MEMORANDUM DECISION

Pursuant to Ind. Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.

APPELLANT PRO SE

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IN THE COURT OF APPEALS OF INDIANA

Timothy Mackall,
Appellant-Respondent,

v.

Kathryn Stuart,
Appellee-Petitioner.

September 27, 2022

Court of Appeals Case No. 22A-PO-981

Appeal from the Marion Superior Court

The Honorable Marie L. Kern, Magistrate

Trial Court Case No. 49D14-2111-PO-38606

Friedlander, Senior Judge.

[1] Timothy Mackall appeals from the trial court's orders denying his motion to correct error and motion to dismiss for lack of subject matter jurisdiction in this

action involving an order of protection granted in favor of Kathryn Stuart. We affirm.

[2] Mackall and Stuart were engaged in a three-month romantic relationship ending on November 4, 2021. On November 18th, Stuart filed a petition for protective order. A hearing was set for December 22nd, but no temporary protective order was issued. On December 21st, Mackall filed a Motion to Dismiss Petition for Failure to Hold Timely Hearing. That same day, Mackall also filed a Motion to Dismiss Hearing as Moot or, in the Alternative, to Continue.

[3] The court held the hearing as scheduled, Stuart and her counsel attended, while Mackall did not, and the court issued its permanent order of protection. The court also denied Mackall's December 21st motions. A copy of the protective order was served on Mackall on January 4, 2022.

[4] Next, on February 2, 2022, Mackall filed a Verified Motion to Set Aside Protective Order(s), including exhibits. Stuart filed Petitioner's Motion to Strike Respondent's Verified Motion to Set Aside Protective Order(s) on February 8, 2022. The court granted Stuart's motion under Indiana Trial Rule 12(F).[1]

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[1] Indiana Trial Rule 12(F) provides as follows:

> (F) Motion to Strike. Upon motion made by a party before responding to a pleading, or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty [20] days after the service of the pleading upon him or at any time upon the court's own initiative,

[5] Mackall then filed a notice of appeal under Cause Number 22A-PO-490, challenging the court's December 22nd Order of Protection, the February 9th Order Striking Respondent's Motion to Set Aside Protective Order and the February 2nd Denial of the Verified Motion to Set Aside Protective Order(s).

[6] The trial court clerk filed a Notice of Completion of the Clerk's Record on March 14th after which Mackall filed a Motion to Dismiss and to Compel Clerk to Correct the Record. The trial court denied Mackall's motion.

[7] On April 4th, this Court dismissed with prejudice Mackall's appeal brought under Cause Number 22A-PO-490. The next day, Mackall filed a Motion to Correct Error in the trial court, challenging the court's decision to deny his March 16th Motion to Dismiss and to Compel Clerk to Correct the Record without holding a hearing. Mackall also filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction, arguing that the protective order petition should have been dismissed because the hearing was held beyond the thirty days provided for by Indiana Code section 34-26-5-9(b) (2019). He maintained that the order was void on the same grounds. The court denied Mackall's motions and this appeal ensued.

> the court may order stricken from any pleading any insufficient claim or defense or any redundant, immaterial, impertinent, or scandalous matter.

[8] The first issue we address is Mackall's argument that the trial court erred by denying his Motion to Dismiss for Lack of Subject Matter Jurisdiction. Indiana Code section 34-26-9(b) provides as follows:

> (b) If it appears from a petition for an order for protection or from a petition to modify an order for protection that harassment has occurred, a court:
>
> (1) may not, without notice and a hearing, issue an order for protection ex parte or modify an order for protection ex parte; but
>
> (2) may, upon notice and after a hearing, whether or not a respondent appears, issue or modify an order for protection.
>
> *A court must hold a hearing under this subsection not later than thirty (30) days after the petition for an order for protection or the petition to modify an order for protection is filed.*

(emphasis added).

