IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

CODY E. WHITAKER,
Plaintiff/Appellee,

v.

ROY H. WARDEN,
Defendant/Appellant.

No. 2 CA-CV 2016-0160
Filed June 13, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f).

Appeal from the Superior Court in Pima County
No. C20161109
The Honorable Sarah R. Simmons, Judge

AFFIRMED

Cody Whitaker, Tucson
In Propria Persona

Roy Warden, Tucson
In Propria Persona

MEMORANDUM DECISION

Judge Miller authored the decision of the Court, in which Presiding Judge Staring and Judge Espinosa concurred.

M I L L E R, Judge:

¶1 After a contested evidentiary hearing, the trial court affirmed with modifications an ex parte injunction against harassment requested by Cody Whitaker. Roy Warden appeals the court's ruling, arguing it unconstitutionally infringes on his First Amendment free speech rights and denies him "a citizen's fundamental right to issue a conditional warning" of one's willingness to use deadly force "in the face of what appeared to be an imminent deadly attack." For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 "We view the evidence in the light most favorable to upholding the trial court's ruling." *Mahar v. Acuna*, 230 Ariz. 530, ¶ 2, 287 P.3d 824, 825 (App. 2012). The multi-day hearing established that Warden and Whitaker are both frequent contributors in social media discussions of Arizona politics. Though the two initially had an amicable relationship, the men had a falling out.

¶3 In February of 2016, Warden began to post announcements for a protest rally he was organizing for the following month. In the weeks surrounding the rally, Warden authored more than one hundred posts specifically directed at Whitaker. In these posts, Warden insulted Whitaker repeatedly, and challenged Whitaker to attend the rally.

¶4 Whitaker attended the rally, during which the two men had a verbal confrontation. During an exchange of insults, while Whitaker was standing several feet away with his hands up and palms open, Warden declared through his loudspeaker, "If [Whitaker] assaults me with deadly force, and frankly his fist is deadly force . . . I will defend myself with deadly force, which means

I will put a bullet in his head." Warden repeated his threat several times before law enforcement officers intervened. A federal marshal told him that Whitaker was "not presenting a threat to you; his hands are open and he is pleading his case. Please don't say you're going to shoot anybody in the head."

¶5 After the rally, Warden continued to insult Whitaker in online posts, and said, "If you . . . assault me like you did today . . . I'm quite likely to draw a weapon and blow . . . your hick head clean off. . . . I don't have to await the first blow to defend[] myself." A few days after the rally Whitaker obtained an ex parte injunction. Warden challenged that injunction at an evidentiary hearing soon thereafter.

¶6 The trial court affirmed the injunction with amendments that limited its reach. Warden appeals that amended injunction. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(5)(b). *See LaFaro v. Cahill*, 203 Ariz. 482, ¶¶ 7-8, 56 P.3d 56, 58-59 (App. 2002).

Discussion

¶7 "We review a trial court's order granting an injunction for a clear abuse of discretion." *Mahar*, 230 Ariz. 530, ¶ 14, 287 P.3d at 828. Such occurs when a court "commits an error of law in the process of reaching a discretionary conclusion or 'when the record, viewed in the light most favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision.'" *Id.*, *quoting Hurd v. Hurd*, 223 Ariz. 48, ¶ 19, 219 P.3d 258, 262 (App. 2009).

¶8 An injunction prohibiting harassment is governed by A.R.S. § 12-1809, which, pursuant to subsection (E), requires a finding that there is "reasonable evidence of harassment of the plaintiff by the defendant during the year preceding the filing of the petition or that good cause exists to believe that great or irreparable harm would result to the plaintiff if the injunction is not granted." Harassment means "a series of acts over any period of time 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 and serves no legitimate purpose." § 12-1809(S).

¶9 Whitaker testified that Warden had authored over one hundred social media posts containing personal attacks against him. "The statute permits courts to enjoin such harassment, because a person should not have to endure repeated frightening, dangerous or otherwise alarming and intrusive personal conduct that serves no legitimate purpose." *LaFaro*, 203 Ariz. 482, ¶ 15, 56 P.3d at 60. The trial court did not abuse its discretion in finding that a reasonable person in Whitaker's situation would feel alarmed, annoyed or harassed by Warden's actions, and that those actions constituted harassment. § 12-1809(S); *Mahar*, 230 Ariz. 530, ¶ 14, 287 P.3d at 828.

¶10 Warden has conceded he committed a series of acts directed at Whitaker; further, he implicitly concedes Whitaker himself was annoyed and harassed by his conduct. Warden nevertheless challenges the injunction as an unconstitutional infringement of his First and Fourteenth Amendment right to free speech, primarily arguing the injunction violated his right to free expression as guaranteed by the First Amendment.[1] Although an injunction against harassment can impermissibly infringe on a defendant's free speech rights, "the protection of citizens from harassment [is] a legitimate and laudable goal [that] is not incompatible with the protection and exercise of free speech." *See LaFaro*, 203 Ariz. 482, ¶¶ 16, 22, 56 P.3d at 486-87, 488.

¶11 "Core political speech" is entitled to First Amendment protection "at its zenith." *KZPZ Broad., Inc. v. Black Canyon City Concerned Citizens*, 199 Ariz. 30, ¶ 23, 13 P.3d 772, 778 (App. 2000), *quoting Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186-87 (1999). "[P]olitical debates . . . are the essence of our democracy," *United Pub. Workers of Am. (C.I.O.) v. Mitchell*, 330 U.S. 75, 111 (1947) (Black, J., dissenting), and "in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment," *LaFaro*, 203 Ariz. 482, ¶ 20, 56 P.3d at 62, *quoting Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 774 (1994). As such, we have

[1] Warden does not challenge the constitutionality of § 12-1809; he argues only that the particular injunction issued against him is unconstitutionally broad.

