IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

SARAH AMRHEIN,
Plaintiff/Appellee,

v.

FALLON MCCLELLAN SR.,
Defendant/Appellant.

No. 2 CA-CV 2019-0128
Filed August 21, 2020

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NOT FOR PUBLICATION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 Gila County
No. PO400PO201900040
The Honorable Timothy M. Wright, Judge
The Honorable Gary V. Scales, Judge Pro Tempore

AFFIRMED IN PART;
REMANDED WITH DIRECTION IN PART

COUNSEL

Crider Law Firm PLLC, Mesa
By Brad J. Crider
Counsel for Plaintiff/Appellee

The Nolan Law Firm P.L.L.C., Mesa
By Cari McConeghy Nolan
Counsel for Defendant/Appellant

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Fallon McClellan appeals from the trial court's order of protection preventing him from having any contact with his two minor children, L.M. and T.M., and their mother, Sarah Amrhein. For the reasons that follow, we affirm in part and remand with directions in part.

Factual and Procedural Background

¶2 In April 2019, Amrhein filed a petition for an order of protection against McClellan, listing herself and their mutual children, L.M. and T.M., as well as her child from a different relationship, and another adult. In the petition, Amrhein noted that a previous order of protection had expired and McClellan "continues to threaten [her]." Amrhein supported her petition by explaining that as recently as October 2018 McClellan had called her and left a voice recording saying, "I hope your dude wears body arm[o]r cause I[']m coming for you and I[']m loaded." Following an ex parte hearing, the trial court granted Amrhein's petition for an order of protection for herself, L.M., and T.M. but denied an order of protection for the other individuals listed on the petition. Two months later, McClellan requested a hearing to contest the order of protection. He alleged that he had not threatened Amrhein and insisted that she was using the order of protection as "a tactic to keep [him] from communicating with [his] children." The court granted McClellan's request and scheduled the contested hearing for the following month.

¶3 At the hearing, Amrhein testified that McClellan "has a history of violence and has made many threats to [her]." Amrhein then played for the trial court an audio recording of the October 2018 threat that she had included in her petition. The audio recording was of McClellan's voice message on Amrhein's phone saying, "make sure your dude[is] wearing body armor" because "I'm going to be . . . loaded." After the recording was played, Amrhein reiterated to the court that McClellan "has a history of violence" and has made "threats towards [her]." At that time, the court found Amrhein had made a prima facie case to issue an order of protection.

¶4 McClellan then testified that he "did[not] hear any threats to [Amrhein's] person on th[e] audio" and explained that the matter "is a custody dispute" and he is "just . . . trying to see his kids." He later admitted that a parenting-time order had been entered in 2012, but that he had recently served Amrhein with a petition to modify that parenting time order and insisted the matter should be heard in the "family [c]ourt" where his petition was pending. McClellan did not provide the trial court with any evidence of the 2012 parenting time order or a copy of his alleged recent petition to modify parenting time at the hearing. Nonetheless, McClellan urged the court to remove L.M. and T.M. from the order of protection because he would not be "able to see or contact [his] children" if the order was allowed to remain in effect as to them.

¶5 The trial court denied McClellan's request and ordered the April 2019 order of protection remain in effect. It explained that the "audio tape is very threatening," and further clarified that their children would remain on the order of protection until McClellan "do[es] something about it" during a "custody hearing where[] [he] live[s]." McClellan appealed the court's order, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(5)(b). *See* Ariz. R. Protective Order P. 42(a)(2) (defining order of protection after hearing as appealable); *Mahar v. Acuna*, 230 Ariz. 530, ¶ 11 (App. 2012) (signed protective order after hearing is final, appealable order).

Trial Court's Jurisdiction

¶6 McClellan argues the trial court did not have jurisdiction to issue an order of protection because there was "a family law Order in place regarding custody and parenting time" and the matter "should have been transferred to Maricopa County Superior Court for the Order of Protection Hearing." "A trial court's jurisdiction is a matter of law that we review de novo." *Duwyenie v. Moran*, 220 Ariz. 501, ¶ 7 (App. 2009).