[9] Stuart's petition for protective order was filed on November 18, 2021 and a hearing was set for and held on December 22, 2021. Thus, the hearing was scheduled for and held on the 34th day after the petition was filed.

[10] Mackall argues that the court lacked subject matter jurisdiction to hear the petition because its "jurisdiction is strictly limited to 30- days[sic] following filing of the petition for an order for protection on a claim of harassment." Appellant's Br. p. 10. He also claims that Stuart "waived her right to be heard on the petition" because she did not object to the trial court's scheduling of the hearing outside of the thirty-day window. *Id.* He alleges that the "protection

order is void because the manner in which it was obtained violated" his liberty interests and an assortment of statutory and constitutional protections he cites by requiring him to object to the hearing date within the thirty-day period required by statute, while allowing Stuart to be heard on her petition after the expiration of the thirty-day statutory period. *See generally*, *id.* at 35-48.

[11] In its order denying Mackall's motion alleging a lack of subject matter jurisdiction, the court concluded as follows:

> The Court finds that Respondent waives any objection to the setting of this matter outside of the 30 days, as the objection was not timely. Further, the Court finds good cause to have set the matter beyond the 30 days, due to the Court's dockets and ability to schedule the matter. Any harm to Respondent associated with the delay is de minimus. Additionally, Respondent also requested as alternative relief, a continuance from the Court, thereby waiving any objection to the setting of the matter beyond 30 days. Respondent has demonstrated that he did not suffer any prejudice as a result of the 4 day delay when he requested a continuance as alternate relief, as such action by the Court would only have further delayed the proceeding. Respondent incorrectly assigns the burden of objecting to the setting of the matter to Petitioner; the objection was his to raise. Instead, Respondent attempted to ambush the Petitioner by filing his motion to dismiss, after the expiration of 30 days. Respondent had notice of the hearing, the motion was not ruled upon before the hearing. Respondent voluntarily waived his right to appear and present argument on his motion and evidence on the petition. For all the foregoing, the Court denies the motion.

Appellee's App. Vol. 2, p. 71.

[12] We conclude that the trial court did not lose jurisdiction of the matter by scheduling and hearing the matter outside the thirty-day window set out in the statute under the facts of this case. First, "[j]urisdiction involves three elements: jurisdiction of the subject matter, jurisdiction of the person, and jurisdiction of the particular case." *Harp v. Ind. Dep't of Highways*, 585 N.E.2d 652, 659 (Ind. Ct. App. 1992). "A court can have subject matter jurisdiction over a class of cases, and not have jurisdiction over the particular case due to the facts of the particular case." *Id.* "Jurisdiction of the particular case refers to the right, authority, and power to hear and determine a specific case within that class of cases over which a court has subject matter jurisdiction." *Id.*

[13] Here, Mackall is not challenging the trial court's ability to hear protective order cases as a class of cases, in other words, subject matter jurisdiction. And "[a] party can never waive the issue of subject matter jurisdiction." *Georgetown Bd. of Zoning Appeals v. Keele*, 743 N.E.2d 301, 303 (Ind. Ct. App. 2001). Instead, his argument appears to be that the trial court did not have jurisdiction over this particular case. "When a court lacks jurisdiction over the particular case, the judgment is voidable, requiring proper and timely objection to the court's exercise of jurisdiction, or the objection is waived." *Harp*, 585 N.E.2d at 659. "Challenges to a trial court's jurisdiction over the particular case must be raised at the first opportunity to avoid waiver." *Id.*

[14] "The overriding purpose of the requirement for a specific and timely objection is to alert the trial court so that it may avoid error or promptly minimize harm from an error that might otherwise require reversal, result in a miscarriage of

justice, or waste time and resources." *Allison v. Pepkowski*, 6 N.E.3d 467, 470 (Ind. Ct. App. 2014). "[J]urisdiction over the particular case may be established by a party's failure to timely assert its absence." *Harp*, 585 N.E.2d at 659. "[L]itigants will not be permitted to invite error by their action, inaction or silence and then expect to be successful in an attempt to gain relief from the error on appeal." *Allison*, 6 N.E.3d at 471 (quoting *Schiller v. Knigge*, 575 N.E.2d 704, 707 (Ind. Ct. App. 1991)). Appellate courts have consistently held that a party "cannot sit idly by without objecting, await the outcome of trial, and thereafter raise an issue for the first time on appeal." *Bogner v. Bogner*, 29 N.E.3d 733, 741 (Ind. 2015).

