IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

OFFICE OF THE COCHISE COUNTY ATTORNEY,
A POLITICAL SUBDIVISION OF THE STATE OF ARIZONA,
BY AND THROUGH COCHISE COUNTY ATTORNEY,
BRIAN M. MCINTYRE,
Plaintiff/Appellant,

v.

DAVID MORGAN, AN UNMARRIED INDIVIDUAL,
Defendant/Appellee.

No. 2 CA-CV 2018-0093
Filed June 13, 2019

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NOT FOR PUBLICATION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).

Appeal from the Superior Court in Cochise County
No. S0200CV201700670
The Honorable Thomas Fink, Judge

AFFIRMED

COUNSEL

Brian M. McIntyre, Cochise County Attorney
By Sara V. Ransom, Deputy Cochise County Attorney, Bisbee
Counsel for Plaintiff/Appellant

David Morgan, Bisbee
In Propria Persona

Kathleen E. Brody, Legal Director, American Civil Liberties Union Foundation of Arizona, Phoenix
First Amendment Clinic, Arizona State University, Sandra Day O'Connor College of Law, Phoenix
By Gregg P. Leslie, Supervising Attorney pursuant to Rule 38(d), Ariz. R. Sup. Ct., and Karlea Fleming and Rolf Tilley, students certified pursuant to Rule 38(d), Ariz. R. Sup. Ct., Phoenix
Counsel for Amicus Curiae American Civil Liberties Foundation of Arizona, the Reporters Committee for Freedom of the Press, and the Society of Professional Journalists

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MEMORANDUM DECISION

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

E S P I N O S A, Judge:

¶1 The Cochise County Attorney's Office (the "County") appeals the trial court's denial of its application for a preliminary injunction. For the following reasons, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to upholding the trial court's ruling. *See Lane v. Bisceglia*, 15 Ariz. App. 269, 270 (1971). David Morgan is a Cochise County resident who operates a website and social media discussion group dedicated to electronically posting his views and articles about criminal justice topics. In September 2017, Morgan obtained an unredacted copy of the grand jury transcript for a murder case the County was prosecuting against Roger Wilson. Morgan received the transcript, which contained the full names of the grand jurors, and a grand jury exhibit consisting of a photograph of the deceased victim in a hospital bed, from Wilson's defense attorney after Morgan offered to deliver the materials to Wilson at the jail where he was incarcerated awaiting trial. He also obtained a sealed motion for remand after it had been filed with the

superior court.[1] Morgan thereafter emailed the materials to several third parties and in October 2017, posted a link to the grand jury transcript, photograph, and the remand motion on his social media page. The victim's mother brought the posting to the County's attention, and the County asked Morgan to remove the link. The grand jury transcript and exhibits were subsequently ordered sealed by the trial court. Morgan, however, did not remove the link.

¶3 The County filed a complaint against Morgan seeking a declaration that, by posting the transcript and motion and maintaining them online, Morgan had violated a criminal statute, A.R.S. § 13-2812, two civil statutes, A.R.S. §§ 21-312 and 39-121.04, and the trial court order sealing the materials.[2] The complaint also sought an order permanently enjoining Morgan from maintaining the materials online or otherwise publicly disseminating them. The County simultaneously applied for a temporary restraining order and preliminary injunction. In his answer to the County's filings, Morgan raised the First Amendment as his primary defense, claiming his conduct was constitutionally protected.

¶4 After a two-day evidentiary hearing, the trial court orally pronounced its findings and, in a signed order, denied the County's application for the preliminary injunction. The County now appeals that denial. We have jurisdiction in accordance with A.R.S. § 12-2101(A)(5)(b). *See Bulova Watch Co. v. Super City Dep't Stores of Ariz., Inc.*, 4 Ariz. App. 553, 555 (1967).

Discussion

¶5 Preliminary injunctions are disfavored because they affect the status quo pending a trial on the merits. *Shoen v. Shoen*, 167 Ariz. 58, 63 (App. 1990). A party may obtain a preliminary injunction by showing "a strong likelihood of success on the merits, a possibility of irreparable injury if the injunction is not granted, a balance of hardships weighing in [its]

[1]Wilson's motion for remand had been filed pursuant to Rule 12.9, Ariz. R. Crim. P., and was subsequently sealed by the trial court after Morgan had obtained it from the clerk.