"construe[d] § 12-1809's definition of harassment—conduct that 'serves no legitimate purpose'—to *exclude* pure political speech." *Id.* ¶ 23. "Nonetheless, '[e]ven protected speech is not equally permissible in all places and at all times,'" and the government "may impose reasonable restrictions on the time, place, and manner of speech." *State v. Baldwin*, 184 Ariz. 267, 271, 908 P.2d 483, 487 (App. 1995), *quoting Frisby v. Schultz*, 487 U.S. 474, 479 (1988).

¶12 What is at issue here, however, is not pure political speech, but rather annoying, alarming, and harassing behavior. "[I]t is well established that '[r]esort to epithets or personal abuse is not in any proper sense communication of information or opinion safeguarded by the Constitution.'" *State v. Brown*, 207 Ariz. 231, ¶ 8, 85 P.3d 109, 112 (App. 2004), *quoting Cantwell v. Connecticut*, 310 U.S. 296, 309-10 (1940). "[P]rohibiting harassment is not prohibiting speech, because harassment is not . . . communication, although it may take the form of speech." *Id.*, *quoting Thorne v. Bailey*, 846 F.2d 241, 243 (4th Cir. 1988).

¶13 Unlike a generally applicable statute, "[a]n injunction, by its very nature, applies only to a particular group (or individuals) and regulates the activities, and perhaps the speech, of that group." *Madsen*, 512 U.S. at 762. Such an injunction will issue "because of [a] group's past actions in the context of a specific dispute between real parties. The parties seeking the injunction assert a violation of their rights; the court hearing the action is charged with fashioning a remedy for a specific deprivation." *Id.* The fact that an injunction restricts the speech of a particular individual or group does not, by itself, render that injunction a content-based or viewpoint-based regulation of speech. *See id.*

¶14 The principal inquiry in determining whether an injunction is content-neutral is whether the government "has adopted [it] 'without reference to the content of the regulated speech.'" *Madsen*, 512 U.S. at 763, *quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). A regulation of speech is not content-neutral if it is based on "hostility—or favoritism—towards the underlying message expressed." *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 386 (1992). "[W]hen . . . evaluating content-neutral injunctions that restrict speech[,] . . . [t]he test is 'whether the challenged provisions of

the injunction burden no more speech than necessary to serve a significant government interest.'" *LaFaro*, 203 Ariz. 482, ¶ 17, 56 P.3d at 61(emphasis omitted), *quoting Schenck v. Pro-Choice Network of W. N.Y.*, 519 U.S. 357, 371 (1997). An injunction that "includes no provisions designed to limit its infringement of political speech" may be "unconstitutionally broad." *See id.* ¶¶ 16-17.

¶15 Here, the injunction against Warden was content-neutral. Without regard to the message conveyed, it prohibits communications directed at a particular person, Whitaker, with the intent to harass, annoy, or alarm. *See Baldwin*, 184 Ariz. at 271, 908 P.2d at 487. The injunction restrains certain conduct directed at Whitaker whether or not it concerns Arizona politics; none of the restrictions imposed by the trial court were directed at the content of Warden's message. *See Madsen*, 512 U.S. at 762.

¶16 Further, the injunction is narrowly tailored to achieve the significant government interest of protecting Whitaker from harassment. *See LaFaro*, 203 Ariz. 482, ¶ 22, 56 P.3d at 62 (protecting citizens from harassment is "a legitimate and laudable goal" of government). It includes a prohibition on Warden going to Whitaker's house, which is a valid time, place, and manner restriction under *Frisby*, 487 U.S. at 482-84. The injunction also prohibits Warden from making communications directed to Whitaker "in a manner which consists of lewd, obscene, or profane remarks or which are personal attacks and which do not convey a message that is of public interest or a matter of public concern," but specifically notes that Warden "may comment on Mr. Whitaker's ideas." The trial court specifically denied Whitaker's request that the court "prohibit[] Mr. Warden from making any direct or indirect contact" with him on social media. Finally, the injunction prohibits Warden from threatening Whitaker with violence "except in self-defense."

¶17 The injunction does not prohibit Warden's direct communications with Whitaker about matters of public interest and concern, it allows him to comment on Whitaker's ideas, and it does not restrict what he calls "[his] fundamental right" to threaten Whitaker in self-defense. Warden is only prohibited from directed communications with Whitaker that are lewd, obscene, profane, or personal attacks. Such restrictions pose only the burden necessary to

serve the significant government interest of protecting Whitaker from harassment. *Madsen*, 512 U.S. at 765; *cf. LaFaro*, 203 Ariz. 482, ¶ 17, 56 P.3d at 61.

¶18 Additionally, Warden suggests that his conduct would not have caused "a reasonable person to be seriously alarmed, annoyed or harassed," because "name calling" is a normal part of political discourse on social media, which is "an incredibly important forum for people to exchange their political viewpoints," and because his threats were made only in response to Whitaker "assault[ing]" him at the rally. § 12-1809(S). Insofar as Warden raises this argument separately from his constitutional claims, we reject it. While we acknowledge that online discourse can be coarse and rude, the occurrence of such communications does not mean that a reasonable person cannot feel harassed when subjected to a sustained, targeted series of online insults. Stated differently, the general prevalence of harassment does not obviate the issuance of a proper injunction against such conduct. *Cf. Cardoso v. Soldo*, 230 Ariz. 614, ¶¶ 16-17, 277 P.3d 811, 816 (App. 2012) (hundreds of text and email messages to victim and third party, including statements such as "I know where you live" and "you scumbag, die already," sufficient to support trial court's continuance of order of protection).

Disposition

¶19 For the foregoing reasons, we affirm the trial court's grant of the injunction against harassment.