IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

MARY SKEHAN-KYLE,
Petitioner/Appellee,

v.

ALAN KYLE,
Respondent/Appellant.

No. 2 CA-CV 2020-0065
Filed July 14, 2021

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NOT FOR PUBLICATION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 Pinal County
No. S1100DO201800921
The Honorable Joseph R. Georgini, Judge
The Honorable Karen F. Palmer, Judge Pro Tempore

AFFIRMED

COUNSEL

Jones, Skelton & Hochuli P.L.C., Phoenix
By Eileen Dennis GilBride
Counsel for Petitioner/Appellee

Orent Law Offices PLC, Phoenix
By Craig Orent
Counsel for Respondent/Appellant

MEMORANDUM DECISION

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

S T A R I N G, Vice Chief Judge:

¶1 Alan Kyle challenges the ex parte protective order entered against him at the request of Mary Skehan-Kyle, the trial court's denial of his motion to dismiss the proceedings, the court's order affirming the protective order, and the award of attorney fees entered below. 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." *Michaelson v. Garr*, 234 Ariz. 542, n.1 (App. 2014) (quoting *Mahar v. Acuna*, 230 Ariz. 530, ¶ 2 (App. 2012)). In September 2019, Mary petitioned for her third order of protection against Alan, her estranged husband. The court held an ex parte hearing on the petition, after which it entered the order based on its conclusion that there was "reasonable cause to believe that an act of domestic violence ha[d] been committed." The order was served on Alan approximately one week later; in January 2020, he moved to dismiss it.

¶3 The trial court treated Alan's motion as a request for a contested hearing, *see* Ariz. R. Protective Order P. 38(a), and set such a hearing for mid-February. Despite Alan's motion to vacate the hearing, it proceeded, and the court ultimately affirmed the order. Thereafter, the court awarded Mary $1,250 in attorney fees. This appeal followed.

Jurisdiction

¶4 Alan initially filed a timely notice of appeal from the trial court's order affirming the order of protection. Therefore, we have jurisdiction over his claims regarding the order of protection pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(5)(b). *See Moreno v. Beltran*, 250 Ariz. 379, ¶¶ 11, 16 (App. 2020). However, as mentioned above, Alan also challenges the order awarding attorney fees, which had not yet been entered at the time he filed his initial notice of appeal. Accordingly, he filed a motion in this court requesting a stay of appeal "so that he may seek and

obtain from the trial court a certification of finality pursuant to Arizona Rule of Family Law Procedure 78(c)." *See id.* ¶ 16 ("final decision awarding fees may be reviewed on appeal only upon entry of an order containing a certificate of finality pursuant to . . . ARFLP 78(b) or (c), followed by a timely notice of appeal"). We granted this motion and ultimately reinstated the appeal based on the order awarding attorney fees.[1]

¶5 Mary argues we lack jurisdiction to address the award of attorney fees in this case, claiming Alan "did not appeal from that order until 48 days" after it was entered. *See* Ariz. R. Civ. App. P. 9(a) ("To appeal a judgment, a party must file a notice of appeal . . . no later than 30 days after entry of the judgment from which the appeal is taken . . . ."). However, on June 26, 2020, thirty days after the entry of the order awarding attorney fees, Alan attempted to file a notice appealing that order in this court. *See* Ariz. R. Civ. App. P. 8(a) (notice of appeal must be filed in superior court).

¶6 Our jurisdiction is established by statute, *see Ghadimi v. Soraya*, 230 Ariz. 621, ¶ 7 (App. 2012), and, "No case . . . [or] appeal . . . brought in the . . . court of appeals shall be dismissed for the reason only that it was not brought in the proper court or division, but it shall be transferred to the proper court or division," A.R.S. § 12-120.22(B). Therefore, although Alan submitted his notice of appeal to the incorrect court, we nonetheless also have jurisdiction over his appeal of the attorney-fee award. *See* §§ 12-120.21(A)(1), 12-2101(A)(1); *Moreno*, 250 Ariz. 379, ¶ 16; *DeLong v. Merrill*, 233 Ariz. 163, ¶ 9 (App. 2013) ("resolution of cases on their merits is preferred").

