

NOTICE: NOT FOR PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION DOES NOT CREATE
LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of: JENNIFER MINITREZ-CLARK, *Plaintiff/Appellee*,

v.

HENRY C. MINITREZ, *Defendant/Appellant*.

No. 1 CA-CV 13-0176

FILED 5-8-2014

Appeal from the Superior Court in Maricopa County

No. FC2012-054162

The Honorable Julie P. Newell, Judge Pro Tempore

AFFIRMED

COUNSEL

Jennifer Minitrez-Clark, Protected Address
Appellee in propria persona

Burns, Nickerson & Taylor, PLC, Phoenix
By Neal C. Taylor
Counsel for Appellant

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MEMORANDUM DECISION

Presiding Judge Donn Kessler delivered the decision of the Court, in which Judge Patricia K. Norris and Judge Maurice Portley joined.

K E S S L E R, Presiding Judge:

¶1 Appellant Henry C. Minitrez (“Minitrez”) appeals from the superior court’s judgment granting Appellee, Jennifer Minitrez-Clark (“Clark”), an amended protective order against Minitrez. For the following reasons, we affirm the order of protection.

FACTUAL AND PROCEDURAL HISTORY

¶2 Minitrez and Clark were divorced in Virginia and they have one child in common. Under a Virginia court order, Minitrez and Clark shared legal custody and parenting time of the child.¹ Two months after the joint custody order was entered, Clark sought and obtained a protective order in Virginia for her and the child against Minitrez. The Virginia court dissolved the protective order after a hearing. The following summer, Clark took the child to Arizona for her 2012 summer parenting time, but did not return the child to Virginia.

¶3 Minitrez sought to enforce the custody and parenting time order in Virginia. Clark, however, filed for an order of protection against Minitrez in the superior court in Arizona. The court granted her November 20, 2012 petition for a protective order but only as to her and not the child. Clark then filed and obtained an amended protective order from a different superior court judge which included the child.

¶4 The superior court conducted an evidentiary hearing upon Minitrez’s request and was aware of the Virginia custody proceeding. After the evidentiary hearing, the court concluded that Minitrez had committed an act of domestic violence in the past year or might commit an act of domestic violence in the future and affirmed the amended protective order in favor of Clark. However, the court modified the order

¹ The Virginia custody order also contains a provision that neither party may relocate out of the northern Virginia area without court approval.

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by removing the child from the order and by permitting Minitrez to contact Clark on limited bases about the child.²

¶5 Minitrez timely appealed the superior court's amended protective order. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A)(1) (Supp. 2013).³

DISCUSSION

¶6 A court may grant an order of protection if it finds reasonable cause to believe a respondent may commit an act of domestic violence or has committed an act of domestic violence within the past year. A.R.S. § 13-3602(E) (Supp. 2013). For purposes of an order of protection, the term "domestic violence" includes crimes of threatening or intimidating, disorderly conduct, and use of an electronic communication to harass, harassment and stalking. A.R.S. § 13-3601(A) (Supp. 2013) (incorporating by reference A.R.S. §§ 13-1202 (2010), 13-2904(A)(1)-(3) and (6) (2010), 13-2916 (Supp. 2013), 13-2921 (2010), and 13-2923 (Supp. 2003)). Minitrez argues the superior court abused its discretion by affirming the protective order by applying only a subjective test rather than both a subjective and objective test to find threats or harassment.