¶7 "The superior court has exclusive jurisdiction to issue a protective order when a family law action is pending between the parties." Ariz. R. Protective Order P. 34(a). An action is pending if: (1) "an action has begun but no final judgment, decree, or order has been entered," or (2) "a post-decree proceeding has begun but no final order determining that proceeding has been entered." Ariz. R. Protective Order P. 34(a)(1), (2).

¶8 In this case, assuming without deciding McClellan's suggestion is correct, that under Rule 34(a) "*the* superior court" means "the one that has family law jurisdiction," he ignores that a matter must be pending to prompt the particular court's exclusive authority to hear the

matter. *See id*. Specifically, as stated in Rule 34(a), "[t]he superior court" only has "exclusive jurisdiction" if there is evidence of a "pending family law action." Although both parties agreed there had been a previous family law matter concerning parenting time that resulted in an order, and McClellan claimed that he had filed a petition to modify that previous parenting-time order, he failed to provide the trial court with any evidence that there was in fact a pending action as defined in either Rule 34(a)(1) or (2). The court was therefore under no obligation to transfer the matter without such verification and had jurisdiction to issue the protective order. *See* Ariz. R. Protective Order P. 34(a). Accordingly, we find no error concerning jurisdiction. *See Duwyenie*, 220 Ariz. 501, ¶ 7.

Due Process

¶9 McClellan asserts that the audio recording played during the contested hearing was "the only piece of evidence actually considered as evidentiary support for the [order of protection]," but it "cannot be heard in the [digital] recording [of the hearing] and was not transcribed by the court reporter." He therefore contends the trial court's failure to preserve the audio recording has denied him "due process and a fair review of the lower court's ruling" on appeal. We review constitutional issues de novo. *See State v. West*, 238 Ariz. 482, ¶ 12 (App. 2015).

¶10 "A judicial officer must cause all contested protective order hearings and, where practicable, all *ex parte* hearings to be recorded electronically or by a court reporter." Ariz. R. Protective Order P. 18. "An appeal from a contested hearing that was not electronically recorded or otherwise reported results automatically in a new hearing in the original trial court." *Id.*

¶11 The ex parte order of protection hearing conducted by the trial court in April 2019 was digitally recorded in compliance with Rule 18. Additionally, the contested order of protection hearing in July 2019 was both digitally recorded and transcribed by a court reporter, also in compliance with Rule 18. Although the court reporter was unable to transcribe the portion that included the audio recording of McClellan's message, the digital recording sufficiently preserved the audio recording's substance that was played during the hearing. Despite McClellan's assertion that the audio recording "cannot be heard in the recording and was not transcribed . . . thereby violating Rule 18," based on our review of the record, the digital recording clearly preserves the threats McClellan made on the audio recording: "make sure your dude[is] wearing body armor" because "I'm going to be . . . loaded." McClellan was therefore not

denied due process below or on appeal, nor is he entitled to a new hearing under Rule 18. *See West*, 238 Ariz. 482, ¶ 12.

¶12 Further, because the digital recording from the contested hearing sufficiently preserved the audio recording, we find unpersuasive McClellan's contention that "the lack of preservation of the record . . . precludes any factual review by this Court and requires that the case be reversed and remanded for a new record." As did the trial court pursuant to Rule 23(d), Ariz. R. Protective Order P., and A.R.S. §§ 13-3601 and 13-3602(E), we were able to listen to the audio recording of McClellan threatening Amrhein. The record was therefore properly preserved to permit a "factual review by this Court," and we conclude the court did not violate McClellan's right to due process when granting or continuing the order of protection as to Amrhein. *See Savord v. Morton*, 235 Ariz. 256, ¶ 16 (App. 2014) (due process claims reviewed de novo); *see also* Ariz. R. Protective Order P. 23(e).

Sufficiency of the Evidence

¶13 McClellan also contends there was insufficient evidence "presented or even alleged that would indicate any factual basis to support the children being on the Order of Protection." "We review an order of protection for an abuse of discretion." *Savord*, 235 Ariz. 256, ¶ 10. "A trial court abuses its discretion when it makes an error of law in reaching a discretionary conclusion." *Id.* ¶¶ 10, 14 (granting petition for order of protection that fails to list offense enumerated in § 13-3601 is error of law).

