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EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c);  
Ariz. R. Crim. P. 31.24



DIVISION ONE  
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RUTH A. WILLINGHAM,  
CLERK  
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IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION ONE

In re the Matter of: ) No. 1 CA-CV 12-0636  
)  
LESLIE PEACOCK, ) DEPARTMENT E  
)  
Plaintiff/Appellee, ) **MEMORANDUM DECISION**  
) (Not for Publication -  
v. ) Rule 28, Arizona Rules of  
) Civil Appellate Procedure)  
DOMINIC ROBERT AFFUSO, )  
)  
Respondent/Appellant. )  
\_\_\_\_\_ )

Appeal from the Superior Court in Maricopa County

Cause Nos. FC2004-010565 & FC2004-094342 (Consolidated)

The Honorable Jaime B. Holguin, Judge *Pro Tem*

**AFFIRMED**

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**D O W N I E**, Judge

¶1 Dominic Robert Affuso ("Father") appeals from an order continuing an order of protection ("OOP") against him. For the reasons that follow, we affirm.

#### **FACTS AND PROCEDURAL HISTORY**

¶2 Father and Leslie Peacock ("Mother") divorced in January 2005 and were awarded joint custody of D.A., born in September 2002. In December 2008, the family court found that Father was "sometimes . . . unable to control his frustrations" and engaged in "inappropriate verbal exchanges" with D.A. The court ordered him to attend a parenting class "directed at controlling and redirecting his frustration" and three sessions with a certain doctor regarding the same issues within 60 days ("Parenting Class").

¶3 In September 2011, Mother filed a Motion for Post-Decree Temporary Order Without Notice for Modification of Child Custody and a separate Petition to Modify Child Custody, Parenting Time and Child Support. Noting three Child Protective Services ("CPS") reports filed against Father, Mother alleged D.A. was in danger and asked the court to award her sole custody until Father completed the Parenting Class ordered in 2008. The court denied the request for temporary orders but set an evidentiary hearing and ordered Father to provide proof of completion of the Parenting Class. Father completed the class in November 2011.

¶14 In February 2012, Mother filed a Motion to Modify Parenting Time Based on New Substantiated Evidence, seeking supervised parenting time for Father until the scheduled evidentiary hearing concluded. She attached a January 2012 letter from CPS stating that it had investigated and substantiated a report of physical abuse by Father against D.A. Father opposed Mother's motion, which the court denied pending the evidentiary hearing.

¶15 On June 22, 2012, D.A. was crying "uncontrollably" when Mother picked him up after a two-day visit with Father ("June Visit"). D.A. told Mother that Father had threatened to drop him at school, which was not in session, and not tell Mother where he was if Mother failed to arrive at the drop off location. D.A. also said Father "was very angry and was waving a knife around" and told D.A., "Fuck You, Fuck your Mom, Fuck [Mother's current husband, "R.B."], and Fuck the Courts" and that D.A. could "go to hell." During a subsequent telephone conversation with R.B., Father began cursing, threatened "to kick [R.B.'s] ass," "raged on with the threats," and said he was "going to kill [R.B.] and [his] bitch whore wife."

¶16 R.B. and Mother called the police, and Mother sought an OOP against Father. Her petition detailed events of the June Visit and stated Father had been arrested for domestic violence during the marriage. The court issued an OOP on an *ex parte*

basis, preventing Father from contacting Mother and D.A. or going to their home, Mother's work, or D.A.'s school.

¶17 On June 27, Father's counsel requested a hearing on the OOP. Father thereafter accepted service of the OOP and filed a notice of acceptance of service on July 2. On July 17, Father filed a *pro se* request for hearing on the OOP. The court set a July 31 hearing. Father later moved to dismiss the OOP, alleging it violated Rules 1(F), 4(B), and 8, Arizona Rules of Protective Order Procedure ("Rule"). The court denied the motion and affirmed the July 31 hearing.

¶18 During the July 31 hearing, Mother testified that D.A. was extremely scared and traumatized when she picked him up from the June Visit. Mother testified that D.A. told her Father brandished a knife while telling D.A. to "[g]et the fuck over here." Mother also testified about past physical, mental, and verbal abuse by Father, including the 2011 incident substantiated by CPS, where Father slapped D.A. According to Mother, Father's anger had escalated, and she feared for D.A.'s safety. R.B. testified that D.A. was "very emotionally upset," crying, shaky, and scared when he returned from the June Visit. R.B. also testified about Father's threat to kill R.B. and Mother.

¶19 Father testified that D.A. was "completely fine" the morning of June 22, and he denied brandishing a knife at his

son. Father also denied threatening Mother or D.A. and explained it was D.A.'s paternal grandfather who, during a speaker phone conversation, used expletives about Mother and the court. Father admitted the CPS-substantiated report about slapping D.A. in the face.

