

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

CATHY MARTINEZ,
Plaintiff/Appellant,

v.

ARMANDO PACHO,
Defendant/Appellee.

No. 2 CA-CV 2019-0005
Filed July 28, 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NOT FOR PUBLICATION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. DV20180995
The Honorable Laurie San Angelo, Judge Pro Tempore

AFFIRMED

COUNSEL

Richard M. Martinez, Tucson
Counsel for Plaintiff/Appellant

Perkins Coie LLP, Phoenix
By Christopher D. Thomas, Randy McDonald, and Janet M. Howe
*Pro Bono Counsel for Defendant/Appellee*¹

¹In December 2019, after the parties had filed their briefs with Pacho having proceeded pro se, this appeal was placed in the court's Pro Bono Representation Program and pro bono counsel filed a replacement answering brief.

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MEMORANDUM DECISION

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

ESPINOSA, Judge:

¶1 Cathy Martinez appeals the trial court's ruling dismissing an order of protection issued against her estranged husband, Armando Pacho. Because she has demonstrated no abuse of discretion by the trial court in excluding two exhibits at the contested hearing and ultimately dismissing the order of protection, we affirm.

Factual and Procedural Background

¶2 Martinez and Pacho are in the midst of divorce proceedings. In May 2018, Martinez filed a petition for an order of protection against Pacho, alleging (1) Pacho had "insisted" the Pima County Sheriff's Department (PCSD) investigate her in April 2018, (2) Pacho had "sent police to [her] house for a 'welfare' check" in March 2018, (3) suspicious vehicles had circled her mother's and grandmother's houses in March and April 2018, (4) Pacho had told their daughter that Martinez "is gonna get it one of these days" and "bad things are going to happen to her," (5) she feared retaliation and Pacho's continued "harassing and stalking," and (6) her son had seen multiple firearms in Pacho's home. A preliminary order of protection was issued.

¶3 At the contested hearing on the petition, Martinez introduced several exhibits to substantiate her allegation that Pacho had been filing false reports against her. A PCSD incident report indicated Martinez had reported that her daughter had a bruise on her face allegedly inflicted by Pacho. The report also showed that in March 2018, Pacho had contacted a PCSD detective, asking that Martinez's family members and friends be interviewed because he believed she had admitted to them that she had "lied to get him in trouble." Pacho was thereafter dissatisfied with the detective's review of the case and "requested . . . that more be done in this matter." The report also detailed Martinez's allegation that Pacho had filed "several reports against her" through the Tucson Police Department (TPD). A March 2018 TPD report confirmed he had requested a welfare check because he believed "his four children were possibly living in squalor due

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to a hoarding situation.” Martinez, however, had not permitted officers inside the residence to check.

¶4 Martinez also introduced a November 2017 “notice of unsubstantiated child safety report” in which the Department of Child Safety, after investigation, found Pacho’s report that Martinez had been hoarding was “unsubstantiated.” Martinez testified that Pacho’s repeated unsubstantiated reports to law enforcement were “false reporting.” And, she believed Pacho had been stalking her because she had seen “suspicious vehicles” around where she lived and visited. On cross-examination, Martinez acknowledged none of the vehicles were Pacho’s.

¶5 Pacho too testified at the hearing and categorically denied the allegations in Martinez’s petition, stating that he believed Martinez had been filing false police reports against him and had been “coaching” the children to say things about him to get him arrested. He specifically denied telling his daughter that Martinez was a bad person and bad things were going to happen to her. He also denied going near the locations where Martinez had observed suspicious vehicles and explained he had requested a welfare check based on things his son had said to a family member. Lastly, he testified Martinez had been aware of firearms he owned while they were married and that he had turned in his firearms to TPD the day he was served with the initial order of protection.

