IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

KATHLEEN MARY DERRIG,
Plaintiff/Appellee,

v.

JOHN ANTHONY ALEXANDER,
Defendant/Appellant.

No. 2 CA-CV 2019-0193
Filed December 18, 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NOT FOR PUBLICATION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 Pima County
No. DV20191766
The Honorable Cathleen Linn, Judge Pro Tempore

AFFIRMED

COUNSEL

Kathleen Derrig, Marana
In Propria Persona

Salam A. Tekbali, Tucson
Counsel for Defendant/Appellant

MEMORANDUM DECISION

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

E P P I C H, Presiding Judge:

¶1 John Anthony Alexander appeals from the trial court's orders issuing and affirming an order of protection and from the Notice to Sheriff of Brady Indicator ("Brady Notice"),[1] entered in favor of his previous romantic partner, Kathleen Derrig. 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. *Mahar v. Acuna*, 230 Ariz. 530, ¶ 2 (App. 2012). In September 2019, Derrig filed a petition for an order of protection, alleging Alexander had surreptitiously taken pictures of her during sexual intercourse without her consent, disseminated those pictures, and harassed her in person and via text messages. At an *ex parte* hearing, the trial court found Alexander had committed an act of domestic violence against Derrig within the last year and issued an order of protection prohibiting Alexander from having any contact with Derrig, coming within 100 feet of her, and going "to or near" her residence or school. The order also indicated that "[Alexander] 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 [Derrig]."

¶3 Alexander, who was attending the same law school as Derrig, contested the order. At a hearing, Derrig and Alexander testified and the trial court admitted into evidence multiple exhibits, including a picture taken by Alexander while he and Derrig were engaged in sexual activity and screenshots of various text messages related to that picture. The court

[1]A "Brady Notice" refers to notification requirements related to the federal Brady Handgun Violence Prevention Act, Pub. L. No. 103–159, 107 Stat. 1536 (1993); *see also* 18 U.S.C. § 922(g)(8)(C)(i)-(ii) (providing that firearm possession shall be unlawful for people subject to certain court orders).

found that Derrig had demonstrated reasonable cause to believe Alexander had committed an act of domestic violence within the past year. The court then ruled that the order of protection should remain in effect and issued a Brady Notice. Alexander appealed that order.[2] We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1),[3] (5)(b). *See* Ariz. R. Protective Order P. 42 (order of protection after hearing is appealable); *Mahar*, 230 Ariz. 530, ¶ 11.[4]

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[2]Alexander initially filed a motion for reconsideration in an attempt to amend the order of protection and narrow its scope. The trial court failed to issue a ruling before Alexander filed his notice of appeal, which divested the trial court of jurisdiction to proceed on that motion. *See In re Marriage of Flores & Martinez*, 231 Ariz. 18, ¶ 10 (App. 2012). In any event, the trial court had no authority to rule on this motion because, after a contested hearing, orders of protection may only be amended by request of the plaintiff or by appeal. *See Vera v. Rogers*, 246 Ariz. 30, ¶¶ 20-21 (App. 2018) (trial court's "authority to amend an active order of protection after a contested hearing" is very limited).

[3] In December 2019, we suspended the appeal and revested jurisdiction in the trial court to consider whether judgment was final and, if so, to issue a judgment containing language pursuant to Rule 54(c), Ariz. R. Civ. P. *See* Ariz. R. Protective Order P. 2 (Arizona Rules of Civil Procedure apply when not inconsistent with these rules). In January 2020, the court issued an order finding no matters remained pending and the order of protection was final and appealable under Rule 54(c). We then vacated the stay and reinstated the appeal. Because certifying the judgment as final pursuant to Rule 54(c) was a purely ministerial task, this cured the premature notice of appeal. *See McCleary v. Tripodi*, 243 Ariz. 197, ¶ 9 (App. 2017). Notably, we ordered compliance with Rule 54(c) because it was mandated in 2019, but effective January 1, 2020, this language is no longer required for an appeal of an order of protection because our supreme court recently eliminated this requirement when it amended the rules of protective order procedure. Ariz. Sup. Ct. Order R-19-0009 (Aug. 27, 2019); *see also* Ariz. R. Protective Order P. 42.

[4]Although an order of protection expires a year after service on a defendant, *see* A.R.S. § 13-3602(N), and the order at issue has expired, this appeal is not moot. *See Cardoso v. Soldo*, 230 Ariz. 614, ¶ 14 (App. 2012) ("Because expired orders of protection carry with them significant collateral legal and reputational consequences," they are not "moot for purposes of appellate review.").