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[1]The order contained the following language: "It is further ordered denying any affirmative relief sought before the date of this Order that is not expressly granted above. It is further ordered signing this minute entry as a formal and appealable order of this Court pursuant to . . . Rule 78(C) of the Arizona Rules of Family Law Procedure." Although the court did not expressly "recite[] that no further matters remain pending" as required under Rule 78(c), we interpret the court's language denying any pending claims as certifying the order as final. As to Mary's argument, based on Rule 42(a)(3), Ariz. R. Protective Order P., that we lack jurisdiction to address the ex parte order, we disagree. *See Savord v. Morton*, 235 Ariz. 256, ¶¶ 8, 10-14 (App. 2014); *cf. Dowling v. Stapley*, 221 Ariz. 251, n.12 (App. 2009) ("appeal from . . . final judgment . . . include[s] appeals from otherwise non-appealable interlocutory orders").

Ex Parte Protective Order

¶7 Alan first argues that the initial protective order was granted based on "misapplied . . . law" and "insufficient factual allegations and dated criminal conduct" and that the trial court consequently erred in denying his motion to dismiss. We review a ruling on an order of protection for an abuse of discretion. *See Savord v. Morton*, 235 Ariz. 256, ¶ 10 (App. 2014). "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.'" *Id.* (quoting *Mahar*, 230 Ariz. 530, ¶ 14). Generally, a court may issue an order of protection "if it finds there is reasonable cause to believe a 'defendant may commit an act of domestic violence' or 'has committed an act of domestic violence within the past year' or longer if [it] finds good cause." *Shah v. Vakharwala*, 244 Ariz. 201, ¶ 5 (App. 2018) (quoting A.R.S. § 13-3602(E)).

¶8 At the hearing, the trial court asked Mary if Alan had made any contact with her since pleading guilty to disturbing her peace in December 2018. Mary alleged Alan had been "lurking around the house" and leaving items in odd places. Ultimately, the court concluded, "I can find for purposes of this hearing that there is reasonable cause to believe that an act of domestic violence has been committed pursuant to the plea agreement that [Alan] entered into more than a year [ago]," and signed the order.

¶9 In Alan's motion to dismiss, he alleged the trial court had only considered "the fact of conviction, and therefore there was and could not be a finding that . . . Alan may commit another DV act in the future." He further claimed the conviction on which the court had relied "occurred well beyond one year before the hearing date," requiring good cause for it to have been considered. Accordingly, Alan argued the court had not and could not have found the requisite "good cause."

¶10 Alan raises these arguments again on appeal, also claiming the trial court "did not cite a particular crime of domestic violence, which is a foundational requirement for issuance of" a protective order. Moreover, he argues the court "was required to address the merits of the motion to dismiss." Mary claims dismissal of the ex parte order was not an available remedy, and therefore, the court did not err in essentially denying the motion. Finally, Mary asserts the court properly relied on findings that Alan had committed acts of domestic violence over the past year.

¶11 The ex parte protective order was properly issued under § 13-3602(E)(2). Mary's petition included allegations that Alan had threatened, intimidated, and stalked her after December 2018. Thus, the trial court did not err in finding "reasonable cause" to believe Alan had committed an act of domestic violence within the past year.[2] *See* A.R.S. § 13-3601(A)(1) (stalking, threatening, and intimidating are acts of domestic violence when "relationship between the victim and the defendant is one of marriage or former marriage"). And, although the court may not have been completely clear as to which part of § 13-3602(E) or which alleged acts it relied on, we may nonetheless uphold its order if it is legally correct for any reason. *See First Credit Union v. Courtney*, 233 Ariz. 105, ¶ 7 (App. 2013). Thus, we find no error in the court's denial of Alan's motion to dismiss.

