan requested a hearing. At the order of protection hearing, both parties testified about the aforementioned events. After hearing the testimony, the trial court determined that there was sufficient evidence that domestic violence had occurred in the last year or could occur in the future and affirmed the order of protection.

¶19 Gaitan timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes (A.R.S.) sections 12-120.21.A.1 (2003) and -2101.A.5(b) (Supp. 2011).

DISCUSSION²

Mootness

¶10 Gaitan appeals the trial court's decision affirming the order of protection that Heller obtained against him in October 2011. We first note that the order of protection will expire by the time the appeal comes before this panel in November 2012.³

² Although Heller did not file an answering brief, we are not required to regard her failure to respond as a confession of reversible error. *Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982). Because all of the evidence before the trial court is contained in the record on appeal, we will consider this case on its merits based on the record and the opening brief. *Id.*

³ Gaitan timely filed his notice of appeal in November 2011 and his opening brief in February 2012, both well before the order of protection expired. Heller's answering brief was due in April 2012, but she did not file an answering brief by that deadline. Even though Heller did not request an extension of time, we extended the time for filing the answering brief until

Pursuant to A.R.S. § 13-3602.K (Supp. 2011), an order of protection expires one year after it is served. We will generally dismiss an appeal as moot when, as a result of a change of circumstances before the appellate decision, our action as a reviewing court will have no effect on the parties. *Vinson v. Marton & Assocs.*, 159 Ariz. 1, 4, 764 P.2d 736, 739 (App. 1988).

¶11 However, under the collateral consequences exception to mootness, an appellate court may review an expired order of protection "if the consequences of that order will continue to affect a party." *Cardoso v. Soldo*, ___ Ariz. ___, ___, ¶ 9, 277 P.3d 811, 814 (App. 2012). Because our decision will affect the validity of a publicly accessible adverse ruling that may give rise to an array of concrete legal consequences that continue beyond its expiration, we conclude that Gaitan's appeal is not moot. See *id.* at ___, ¶¶ 10-13, 277 P.3d at 815-16. We, therefore, elect not to dismiss his appeal on that ground and will consider the merits of Gaitan's argument.

Intent to Harass

¶12 At the evidentiary hearing, the trial court found by a preponderance of the evidence that an act of domestic violence had occurred in the last year or could occur in the future. The

May 2012. No answering brief was filed by the extended deadline, and, in May 2012, we ordered that the appeal would be submitted for decision on the record and the opening brief. The appeal did not come before this panel until November 2012.

determination was based on the trial court's findings that Gaitan's conduct constituted harassment.⁴

¶13 Section 13-2921.E (2010) provides that harassment is "conduct that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person." In order to find that a person has committed harassment, the trial court must determine that the person, "with intent to harass or with knowledge that the person is harassing another person," has committed at least one of several acts, including communicating with or contacting another person in a manner that harasses or repeatedly committing an act that harasses another person. A.R.S. § 13-2921.A.1, 3.

¶14 Although Gaitan asserts that there was insufficient evidence presented at the hearing to support a finding that he had the requisite intent to harass Heller, the trial found by a preponderance of the evidence that Gaitan intended to commit harassment. We review a trial court's decision to affirm an order of protection for an abuse of discretion. See *LaFaro v. Cahill*, 203 Ariz. 482, 485, ¶ 10, 56 P.3d 56, 59 (App. 2002) (noting that an appellate court reviews a trial court's injunction against harassment for a clear abuse of discretion).

⁴ A person's actions can amount to domestic violence by committing one of the numerous enumerated offenses, including harassment, listed in A.R.S. § 13-3601.A (Supp. 2011).

¶15 Additionally, we defer to the trial court's factual findings, *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, 254, ¶ 10, 63 P.3d 282, 285 (2003), and we "will not weigh evidence to determine its preponderance on a disputed question of fact." *Whittemore v. Amator*, 148 Ariz. 173, 175, 713 P.2d 1231, 1233 (1986). We will only consider whether substantial evidence exists to support the trial court's decision. *In re Estate of Pouser*, 193 Ariz. 574, 579, ¶ 13, 975 P.2d 704, 709 (1999).

¶16 After Gaitan raised the intent issue at the order of protection hearing, the court focused on three facts. First, despite Heller telling Gaitan not to come to her apartment complex and that what he was doing was stupid, he still drove to Phoenix and sought verification that Heller had gone to the grocery store.

¶17 Also, during the two days after a police officer told Gaitan to leave Heller's apartment complex, Gaitan sent Heller approximately eighty text messages. The court noted that the excessive number of messages was a problem, as it indicated an urgency that Gaitan was unable to control. While none of the text messages were derogatory or threatening and some even expressed concern for Heller's wellbeing, the trial court found that Gaitan was manipulative. *See Goats v. A.J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 171, 481 P.2d 536, 541 (1971) (stating that the superior court "is in the best position to judge the

credibility of the witnesses, the weight of evidence, and also the reasonable inferences to be drawn therefrom").

¶18 Finally, although Heller did not respond to Gaitan's approximately eighty messages, Gaitan failed to "get the message that [he should] leave her alone" and instead went to her place of employment and waited for her in the parking lot, which resulted in Heller calling police a second time.

¶19 Although this may not be direct evidence of Gaitan's intent to harass, the trial court could properly infer his intent based on the evidence. See *Phx. Newspapers, Inc. v. Dep't of Corr.*, 188 Ariz. 237, 245, 934 P.2d 801, 809 (App. 1997) ("[I]ntent to harass may be established by circumstantial evidence."). We find that substantial evidence was presented to support the trial court's determination that Gaitan intended to harass Heller; therefore, the trial court did not abuse its discretion in affirming the order of protection.

CONCLUSION

¶20 For the foregoing reasons, we affirm.

/S/

PATRICIA A. OROZCO, Judge

CONCURRING:

/S/

MAURICE PORTLEY, Presiding Judge

/S/

RANDALL M. HOWE, Judge