IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

SARA QUINN,
Petitioner/Appellee,

v.

PATRICK HARRINGTON,
Respondent/Appellant.

No. 2 CA-CV 2016-0061
Filed October 31, 2016

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NOT FOR PUBLICATION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 Cochise County
No. S0200DO200601141
The Honorable James L. Conlogue, Judge

AFFIRMED

Sara Quinn
In Propria Persona

DeConcini McDonald Yetwin & Lacy P.C., Tucson
By Ryan O'Neal
Counsel for Respondent/Appellant

MEMORANDUM DECISION

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

S T A R I N G, Judge:

¶1 Patrick Harrington appeals the trial court's order continuing in place an order of protection issued against him. We affirm for the reasons that follow.

Factual and Procedural Background

¶2 In December 2015, Sara Quinn petitioned for an order of protection against Harrington, her ex-spouse. The trial court set the matter to be heard in January 2016, and permitted Harrington to appear, including by telephone if necessary. He failed to appear at the hearing, in person or telephonically. Quinn's attorney "stated she had e-mailed documents to [Harrington] at the address typically used," and "she had received an e-mail receipt which indicated that [Harrington] had received her e-mailed documents." According to Quinn's attorney, "e-mail [was] the parties' primary form of communication." The court concluded notice by e-mail was "acceptable," and noted "it appears [Harrington] has received notice but has chosen not to participate." The court proceeded to conclude "the evidence establishe[d] the basis for the Order of Protection," and granted Quinn's petition. That same day, the court issued an order of protection prohibiting Harrington from having any contact with Quinn and limiting his contact with their son.

¶3 Harrington subsequently moved to vacate the order of protection, claiming he was not served with the petition and that, as a result, the order was void. Alternatively, Harrington asked "the court to amend its judgment pending a hearing in which he [could] appear and testify as to the merits." Harrington also "request[ed] a hearing." The court set a hearing for March, at which Harrington

appeared[1] and argued personal service had been required before the January hearing could take place on Quinn's original petition. The court rejected Harrington's argument, concluding "that when the service was not complete the order was entered ex parte." Quinn and Harrington both proceeded to testify at the March hearing, and the court again concluded Quinn had established a basis for issuing an order of protection.

¶4 Harrington timely appealed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(1), (5)(b) and Rule 42, Ariz. R. Protective Order P.[2]

Discussion

¶5 Harrington first argues the trial court lacked personal jurisdiction to enter the order of protection because he was not served with Quinn's petition prior to the January hearing. Harrington, however, does not cite any statute or rule that requires service of a petition, or even notice, before the issuance of an order of protection. Rather, the Arizona Rules of Protective Order Procedure expressly contemplate ex parte issuance. *See, e.g.*, Ariz. R. Protective Order P. 3(b) (defining "Ex parte"), 6(b) (titled, "Access to the Court for *Ex Parte* Hearing"), 17 ("[a] judicial officer must expeditiously schedule an *ex parte* hearing for a protective order involving a threat to personal safety"), 23(e)(1) ("To grant an *ex parte* Order of Protection . . . ."). The rules also provide a defendant with the ability to contest an order of protection "while [it] is in effect."

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[1]Harrington appeared by telephone, with his lawyer appearing in person.

[2]Quinn's answering brief meets few, if any, of the requirements in Rule 13(b), Ariz. R. Civ. App. P. Although we may view Quinn's brief as a failure to respond and thus a confession of error, we are not required to do so. *See Gonzales v. Gonzales*, 134 Ariz. 437, 437, 657 P.2d 425, 425 (App. 1982). Because Harrington does not contest the evidentiary basis of the order, we address the substance of his appeal in the exercise of our discretion. *See Savord v. Morton*, 235 Ariz. 256, ¶ 9, 330 P.3d 1013, 1016 (App. 2014).

Ariz. R. Protective Order P. 38(a); *see also* Ariz. R. Protective Order P. 31(i) ("An initial protective order takes effect when the defendant is served with a copy of the order and the petition. . . .").

¶6 Furthermore, A.R.S. § 13-3602(K) provides that "[a] copy of the petition and the order shall be served on the defendant within one year from the date the order is signed," and that "[a]n order is effective on the defendant on service of a copy of the order and petition." Section 13-3602(I) entitles a party "under an order of protection" to "one hearing on written request," "during the period during which the order is in effect." And, § 13-3602(I) states: "An ex parte order that is issued under this section shall state on its face that the defendant is entitled to a hearing on written request . . . ." Thus, nowhere does the statute require that a defendant be served with a petition before a court may conduct a hearing on the merits and issue an order of protection.

¶7 While Harrington correctly points out that an order of protection does not become effective until the defendant is served with a copy of the order and the petition, the question of whether an order has gone into effect is different from a court's authority to issue it.[3] Harrington has cited no statute or case that strips a court of its authority to issue an order of protection prior to a defendant receiving service of the petition.