¶10 At the conclusion of the hearing, the court ruled:

Based on the allegations in the petition and the testimony provided, I find by a preponderance of the evidence that the Defendant may commit an act of domestic violence, or has committed an act of domestic violence within the last year. Therefore, the Court holds that the order of protection shall remain in effect without modification.

Father timely appealed. We have jurisdiction pursuant to Arizona Revised Statutes ("A.R.S.") section 12-2101(A).<sup>1</sup>

#### DISCUSSION

¶11 Father has identified five appellate issues in his opening brief. We do not, however, address arguments relating to the *ex parte* OOP (e.g., the alleged failure to identify sufficient harm in the petition and the lack of specific findings). Arguments about that interlocutory order are moot in light of the final, appealable order continuing the OOP in place

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<sup>1</sup> While the appeal was pending, the family court continued to address custody and parenting time issues and, by agreement of the parties, modified the OOP to permit specified contact between Father and D.A. Those modifications are not at issue on appeal.

after a full evidentiary hearing.<sup>2</sup> Cf. *State v. Verive*, 128 Ariz. 570, 574-75, 627 P.2d 721, 725-26 (App. 1981) (defendant may not seek appellate review of deficiencies associated with grand jury/probable cause phase after trial on merits).

¶12 Because the OOP's existence has ramifications for Father in the ongoing family court proceedings, the remaining appellate issues identified in the opening brief are not moot. See *Cardoso v. Soldo*, 230 Ariz. 614, 618-19, ¶¶ 10-14, 277 P.3d 811, 815-16 (App. 2012) (expired OOP not moot on appeal because of "ongoing collateral legal consequences," including implications in custody matters). Father contends the court erred in continuing the OOP because: (1) insufficient evidence was presented as to D.A.; (2) the court considered evidence not included in the petition; (3) the court improperly limited impeachment of witnesses; and (4) the court failed to hold a timely hearing.

¶13 We review the order continuing the OOP in effect for a clear abuse of discretion. See *id.* at 619, ¶ 16, 277 P.3d at 816 (citation omitted). "A court abuses its discretion when it

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<sup>2</sup> This Court's jurisdiction extends only to those matters enumerated by statute. See *Sarwark v. Thorneycroft*, 123 Ariz. 1, 2, 596 P.2d 1173, 1174 (App. 1979) ("[T]he right of appeal only exists by force of a statute."). Section 12-2101 does not confer appellate jurisdiction over interlocutory, *ex parte* orders of protection. Moreover, Father's notice of appeal states that he is appealing only from the July 31 order continuing the OOP in place.

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." *Mahar v. Acuna*, 230 Ariz. 530, 534, ¶ 14, 287 P.3d 824, 828 (App. 2012) (internal quotation marks omitted).

**A. Sufficiency of Evidence as to D.A.<sup>3</sup>**

¶14 A court may include a child of the named defendant as a protected person on an OOP if it finds reasonable cause to believe that: (1) physical harm has resulted or may result to the child; or (2) the alleged acts of domestic violence involved the child. See Ariz. R. Protective Order P. 1(F). A court is required to issue an order of protection if "there is reasonable cause to believe" a defendant may commit an act of domestic violence or has committed an act of domestic violence in the last year or longer period of time. A.R.S. § 13-3602(E). "Domestic violence" includes, *inter alia*, assault, aggravated assault, and threatening or intimidating. A.R.S. § 13-3601(A).

¶15 A reasonable trier of fact could conclude from the evidence presented at hearing that Father was physically aggressive, verbally abusive, and angrily brandishing a knife at

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<sup>3</sup> Father's opening brief, in both the "Issues Presented" section and the title of his argument, identifies only the sufficiency of the evidence as to D.A. We confine our analysis to that identified issue.

D.A. during the June Visit. His actions scared and traumatized the child. The evidence further established that Father had a substantiated allegation of abusing D.A. in July 2011<sup>4</sup> -- a fact relevant to the court's consideration of whether Father was likely to commit future acts of domestic violence involving the child. See A.R.S. § 13-3602(E)(1).

¶16 The hearing evidence warranted including D.A. as a protected person on the OOP. See A.R.S. §§ 13-1202(A)(1) ("threatening or intimidating" occurs when a person threatens or intimidates by word or conduct to cause physical injury to another), -1203 (assault committed when person intentionally, knowingly or recklessly causes any physical injury to another person, or intentionally places another in reasonable apprehension of imminent physical injury), -1204 (aggravated assault committed when person commits assault using a deadly weapon or dangerous instrument).

**B. Evidence Not Included in Petition**

¶17 Father contends his due process rights were violated because Mother testified about comments he made during the knife incident, past domestic violence, and physical, mental, and verbal abuse not specifically mentioned in her OOP petition.

