

NOTICE: NOT FOR OFFICIAL PUBLICATION.
UNDER ARIZONA RULE OF THE SUPREME COURT 111(c), THIS DECISION IS NOT PRECEDENTIAL
AND MAY BE CITED ONLY AS AUTHORIZED BY RULE.

IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

CAROLINE DISHON, *Petitioner/Appellee*,

v.

BRETT DISHON, *Respondent/Appellant*.

No. 1 CA-CV 16-0669 FC
FILED 7-11-2017

Appeal from the Superior Court in Maricopa County
No. FC2016-094252
The Honorable Richard J. Hinz, Judge *Pro Tempore*

AFFIRMED

COUNSEL

Brett Dishon, Peoria
Appellant

MEMORANDUM DECISION

Chief Judge Samuel A. Thumma delivered the decision of the Court, in which Presiding Judge Jon W. Thompson and Judge Randall M. Howe joined.

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T H U M M A, Judge:

¶1 Brett Dishon challenges an order of protection, entered after an evidentiary hearing, prohibiting him from having contact with his wife Caroline Dishon. Brett¹ argues the superior court erred by precluding two affidavits he offered as evidence at the hearing. Because Brett has shown no error, the order of protection is affirmed.

FACTS² AND PROCEDURAL HISTORY

¶2 On July 5, 2016, Caroline filed a petition seeking an order of protection against Brett. The petition alleged Brett verbally abused and physically threatened Caroline and one of their two children, citing alleged incidents on three different dates. The court issued an ex parte order of protection that same day. Although Caroline made several attempts, she was not successful in serving Brett with the order of protection until October 1, 2016. Within days of being served, Brett requested an evidentiary hearing, which was held on October 11, 2016.

¶3 At the hearing, Brett sought to introduce two affidavits dated October 7, 2016, purporting to recall conversations the declarants had with Caroline and Brett on July 8, 2016. The affidavits state Caroline apparently admitted “there was not any basis” for the order of protection, “it was a reaction to her being angry” and she had taken steps to “cancel” it. The

¹ Because the parties share the same last name, this decision uses their first names to distinguish between them.

² On appeal, this court views the evidence in the light most favorable to upholding the superior court’s decision following a bench trial. *Double AA Builders, Ltd. v. Grand State Constr. L.L.C.*, 210 Ariz. 503, 506 ¶ 9 (App. 2005). In addition, Brett submitted a partial transcript of the hearing, the evidentiary portion of which is limited to Caroline’s direct testimony, notwithstanding his responsibility to provide a complete record for this court to consider the issues he raises. Ariz. R. Civ. App. P. 11(b) (2017). Accordingly, this court assumes the missing portions of the record would “support the court’s findings and conclusions.” *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995).

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superior court did not admit these affidavits in evidence, concluding they did not relate to the incidents alleged in the petition, meaning they were not relevant. The court also noted the declarants were not available to testify, which would negate Caroline’s “right to cross-examine those witnesses.”

¶4 Caroline testified about the incidents alleged in the petition. After considering all the evidence, the superior court affirmed the order of protection and provided both parties with a copy at the conclusion of the hearing. This court has jurisdiction over Brett’s timely appeal pursuant to Article 6, Section 9, of the Arizona Constitution and Arizona Revised Statutes (A.R.S.) sections 12-120.21(A)(1), 13-4031 and 13-4033(A)(2017).³

DISCUSSION

¶5 Notwithstanding Brett’s appeal, Caroline failed to file an answering brief and the time to do so has passed. While this failure could be construed as a confession of error, *see, e.g., Nydam v. Crawford*, 181 Ariz. 101, 101 (App. 1994), given the issues involved, this court will exercise its discretion and address the merits of Brett’s arguments.

¶6 Brett presents two issues on appeal. First, he asks “[c]an a Commissioner or Judge not allow substantive evidence that clearly shows fraud or deception or plaintiff under oath knowingly perjured them?” Second, he asks “[s]hould an attorney be held harmless when they and plaintiff knowingly conceal a material fact?” These related questions can be condensed into one main issue on appeal: whether the superior court erred by excluding the affidavits Brett offered as evidence.

¶7 The admission of evidence is “within the [superior] court’s discretion and will not be disturbed absent an abuse of discretion.” *State v. Cooney*, 233 Ariz. 335, 338 ¶ 6 (App. 2013); *see also State v. Meraz*, 152 Ariz. 588, 589 (1987) (“The decision to admit or exclude . . . is left to the sound discretion of the trial judge and [this court] will not reverse the admission of evidence absent a clear abuse of discretion by the [superior] court.”).

¶8 Brett is correct that, at a contested hearing, both parties must be given “the opportunity to be heard, to present evidence, and to call and examine and cross-examine witnesses.” Ariz. R. Protect. Ord. P. 38(e). Based on the record provided, however, both Caroline and Brett were afforded the opportunity to present evidence. The superior court found that, because the declarants were absent, receiving the affidavits would

³ Absent material revisions after the relevant dates, statutes and rules cited refer to the current version unless otherwise indicated.

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violate Caroline's right to cross-examine witnesses. Given Rule 38(e), on this record, Brett has shown no error in that ruling.

¶9 The superior court also found the affidavits addressed issues not alleged in the petition, meaning they were not relevant and their admission would raise issues beyond those properly addressed at the hearing. Although relevant evidence is admissible, "the court must exclude evidence if its probative value is outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, undue delay, wasting time, needlessly presenting cumulative evidence, or lack of reliability." Ariz R. Protect. Ord. P. 36(a). Brett has not shown the superior court erred in concluding the affidavits were inadmissible under this standard.

¶10 Brett also argues "the following Arizona Revised Statutes and Arizona Rules of Protective Order Procedure and *Rules of Family Law Procedure* make it very clear Affidavits materially relevant should be allowed." This argument, however, is contrary to the authority discussed above. Moreover, the phrase "should be allowed" does not appear in any of the rules Brett cites.

¶11 Recognizing Brett was self-represented, the superior court informed him that Caroline had a right to cross-examine any witnesses he presented, and "affidavits don't give her the opportunity to do that." In response, Brett did not seek other options that may have allowed the declarants to testify, such as requesting a continuance or for the witnesses to testify by telephone. Nor does the record indicate that he subpoenaed the declarants or otherwise arranged for them to be present.

¶12 Brett argues the affidavits were relevant to Caroline's purported assurance that "the [July 5, 2016] protective order had been cancelled." The very fact that the hearing was being held, however, negated any claim that the protective order was cancelled. Moreover, this argument does not show the superior court erred in concluding that the affidavits were not admissible for the reasons discussed above.⁴

⁴ Brett does not claim the evidentiary record could not support the order of protection. Indeed, Brett filed his own petition, seeking an order of protection against Caroline, less than a week after the October 11, 2016 hearing in this proceeding.

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CONCLUSION

¶13
affirmed.

Because Brett has shown no error, the order of protection is



AMY M. WOOD • Clerk of the Court
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