IN THE
ARIZONA COURT OF APPEALS
DIVISION ONE

In re the Matter of:

CHRISTINA QUEZADA, *Plaintiff/Appellee*,

v.

MICHAEL SERVIN, JR., *Respondent/Appellant*.

No. 1 CA-CV 20-0014 FC
FILED 11-19-2020

Appeal from the Superior Court in Maricopa County
No. FC 2019-054903
The Honorable Harriet M. Bernick, Judge *Pro Tempore*

VACATED AND REMANDED

COUNSEL

Udall Law Firm LLP, Phoenix
By Elizabeth L. Fleming
Counsel for Respondent/Appellant

Belen Law Firm PLLC, Phoenix
By Belen Olmed-Guerra
Counsel for Plaintiff/Appellee

MEMORANDUM DECISION

Presiding Judge Jennifer B. Campbell delivered the decision of the Court, in which Judge Lawrence F. Winthrop and Chief Judge Peter B. Swann joined.

C A M P B E L L, Judge:

¶1 Michael Servin, Jr., timely appeals the denial of his Motion for Reconsideration affirming an Amended Order of Protection. We hold before imposing firearm restrictions under the Brady Act,[1] the court must assess whether a credible threat of physical harm is present and enter findings in conformity therewith. The court failed to enter those findings here. We vacate the Amended Order of Protection and remand for further proceedings.

BACKGROUND

¶2 Christina Quezada[2] a petition for an Order of Protection ("OOP") against her ex-husband Michael Servin, Jr., in August of 2019. Quezada averred that Servin harassed her through repeated hostile, aggressive, and accusatory emails, text messages, and phone calls. The OOP was issued ex parte. Servin was served in Washington State a couple months later. Servin timely moved to dismiss the OOP by way of a mistitled motion and requested a hearing.

¶3 The superior court set the hearing for 45 minutes. After Quezada was subject to direct and cross-examination, the court took a recess and instructed the parties to discuss settlement possibilities. The

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[1] Codified within Title 18, Chapter 44 of the United States Code, the Brady Handgun Violence Prevention Act, Pub. L. 103-159, 107 Stat. 1536, amended the federal Gun Control Act of 1968, Pub. L. 90-618, 82 Stat. 1213.

[2] In the Rule 69 Agreement, which was adopted in the Order Modifying Legal Decision Making & Parenting Time, Christina requested her name be restored to her former name of Christina Elizabeth Quezada. We therefore amend the caption to reflect the name change, which shall be used on all further documents filed in this appeal.

court resumed the hearing when the negotiations failed. At that point, with little time remaining, the court invited Servin's counsel to make a proffer of what Servin would have testified to, had there been time. Without objecting, counsel provided a narrative of the expected testimony.

¶4 At the end of the hearing, the superior court upheld the OOP as amended (the "Amended Order"). The court did not make a credible threat determination but ordered: "Defendant shall not commit any crimes, including but not limited to harassment, stalking, or conduct involving the use, attempted use, or threatened use of physical force that would reasonably be expected to cause bodily injury, against Plaintiff or Protected Person(s)." Based on this finding, the court-imposed firearm restrictions pursuant to the Brady Act. Servin timely filed a Motion for Reconsideration of the Amended Order, which the superior court denied. Servin timely appealed.

DISCUSSION

¶5 "It is well settled that the issuance of an order of protection is a very serious matter," *Savord v. Morton*, 235 Ariz. 256, 259, ¶ 11 (App. 2014), and we review it for an abuse of discretion, *LaFaro v. Cahill*, 203 Ariz. 482, 485, ¶ 10 (App. 2002). "An abuse of discretion exists 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." *State ex rel. Dep't of Econ. Sec. v. Burton*, 205 Ariz. 27, 30, ¶ 14 (App. 2003). We review constitutional and purely legal issues de novo. *State v. Moody*, 208 Ariz. 424, 445, ¶ 62 (2004).