Order of Protection

¶4 We review an *ex parte* order of protection and the decision of the trial court to uphold such an order for an abuse of discretion. *See Savord v. Morton*, 235 Ariz. 256, ¶ 10 (App. 2014) (issuing *ex parte* order of protection); *Michaelson v. Garr*, 234 Ariz. 542, ¶ 5 (App. 2014) (upholding order of protection). A trial court "abuses its discretion when it makes an error of law in reaching a discretionary conclusion or '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.'" *Michaelson*, 234 Ariz. 542, ¶ 5 (quoting *Mahar*, 230 Ariz. 530, ¶ 14). "We review any questions of law de novo." *Id.*

***Ex Parte* Hearing**

¶5 Alexander argues the trial court abused its discretion in issuing the *ex parte* order of protection because it failed to make "specific findings on the record" that he committed an act of domestic violence and there was insufficient evidence for the court to issue such an order.

¶6 A plaintiff seeking an order of protection must file a petition alleging "each specific act of domestic violence that will be relied on." Ariz. R. Protective Order P. 23(b). After an *ex parte* hearing, a court may grant the order if it finds there is a qualifying domestic relationship, *see* Ariz. R. Protective Order P. 23(f), and "reasonable cause to believe that the defendant . . . has committed an act of domestic violence within the past year." Ariz. R. Protective Order P. 23(e)(1); *see also* A.R.S. § 13-3602(E)(2). A prior romantic or sexual relationship is a qualifying domestic relationship under which an order of protection may be obtained, *see* Ariz. R. Protective Order P. 23(f)(2)(E), and surreptitious photography, harassment, and unlawful disclosure of sexual images are considered acts of domestic violence for the purpose of obtaining such an order, *see* A.R.S. § 13-3601(A) (listing A.R.S. § 13-2921 (harassment), A.R.S. § 13-3019 (surreptitious photography), and A.R.S. § 13-1425 (unlawful disclosure of sexual images)).

¶7 Alexander cites *Christopher K. v. Markaa S.*, 233 Ariz. 297, ¶ 19 (App. 2013)—a child custody case—for the proposition that "a finding of domestic violence must be justified by specific findings on the record demonstrating the reasons for the court's decision." But *Christopher K.* is inapplicable here because this is not a child custody case. In the context of child custody, A.R.S. § 25-403(B) expressly requires courts to "make specific findings on the record." Contrary to Alexander's suggestion, nothing in Rule 23(e)(1) or § 13-3602 requires courts to do the same in a case involving

an *ex parte* order of protection. In this case, the court only needed to find reasonable cause to believe an act of domestic violence had been committed within the past year based on a petition alleging "specific act[s] of domestic violence." *See* Ariz. R. Protective Order P. 23.

¶8 Derrig's petition alleged a qualifying domestic relationship—a prior romantic relationship—and facts related to specific domestic violence offenses—harassment, surreptitious photography, and unlawful disclosure of sexual images—that occurred within the past year. Based on its minute entry, it was sufficiently clear why the court granted the *ex parte* order of protection: it found Alexander had "committed an act of domestic violence against [Derrig] within the last year." Because Alexander has not provided us with a transcript of the *ex parte* hearing,[5] we must assume any evidence not available on appeal supports the trial court's action. *See Bliss v. Treece*, 134 Ariz. 516, 519 (1983) ("Where the record is incomplete, a reviewing court must assume any evidence not available on appeal supported the trial court's action."); *Visco v. Universal Refuse Removal Co.*, 11 Ariz. App. 73, 76 (1969) (appellant faces burden of ensuring complete record on appeal).[6]

Contested Hearing

¶9 Next, Alexander contends there was insufficient evidence for the court to uphold the order of protection. At the contested hearing, Derrig testified she had ended her romantic relationship with Alexander because he had texted her a picture taken during sexual intercourse that she had not consented to. Derrig also testified that an acquaintance from the law school had informed her that Alexander had been sending lewd pictures of her to other law students. After discussing these matters with Alexander, Derrig

[5]Alexander attempted to introduce the transcript into the record on appeal after the opening brief and the answering brief had been filed by filing a motion to expand the record. *See* Ariz. R. Civ. App. P. 11(g) (record on appeal may be corrected or supplemented under certain circumstances). We denied that motion.

