IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

KIMBERLEY MCDANIEL, *Plaintiff/Appellee*,

v.

GREGORY SCOTT SUNDBERG, *Defendant/Appellant*.

No. 1 CA-CV 15-0335 FC
FILED 7-14-2016

Appeal from the Superior Court in Maricopa County
No. FC2015-051625
The Honorable Richard F. Albrecht, Judge *Pro Tempore*

VACATED

COUNSEL

Law Office of Steven D. Sheldon, Phoenix
By Steven D. Sheldon
Counsel for Plaintiff/Appellee

Jeffrey M. Zurbriggen, PC, Phoenix
By Jeffrey M. Zurbriggen
Counsel for Defendant/Appellant

MEMORANDUM DECISION

Judge Randall M. Howe delivered the decision of the Court, in which Presiding Judge Kent E. Cattani and Judge Samuel A. Thumma joined.

H O W E, Judge:

¶1 Gregory Sundberg ("Father") appeals the issuance and affirmance of an order of protection and Notice to Sheriff of Positive Brady Indicator ("Brady notice"), 18 U.S.C. § 922(g)(8)(C)(i)–(ii), entered in favor of Kimberley McDaniel ("Mother"). For the following reasons, we vacate the decision for the order of protection and quash the Brady notice.

FACTS AND PROCEDURAL HISTORY

¶2 On March 30, 2015, Mother petitioned for a protective order for her and the couple's two minor children, alleging that Father had drunk and driven with one of the children in the car and also had driven the child to softball practice "while high on marijuana." The trial court granted an ex-parte order of protection later that day and ordered Father to have no contact with Mother or the children. But Father requested a hearing and moved to dismiss the order of protection.

¶3 On April 13, 2015, Mother moved to amend her petition to add an allegation that Father had drunk "alcohol while he ha[d] the children in the vehicle." At a hearing the next day, the trial court said it would permit Mother's motion to amend, but would also grant Father "the opportunity to ask for a hearing with respect to that amendment." Father objected to the motion to amend and asked to proceed only on the allegations in the initial petition. The trial court offered to continue the hearing, but Father rejected the offer because he had not had contact with his children since the order of protection had been served upon him.

¶4 The court took a brief recess during the hearing to allow Mother to file an amended petition for the protective order that included the new allegation. The court issued an amended order of protection dated April 14, which also ordered that Father have no contact with Mother or the children. The court also denied Father's motion to dismiss the order of protection, and the hearing proceeded immediately thereafter on the amended order of protection.

¶5 Mother testified that she was concerned that Father was drinking and driving with the children and that they told her that Father "drinks a large beer on the way home from work when they go to work with him." Mother also testified that she was concerned that Father was smoking marijuana around the children and that one of the children reported that Father had "exited the bathroom surrounded by a cloud of white smoke and coughing," after which he drove the child to softball practice. Mother further testified that she had hired a detective, who provided her with photographs of their 14-year-old child in a bar after 8:00 p.m. on a school night and a photograph of Father holding a beer.

¶6 Mother admitted having never seen Father drive with beer in the car during the previous year. Mother also admitted that on the date the detective observed Father in the bar, Mother did not know whether Father was affected by alcohol. Mother further admitted that she did not have any specific dates that Father had beer in his car.

¶7 Father admitted drinking and then driving with the children. He also admitted having had an open container in his car when he had driven the children and did not deny that in the recent past he "drank an open container of alcohol in [his] car with [his] children." Father agreed that drinking while driving with the children was not in their best interests. Father testified that he had never driven the children while he was impaired by alcohol or any substances. He also testified that he had never committed any domestic violence against his children or Mother. Father further testified that he had a medical marijuana card and that he smoked cigars that could cause him to cough and puff smoke.

¶8 After the hearing, the trial court found that the amended order of protection issued on April 14 "shall remain in full force and effect" and that "the Brady Law now applies." The court found that Mother had proved by a preponderance of the evidence that Father endangered the children with his alcohol consumption and that good cause existed to continue the amended order of protection. The court issued a written order, which stated that the protective order remained in effect and that "Brady applie[d]." The court entered a Brady notice. Father timely appealed, but Mother thereafter moved for attorneys' fees, which the trial court granted.