I. The superior court erred by imposing Brady Act restrictions without making the necessary findings.

¶6 Servin argues the superior court erred by restricting his possession of firearms under the Brady Act. He points to the court's failure to make a finding that he presented a credible threat of physical harm to Quezada and also argues that no evidence was presented to support such a finding. We agree.

¶7 The court imposed the firearm restrictions pursuant to the Brady Act, which prohibits the subject of a protective order from possessing firearms if the protective order "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against [an] intimate partner or child that would reasonably be expected to cause bodily injury." 18 U.S.C. § 922(g)(8)(C)(ii); *see also Mahar v. Acuna*,

230 Ariz. 530, 534, ¶ 15 (App. 2012). In denying the motion for reconsideration, the superior court explained,

> [O]nce a finding of domestic violence is made, the [c]ourt was required to order Brady prohibitions. The Order of Protection in this matter contains the explicit language required by Brady. In other wor[ds] the order states [Servin] is explicitly prohibited from the use, attempted use, or threatened use of physical force against such intimate partner or child that would reasonably be expected to cause bodily injury. As a result, the court did not need to make a credible threat finding.

This is an incorrect statement of Arizona law—"[a] restriction against firearms does not automatically follow an order of protection." *Savord*, 235 Ariz. at 260, ¶ 22.

¶8 In Arizona, firearm restrictions "should be based on a court's assessment of credible threats of physical harm by the specific person whose rights would be affected by the order." *Mahar*, 230 Ariz. at 536, ¶ 20. Pursuant to A.R.S. § 13-3602(G)(4), a Brady prohibition is only triggered by an order of protection when the order "includes a finding that [the] person represents a credible threat to the physical safety of [the] intimate partner or child." *Savord*, 235 Ariz. at 260, ¶ 20 (citations omitted). Furthermore, Arizona Rule of Protective Order Procedure ("Rule") 23(i)(1) requires a judicial officer issuing an order of protection to "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." Then, "[u]pon finding that the defendant is a credible threat to the physical safety of the plaintiff or other protected persons, the judicial officer may, for the duration of the Order of Protection[,] . . . prohibit the defendant from possessing, purchasing, or receiving firearms." Rule 23(i)(2)(A).

¶9 The superior court did not make a finding that Servin posed a credible threat of physical harm to Quezada. Rather, it explicitly stated its view that such a finding was unnecessary in light of the specific language it used—prohibiting the use, attempted use, or threatened use of physical force—without explanation. On this record, the court erred, and we vacate and remand the Amended Order for the court to take additional evidence.

II. On remand, both parties shall be allowed to testify to avoid a violation of due process.

¶10 Servin argues the court violated his due process rights by depriving him of the right to testify at the hearing. The protections of due process, under both the Fourteenth Amendment to the United States Constitution and Article 2, Section 4, of the Arizona Constitution, apply to protective order proceedings. *See Savord*, 235 Ariz. at 259–60, ¶ 16. Rule 38(e) states that in a contested hearing on an order of protection, "[t]he judicial officer must ensure that both parties have an opportunity to be heard, to present evidence, and to call and examine and cross-examine witnesses." The court violates a party's due process rights when it denies the party the opportunity for meaningful direct testimony and efficient but adequate cross-examination. *Volk v. Brame*, 235 Ariz. 462, 468, ¶ 21 (App. 2014).

¶11 Here, the court did not allow Servin time to testify, and he argues that his counsel's proffer was insufficient to satisfy his right to be heard. Servin contends that his defense suffered because he was unable to demonstrate his credibility though his testimony.

¶12 Because we are remanding for findings on the Brady factors, which will require additional testimony, we need not decide this issue. On remand both parties shall be allowed to present live testimony in furtherance of the relief they request.