¶6 After taking the matter under advisement, the trial court found that Martinez’s allegations and evidence in support thereof were insufficient to establish Pacho might commit or had committed an act of domestic violence against her and accordingly dismissed the order of protection. This appeal followed.²

²Although an appeal may be taken from a dismissal of an order of protection, *see* Ariz. R. Protective Order P. 42(a)(2), the present issues are arguably moot because the time during which the order of protection would have been effective—had it not been dismissed—has passed. The original order of protection was issued on May 24, 2018 and served on May 29, 2018 and therefore would have expired, at latest, on May 29, 2019. *See* A.R.S. § 13-3602(N); Ariz. R. Protective Order P. 31(j). In *Cardoso v. Soldo*, we recognized that even expired orders of protection have ongoing collateral legal consequences and therefore are not moot for purposes of appellate review. 230 Ariz. 614, ¶¶ 10-11, 14 (App. 2012). The instant case, however, may be distinguishable from *Cardoso* because appellant Martinez might not suffer those collateral consequences as the party who obtained

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Exclusion of Evidence

¶7 Martinez contends the trial court erred by excluding two exhibits from consideration at the hearing: a 2018 psychological evaluation of Pacho and a 1999 summons indicating he had been charged with a felony.³ At the hearing, Martinez testified about Pacho’s psychological evaluation, in which he had reported he had no criminal history to the psychologist. She then began discussing the 1999 summons, to which Pacho objected on relevance grounds. Martinez argued the exhibits and questioning were relevant impeachment as to Pacho’s “dishonesty” and “credibility.” The court sustained Pacho’s objection.

¶8 A trial court has broad discretion to admit or exclude evidence, and we will not disturb its decision absent a clear abuse of discretion and resulting prejudice. *Lashonda M. v. Ariz. Dep’t of Econ. Sec.*, 210 Ariz. 77, ¶ 19 (App. 2005). An abuse of discretion is “discretion manifestly unreasonable, or exercised on untenable grounds, or for untenable reasons.” *Quigley v. Tucson City Court*, 132 Ariz. 35, 37 (1982). In a contested hearing regarding an order of protection, relevant evidence is admissible, but the court may exclude such evidence if its probative value is substantially outweighed by a danger of “unfair prejudice, confusing the issues, undue delay, wasting time, needlessly presenting cumulative evidence, or lack of reliability.” Ariz. R. Protective Order P. 36(a).

¶9 Martinez maintains the trial court abused its discretion because the exhibits went to Pacho’s “inability to provide truthful responses” and “propensity to lie.” But she cites no authority suggesting the trial court’s decision to disallow such evidence was “manifestly unreasonable” or based on “untenable grounds.” See *Lashonda M.*, 210 Ariz. 77, ¶ 19. Indeed, limiting the evidence and testimony to that relevant to allegations in the petition is precisely what the court was required to do. See Ariz. R. Protective Order P. 36(a). But even were we to assume the court

the order against Pacho. And, as noted, even were she to prevail on appeal, the order of protection would have expired by now. Nevertheless, because the question of mootness was not raised by either party, we exercise our discretion to consider the merits of the appeal. See *Phoenix Newspapers, Inc. v. Molera*, 200 Ariz. 457, ¶ 12 (App. 2001) (mootness doctrine not mandated by Arizona Constitution, “but is solely a discretionary policy of judicial restraint”).

³Martinez did not move for admission of either exhibit but described their contents in her testimony.

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erred in finding the questioning and exhibits irrelevant, we would not reverse its ultimate decision because Martinez has not alleged, let alone demonstrated, any prejudice resulting from the exclusion of the evidence.⁴ *See Schwartz v. Farmers Ins. Co. of Ariz.*, 166 Ariz. 33, 37 (App. 1990) (“A trial court’s decision regarding admission or exclusion of evidence will not be questioned absent a clear abuse of discretion and resulting prejudice.”).⁵

Dismissal of Order of Protection

¶10 Martinez also argues the trial court erred by dismissing the order of protection. 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 an act of domestic violence within the past year.” A.R.S. § 13-3602(E)(1); Ariz. R. Protective Order P. 38(g). In the context of a past or current marital relationship, the term “domestic violence” is broadly defined in A.R.S. § 13-3601(A) and includes an array of criminal acts as well as harassment by way of repeated false reports to a law enforcement or social service agency “with intent to harass or with knowledge that the person is harassing another person.” A.R.S. § 13-2921(A)(5). We review the court’s dismissal of an order of protection for an abuse of discretion. *See Michaelson v. Garr*, 234

⁴At oral argument before this court, counsel for Martinez asserted that “harm” from the trial court’s rulings had in fact been alleged and demonstrated in Martinez’s opening brief where it was argued the court had consequently failed to recognize Pacho’s untruthfulness. But even were that deemed a sufficient claim of prejudice, however indirect, Pacho’s credibility was by no means the court’s sole consideration; the court could also assess the exhibits, both admitted as well as offered, and Martinez’s credibility as well. *See Cotterhill v. Bafile*, 177 Ariz. 76, 81 (App. 1993) (prejudice from evidentiary ruling must affirmatively appear from the record); *see also Creach v. Angulo*, 189 Ariz. 212, 214-15 (1997) (reversal requires error “prejudicial to the substantial rights of the party” and action inconsistent with substantial justice).