¶8 Harrington next asserts the trial court lacked authority to continue the order of protection in place because it had not yet been served on him. We review a court's continuance of an order for an abuse of discretion. *See Cardoso v. Soldo*, 230 Ariz. 614, ¶ 16, 277 P.3d 811, 816 (App. 2012). A court abuses its discretion when it

[3]Harrington's reliance on the usual requirement for personal service to confer jurisdiction over a defendant, *see Barlage v. Valentine*, 210 Ariz. 270, ¶ 4, 110 P.3d 371, 373 (App. 2005) (proper service a prerequisite to exercising personal jurisdiction), ignores the fact both § 13-3602 and the Rules of Protective Order Procedure require service before any order can go into effect. In short, they do not conflict with the personal jurisdiction requirement.

commits an error of law in reaching a discretionary decision. *Michaelson v. Garr*, 234 Ariz. 542, ¶ 5, 323 P.3d 1193, 1195 (App. 2014).

¶9 In its March 8 minute entry, the trial court ruled the order of protection would "continue in effect." There is no indication in the record the order of protection was ever served on Harrington. *See* A.R.S. § 13-3602(M) ("Each affidavit, acceptance or return of service shall be promptly filed with the clerk of the issuing court."). But, while Harrington has yet to be served with a copy of the order and the petition, at least on the record before us, he waived any right to service by both requesting a hearing to contest the order and appearing at that hearing.

¶10 "Waiver is either the express, voluntary, intentional relinquishment of a known right or such conduct as warrants an inference of such an intentional relinquishment." *Am. Cont'l Life Ins. Co. v. Ranier Constr. Co.*, 125 Ariz. 53, 55, 607 P.2d 372, 374 (1980). "Waiver by conduct [is] established by evidence of acts inconsistent with an intent to assert the right." *Id.* We may find waiver as a matter of law where the facts relating to waiver are uncontested and unrelated to the underlying facts of the claim. *See Jones v. Cochise County*, 218 Ariz. 372, ¶ 28, 187 P.3d 97, 105-06 (App. 2008).

¶11 A defendant is only entitled to a hearing on an order of protection "during the period during which the order is in effect." § 13-3602(I); *see also* Ariz. R. Protective Order P. 38(a). An order does not go into effect until it is served on the defendant. § 13-3602(K); Ariz. R. Protective Order P. 31(i). At the March hearing, Harrington challenged the trial court's ability to issue the order, citing a lack of service. After the court rejected his argument, Harrington proceeded to participate in a contested hearing on the order of protection. Now, he claims the court could not make a ruling because he had yet to be served. But by asserting his right to a contested hearing, and participating in it, Harrington waived his right to service and rendered the order effective. *See Am. Cont'l Life Ins. Co.*, 125 Ariz. at 55, 607 P.2d at 374; *see also Montano v. Scottsdale Baptist Hosp., Inc.*, 119 Ariz. 448, 452, 581 P.2d 682, 686 (1978) ("It is a rule of ancient and universal application that a general appearance by a party who has not been properly served has exactly the same effect as a proper, timely and valid service of process."); *Nat'l Homes*

Corp. v. Totem Mobile Home Sales, Inc., 140 Ariz. 434, 437, 682 P.2d 439, 442 (App. 1984) ("Broadly stated, any action on the part of defendant, except to object to the jurisdiction over his person, which recognizes the case as in court, will constitute a general appearance."), *quoting Austin v. State ex rel. Herman*, 10 Ariz. App. 474, 477, 459 P.2d 753, 756 (1969).[4] It would be antithetical to allow a defendant to assert his right to a contested hearing but permit him to discharge any conditions imposed by later claiming he had not received proper service.

¶12 Last, Harrington claims the trial court erred by failing to state on the record the basis for continuing the order of protection. *See* Ariz. R. Protective Order P. 38(h) ("At the conclusion of [a contested] hearing, the judicial officer must state the basis for continuing, modifying, or revoking the protective order."). Harrington has not provided us with a transcript or a recording of the proceedings. *See* Ariz. R. Protective Order P. 18 ("A judicial officer must cause all contested protective order hearings . . . to be recorded electronically or by a court reporter."). It is incumbent on the appellant to provide a complete record on appeal. *Visco v. Universal Refuse Removal Co.*, 11 Ariz. App. 73, 76, 462 P.2d 90, 93 (1969). "Where the record is incomplete, a reviewing court must assume any evidence not available on appeal supported the trial court's action." *Bliss v. Treece*, 134 Ariz. 516, 519, 658 P.2d 169, 172 (1983). The court, in its minute entry continuing the order in effect, found "Petitioner did establish [a] basis for the Order of Protection." Lacking any recording or transcript to the contrary, we must assume the evidence supported the court's action. *See id.*

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[4]As noted, oftentimes "[p]roper, effective service on a defendant is a prerequisite to a court's exercising personal jurisdiction over the defendant." *Barlage*, 210 Ariz. 270, ¶ 4, 110 P.3d at 373. But personal jurisdiction "may be acquired by service of notice in the manner and form prescribed by law, or by defendant's general appearance. A general appearance is a waiver of notice and if a party appears in person or by attorney he submits himself to the jurisdiction of the court." *Montano*, 119 Ariz. at 452, 581 P.2d at 687 (citations omitted), *quoting Lonning v. Lonning*, 199 N.W.2d 60, 62 (Iowa 1972).

Disposition

¶13 For the reasons stated above, we affirm the trial court's order.