¶9 Meanwhile, another trial court in a family court case involving Father and Mother held a temporary orders hearing and "dismissed the Order of Protection against" Father, ostensibly because the order conflicted with Father's visitation rights. The court in the protective order action then dismissed and quashed the original order of protection

issued on March 30. The court also issued an order noting that the request for protective order was "withdrawn" and that the court dismissed the protective order action.

¶10 Father filed a supplemental notice of appeal from the attorneys' fees award. The trial court vacated its order granting attorneys' fees to Mother relating to the order of protection, however, because Father's notice of appeal from the order of protection divested the court of jurisdiction. We dismissed that portion of this appeal arising out of the supplemental notice of appeal.[1]

DISCUSSION

1. Order of Protection

¶11 As relevant to our disposition of this appeal, Father argues that granting the petition for the order of protection and then issuing and affirming it were error. We review the decision regarding an order of protection for an abuse of discretion. *Cardoso v. Soldo*, 230 Ariz. 614, 619 ¶ 16, 277 P.3d 811, 816 (App. 2012). An error of law in the process of reaching a discretionary decision and when the record is devoid of competent evidence to support a discretionary decision can both constitute an abuse of discretion. *Mahar v. Acuna*, 230 Ariz. 530, 534 ¶ 14, 287 P.3d 824, 828 (App. 2012). But we review questions of law de novo. *Michaelson v. Garr*, 234 Ariz. 542, 544 ¶ 5, 323 P.3d 1193, 1195 (App. 2014). Because insufficient evidence supports granting the petition for the order of protection, the order was error.

¶12 Father specifically argues that granting the petition was error because the allegations were facially insufficient regarding Mother and the children. The trial court shall issue an order of protection if the plaintiff shows "reasonable cause to believe . . . [that] [t]he defendant has committed an act of domestic violence within the past year or within a longer period of time if the court finds that good cause exists to consider a longer period." A.R.S. § 13–3602(E)(2). "Domestic violence" is "any act that is a dangerous crime against children" as statutorily defined or an offense as statutorily

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[1] After the parties submitted their briefs regarding the order of protection, we requested supplemental briefing on whether the appeal is moot because the trial court dismissed the order of protection. But because we determine that the trial court lacked jurisdiction to dismiss the order of protection while the appeal was pending, we need not address mootness.

prescribed. A.R.S. § 13–3601(A). Here, Mother's petition listed grievances concerning Father's conduct with the couple's children, but provided no allegations that would justify granting an order of protection regarding Mother. Despite this omission, however, the order of protection contained a no-contact order regarding Mother.

¶13 Mother counters that the order of protection appropriately listed her as the plaintiff because A.R.S. § 13–3602(A) requires the parent to be named as the plaintiff on the petition for an order of protection and minor children to be listed as specifically designated persons. While true, a trial court nevertheless errs in granting an order of protection if the allegations "fail to include a statutorily enumerated offense" as set forth in A.R.S. § 13–3601(A). *Savord v. Morton*, 235 Ariz. 256, 259 ¶ 11, 330 P.3d 1013, 1016 (App. 2014). Consequently, the trial court erred in entering a no-contact order regarding Mother because the petition for the order of protection regarding her was facially deficient. It did not allege any predicate offense against Mother as A.R.S. § 13–3601 required.

Father also argues that issuing and affirming the order of protection was error because the evidence failed to establish endangerment to Mother or the children. At a hearing contesting an order of protection, a plaintiff must prove by a preponderance of the evidence that the protective order should remain in effect as originally issued. Ariz. R. Prot. Order P. 8(F) (2015); Ariz. R. Prot. Order P. 38(g) (2016).[2] Endangerment is an offense included in the definition of domestic violence that can justify the issuance of an order of protection. *See* A.R.S. § 13–3601(A). Thus, we examine whether the record contains sufficient evidence to support a finding that Father endangered the children.[3] *Mahar*, 230 Ariz. at 534 ¶ 14, 287 P.3d at 828; *see also* A.R.S. §§ 13–3602(E)(2), –3601(A), –1201(A).

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[2] The Arizona Rules of Protective Order Procedure were revised effective January 1, 2016, after this appeal was filed, but no revisions are material to this decision. But because the hearings in this case were held in 2015, the parallel provisions with applicable effective dates are provided.

[3] Mother argues alternatively that child abuse is "also included within the 'domestic violence' acts [that] supports an order of protection" and that Father's violation of Arizona's open-container laws constituted child abuse. But because the trial court's ruling is limited to a finding of endangerment, we confine our analysis to endangerment.