I. Standard of Review

¶7 We review the facts in the light most favorable to affirming the superior court. *State v. Childress*, 222 Ariz. 334, 338, ¶ 9, 214 P.3d 422, 426 (App. 2009). We review the order of protection ruling for an abuse of discretion. *See Cardoso v. Soldo*, 230 Ariz. 614, 619, ¶ 16, 277 P.3d 811, 816 (App. 2012). A court abuses its discretion when it errs in interpreting or applying the law or when there is no evidence to substantially support its decision. *Merlina v. Jejna*, 208 Ariz. 1, 3, ¶ 6, 90 P.3d 202, 204 (App. 2004); *see Little v. Little*, 193 Ariz. 518, 520, ¶ 5, 975 P.2d 108, 110 (1999) (explaining that a court abuses its discretion if there is no competent evidence to support the decision). We will infer any findings of fact necessary to affirm provided they do not conflict with express findings the

² The Virginia court ultimately granted Minitrez immediate temporary legal and physical custody of the child, and Clark was ordered to return the child to Minitrez in Virginia pending further proceedings.

³ We cite the current versions of statutes when no amendments material to this decision have since occurred.

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superior court made. *Thomas v. Thomas*, 142 Ariz. 386, 390, 690 P.2d 105, 109 (App. 1984).

II. The superior court did not abuse its discretion in affirming the protective order as to Clark.

¶8 Minitrez argues that the superior court abused its discretion by finding, pursuant to A.R.S. § 13-1202(A)(1), that he had threatened or intimidated Clark, and by finding, pursuant to A.R.S. § 13-2921(E), that he had harassed her because the court conceded during the evidentiary hearing that it did not know if Clark had an objective fear of being threatened or harassed. Minitrez is correct that the court stated it did not know if there was a “real threat” or “real harassment” occurring.⁴ He is also correct that both statutes require both objective and subjective elements.⁵

¶9 We nevertheless affirm the court’s order because the order is supported by a different ground. The superior court did not affirm the protective order based solely on alleged harassment or threatening, but because Minitrez had committed an act of domestic violence in the past or might commit such an act of domestic violence in the future. The record supports that finding based on disorderly conduct. Clark alleged under oath that Minitrez came to her house and attempted to force open the security door, and then acted like he was going to jump the fence to get

⁴ The court stated, “that there is enough activity going on that [Clark] feels harassed and potentially threatened. Whether that’s actually a real harassment or a real threat, I don’t know, but that’s the way I believe [Clark] feels”

⁵ Section 13-1202(A)(1) provides that threatening occurs “if the person threatens or intimidates by word or conduct . . . to cause physical injury to another person or serious damage to the property of another.” Although the statute does not contain an express objective element of feeling threatened or intimidated, we have held that a true threat requires words or conduct that “a reasonable person would foresee . . . would be taken as a serious expression of an intent to inflict bodily harm.” *See In re Kyle M.*, 200 Ariz. 447, 451-52, ¶ 23, 27 P.3d 804, 808-09 (App. 2001). Section 13-2921(E) defines harassment to include “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.”

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inside the house. She also testified that he had attempted to force her off the road while she was driving. His conduct could amount to disorderly conduct by making unreasonable noise or engaging in seriously disruptive behavior with the intent to disturb or knowledge that it would disturb Clark's peace. See A.R.S. § 13-2904(A)(1)-(2); *State v. Miranda*, 200 Ariz. 67, 69, ¶ 5, 22 P.3d 506, 508 (2001) (explaining disorderly conduct does not require that one actually disturb the peace of another but committed certain acts with intent to disturb or knowledge of doing so); *State v. Burdick*, 211 Ariz. 583, 585, ¶ 8, 125 P.3d 1039, 1041 (App. 2005) (stating elements of disorderly conduct for disturbing the peace of an individual are that the defendant knowingly disturbed the victim's peace or intended to do so; contrasted with objective test applied for disturbing the peace of a neighborhood). Consequently, because there are substantial facts to support the court's determination, we find no abuse of discretion.

III. Attorneys' fees and costs on appeal

¶10 Minitrez requests attorneys' fees on appeal pursuant to A.R.S. § 13-3602(P) (Supp. 2013) and his costs. Because he did not prevail on appeal, we deny his requests.

CONCLUSION

¶11 For the reasons stated, we affirm the superior court's modified order of protection filed on February 1, 2013.



Ruth A. Willingham · Clerk of the Court
FILED: MJT