Affirmance of Protective Order

Evidence Considered

¶12 Alan, citing his due process rights under the United States and Arizona Constitutions, contends the trial court "went too far and considered too much" in deciding to sustain the protective order. Specifically, he contends he lacked notice that the court would consider anything that did not involve the current protective order proceeding or related events that took place over the previous year, depriving him of his ability to prepare a defense. However, at the end of the contested hearing on the protective order, the court stated, "I will use everything at my disposal which would include pleadings and the record, as well as the admitted exhibits today. Okay? Anything else?" Subsequently, the parties and the court only discussed the procedure by which Mary and Alan would exit the courtroom. Alan did not object to the court using "everything at [its] disposal" in making its determination. We generally do not address arguments, even those involving constitutional issues, raised for the first time on appeal, and we decline to do so here. *See Cook v. Ryan*, 249 Ariz. 272, ¶ 11 (App. 2020).

Sufficiency of the Evidence

¶13 Alan further "asserts the presented evidence was insufficient to support sustaining" the order of protection and the trial court abused its discretion in not finding his testimony credible. But, in these portions of

[2]Citing only § 13-3602(E)(2) and *Savord*, 235 Ariz. 256, ¶ 12, Alan has failed to persuade us the trial court was required to cite and define the specific acts of domestic violence that informed its ruling.

his opening brief, he fails to provide legal authority supporting his arguments. Therefore, they are waived on appeal. *See* Ariz. R. Civ. App. P. 13(a)(7)(A); *Ritchie v. Krasner*, 221 Ariz. 288, ¶ 62 (App. 2009) (failure to comply with Rule 13(a)(7) may constitute abandonment and waiver of claim);[3] *Ace Auto. Prods., Inc. v. Van Duyne*, 156 Ariz. 140, 143 (App. 1987) ("It is not incumbent upon th[is] court to develop an argument for a party."). In any event, Alan essentially asks us to reweigh the evidence on appeal, which we will not do. *See Hurd v. Hurd*, 223 Ariz. 48, ¶ 16 (App. 2009). And, not only do we presume the court considered all admitted evidence, *see Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18 (App. 2004), but "[w]e must give due regard to [its] opportunity to judge the credibility of the witnesses," *Hurd*, 223 Ariz. 48, ¶ 16.

Attorney Fees

Request for Hearing

¶14 Alan also argues the trial court "abused its discretion when it denied [his] request for an evidentiary hearing concerning [Mary]'s attorney's fees request." A court abuses its discretion when it makes an error of law. *Savord*, 235 Ariz. 256, ¶ 10. Further, if the language of a statute or rule is clear, we apply it without engaging in further interpretation. *See State v. Givens*, 206 Ariz. 186, ¶ 5 (App. 2003); *State v. Mendoza*, 248 Ariz. 6, ¶ 12 (App. 2019). However, when the language is ambiguous, we may consider the provision's context, effects, consequences, and background. *See Givens*, 206 Ariz. 186, ¶ 6; *Mendoza*, 248 Ariz. 6, ¶ 12.

¶15 Alan claims the provision for attorney fees "[a]fter a hearing with notice to the affected party" in Rule 39(a), Ariz. R. Protective Order P., and § 13-3602(S) "requires a separate fees hearing." He also argues the denial of a hearing violated his "Due Process rights." Mary, in response, asserts the "hearing" referenced here is only the contested hearing on the order of protection. We agree.

¶16 Rule 38, Ariz. R. Protective Order P., addresses "Contested Hearing Procedures," and subsection (c) provides that "[t]he court must notify the plaintiff of the hearing." Accordingly, Rule 39(a) states, "After a hearing with notice to the affected party, a judicial officer may order any

[3]*Ritchie* discusses Rule 13(a)(6). However, Rule 13 has since been amended, and the pertinent requirements are now found in Rule 13(a)(7).

party to pay the costs of the action, including reasonable attorneys' fees, if any." Similarly, § 13-3602(S) reads as follows:

> Notwithstanding any other law and unless prohibited by an order of the superior court, a municipal court or justice court may hold a hearing on all matters relating to its ex parte order of protection if the hearing was requested before receiving written notice of the pending superior court action. . . . After a hearing with notice to the affected party, the court may enter an order requiring any party to pay the costs of the action, including reasonable attorney fees, if any.