¶14 In order to grant an order of protection a judicial officer "must find reasonable cause to believe that the defendant may commit an act of domestic violence or has committed an act of domestic violence within the past year." Ariz. R. Protective Order P. 23(e)(1). When the petition lists "any other person . . . , including any child with whom the defendant has a legal relationship," the judicial officer must make a separate reasonable cause determination for each person listed on the petition. *See* Ariz. R. Protective Order P. 23(e)(2); *see also Savord*, 235 Ariz. 256, ¶¶ 12-14 (trial court committed error of law when it issued order of protection for defendant's child without reasonable cause determination of domestic violence against child specifically). "A judicial officer cannot include a defendant's child in a protective order unless there is reasonable cause to believe: (A) physical harm may result or has resulted to the child, or (B) the alleged acts of domestic violence involved the child." Ariz. R. Protective Order P. 5(b)(1). And before granting an order of protection prohibiting contact between a defendant and his or her child, the judicial officer must

also consider: "(1) whether the child may be harmed if the defendant is permitted to maintain contact with the child, and (2) whether the child may be endangered if there is contact outside the presence of the plaintiff." Ariz. R. Protective Order P. 35(b).

¶15 The trial court erred by entering an order of protection as to L.M. and T.M. for three reasons. First, Amrhein's petition did not describe any threats to L.M. and T.M. specifically, nor did the court inquire about any specific acts of domestic violence toward the children under § 13-3601 during either hearing as required by Rule 23(e)(2).[1] Second, there was no evidence presented at the hearing that the children were subject to physical harm or that the acts of domestic violence between McClellan and Amrhein involved the children pursuant to Rule 5(b)(1). And similarly, third, the court did not determine if there was reasonable cause to believe the children would be harmed if McClellan were permitted to have contact with them or whether the children would be endangered if they had contact with McClellan without Amrhein being present before it issued the order of protection as required by Rule 35(b). The court only stated generally that the "audio tape is very threatening" and only mentioned the children specifically to explain to McClellan that L.M. and T.M. were "on [the protection order] and . . . going to stay on [the protection order]" until he received "some kind of custody order out of . . . wherever it is [he decided] to file."

¶16 The trial court therefore abused its discretion in issuing the order of protection for L.M. and T.M. when it granted Amrhein's petition at the ex parte hearing and ordered that it remain in effect after the contested hearing. *See* Ariz. R. Protective Order P. 23(e)(2); *see also Savord*, 235 Ariz. 256, ¶¶ 12-14.[2]

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[1]Notably, on the audio recording McClellan states, "just because you [have not] heard from me doesn't mean I [am not] . . . coming for those kids." Neither party refers to this statement in their briefs, nor did the trial court mention it in its order in determining whether or not it warranted L.M. and T.M. to be included on the order for protection under Rules 5(b)(1), 23(e)(2), or 35(b).

[2]Because of our decision, we do not address the constitutional issues McClellan raises on appeal in which he alleges he was denied his "rights to his children" under Rule 35(b).

Attorney Fees

¶17 Amrhein requests her attorney fees and costs on appeal pursuant to A.R.S. § 12-349 and in accordance with Rule 21, Ariz. R. Civ. App. P. She contends McClellan "has unreasonably contested the trial court's ruling by his refusal to acknowledge his own actions." As explained above and reflected in our decision, however, McClellan did not "unreasonably contest[] the trial court's ruling," and we deny Amrhein's request for attorney fees. *See* § 12-349. And because Amrhein is not the prevailing party, she is not entitled to her costs. *See* Ariz. R. Civ. App. P. 21; *see also Braillard v. Maricopa County*, 224 Ariz. 481, ¶ 60 (App. 2010) (prevailing party entitled to costs upon compliance with Rule 21).

Disposition

¶18 For the reasons stated above, we affirm in part and remand with direction in part for the trial court to consider whether the record supports its protective order as to the children, and if so to make the necessary findings.