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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

ROBIN MARIE DESMARAIS, nka ROBIN COMON, Plaintiff/Appellee, v. NATHAN REED ANDERSON, Defendant/Appellant.	2 CA-CV 2012-0160 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. DV20121718

Honorable Stephen C. Villarreal, Judge

AFFIRMED

Robin Comon — Tucson
In Propria Persona

Nathan Anderson — Paulden
In Propria Persona

E C K E R S T R O M, Presiding Judge.

¶1 This appeal stems from an order of protection entered against appellant Nathan Anderson precluding him from contact with appellee Robin Desmarais[1] and their three children for one year. On appeal, Anderson argues there was insufficient evidence supporting the order and the trial court failed to consider all the evidence. For the following reasons, we affirm the order.

¶2 Desmarais and Anderson had been married until June 2011. After the dissolution, she lived in Tucson and had physical custody of the children, while he lived in a small town near Prescott and exercised parenting time every other weekend. In August 2012, Desmarais sought an order of protection against Anderson based on a threatening e-mail message he had sent to her. In the message, Anderson stated that he would kill Desmarais if she tried to retrieve the children after his next visit with them and that she would "never see the[m] . . . again." After an *ex parte* hearing, the court granted the order. Anderson was served with a copy of the petition and order, and he requested a hearing, contending that he had not sent the message.

¶3 At the hearing, Anderson presented evidence that the threatening message was sent from his account, but using an Internet Protocol (IP) address based in Tucson. He contended it would have been impossible for him to have sent the message because he was at his home near Prescott when it was sent. Nevertheless, the court concluded by a preponderance of evidence "that the threats that are contained in the original e-mail attached to the order of protection were made by Mr. Anderson." The court therefore

[1]Although Desmarais has submitted an answering brief under her new name, Robin Comon, we refer to her as Desmarais in this decision in order to maintain consistency with the lower court's documents.

affirmed the order of protection, and Anderson timely appealed. We have jurisdiction over the appeal pursuant to A.R.S. § 12-2101(A)(5)(b). *See* Ariz. R. Prot. Order P. 9(A)(2), (B)(2); *Mahar v. Acuna*, 230 Ariz. 530, ¶ 11, 287 P.3d 824, 827-28 (App. 2012).

¶4 We review an order of protection for an abuse of discretion. *Cardoso v. Soldo*, 230 Ariz. 614, ¶ 16, 277 P.3d 811, 816 (App. 2012). The superior court must issue an order of protection if it "determines that there is reasonable cause to believe . . . [t]he defendant has committed an act of domestic violence within the past year." A.R.S. § 13-3602(E)(2). "Domestic violence" is defined to include the commission of certain enumerated crimes by a defendant against another person related by marriage or blood. A.R.S. § 13-3601(A)(1), (4). One of the enumerated crimes is "threatening or intimidating . . . by word or conduct . . . [t]o cause physical injury to another person." A.R.S. § 13-1202(A)(1); *see* § 13-3601(A). A party against whom an order is granted may request a hearing to contest the order, and after such a hearing, "the court may modify, quash or continue the order." § 13-3602(I).

¶5 Anderson argues the trial court's order "is not supported by the evidence." Specifically, he maintains that the court "did not have a firm understanding of the evidence submitted" about the IP addresses. To demonstrate the court's lack of understanding, he points to its statement to Desmarais when allowing her to look over the evidence: "I don't know if you understand that stuff. Do you understand what it says?" However, in context, the court was not making a comment on its own understanding of the evidence but was asking Desmarais if she understood it in order to question her

further. Nothing in the record supports Anderson's contention that the court did not understand the evidence. Indeed, before ruling, the court stated it had considered the testimony and "documents that were received in evidence." That the court did not interpret the evidence in Anderson's favor does not mean that the court did not understand it.

¶6 Anderson also argues the court failed to consider that "the District Attorney has already dismissed this case." At the hearing, Anderson stated that a Pima County Sheriff's deputy "had brought th[e] case before the District Attorney's Office already, and they have dismissed it." He further declared that "they found me not guilty of sending the e-mail." The court responded that Anderson had not been "found not guilty," explaining, "The Sheriff's Department makes up their own mind about going forward with evidence in a case based on a whole lot of factors." The court further explained that, "Guilt can be one of the[factors], but the[department] can also say, well, there is not enough evidence or we're just too darn busy, we don't want to go forward with this thing." Anderson contends the court's statements demonstrate "the Court's lack of consideration of the importance of getting the District Attorney's dismissal of this case" after law enforcement reviewed Anderson's exculpatory evidence.

¶7 We presume the trial court considers all admissible evidence and applies the law correctly. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶¶ 18, 32, 97 P.3d 876, 880-81, 883 (App. 2004); *see also Frederickson v. McIntyre*, 52 Ariz. 61, 64, 78 P.2d 1124, 1126 (1938) ("We indulge the presumption always that the action of the trial court was regular and proper in the absence of a record controverting such presumption."). The court's

speculation about law enforcement's possible reasons for "dismiss[ing]" the case does not demonstrate that the court failed to consider the potential relevance of the authorities not pursuing a prosecution.

¶8 In essence, Anderson's arguments on appeal amount to a request for this court to weigh the evidence differently, which we cannot do. *See Hurd v. Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d 258, 262 (App. 2009). Rather, we must defer to the trial court's factual findings supported by the evidence, *Twin City Fire Ins. Co. v. Burke*, 204 Ariz. 251, ¶ 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). Moreover, the trial court is in the best position to judge the credibility of the witnesses. *Hurd*, 223 Ariz. 48, ¶ 16, 219 P.3d at 262. And, if substantial evidence supports the trial court's decision, we will uphold it. *See LaFaro v. Cahill*, 203 Ariz. 482, ¶ 12, 56 P.3d 56, 59-60 (App. 2002).

¶9 The trial court was within its discretion to reject Anderson's evidence, and Anderson conceded the message had been sent from his account; therefore, substantial evidence supported the court's finding that Anderson sent the threatening message. *Cf. Cardoso*, 230 Ariz. 614, ¶ 17, 277 P.3d at 816 (court did not abuse discretion by accepting one version of disputed facts about threatening messages). We find no abuse of discretion.

¶10 The order of protection is affirmed.

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

/s/ Michael Miller
MICHAEL MILLER, Judge