[2] The County does not challenge the denial of the preliminary injunction as to this court order. Accordingly, any such issue that could have been raised on appeal has been abandoned and waived. *See Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009).

favor, and public policy favoring the requested relief." *TP Racing, L.L.L.P. v. Simms*, 232 Ariz. 489, ¶ 21 (App. 2013). Courts may apply a "sliding scale," meaning that the moving party may obtain relief by showing both that it probably would succeed on the merits of the underlying action and the possibility of irreparable injury if the injunction is not granted. *Ariz. Ass'n of Providers for Persons with Disabilities v. State*, 223 Ariz. 6, ¶ 12 (App. 2009). "The scope of our review of an order denying a preliminary injunction is limited to determining whether the trial court committed a clear abuse of discretion." *Shoen*, 167 Ariz. at 62. Unless the court made a mistake of law or clearly erred in finding the facts or applying them to the legal criteria for granting an injunction, we will affirm. *Id.*

¶6 The County raises several arguments, contending the trial court erred in finding the County was not likely to succeed on the merits because the court misinterpreted A.R.S. § 13-2812, improperly considered the constitutionality of § 13-2812, failed to make factual findings related to A.R.S. §§ 21-312 and 39-121.04, wrongly concluded Morgan lawfully obtained the materials, and disregarded First Amendment authority cited by the County. We address each argument in turn.

Interpreting § 13-2812

¶7 The County first argues the trial court misconstrued § 13-2812 and determined contrary to the record "that Cochise County was asserting that mere possession of the materials exposes [numerous] individuals to prosecution." A review of the court's full comments, however, suggests otherwise. Section 13-2812 criminalizes the knowing disclosure "to another the nature or substance of any grand jury testimony," absent enumerated exceptions. At one point, the court seemed to suggest the statute would punish the mere possession of grand jury information, stating "you've got 100,000 possible violators of the law" because those people "now have this information about the grand jury." But the court went on to note that those possessors would not be free to disseminate the information "or risk being in . . . criminal violation of the law," indicating the court was aware that it was dissemination, not mere possession, of grand jury information that is prohibited. Thus, we are not persuaded the court made a mistake of law in this respect.

Constitutionality of § 13-2812

¶8 In concluding the County did not demonstrate a strong likelihood of success on the merits, the trial court considered the

constitutionality of § 13-2812. The court did not find the statute unconstitutional, but reasoned that under the County's interpretation, in which a person could be enjoined after publishing grand jury information, the statute was "so broad that it would on its face . . . reach a substantial amount of constitutionally protected conduct and speech." The County appears to argue that the court's consideration of the constitutionality of the statute on overbreadth and vagueness grounds was erroneous because Morgan did not raise the issue and had no standing to do so. But because Morgan did not challenge the statute for being overbroad and vague, we need not consider the issue of his standing. *See Progressive Specialty Ins. Co. v. Farmers Ins. Co.*, 143 Ariz. 547, 548 (App. 1985) (appellate courts should not give advisory opinions or decide questions unnecessary to disposition of appeal). We likewise need not address the County's contention that the court erroneously found the statute unconstitutional or should have given the statute a constitutional construction because the court did not find the statute unconstitutional.

¶9 As to the County's argument that considering the constitutionality of the statute without Morgan having raised such concerns was improper, we note the County has not identified any authority for the proposition that a trial court may not consider the constitutionality of a statute that is advanced as the basis for granting a preliminary injunction. And in light of a trial court's inherent discretion in crafting equitable relief such as an injunction, *see City of Tucson v. Clear Channel Outdoor, Inc.*, 218 Ariz. 172, ¶ 51 (App. 2008), we cannot say the court's consideration of constitutional principles here was an abuse of that discretion. More importantly, the County has not demonstrated how a violation of § 13-2812 would authorize an injunction after the protected material has been made public.