⁵To the extent Martinez now contends the criminal record was relevant to establish Pacho “is an extremely dangerous individual,” she did not raise that claim in her petition or at the hearing before the trial court and has accordingly waived the argument. *See Harris v. Cochise Health Sys.*, 215 Ariz. 344, ¶ 17 (App. 2007) (appellate court will not consider issues not raised in the trial court; argument waived when not made at trial court and trial court had no opportunity to consider it).

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Ariz. 542, ¶ 5 (App. 2014). The 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 v. Acuna*, 230 Ariz. 530, ¶ 14 (App. 2012)).

¶11 Martinez argues she demonstrated Pachó had committed domestic violence by making repeated false reports and the trial court abused its discretion because it “misread or misunderstood” her exhibits and “fail[ed] to properly consider all of the evidence.” She further argues it erred in failing to find Pachó poses a credible threat to her safety. In essence, however, Martinez’s argument is that, contrary to the court’s conclusion as the trier of fact, sufficient evidence existed to support a continued order of protection against Pachó. But we do not reweigh the evidence or make credibility determinations on appeal. *Clark v. Kreamer*, 243 Ariz. 272, ¶ 14 (App. 2017). Nor do we redetermine the preponderance of the evidence. *Hurd v. Hurd*, 223 Ariz. 48, ¶ 16 (App. 2009). And, we presume the court considered all evidence before it. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 18 (App. 2004).

¶12 The trial court was well within its discretion to find Pachó’s explanations of his reports to law enforcement credible and accordingly conclude Pachó did not make them with knowledge or intent to harass Martinez.⁶ *See Cardoso v. Soldo*, 230 Ariz. 614, ¶ 17 (App. 2012) (trial court in best position to judge credibility of witnesses and resolve conflicting evidence; appellate court generally defers to its findings). Similarly, Martinez has shown no abuse of the court’s discretion in finding Pachó’s ownership of firearms, which Martinez had evidently known about, did not show he might commit domestic violence.⁷ *See Mahar*, 230 Ariz. 530, ¶ 20

⁶Although Martinez argues the trial court ignored Pachó’s six “false report[s]” to law enforcement over a period of nine months, her petition contained only two allegations that could be construed as false reporting: the March 2018 welfare check and the April 2018 request that PCSD conduct further investigation. The court properly limited its consideration to only those allegations contained in the petition. *See* Ariz. R. Protective Order P. 36(a) (“The court must limit the scope of the hearing to the allegations of the petition.”).

⁷As noted earlier, Martinez’s petition also alleged Pachó had been stalking her because she had seen suspicious looking vehicles in her vicinity, she feared retaliation, and Pachó knew where she lived. Martinez has not raised any argument related to those grounds on appeal, and they

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(allegations require specificity in regards to alleged acts of domestic violence and firearms restrictions).

Attorney Fees on Appeal

¶13 Pacho requests attorney fees on appeal pursuant to A.R.S. § 12-349(A), (F), claiming Martinez’s appeal was brought without “substantial justification” and her arguments were “based wholly on a request to reevaluate and reweigh the evidence submitted to the trial court and the credibility of the parties.” Our authority to award fees on appeal is discretionary, and, exercising that discretion, we decline Pacho’s request. *See Deutsche Credit Corp. v. Case Power & Equip. Co.*, 179 Ariz. 155, 164 (App. 1994).

Disposition

¶14 For the foregoing reasons, the trial court’s dismissal of the order of protection is affirmed.

are therefore waived. *See Sholes v. Fernando*, 228 Ariz. 455, n.1 (App. 2011); *State v. Carver*, 160 Ariz. 167, 175 (1989) (“Failure to argue a claim usually constitutes abandonment and waiver of that claim.”).