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<sup>4</sup> Father admitted this fact on cross-examination.



With one exception,<sup>5</sup> though, Father did not object on this basis in the superior court. He has thus waived the objection for purposes of appeal. See *Harris v. Cochise Health Sys.*, 215 Ariz. 344, 351 n.3, ¶ 24, 160 P.3d 223, 230 (App. 2007) (arguments not raised at trial level waived on appeal) (citation omitted); *State v. Kelly*, 122 Ariz. 495, 497, 595 P.2d 1040, 1042 (App. 1979) (raising one objection at trial does not preserve another objection on appeal).

¶18 Moreover, the petition specifically referred to the knife incident and past domestic violence. To the extent Mother provided additional details while testifying, she explained why they were not included in her petition, and Father cross-examined her about her claims. Thus, even if Father had preserved this objection for our review, we would find no due process violation. See *Curtis v. Richardson*, 212 Ariz. 308, 312, ¶ 16, 131 P.3d 480, 484 (App. 2006) (“Due process entitles a party to notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Due process also entitles a party to offer evidence and confront adverse witnesses.”) (internal citations omitted). Nor has Father explained how he would have responded differently had he known the precise parameters of Mother’s intended testimony.

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<sup>5</sup> Father timely objected to Mother’s testimony about ongoing custody proceedings and limitations on Father’s parenting time from those proceedings; the court sustained his objection.

### C. Evidentiary Rulings

¶19 During the OOP hearing, Father's counsel attempted to cross-examine R.B. about a misdemeanor DUI conviction. The court ruled such evidence was irrelevant to the issues before it and rejected Father's contention that such a conviction would call R.B.'s credibility into question.

¶20 "The extent of cross-examination to be permitted is within the discretion of the trial court and will not be disturbed on appeal unless this discretion has been clearly abused." *State v. Zuck*, 134 Ariz. 509, 513, 658 P.2d 162, 166 (1982) (citation omitted). We review a trial court's restrictions on cross-examination to determine whether the court unduly inhibited a party's ability to present information bearing on issues or on the credibility of witnesses. See *State v. Doody*, 187 Ariz. 363, 374, 930 P.2d 440, 451 (App. 1996) (citation omitted). Father has not explained how a misdemeanor DUI conviction, assuming one existed, would impair R.B.'s credibility regarding Father's alleged acts of domestic violence or would otherwise be admissible. See Ariz. R. Evid. 609(a)(2) (impeachment with conviction where element of underlying offense required proof of dishonest act or false statement).

¶21 We similarly find no abuse of discretion in limiting Father's testimony regarding specific incidents wherein Mother purportedly made misrepresentations about collateral matters

(including, for example, allegedly advising D.A. to lie about his age at a paintball facility). Father was testifying about specific other acts by Mother without satisfying the criteria in Rule 404(b), Arizona Rules of Evidence. Moreover, the record supports the court's determination that such collateral matters were irrelevant to Mother's credibility vis-à-vis the allegations of domestic violence.

**D. Timeliness of Hearing**

¶22 Lastly, Father contends the court failed to hold a hearing on the OOP within ten business days, as required by Rule 8(A). However, the OOP was not in effect until Father was served with it. See A.R.S. § 13-3602(K) ("An order is effective on the defendant on service of a copy of the order and petition."); Ariz. R. Protective Order P. 1(M)(2) (same). A party may not request a hearing on an OOP not yet in effect. See A.R.S. § 13-3602(I) ("At any time *during the period during which the order is in effect*, a party who is under an order of protection . . . is entitled to one hearing on written request.") (emphasis added); Ariz. R. Protective Order P. 8(A) (same). Father's counsel filed a request for hearing before service was effectuated. That request was thus premature and a nullity. After Father accepted service of the OOP, he filed his own *pro se* request for a hearing on July 17, and the court held a hearing ten business days later.

¶23 Furthermore, even if there had been a delay in the hearing, the 10-day rule is not jurisdictional. The rule exists to ensure that a defendant receives prompt consideration of an OOP issued on an *ex parte* basis so that he or she does not remain subject to a potentially improvidently issued order for an extended period of time. In the case at bar, though, the OOP was upheld after an evidentiary hearing, obviating any arguable prejudice to Father.

**CONCLUSION**

¶24 For the foregoing reasons, we affirm the superior court's order continuing the OOP in effect. Mother requests an award of attorneys' fees and costs incurred on appeal. In the exercise of our discretion, we decline her request for fees. Mother, however, is entitled to recover her appellate costs upon compliance with ARCAP 21.

/s/  
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MARGARET H. DOWNIE, Judge

CONCURRING:

/s/  
\_\_\_\_\_   
LAWRENCE F. WINTHROP, Presiding Judge

/s/  
\_\_\_\_\_   
JON W. THOMPSON, Judge