Factual Findings

¶10 The County also contends the trial court erred "by failing to make any findings" with respect to Morgan's violations of §§ 21-312 and 39-121.04. At the outset, we note the County cites no authority requiring the court to make such findings. But in any event, the County has not demonstrated that these statutes clearly apply to Morgan, thus we cannot say the court erred in failing to address them. Section 21-312(A) provides that "juror names or other juror information shall not be released unless specifically required by law or ordered by the court." When read in conjunction with subsection (B), however, which expressly applies to counsel and parties, this statute does not appear to regulate the conduct of

a non-party to the underlying criminal case, such as Morgan. *See State v. Seyrafi*, 201 Ariz. 147, ¶ 13 (App. 2001) (statutory provisions interpreted in context with related provisions). Likewise, § 39-121.04 requires that before "the release of any record created or received by or in the possession of a law enforcement or prosecution agency that relates to a criminal investigation or prosecution" containing a victim's image, the person seeking release of the record "shall establish that the public's interest in disclosure outweighs the . . . victim's right to privacy." This statute sets forth the standard for ordering disclosure of public records held by the state and sought by the public. It does not, on its face, appear to govern the conduct of private citizens, nor, as with § 13-2812, does it provide a legal basis for obtaining injunctive relief. Accordingly, we conclude the trial court did not err by failing to apply, or make findings related to, these statutes.

Acquisition and Dissemination of Grand Jury Materials

¶11 The County next contends the trial court abused its discretion by concluding that Morgan "did not break any law" when he obtained the grand jury transcript and specifically challenges the court's failure to make factual findings about Morgan's conduct in both securing and disseminating the protected materials. But this is not supported by the record. The court expressly found that Morgan "obtained the grand jury information without breaking the law" because he obtained it from the defense attorney who had it "as a matter of course." To the extent the County disagrees with the court's conclusion, we note it has not cited any law Morgan violated in obtaining the materials. Section 13-2812 criminalizes dissemination of grand jury matters, not their acquisition. And the County does not claim that Morgan engaged in criminal activity or arguably became an accomplice in the defense attorney's violation of the statute by representing to the defense attorney, arguably pretextually, that he would deliver the transcript to Wilson at the jail.[3] Accordingly, the County has not shown the court abused its discretion in concluding Morgan did not break any laws in obtaining the materials at issue.

[3]In an oral ruling in which the trial court concluded "Morgan got the material without breaking any law," the court suggested the defense attorney was not covered by the exception in § 13-2812 for those "in the proper discharge of official duties," but then expressed doubt that the statute prohibited his disclosure of the grand jury information to Morgan.

¶12 The trial court also found that Morgan published "excerpts of the grand jury transcripts along with hyperlinks for readers to view . . . the full transcript of the grand jury proceedings," but made no explicit determination that in doing so Morgan had or had not violated the statute, only rejecting it as the basis for a preliminary injunction in this case. Thus, the court did make findings both as to how Morgan obtained the grand jury materials and what he did with them thereafter. To the extent the court may have erred in suggesting Morgan had not violated § 13-2812, Morgan was not charged with that offense and its commission was not squarely at issue.[4]

¶13 Finally, because the state has not cited any persuasive authority supporting a preliminary injunction on facts such as those of this case, and because the issue of injunctive relief is still pending trial, we need not consider the constitutional arguments urged by the parties and take no prospective position as to the constitutionality of such a remedy. *See State v. Korzuch*, 186 Ariz. 190, 195 (1996) ("[W]e should resolve cases on non-constitutional grounds in all cases where it is possible and prudent to do so."); *Fragoso v. Fell*, 210 Ariz. 427, ¶ 6 (App. 2005) (same); *Progressive Specialty Ins. Co.*, 143 Ariz. at 548 (appellate courts should not give advisory opinions or decide questions unnecessary to disposition of appeal).

Disposition

¶14 Because the County has not demonstrated the trial court clearly abused its discretion in declining to find a strong likelihood of success on the merits and denying the County's application for a preliminary injunction, the court's ruling is affirmed.

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[4]As noted above, § 13-2812 makes it a class one misdemeanor to "knowingly disclose[] to another the nature or substance of any grand jury testimony or any decision, result or other matter attending a grand jury proceeding," unless "in the proper discharge of official duties, at the discretion of the prosecutor to inform a victim of the status of the case or when permitted by the court in furtherance of justice." *Cf. United States v. Friedman*, 445 F.2d 1076, 1078, 1089 (9th Cir. 1971) (affirming contempt convictions for disclosing unreleased grand jury transcripts in violation of federal grand jury secrecy rule). We express no opinion as to whether Morgan violated § 13-2812 and could be criminally charged and prosecuted for that offense.