III. The superior court did not interfere with existing legal decision-making or parenting time issues.

¶13 According to Servin, the Amended Order "is directly at odds with the existing Joint Parenting Order" established in the Rule 69 Agreement ("Agreement") between the parties.[3] Servin argues that the Amended Order violated Rule 35 by interfering with his right to exercise legal decision-making and parenting time as previously ordered by the superior court. We address this issue because it may arise on remand.

¶14 Rule 35(a) states,

> Except as otherwise provided in this rule, a protective order cannot contain provisions regarding legal decision-making

[3] The Agreement was adopted by the Order Modifying Legal Decision Making & Parenting Time in 2019.

> or parenting time issues. Legal issues such as maternity, paternity, child support, legal decision-making, parenting time, dissolution of marriage, or legal separation may be addressed only by the superior court in a separate action under A.R.S. Title 25.

¶15 Servin argues the Amended Order prevents him from contacting Quezada directly to discuss exchanges of the children, parenting time, travel arrangements, and other matters related to the care of their children. However, the superior court did not modify Servin's rights and responsibilities related to his children but only required that he communicate through a mediator (third-party) when exercising those rights.

¶16 Servin also argues the Amended Order conflicts with parenting time orders that grant daily contact with his children "during normal waking hours." The Amended Order restricts communication to one text message each day to coordinate the time of the evening phone call and one phone call to speak with his children at the designated time. However, this too complies with the Agreement, which states that if communications become harassing in nature, "Communication will revert to email/text only, as accepted by the court *and an evening phone call* to [the] children." (Emphasis added).

IV. The superior court did not err by hearing an allegedly horizontal appeal.

¶17 Servin argues Quezada's allegations were already litigated and that in seeking the OOP, she was improperly relitigating issues already decided. A party attempts a "horizontal appeal" by requesting a different judge, in another matter with the same parties, reconsider a decision already made in the parallel matter, "even though no new circumstances have arisen in the interim and no other reason justifies reconsideration." *Powell-Cerkoney v. TCR-Montana Ranch Joint Venture, II*, 176 Ariz. 275, 278–79 (App. 1993). Quezada alleged Servin harassed her by a series of acts over a range of dates—many occurring after the superior court declined Quezada's motion for court-monitored communication.

Since the conduct Quezada alleged occurred after the court's denial of her motion, her petition was not a horizontal appeal. [4]

V. The superior court did not err by conducting the hearing on the OOP.

¶18 Servin argues that the hearing should have been transferred to the family court judge presiding over the dissolution. According to Rule 5(A)(1) of the Arizona Rules of Family Law Procedure, "[i]f pending cases involve a common child, common parties, or a common question of law or fact, the court may order a joint hearing or trial of any or all the matters at issue, or it may consolidate the cases." "While the superior court has the discretion to hold a joint hearing to harmonize parenting-time orders and an order of protection, it is not *obligated* to do so." *Vera v. Rogers*, 246 Ariz. 30, 34, ¶ 16 (App. 2018) (citing Ariz. R. Fam. L. P. 5(A)). Because the superior court had discretion to hear the matter without transferring it to the family court, no error occurred.

VI. Attorney's Fees

¶19 Servin requests an award of his attorney's fees under A.R.S. § 13-3602(S). Section 13-3602(S) is inapplicable because it addresses appeals from a municipal court to a superior court. We therefore decline to award fees.

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[4] Servin also claims these issues were later considered when the court denied his motion for court-monitored communication, but the record is devoid of information to support his claim. It was Servin's "responsibility to preserve the record and ensure that it contained the materials relevant to his appeal." *See Michaelson v. Garr*, 234 Ariz. 542, 546, ¶ 13 (App. 2014). We presume the evidence supports the judgment. *Baker v. Baker*, 183 Ariz. 70, 73 (App. 1995); *see also* ARCAP 11.

CONCLUSION

¶20 We vacate the Amended Order entered against Servin and remand to the superior court for further proceedings.

AMY M. WOOD • Clerk of the Court
FILED: AA