IN THE

# ARIZONA COURT OF APPEALS

DIVISION TWO

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THOMAS M. FITZWILLIAMS AND/OR ON BEHALF OF
T.F., A MINOR,
*Plaintiff/Appellee*,

*v.*

LOWELL W. TACK,
*Defendant/Appellant*.

No. 2 CA-CV 2013-0025
Filed December 6, 2013

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Appeal from the Superior Court in Pinal County
No. S1100DO201202268
The Honorable Dwight P. Callahan, Judge Pro Tempore

**AFFIRMED**

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COUNSEL

Burke Panzarella Rich, P.C., Phoenix
By Heather A. Cornwell
*Counsel for Plaintiff/Appellee*

Broening Oberg Woods & Wilson, P.C., Phoenix
By Terrence P. Woods
*Counsel for Defendant/Appellant*

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**MEMORANDUM DECISION**

Presiding Judge Kelly authored the decision of the Court, in which Judge Espinosa and Judge Eckerstrom concurred.

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K E L L Y, Presiding Judge:

**¶1** In this appeal from the trial court's issuance of an order of protection against him, appellant Lowell Wayne Tack argues that the court erred in its admission of certain evidence and that the remaining evidence did not support the order requested by appellee Thomas Fitzwilliams. Because we conclude the court did not abuse its discretion in admitting hearsay evidence, we affirm.

**Factual and Procedural Background**

**¶2** "We view the evidence in the light most favorable to upholding the trial court's ruling." *Mahar v. Acuna*, 230 Ariz. 530, ¶ 2, 287 P.3d 824, 826 (App. 2012). Fitzwilliams sought and obtained an order of protection from the trial court in December 2012 at an ex parte proceeding.[1] The order prohibited Tack from contact with Fitzwilliams and his daughter, T.F., a minor. After Tack was served with the order, he requested a hearing. Following the hearing in January 2013, the court affirmed its order, with a modification that is not pertinent to this appeal. Tack argues the court erred in entering the order because no admissible evidence supported its entry and the evidence that was properly admitted established the order should not have been entered. We have jurisdiction pursuant to Rule 9(B)(2), Ariz. R. Prot. Order P., and A.R.S. §§ 12–120.21(A)(1), 12-2101(A)(1).

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[1]An injunction against harassment which was entered at the same time subsequently was vacated and is not part of this appeal.

**Discussion**

**¶3** Tack argues there was no admissible evidence to support the trial court's findings of a domestic relationship and sexual conduct between Tack and T.F., and the order of protection therefore was not warranted. We review the trial court's issuance of an order of protection for an abuse of discretion. *Cardoso v. Soldo*, 230 Ariz. 614, ¶ 16, 277 P.3d 811, 816 (App. 2012). Under this standard, we will uphold the order if there is any reasonable evidence in the record to sustain it. *See State v. Morris*, 215 Ariz. 324, ¶ 77, 160 P.3d 203, 220 (2007). Because the trial court is in the best position to judge the credibility of witnesses and evaluate conflicts in the evidence, we generally defer to its findings. *See Goats v. A.J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 169, 171, 481 P.2d 536, 539, 541 (1971). We also review for an abuse of discretion the trial court's admission of evidence. *State v. McGill*, 213 Ariz. 147, ¶ 30, 140 P.3d 930, 937 (2006).

**¶4** At the hearing on the protective order, Fitzwilliams testified that his daughter, T.F., who was sixteen years old at the time of the hearing, had told him that Tack, a family friend, had raped her numerous times—the first time when she was fourteen. Fitzwilliams testified that Tack's conduct began after T.F. revealed she was a lesbian. He claimed Tack had told T.F. that he would show her what "a real man is like" and that she "should be with a man." And, according to T.F., "[Tack] kept coming back, he kept trying to show her what she had to know." Fitzwilliams stated Tack had been indicted for sexual assault, sexual abuse, and kidnapping the previous year and had spent a year in jail awaiting trial before the charges were dismissed.[2] Fitzwilliams also explained that T.F. was attending school out of state and that an order of protection would allow her peace of mind so she could return to Tucson.

[2]In connection with the order of harassment which subsequently was dismissed, Fitzwilliams also stated that Tack and his wife had telephoned Fitzwilliams's wife numerous times while Tack was incarcerated. Fitzwilliams explained he was out of town a lot and was concerned for his family's safety.

**¶5** In addition to Fitzwilliams's testimony, two documents provided by Fitzwilliams were admitted. The first of the two exhibits admitted at the hearing was an excerpt from a police report which contained transcribed text messages between T.K. and a man identified as Wayne. Tack, whose middle name is Wayne, had no objection to their admission. The second consisted of written statements of two people who knew both the Tack and Fitzwilliams families through scouting activities. According to Fitzwilliams, both witnesses had prepared the statements at the request of a police detective.

**¶6** Tack objected to the admission of these statements on the grounds that they were "twice hearsay." The court acknowledged both statements were hearsay, concluded they were reliable for the purpose of showing the relationship between T.F. and Tack, and admitted them for that purpose only. The court stated the hearsay evidence was permitted under the special rules for hearings on orders of protection.

**Admissibility of Hearsay Evidence**

**¶7** On appeal, Tack again objects on hearsay grounds in challenging the admission of Fitzwilliams's testimony and the witness statements. In protective order hearings, however,

> All relevant evidence is admissible, except the court may exclude evidence if:
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> a. the probative value is outweighed by the danger of unfair prejudice;
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> b. the evidence results in confusion of the issues;
>
> c. admitting the evidence may result in undue delay;
>
> d. a needless presentation of cumulative evidence would result, or
>
> e. the evidence lacks reliability.

