IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

LOUIS ERNEST CESPEDES,
Petitioner/Appellant,

v.

HON. JACK PEYTON, JUSTICE OF THE PEACE, PIMA COUNTY
CONSOLIDATED JUSTICE COURTS,
Respondent Judge/Appellee,

and

THE STATE OF ARIZONA,
Real Party in Interest/Appellee.

No. 2 CA-CV 2016-0021
Filed February 16, 2017

THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
NOT FOR PUBLICATION
See Ariz. R. Sup. Ct. 111(c)(1); Ariz. R. Civ. App. P. 28(a)(1), (f);
Ariz. R. P. Spec. Act. 8(a).

Appeal from the Superior Court in Pima County
No. C20153890
The Honorable Charles V. Harrington, Judge

AFFIRMED

COUNSEL

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By Mark F. Willimann
Counsel for Petitioner/Appellant

Barbara LaWall, Pima County Attorney
By Nicolette Kneup, Deputy County Attorney, Tucson
Counsel for Real Party in Interest/Appellee

MEMORANDUM DECISION

Judge Espinosa authored the decision of the Court, in which Presiding Judge Staring and Judge Vásquez concurred.

E S P I N O S A, Judge:

¶1 Louis Cespedes appeals from the superior court's order denying special action relief from the trial court's probable cause finding in his misdemeanor child abuse prosecution. For the following reasons, we affirm.

Factual and Procedural Background

¶2 At the outset, we note that we are presented with a limited record and we presume the missing portions of the record support the rulings of the lower courts. *See Nat'l Advert. Co. v. Ariz. Dep't of Transp.*, 126 Ariz. 542, 544, 617 P.2d 50, 52 (App. 1980). The essential facts, however, are largely undisputed. On February 7, 2014, after learning his son J.C. had failed to turn in eight assignments at school, Cespedes telephoned him and said "he was going to get eight straps for missing eight assignments." According to J.C., when Cespedes came home, he retrieved a belt and told J.C. to bend over with his hands on the bed. J.C. did not brace himself as instructed and fell over after the first blow from the belt. Cespedes

continued to strike J.C. on "[his] back, the front of the legs and his hands."

¶3 Cespedes left the apartment and J.C. telephoned his mother, who instructed him to call 9-1-1. Shortly thereafter, Tucson Police Department (TPD) officers arrived, conducted an investigation, and transported J.C. to the Child Advocacy Center (CAC), where he was interviewed and had his injuries photographed. The photos showed bruising on J.C.'s back, both thighs, and left buttock.

¶4 In September 2014, the state filed a one-count complaint in Pima County Justice Court for negligent child abuse under A.R.S. § 13-3623(B), charged as a class one misdemeanor. *See* A.R.S. § 13-604(B)(2). Cespedes filed a "Motion for Finding of Probable Cause" and the trial court scheduled an evidentiary hearing in January 2015. At the hearing, after taking witness testimony, the trial court determined there was probable cause to support the child abuse charge.

¶5 Cespedes filed a motion for reconsideration, arguing the state had not established probable cause because it failed to prove "[Cespedes] did not act with justification." The trial court denied the motion. Cespedes subsequently filed a second motion for reconsideration, adding allegations that the state had failed to present "clearly exculpatory evidence," specifically a medical report prepared by a doctor six days after the reported abuse which "detail[s] the true nature of [J.C.]'s injuries." After another hearing, the trial court denied Cespedes's second motion as well.

¶6 Cespedes sought special action relief in superior court, challenging the trial court's probable cause rulings and requesting that the matter be remanded for "another probable cause hearing." The superior court initially declined jurisdiction, but after reconsideration, accepted jurisdiction and denied relief. Cespedes brought this appeal from the superior court's ruling; we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1). *See also* Ariz. R. P. Spec. Act. 8(a).

Discussion

¶7 When a party appeals a special action initiated in superior court, we conduct a bifurcated review. *State ex rel. Montgomery v. Rogers*, 237 Ariz. 419, ¶ 7, 352 P.3d 451, 453 (App. 2015). If the superior court declines special action jurisdiction, we determine only whether the court abused its discretion in doing so. *Files v. Bernal*, 200 Ariz. 64, ¶ 2, 22 P.3d 57, 58 (App. 2001). But if the superior court accepts jurisdiction and rules on the merits, as it did here, we consider whether it abused its discretion in granting or denying relief. *Id.* To the extent that the resolution of an issue depends on issues of law, we review the court's ruling de novo. *See Cranmer v. State*, 204 Ariz. 299, ¶ 7, 63 P.3d 1036, 1038 (App. 2003).