[15] Mackall had received notice of the hearing, yet chose to wait to file his motion to dismiss until the thirty days had expired. Though the motion is dated December 17th, it was not filed with the court until December 21st. *See id.* at 57-59. Also on December 21st, Mackall filed his Motion To Dismiss As Moot Or, In The Alternative, To Continue. Instead of appearing at the hearing to argue his motions, Mackall chose not to appear. As the trial court noted, to have granted the motion to continue would have caused an even further delay, longer than the four-day delay of which he complained in his motion to dismiss for lack of subject matter jurisdiction. He waived his argument about the jurisdiction of the court by failing to timely file his objection, by failing to appear at the hearing to present his arguments, and by asking the court, in the alternative, to further delay the proceedings by granting his motion to continue. We find no error on those grounds.

[16] Additionally, Mackall has not demonstrated that he was harmed by the four-day delay in holding the proceedings. Mackall claims on appeal that there are violations of his liberty interests and an assortment of statutory and constitutional protections resulting from setting the hearing outside the thirty-day time period provided for by statute. These arguments are not compelling, however, because Mackall waived any objection to the hearing date by failing to timely file his objection to it and by failing to appear at the hearing to present his arguments. Furthermore, it is incongruous to argue both that you were harmed by a delay and to make a request for further delay. The trial court did not err.

[17] Next, Mackall argues that the court erred by denying his motion to correct error, contending that the court should have held a hearing on his Motion to Dismiss and to Compel Clerk to Correct the Record. Again, we must disagree.

[18] On February 6, 2022, after Mackall's Motion to Dismiss Petition for Failure to Hold Timely Hearing and Motion to Dismiss Hearing as Moot or, in the Alternative, to Continue were denied by the trial court, Mackall filed a Verified Motion to Set Aside Protective Order(s), including exhibits. Stuart responded by filing Petitioner's Motion to Strike Respondent's Verified Motion to Set Aside Protective Order(s) on February 8, 2022. The court granted Stuart's motion to strike.

[19] In Stuart's February 8th motion to strike, while reciting the procedural history of the case, counsel erroneously stated in paragraph 2 that "On December 21,

2021 *Petitioner* filed a Motion to Dismiss and a Motion for Continuance." Appellee's App. Vol. 2, p. 141 (emphasis added). Counsel inadvertently transposed Petitioner and Respondent.

[20] Meanwhile, Mackall had initiated his appeal under Cause Number 22A-PO-490. The trial court clerk filed a Notice of Completion of the Clerk's Record on March 14th after which Mackall filed his Motion to Dismiss and to Compel Clerk to Correct the Record. Mackall argued that the protective order was void because, as mistakenly set forth in Stuart's motion to strike, "Petitioner filed a Motion to Dismiss." *Id.* The court denied Mackall's motion, concluding "The CCS reflects that Respondent filed the Motion to Dismiss, which was denied, not the Petitioner." *Id.* at 224. And Stuart's counsel acknowledged the transposition, or inadvertent scrivener's error, in her response to the motion. *Id.* at 222. Stuart's motion to strike also contains an incorrect caption indicating that the matter involves a marriage between Mackall and Stuart instead of a protective order. *Id.* at 215.

[21] Many of Mackall's arguments are premised on the mistaken notion (grounded on the paragraph 2 scrivener's error) that somehow Stuart filed a motion to dismiss and that Stuart and the trial court "created and executed an *ex parte* scheme that was collectively concealed from [Mackall] to avoid dismissal." Appellant's Br. p. 9.