Therefore, even assuming without deciding that Rule 39(a) and § 13-3602(S) are not susceptible to plain-language interpretation, based on the context of these provisions, we conclude neither requires a separate hearing for attorney fees. We find no error.[4]

Application of Incorrect Statute

¶17 Alan also claims the trial court applied the wrong statute to the attorney-fees issue.[5] He correctly states that "the court expressly applied A.R.S. § 25-324," which generally governs attorney fees in cases involving dissolution of marriage, legal decision-making, and parenting time. *See* § 25-324(A) (court "may order a party to pay a reasonable amount to the other party for the costs and expenses of maintaining or defending any proceeding under this chapter or chapter 4, article 1 of this title").

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[4]Alan does not sufficiently develop his due process argument. Rather, he only claims—without specifying a state or federal constitutional provision—the trial court denied him due process by denying a hearing and quotes a case that does not support his argument. Therefore, this argument is waived and we do not consider it further. *See* Ariz. R. Civ. App. P. 13(a)(7)(A) (opening brief must include "contentions concerning each issue presented for review, with supporting reasons for each contention"); *Ritchie*, 221 Ariz. 288, ¶ 62; *Ace Auto. Prods.*, 156 Ariz. at 143.

[5]We will not disturb this order absent an abuse of discretion. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 32 (App. 1998). Again, such abuse occurs when a trial court makes an error of law. *Savord*, 235 Ariz. 256, ¶ 10.

Mary, however, notes that the court considered the factors under Rule 39(b) and argues, based on Rule 2, Ariz. R. Protective Order P., that § 25-324 nonetheless applies because it is "not inconsistent" with the protective order procedural rules.

¶18 Again, Rule 39 plainly states, "[A] judicial officer may order any party to pay the costs of the action, including reasonable attorneys' fees, if any," and then lists factors "the judicial officer *may* consider." (Emphasis added.) The rule's plain language did not preclude the trial court's consideration of the parties' financial resources, the reasonableness of their positions throughout the litigation, and whether the filings were made in bad faith or for improper purposes. *See Mendoza*, 248 Ariz. 6, ¶ 12; § 25-324(A), (B). Based on its compliance with Rule 39, we conclude the court did not abuse its discretion.

Remaining Arguments

¶19 Alan further asserts the trial court improperly considered his income, which he alleges was "not in the [protective order] record," in determining the fee award and "relied on . . . inaccurate and unsupported claims that [he] and his counsel acted in bad faith throughout the [protective order] litigation." But, again, Alan does not cite any binding legal authority supporting his arguments in these portions of his opening brief.[6] Thus, we do not address these contentions. *See* Ariz. R. Civ. App. P. 13(a)(7)(A); *Ritchie*, 221 Ariz. 288, ¶ 62; *Ace Auto. Prods.*, 156 Ariz. at 143.

Attorney Fees on Appeal

¶20 Mary requests an award of reasonable attorney fees "[p]ursuant to A.R.S. § 13-3602(S), A.R.S. § 25-324, Rule 39, [Ariz. R. Protective Order P.,] A.R.S. § 12-349(A), and Rules 21 and 25, [Ariz. R. Civ.

[6]Alan quotes *Cardoso v. Soldo*, 230 Ariz. 614, ¶ 12 (App. 2012), for the proposition that "because an order of protection is issued for the purpose of restraining acts included in domestic violence, its very issuance can significantly harm the defendant's reputation—a collateral consequence that can have lasting prejudice." He also cites an unpublished case to the same effect. This does not adequately support his contention that the court abused its discretion in concluding his request for a hearing on attorney fees "demonstrate[d] a lack of regard for [Mary]'s rights to dignity and respect." *See Ritchie*, 221 Ariz. 288, ¶ 62 ("Opening briefs must present and address significant arguments, supported by authority that set forth the appellant's position on the issue in question.").

App. P.]." After considering the merits of Alan's claims and "whether the award will pose an extreme hardship on [him]" or "deter others from making valid claims," *see* Rule 39(b), we grant Mary's request.

Disposition

¶21 For the foregoing reasons, we affirm the trial court's orders and award Mary her reasonable attorney fees on appeal upon her compliance with Rule 21, Ariz. R. Civ. App. P. As the prevailing party, she is also entitled to taxable costs upon compliance with that rule. *See* A.R.S. § 12-341.