¶8 At the outset, we note that Cespedes requests we remand this case for "a new finding of probable cause," but it is not clear why he believes he is entitled to such a determination in the first instance. Absent any record evidence to the contrary, we assume Cespedes was charged with the misdemeanor offense pursuant to a complaint "signed by a prosecutor,"[1] and thus no finding of probable cause was required before the issuance of a summons. Ariz. R. Crim. P. 2.4(b) ("If a complaint is signed by a prosecutor, the magistrate shall proceed under Rule 3.1."); Ariz. R. Crim. P. 3.1(a) ("Upon presentment of a complaint signed by a prosecutor, the court shall promptly issue a summons. . . ."). Cespedes acknowledges that only a defendant charged with a felony by complaint is entitled to a preliminary hearing to determine "whether probable cause exists to hold the defendant for trial," Ariz. R. Crim. P. 5.1, 5.3; *see also* Ariz. Const. art. II, § 30 (only felonies require preliminary hearing). He contends, however, that he was not afforded a preliminary hearing and instead characterizes it as a "'probable cause' hearing in accord with A.R.S. § 13-3883(A)(4) in conjunction with Ariz. R. Crim. P. 16.6(b)."

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[1]The complaint is not included in the record. *Cf. Nat'l Advert. Co.*, 126 Ariz. at 544, 617 P.2d at 52.

¶9 Cespedes filed a motion for a hearing "to establish whether the [s]tate ha[d] valid probable cause to go forward in this matter against him," which the trial court granted. *See State v. Jones*, 198 Ariz. 18, ¶ 15, 6 P.3d 323, 328 (App. 2000) (purpose of preliminary hearing is to determine whether probable cause exists to hold person charged to answer for alleged charges). At the hearing, the trial court noted that its purpose was to "determine whether or not there is probable cause . . . to believe that a violation of the statute was committed and that the Defendant committed it." *See* Ariz. R. Crim. P. 5.4. We note that a rose by any other name is still a rose, and the probable cause hearing was for all practical purposes a preliminary hearing. *See* William Shakespeare, *Romeo and Juliet*, act 2, sc. 2. Cespedes was never legally entitled to such a procedure to begin with, and we are aware of no authority, nor has Cespedes cited any, that would require a remand to compel the trial court to hold yet another one.

¶10 Nor do we find persuasive Cespedes's characterization of the probable cause hearing as one "in accord with" § 13-3883(A)(4) and Ariz. R. Crim. P. 16.6(b). Section 13-3883(A)(4) allows a peace officer to conduct a warrantless arrest if there is probable cause to believe "[a] misdemeanor . . . has been committed and probable cause to believe the person to be arrested has committed the offense." Rule 16.6(b), Ariz. R. Crim. P., provides for a motion to dismiss on the ground that a "complaint is insufficient as a matter of law." Cespedes contends that "[a]pplying the statute and the rule harmoniously, if the officer did not have *probable cause* that a crime had been committed, then the [c]ourt can dismiss the 'prosecution' 'upon finding that the . . . complaint is insufficient as a matter of law.'"

¶11 However, unless Cespedes was "arrested" or in custody at the time the misdemeanor charges were filed—which the record does not reflect—no probable cause determination was required before his trial. *See* § 13-3883; Ariz. R. Crim. P. 4.2(a)(4) (at initial appearance, magistrate shall "[d]etermine whether probable cause exists *for the purpose of release from custody*") (emphasis added). Cespedes has cited no authority for the proposition that a

misdemeanor complaint signed by a prosecutor, and served by summons, must be supported by a determination of probable cause. *Cf.* § 13-3883 (probable cause required for arrest on misdemeanor charge). Nor could we reasonably construe his "Motion for Finding of Probable Cause" as a motion to dismiss pursuant to Rule 16.6(b).[2]

¶12 Cespedes having failed to demonstrate legal entitlement to a probable cause hearing under rule or statute, and having raised issues arising from that proceeding, the superior court did not abuse its discretion in denying special action relief and refusing to remand the matter for another probable cause hearing.[3] *Cf. Files*, 200 Ariz. 64, ¶ 2, 22 P.3d at 58. Accordingly, the superior court's judgment is affirmed.

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[2]Pursuant to Rule 16.6(b), a defendant may seek dismissal of a prosecution on the ground that the "complaint is insufficient as a matter of law." Rule 2.3(a), Ariz. R. Crim. P., provides that a complaint "is a written statement of the essential facts constituting a public offense." In his motion, Cespedes challenged the existence of probable cause; he did not argue the complaint was legally inadequate to state the offense charged.

[3]Cespedes has argued the merits of a justification defense at length, mostly focusing on its applicability at the preliminary hearing stage. That argument, as well as related ones regarding the preliminary hearing, is moot in view of our resolution of the dispositive procedural issue, and we do not address them further. We note, however, that justification defenses are appropriately presented to the fact-finder at trial because they usually involve factual and reasonableness determinations. *See, e.g.*, *State v. King*, 225 Ariz. 87, ¶¶ 6, 18, 235 P.3d 240, 242, 244 (2010); *State v. Davis*, 148 Ariz. 391, 392-94, 714 P.2d 884, 885-87 (App. 1986). Furthermore, the state does not disagree that if Cespedes presents evidence of justification at trial, the state must prove beyond a reasonable doubt that he did not act with justification. *See* A.R.S. § 13-205 (once defendant presents evidence of justification, state must prove beyond reasonable doubt defendant's actions not justified); § 13-403(1).