[22] For example, his motion to correct error is based on Trial Rule 59(A)'s newly discovered evidence. In his Motion To Dismiss and to Compel Clerk to

Correct the Record, Mackall seeks relief under Trial Rule 60(B)(3) and (6). Those sections concern allegations of "fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party" and that "the judgment is void," respectively. However, as the record demonstrates and the trial court properly found Stuart did not file a motion to dismiss her own petition. Thus, Stuart did not collude with the trial court to perpetrate a fraud. Further, the judgment was not void because there was no timely objection made. The court did not err by denying Mackall's motion to correct error.

[23] Trial Rule 60(D), cited by Mackall, generally requires trial courts to hold a hearing on any pertinent evidence before granting Trial Rule 60(B) relief. *Thompson v. Thompson*, 811 N.E.2d 888, 904 (Ind. Ct. App. 2004), *trans. denied*. However, when there is no pertinent evidence to be heard, as is the case here, a hearing is unnecessary. *See id.* (*citing Pub. Serv. Comm'n v. Schaller*, 157 Ind. App. 125, 133-34, 299 N.E.2d 625, 630 (1973)). We find no error here.

[24] Mackall further alleges that the court was biased and failed to be impartial. We previously set out the law concerning allegations of this type as follows:

> The law presumes that a trial judge is unbiased. To overcome that presumption, the party asserting bias must establish that the trial judge has a personal prejudice for or against a party. Clear bias or prejudice exists only where there is an undisputed claim or the judge has expressed an opinion on the merits of the controversy before him or her. Adverse rulings and findings by the trial judge do not constitute bias per se. Instead, prejudice must be shown by the judge's trial conduct; it cannot be inferred

> from his [or her] subjective views. Said differently, a party must show that the trial judge's action and demeanor crossed the barrier of impartiality and prejudiced that party's case.

Richardson v. Richardson, 34 N.E.3d 696, 703-04 (Ind. Ct. App. 2015) (internal citations and quotations omitted).

[25] We have read and thoroughly considered Mackall's arguments regarding trial court bias and/or impartiality. However, the response to each of those arguments is that it is waived for our review. Mackall did not raise an allegation of judicial bias or impartiality in either of his motions leading to the court's appealed orders. *See* Appellee's App. Vol. 2, pp. 228-29 (motion to correct error); Appellant's App. Vol. 2, pp. 94-100 (motion to dismiss for lack of subject matter jurisdiction).

[26] A party in either a civil or criminal matter may not raise on appeal an issue which could have easily been determined or remedied in the trial court without first giving the trial court the opportunity to correct it. It is the very purpose of Trial Rule 59 to avoid such technical objections as are being made for the first time on appeal. "The motion to correct error serves three purposes: (1) to present to the trial court an opportunity to correct error which occurs prior to the filing of the motion; (2) to develop those points which will be raised on appeal by counsel; and (3) to inform the opposing party concerning the points which will be raised on appeal so as to provide that party an opportunity to respond in the trial court and on appeal." *P-M Gas & Wash Co., Inc. v. Smith*, 268 Ind. 297, 301, 375 N.E.2d 591, 594 (Ind. 1972).

> Arguments articulated in a motion to correct error which were not made at trial do not preserve issues for appellate review. If the opposite were true, motions to correct error might contain a bevy of untimely objections, petty complaints regarding the logistical presentation of evidence, attempts to rework trial strategies that did not work well, and other untimely arguments that would distract from the purpose of a motion to correct error.

Thalheimer v. Halum, 973 N.E.2d 1145, 1150 (Ind. Ct. App. 2012). Mackall's arguments along these lines are waived for our review.

[27] In light of the foregoing, we affirm the trial court's decision.

[28] Judgment affirmed.

Brown, J., and Tavitas, J., concur.