Ariz. R. Prot. Order P. 5(A)(1). The committee comment to this rule states that it "is intended to give the court broad discretion in determining whether proffered evidence shall be admissible in any individual protective order hearing." Ariz. R. Prot. Order P. 5(A)(1) committee cmt.

**¶8** Tack states correctly that Fitzwilliams was the only witness for the plaintiff, and that Fitzwilliams acknowledged he had not observed any sexual activity between Tack and T.F. He also states correctly that Fitzwilliams's testimony was based on what he had been told by T.F., prosecutors, detectives, and others. He does not challenge the probative value of this evidence, nor does he maintain it should be excluded because it confused the issues, resulted in undue delay, or was a needless presentation of cumulative evidence. *See* Ariz. R. Prot. Order P. 5(A)(1). We presume that his hearsay objection was founded upon the lack of reliability often associated with hearsay evidence. *See State v. Allen*, 157 Ariz. 165, 172, 755 P.2d 1153, 1160 (1988) (out-of-court statements generally lack guarantees of trustworthiness and cannot be tested through cross-examination; they are thus generally barred from being admitted as evidence, absent an enumerated exception or exclusion).

**¶9** Because Rule 5 and its comment make clear the intent of the rule is to give the court broad discretion in determining the admissibility of evidence at a protective order hearing, we cannot say the court erred in admitting Fitzwilliams's testimony and the two witness statements. *See* Ariz. R. Prot. Order P. 5(A)(1) & committee cmt. Fitzwilliams testified his information came from his daughter, law enforcement, and family friends. Tack did not object to the admission of text messages that revealed T.F. communicated by text with a person designated as "Wayne," that Lowell Tack's middle name was Wayne, and that "Wayne" made statements suggesting a sexual relationship between the two, including the question "[A]re you having my baby?" Tack did object to the witness statements, but the court concluded they were reliable, noting they had been prepared at the request of law enforcement,

and admitted them for the limited purpose of showing the relationship between T.F. and Tack.[3]

**¶10** Tack testified that he never had a sexual relationship with T.F. He denied sending any of the text messages that were depicted in photographs possessed by the Florence Police Department. He also claimed to have a scientific report that concluded he had not sent the text messages attributed to him in his criminal case. Tack denied having threatened any member of the Fitzwilliams family and said he had no desire to see any of them.

**¶11** To the extent Tack argues that the trial court should have placed more weight on his testimony because it was direct evidence and not hearsay, we cannot agree. The trial court, as the trier of fact at the order of protection hearing, is in the best position to "weigh the evidence, observe the parties, judge the credibility of witnesses, and make appropriate findings." *See Jesus M. v. Ariz. Dep't of Econ. Sec.*, 203 Ariz. 278, ¶ 4, 53 P.3d 203, 205 (App. 2002). "Absent a clear abuse of discretion, we will not second-guess a trial court's ruling on the admissibility . . . of evidence," *State v. Rodriguez*, 186 Ariz. 240, 250, 921 P.2d 643, 653 (1996), and we do not re-weigh evidence, *In re Estate of Pouser*, 193 Ariz. 574, ¶ 13, 975 P.2d 704, 709 (1999).

**Existence of Domestic Relationship**

**¶12** We next consider whether there was reasonable evidence to support the trial court's conclusion that there was a domestic relationship between Tack and T.F. *See Morris,* 215 Ariz. 324, ¶ 77, 160 P.3d at 220. Under Rule 6(C)(3)(b)(1), Ariz. R. Prot. Order P., the judge "must find that a specific relationship exists, either by statute, blood or marriage, between the plaintiff and the

[3]The statements described Tack's behavior at scouting activities, including his paying special attention to T.F. and his admitting to one witness he had told T.F. that she only thought she was a lesbian because she had not had a "real man" yet and he would show her "what one was." The statements also described T.F.'s acknowledgement that she had been in a sexual relationship with Wayne.

defendant" before an order of protection may be issued. *See also* A.R.S. § 13-3601. Such a relationship exists where the victim and defendant "currently share or previously shared a romantic or sexual relationship." Ariz. R. Prot. Order P. 6(C)(3)(b)(2)(e); § 13-3601(A)(6). In determining whether the relationship qualifies as a romantic or sexual relationship, the court may consider:

> i) the type of relationship.
>
> ii) the length of the relationship.
>
> iii) the frequency of the interaction between the victim and the defendant.
>
> iv) if the relationship has terminated, the length of time since the termination.

Ariz. R. Prot. Order P. 6(C)(3)(b)(2)(e). Here the court concluded there had been a sexual relationship. Given that there was evidence T.F. had reported both consensual and nonconsensual sex with Tack—occurring over a period of time with some frequency—and that during text communications both T.F. and "Wayne" had mentioned the possibility T.F. was pregnant with his child, there was ample evidence for the court to conclude the two had been in a sexual relationship. And although the relationship had been over for more than a year while Tack was incarcerated, he had been released from jail for only a short time before the order of protection had been issued. *See* Ariz. R. Prot. Order P. 6(c)(3) and (3)(a)(1) (in determining reasonable cause to believe whether defendant may commit act of domestic violence or has committed such act, judge shall consider specific acts of domestic violence committed within past year but shall not include in that calculation periods of defendant's incarceration).

**¶13** At the conclusion of the hearing, the trial court found by a preponderance of the evidence that there was a domestic relationship between Tack and T.F. and that the two had engaged in sexual intercourse, and that there had been "one or more" acts of domestic violence against T.F. by Tack. The court then affirmed its

earlier no-contact order.[4] The evidence supports that conclusion and we find no error.

**Disposition**

**¶14** The trial court's order is affirmed.

[4]After finding there was no threat of or prospect for physical violence, the trial court modified the order to allow Tack—a member of the armed forces—to possess firearms.