

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

DESIREE YVONNE ROMERO,
Plaintiff/Appellee,

v.

GABRIEL ANTHONY RODRIGUEZ,
Defendant/Appellant.

No. 2 CA-CV 2020-0073
Filed February 18, 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NOT FOR PUBLICATION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 Pima County
No. DV20192433
The Honorable Dean Christoffel, Judge Pro Tempore

VACATED

COUNSEL

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Counsel for Defendant/Appellant

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MEMORANDUM DECISION

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

ESPINOSA, Presiding Judge:

¶1 Gabriel Rodriguez appeals from the trial court's order continuing an order of protection and Notice to Sheriff of Positive Brady Indicator (Notice of PBI) in favor of his former spouse, Desiree Romero, and their two minor daughters, M.C.R. and M.Y.R. For the following reasons, we vacate the order of protection and the Notice of PBI.

Factual and Procedural Background

¶2 In December 2019, Romero petitioned the trial court for an order of protection for herself, M.C.R., and M.Y.R. against Rodriguez. She alleged there is an "open DCS case with allegations [against] Gabriel (physical abuse, sexual abuse and neglect)" and an "open criminal investigation with TPD." The court granted the petition *ex parte*, and Rodriguez requested a hearing. Before the hearing, Rodriguez filed a request for a "[m]ore definite statement" as to the grounds for Romero's petition, noting it failed to include a "specific factual basis *including dates*" of the alleged conduct, and no document from either the DCS or TPD cases was appended to the petition.

¶3 At the contested hearing, Rodriguez argued he had no notice of what the hearing would cover because the petition did not contain specific allegations or any allegations beyond general references to the reported DCS case and TPD investigation. The trial court denied the request for more specificity, stating "it's pretty clear that there is an allegation although it refers to a report . . . of physical abuse, sexual abuse and neglect and that there is an ongoing investigation as to those details. In the remoteness of time or otherwise . . . you may ask questions of . . . Romero concerning that." Romero then testified that she had been abused "mentally, physically, sexually, [and] emotionally" during the entirety of her eighteen-year relationship with Rodriguez and recounted a December 2013 incident in which he had hit her with a bat. She said the children had

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“seen everything every time and they were also hit.” Romero recalled there had been an incident two years earlier in which Rodriguez “dropped off our son to my house drunk.” Romero said that Rodriguez had threatened to kill the children “throughout the whole relationship” and had held a knife to M.Y.R. about ten years before.

¶4 When the trial court asked Romero to talk about “what happened . . . with regard to this open DCS case and the criminal investigation” alleged in the petition, she explained that in October 2019, her adult son told her that Rodriguez molested him in the past. Then in December 2019, M.Y.R. had requested to see a counselor and she too accused Rodriguez of past sexual abuse. Romero introduced letters from M.C.R. and M.Y.R. in which they related feeling scared when they found out Rodriguez was contesting the order of protection; M.Y.R.’s letter stated that Rodriguez had “made [her] touch him when [she] was smaller.”¹ Romero stated that Rodriguez had not been around her or the minor children in at least two years, but was nevertheless seeking an order of protection because “for 18 years he hit” her and the order of protection is needed “for the girls because that’s how they felt safe.”

¶5 Rodriguez denied posing any threat to Romero or the children, testifying he had not threatened to come around Romero’s house, he does not go near Romero or the children, and does not know where they live. Rodriguez further confirmed that he had not seen the children for at least two years. The court did not ask Romero or Rodriguez about any weapons or firearms Rodriguez had access to.

¶6 At the conclusion of the hearing, the trial court found “[d]omestic violence has occurred directly to one, if not both of the minor children” and affirmed the order of protection. The court also stated “Brady applies” and issued the Notice of PBI, restricting Rodriguez from purchasing or possessing a firearm or ammunition. Rodriguez appealed, and we have jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(b) and Rule 42, Ariz. R. Protective Order P.²

¹The record contains a “Notice of Proposed Substantiation of Child Safety Report” dated March 20, 2020, offering to substantiate the sexual abuse allegation against Rodriguez, but the alleged victims, dates of alleged incidents, or details of the alleged abuse are not identified.

²Although the order of protection against Rodriguez expired on January 9, 2021 pursuant to A.R.S. § 13-3602(N), we do not consider his appeal to be moot because “expired orders of protection have ongoing

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Discussion

¶7 On appeal, Rodriguez challenges the trial court’s order continuing the order of protection and issuing the Notice of PBI.³ For a contested order of protection to remain in effect, the plaintiff must prove by a preponderance of the evidence that “[t]he defendant may commit an act of domestic violence” or has committed such an act within the past year “or within a longer period of time if the court finds that good cause exists to consider a longer period.” A.R.S. § 13-3602(E); Ariz. R. Protective Order P. 38(f). Domestic violence is broadly defined in A.R.S. § 13-3601(A) and includes molestation of a child. See A.R.S. §§ 13-1410, 13-3601(A).