[6]For the first time in his reply brief, Alexander argues that Derrig committed a fraud upon the court by making "false statements and misrepresentations" throughout the hearing to affect the court's decisions to issue and uphold the order of protection. Because these arguments were not raised until his reply brief, they are waived. *See Nelson v. Rice*, 198 Ariz. 563, n.3 (App. 2000) (arguments first raised in reply brief may be waived due to appellant's failure to raise them in opening brief).

subsequently sent him a text message that said "Please do not contact me again, including responding to this text. Thank you." Derrig testified that Alexander had made several attempts to communicate with her after this text, including at a school event, by mail, and by coming to her home. Alexander did not dispute his contacts with Derrig after she sent him the text message, but he insisted that the picture he sent her had been taken consensually, and he denied having sent any pictures to other people.

¶10 The trial court upheld the order of protection based on, among other things, a finding that Alexander harassed Derrig. The court found that the parties were "in an intimate relationship" and that "Derrig was clear in her desire to have no further contact with Mr. Alexander." The court found that Alexander's contacts with Derrig via text messages and the sending and delivering items to her home constituted harassment.

¶11 A defendant is entitled to a hearing to contest an order of protection. § 13-3602(L). But the trial court must affirm the order at that hearing if the plaintiff shows by a preponderance of the evidence that "there is reasonable cause to believe . . . [that] [t]he defendant has committed an act of domestic violence within the past year." § 13-3602(E)(2); Ariz. R. Protective Order P. 38(h). "A person commits harassment if, with intent to harass or with knowledge that the person is harassing another person, the person . . . causes a communication with another person . . . in a manner that harasses." A.R.S. § 13-2921(A)(1). In the context of domestic violence, "harassment" is "conduct that is directed at a specific person and that would cause a reasonable person to be seriously alarmed, annoyed or harassed and the conduct in fact seriously alarms, annoys or harasses the person." § 13-2921(E).

¶12 Here, the trial court did not abuse its discretion because the evidence supports a finding of harassment under § 13-2921. The record demonstrates that Alexander's behavior strained his formerly romantic relationship with Derrig so much that Derrig instructed him to cease contacting her in July 2019. The record also indicates that despite Alexander's knowledge of that request, Alexander repeatedly directed conduct at Derrig when he sent her several text messages over the course of approximately four weeks and approached her at an off-campus school event where he insisted on speaking with her multiple times. Alexander also sent Derrig a package of textbooks and switched into a class Derrig was taking after learning her schedule.

¶13 Around this time, Derrig sought and obtained a formal no-contact order from her school. Nevertheless, Alexander continued to

direct conduct toward Derrig by dropping off flowers at her home twice. Alexander argues that this behavior cannot constitute an act of domestic violence because he had no intent to harass. Even if we assume there was no intent to harass, however, there was sufficient evidence for the court to find that Alexander knew he was harassing Derrig because she clearly expressed a desire to have no contact with him, including obtaining a formal no-contact order from her school, and Alexander repeatedly ignored those requests.

¶14 Alexander also argues, as he did below, that Derrig never alleged she was in any danger. But, Derrig testified Alexander's communications with her had made her "feel very unsafe" and she had to "carry mace with [her] walking back and forth at [her] apartment because [she was] afraid of running into him." As such, competent evidence supports a finding that Derrig was in fact, seriously annoyed, alarmed, or harassed and that a reasonable person would be seriously annoyed, alarmed, or harassed by this conduct, despite Alexander's suggestion that it was innocuous. *See Michaelson*, 234 Ariz. 542, ¶ 5 (court does not abuse discretion when protection order supported by competent evidence); *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13 (App. 1998) (appellate court defers to trial court's determination of witness credibility and does not re-weigh conflicting evidence). Because this supported the court's finding that there was an act of domestic violence committed within the past year, it did not abuse its discretion in upholding the order of protection.[7]

Scope of Order of Protection

¶15 Alexander argues the court "exceeded [its] authority by issuing an overbroad and unfairly restrictive order" because it did not

[7]Contrary to Alexander's suggestion, the court did not uphold the order of protection based on a finding of unlawful disclosure of sexual images under § 13-1425. The court explicitly ruled it did "not believe that there is adequate evidence to determine that Mr. Alexander published [a] photo to third parties." Based on the record, it is unclear whether the court found sufficient evidence of surreptitious photography under § 13-3019. Because only one act of domestic violence is required to uphold an order of protection, *see* § 13-3602(E), and the court's finding of harassment is supported, we do not address Alexander's claim related to the surreptitious photography. *See Progressive Specialty Ins. Co. v. Farmers Ins. Co.*, 143 Ariz. 547, 548 (App. 1985) (appellate courts should not decide questions unnecessary to disposition of appeal).