¶14 "A person commits endangerment by recklessly endangering another person with a substantial risk of imminent death or physical injury." A.R.S. § 13–1201(A). One element of the offense "is that the victim must be placed in *actual* substantial risk of imminent death or physical injury." *State v. Doss*, 192 Ariz. 408, 411 ¶ 7, 966 P.2d 1012, 1015 (App. 1998); *see also State v. Villegas-Rojas*, 231 Ariz. 445, 447–48 ¶¶ 7, 11, 296 P.3d 981, 983–84 (App. 2012) (upholding endangerment conviction when defendant admitted endangering the lives of nearby motorist and an officer observed defendant's erratic driving that endangered the motorists). Moreover, endangerment requires imminence, which means "about to occur" or "impending." *State v. Dominquez*, 236 Ariz. 226, 229 ¶ 4, 338 P.3d 966, 969 (App. 2014). The imminence requirement "avoids criminal convictions based on speculative or attenuated theories that could produce uncertainty and unpredictability." *Id.* at ¶ 5. Accordingly, the "temporal component of imminence is essential" to endangerment. *Id.* at ¶ 6.

¶15 Here, the trial court found "by a preponderance of the evidence that there ha[d] been endangerment with respect to the consumption of alcohol by [Father] while the children were in his care." But the record does not show that Father placed the children in actual substantial risk of imminent death or physical injury. No evidence shows the amount of alcohol Father consumed while driving with the children. Likewise, no evidence shows that Father drove while impaired. Father denied having been impaired while caring for the children; Mother's testimony did not show to the contrary. Moreover, the trial court heard no testimony of impaired or erratic driving. Thus, the record before the trial court lacked any evidence—let alone a preponderance of the evidence—that Father endangered the children. *See Mahar*, 230 Ariz. at 534 ¶ 14, 287 P.3d at 828.

¶16 Because we find that the evidence does not support issuing or affirming the order of protection, we do not address Father's argument that the trial court denied him due process by forcing him to either accept Mother's proposed amendment to the petition or continue the hearing and by precluding relevant testimony from the children, who were not witnesses at the hearing. For the same reason, we do not address Father's argument regarding abuse of the order of protection process. Father's argument whether the order of protection regarding the children was properly granted is moot because we vacate the affirmance of the order of protection.

2. Brady Notice

¶17 Father next argues that entering the Brady notice was error because the record is "devoid of any allegations or evidence concerning weapons." We review for an abuse of discretion the trial court's order granting an injunction. *Mahar*, 230 Ariz. at 534 ¶ 14, 287 P.3d at 828. We may quash a Brady notice when no evidence supports a finding that a defendant posed credible threat to the physical safety of the plaintiff or other protected persons. *Savord*, 235 Ariz. at 260 ¶¶ 19–23, 330 P.3d at 1017. Because no evidence supports a finding that Father posed such a threat, the order entering the Brady notice was error.

¶18 When the trial court issues an order of protection, it may prohibit the defendant from purchasing or possessing a firearm for the duration of the order "[i]f the court finds that the defendant is a credible threat to the physical safety of the plaintiff or other specifically designated persons." A.R.S. § 13–3602(G)(4). Before the court may prohibit firearms possession or purchase, however, the court must "ask the plaintiff about the defendant's use of or access to firearms to determine whether the defendant poses a credible threat to the physical safety of the plaintiff or other protected persons." Ariz. R. Prot. Order P. 23(i)(1) (2016); *accord* Ariz. R. Prot. Order P. 6(C)(4)(d) (2015). A firearms restriction "does not automatically follow" from an order of protection. *Savord*, 235 Ariz. at 260 ¶ 22, 330 P.3d at 1017.

¶19 Here, the trial court did not ask Mother about Father's use of or access to firearms. The record contains no evidence that Father posed a credible threat of harm to Mother or the children. The trial court thus erred by failing to comply with the applicable procedural requirements. *See Mahar*, 230 Ariz. at 534 ¶ 14, 287 P.3d at 828.

CONCLUSION

¶20 For the foregoing reasons, we vacate the order granting the petition for the order of protection and quash the Brady notice. Mother and Father request attorneys' fees incurred on appeal, but in our discretion, we deny their requests.