¶8 We will uphold an order of protection absent an abuse of discretion by the issuing court. See *Mahar v. Acuna*, 230 Ariz. 530, ¶ 14 (App. 2012). “A court abuses its discretion when it commits an error of law in the process of 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 *Hurd v. Hurd*, 223 Ariz. 48, ¶ 19 (App. 2009)). “We review due process claims de novo.” *Savord v. Morton*, 235 Ariz. 256, ¶ 16 (App. 2014) (quoting *Mack v. Cruickshank*, 196 Ariz. 541, ¶ 6 (App. 1999)).

¶9 Rodriguez maintains he was denied due process because Romero’s petition was not sufficiently specific to afford him notice of the allegations against him and at the contested hearing she presented evidence unrelated to the allegations in the petition. Both claims are supported by the record here and the law.

¶10 Rule 23(b), Ariz. R. Protective Order P., states the petition must “allege each specific act of domestic violence that will be relied on at

collateral legal consequences.” See *Cardoso v. Soldo*, 230 Ariz. 614, ¶¶ 9-10 (App. 2012) (collateral consequences exception allows review of otherwise expired order of protection).

³Because Romero has not filed an answering brief, we could treat her failure as a confession of error; given the seriousness of the subject matter, however, we exercise our discretion to address the substance of Rodriguez’s appeal. See *Gonzales v. Gonzales*, 134 Ariz. 437, 437 (App. 1982) (“Although we may regard [the] failure to respond as a confession of reversible error, we are not required to do so.”).

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[the] hearing,” and A.R.S. § 13-3602(C)(3) requires the petition to contain dates of the domestic violence alleged. Romero’s petition did not allege any particular instance of domestic violence or timeframe in which it had occurred, but instead only alleged there were open DCS and TPD investigations. Nothing from either investigation was appended to her petition to comprise the substance of the allegations. Rodriguez pointed out these deficiencies before the hearing, but the trial court denied his request that Romero amend her petition to include more specific allegations as required by both statute and rule, instead stating Rodriguez could develop his understanding of the allegations, including specific dates, through cross-examination of Romero.

¶11 Rodriguez’s lack of notice of the allegations was compounded during the hearing when Romero testified about specific allegations of domestic violence that were not included in her petition. *See* Ariz. R. Protective Order P. 36(a) (“The court must limit the scope of the hearing to the allegations of the petition.”); *Savord*, 235 Ariz. 256, ¶¶ 17-18 (court erred in allowing petitioner to testify about matters outside scope of petition). By proceeding on Romero’s petition with an inadequate statement of allegations and permitting her to testify to matters outside the petition, the trial court deprived Rodriguez of the opportunity to adequately prepare his defense. *See Savord*, 235 Ariz. 256, ¶ 16 (“Due process protections provided under the Fourteenth Amendment of the United States Constitution . . . guarantee that Father receive notice, reasonably calculated to apprise him of the action in order to adequately prepare his opposition.”). Accordingly, the order of protection against Rodriguez should not have been continued and cannot stand.

¶12 Rodriguez also argues the trial court erred by issuing the Notice of PBI because there was insufficient evidence that he posed a credible threat of harm to Romero, M.C.R., or M.Y.R. “A restriction against firearms does not automatically follow an order of protection.” *Id.* ¶ 22. Rule 23(i), Ariz. R. Protective Order P., requires the court to first “ask the plaintiff about the defendant’s use of or access to firearms to determine whether the defendant poses a credible threat to the physical safety of the plaintiff or other protected persons.” *See also* A.R.S. § 13-3602(G)(4); *Savord*, 235 Ariz. 256, ¶ 20. Rodriguez correctly points out that the court made no inquiries of either Romero or him in that regard. We therefore cannot sustain the Notice of PBI.

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Disposition

¶13 For the foregoing reasons, we vacate the trial court's decision and quash the order continuing the order of protection and Notice of PBI against Rodriguez.⁴

⁴Rodriguez additionally challenges the timeliness of the allegations supporting the order of protection, pointing out "not a single act on [Rodriguez]'s part beyond the 2013-14 time frame is referenced." We note that the trial court is permitted to reach beyond acts within one year if it finds "good cause." *See* A.R.S. § 13-3602(E)(2). Nevertheless, because we vacate the order of protection on other grounds, we need not address this issue further. We likewise do not address Rodriguez's argument that the court erred by disregarding the dismissal of Romero's previous order of protection.