"balance the interests of the parties" and unfairly burdened his right to pursue an education by prohibiting him from being on the law school campus.

¶16 Arizona law allows courts issuing orders of protection to "[g]rant relief that is necessary for the protection of the alleged victim . . . and that is proper under the circumstances." § 13-3602(G)(6). The purpose of an order of protection is to prevent someone from engaging in act of domestic violence. Ariz. R. Protective Order P. 4(a).

¶17 Viewed in the light most favorable to upholding the trial court's ruling, *see Michaelson*, 234 Ariz. 542, ¶ 5, the record supports the court's decision to prohibit Alexander from being on the law school campus. At the hearing, Alexander admitted willfully disobeying the school's no-contact order by making two unsolicited deliveries to Derrig's residence. This no-contact order had been issued by the school after Alexander had sent Derrig several unwanted text messages, approached her multiple times at a school event, and attempted to switch into her class after learning her class schedule. This evidence provided a sufficient basis for the court to restrict Alexander from being at the law school under § 13-3602(G)(6). *See State v. Roseberry*, 237 Ariz. 507, ¶ 7 (2015) ("We will affirm a trial court's decision if it is legally correct for any reason."). Based on this record, we cannot say the court erred.

Brady Notice

¶18 Lastly, Alexander argues the court erred in issuing a Brady Notice against him under 18 U.S.C. § 922(g)(8)(C) because Derrig did not request one, the court assumed he posed a credible threat to Derrig's physical safety, and the order of protection did not "contain any explicit prohibition of 'the use, attempted use, or threatened use of physical force.'"

¶19 After affirming the order of protection, the following exchange occurred:

> [The Court]: The Brady notice is required under these circumstances, so the Court is issuing that.
>
> [Alexander]: Your Honor, there was no request for Brady.
>
> [The Court]: That's—that's not the standard. If—if, in fact, the order of protection is upheld the finding is included in an order of protection,

> plus the finding regarding the intimate partners requires a Brady notice. It's not a discretionary circumstance under these—these—this situation. So, I will make copies of this and give them to you. The hearing is adjourned.

¶20 Under federal law, a Brady Notice is triggered by an order of protection if the order "includes a finding that [a] person represents a credible threat to the physical safety of [their] intimate partner" or "by its terms explicitly prohibits the use, attempted use, or threatened use of physical force against such intimate partner . . . that would reasonably be expected to cause bodily injury." § 922(g)(8)(C); *see also Mahar*, 230 Ariz. 530, ¶ 15.

¶21 Alexander relies on *Mahar* for the proposition that a credible threat finding must be made before a Brady Notice is issued. However, Alexander misunderstands *Mahar*. There, the court explained that a Brady Notice may be triggered under § 922(g)(8)(C) by either a credible threat finding or through terms in the order explicitly prohibiting the "use, attempted use, or threatened use of physical force." *Mahar*, 230 Ariz. 530, ¶ 15 (quoting § 922(g)(8)(C)(ii)). The *Mahar* court concluded that under federal law, a Brady Notice was improper because neither prong of § 922(g)(8)(C) had been met in that case—there was no credible threat finding or explicit terms in the order of protection. *See id.* ¶¶ 16-17.

¶22 Here, the record does not support Alexander's contention that the trial court issued the Brady Notice based on a credible threat finding. Although the court had the discretion to determine whether Alexander posed a credible threat to Derrig—one of two ways a Brady Notice may be triggered under § 922(g)(8)(C)—we interpret the court's reference to the automatic "finding" as referring to the standardized language on the order form mandated by our supreme court, *see* Ariz. R. Sup. Ct. Admin. Directive 2013-03 (Apr. 17, 2013), expressly prohibiting the "use, attempted use, or threatened use of physical force," *see* § 922(g)(8)(C)(ii), rather than a finding that Alexander posed a credible threat. Our interpretation is supported by the court not having checked the box finding that Alexander posed a credible threat to result in firearms disqualification under state law, or to separately trigger a Brady Notice.

¶23 Because the order of protection explicitly included the language from § 922(g)(8)(C)(ii), and Alexander does not contest that he and Derrig were "intimate partners" under that statute, the Brady Notice was automatically triggered in this case. Therefore, Alexander has not

established that the court erroneously issued the Brady Notice under federal law.

Disposition

¶24 For the foregoing reasons, we affirm the order of protection and the Brady Notice.