

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

AILYN CARRILLO,
Petitioner/Appellant,

v.

JESUS JACOBO CALLEJAS,
Respondent/Appellee.

No. 2 CA-CV 2020-0144
Filed May 11, 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NOT FOR PUBLICATION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. DV20200874
The Honorable Greg Sakall, Judge

AFFIRMED

COUNSEL

Domestic Violence Law Clinic, Tucson
By Negar Katirai, a clinical professor appearing pursuant to Rule 38(c),
Ariz. R. Sup. Ct., and Sarah Hansen, Kat Baiardi, and Katie Derrig,
students certified pursuant to Rule 39(c), Ariz. R. Sup. Ct.
Counsel for Petitioner/Appellant

My Arizona Lawyers, Mesa
By Jacob Morales
Counsel for Respondent/Appellee

MEMORANDUM DECISION

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

V Á S Q U E Z, Chief Judge:

¶1 Ailyn Carrillo contends the trial court erred in quashing an order of protection against her former husband, Jesus Callejas, maintaining the evidence established that he had committed an act of domestic violence against her. For the following reasons, we affirm.

Factual and Procedural Background

¶2 In reviewing a trial court’s decision whether to continue an order of protection, we view the facts in the light most favorable to sustaining the decision. *Michaelson v. Garr*, 234 Ariz. 542, ¶ 5 (App. 2014). In June 2020, Carrillo filed a petition for an order of protection against Callejas. She alleged, among other things, that on November 27, 2019, she and Callejas “were talking in his car [and] he choked me because he got upset.” Based on the allegations, the trial court granted an ex parte order of protection. Callejas contested the order, alleging that it was “based on false allegations with the purpose to deny visitation” of their child.

¶3 At the hearing on the contested order, Carrillo testified that during an argument in her car, Callejas “put his arm around my neck, and he started choking me and squeezing until I was seeing, I guess you would call it stars, and feeling like I couldn’t breathe.” She stated that the incident left red marks on her neck but that she had lost photos of the injury.

¶4 When asked about the incident by his attorney, Callejas testified that he “never choked her.” On cross-examination, Carrillo confronted him with text messages in which he had purportedly admitted the incident:

Q You stated that you never choked me and never did anything, then why is there messages and proof that that’s what you did do?

A I never choked you on November 27. I never pulled you into the car. There was no argument. That is not true.

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Q But there is messages saying that that's what happened, so, I just want to be clear on that.

A You are saying that's what happened. The message says – it says – it's an apology. I never choked you during an argument.

A screenshot of the text messages was admitted into evidence. The screenshot shows a conciliatory message, followed by messages stating, "Sorry I choked u too hard, wasn't thinking[.] I didn'[]t want to scare you[.]" The screenshot does not indicate when the conciliatory messages were sent. Before admitting the screenshot, the court asked Carrillo when she had received the messages, and she stated they were from the night of the incident, after Callejas had choked her and left her house.

¶5 After Carrillo's cross-examination of Callejas, the trial court questioned Callejas about the text messages and the choking:

THE COURT: Sir, did you send her that text message apologizing for choking her?

MR. CALLEJAS: I don't remember, Your Honor. I don't have my messages but I always apologize.

THE COURT: Did you – you've got the exhibits, they've been exchanged, did you send her that text message that she says that you sent her?

MR. CALLEJAS: I think I did, yes.

THE COURT: Okay, so, why would you text her that if you didn't do it?

MR. CALLEJAS: Because we were sexually involved, Your Honor, it was not an argument, what had happened.

MS. CARRILLO: Oh my God.

THE COURT: Okay, so, you did choke her but it was part of a sexual encounter, not an argument?

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MR. CALLEJAS: Yes.

On redirect, Callejas’s counsel asked further questions about the choking, and Callejas stated that he had more than once choked her during sex, but it had always been with permission and at her request. He acknowledged, however, that the conduct was risky and that he had sometimes choked her too hard “in the moment.”

¶6 At the conclusion of the hearing, the trial court quashed the order of protection, stating that Carrillo had not met her burden to show that an act of domestic violence had occurred.¹ This appeal followed. We have jurisdiction pursuant to A.R.S. § 12-2101(A)(5)(b). *See Moreno v. Beltran*, 250 Ariz. 379, ¶ 11 (App. 2020).

Discussion

¶7 Carrillo maintains the trial court “arbitrarily rejected” evidence that Callejas had committed an act of domestic violence against her and misapplied the law in concluding that she had failed to meet her burden of proving domestic violence. We review a court’s decision to quash an order of protection for an abuse of discretion, *see Horton v. Mitchell*, 200 Ariz. 523, ¶ 12 (App. 2001) (denials of injunctive relief reviewed for abuse of discretion), but we review any underlying questions of law de novo, *Michaelson*, 234 Ariz. 542, ¶ 5. A trial court abuses its discretion when it makes an error of law in reaching its decision or when the record lacks any competent evidence to support it. *Id.* Because the trial court is in the best position to determine witness credibility and resolve conflicts in the evidence, we generally defer to its findings. *Cardoso v. Soldo*, 230 Ariz. 614, ¶ 17 (App. 2012).

¶8 “The court shall issue an order of protection . . . if the court determines that there is reasonable cause to believe . . . [t]he defendant has committed an act of domestic violence within the past year” A.R.S. § 13-3602(E)(2). If both parties appear at a contested hearing on an order of protection, the petitioner must prove the alleged domestic violence by a preponderance of the evidence for the order of protection to remain in effect. *See Ariz. R. Prot. Order P. 38(f)(3)*. An assault under A.R.S. § 13-1203

¹ The trial court offered no further explanation for its ruling. Although after a contested hearing the trial court “must state the basis for continuing, modifying, or revoking the protective order,” *Ariz. R. Prot. Order P. 38(f)(4)*, Carrillo has raised no issue here or below questioning the sufficiency of the court’s explanation for its decision.

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constitutes an act of domestic violence if the defendant and victim are or were married. A.R.S. § 13-3601(A)(1). A person commits assault by “[i]ntentionally, knowingly or recklessly causing any physical injury to another person.” § 13-1203(A)(1). “‘Physical injury’ means the impairment of physical condition.” A.R.S. § 13-105(33).

¶9 Carrillo argues that the trial court was bound to accept her version of events because the screenshot of the text messages provided “independent evidence that corroborated her testimony” about the alleged assault on November 27. *See Goats v. A. J. Bayless Mkts., Inc.*, 14 Ariz. App. 166, 170 (1971) (evidence may not be arbitrarily rejected when corroborated by independent document). We, however, disagree with the premise that the screenshot was corroborating evidence of her testimony. Because the screenshot of the text messages did not indicate when the messages were sent, Carrillo’s testimony provided the only evidence that the messages were sent on November 27. The trial court was not required to accept as true her testimony about the context of the messages. *See Premier Fin. Servs. v. Citibank (Arizona)*, 185 Ariz. 80, 86 (App. 1995) (fact finder not required to accept testimony as true, even if not contradicted). Furthermore, Carrillo created the screenshot, and it does not show any messages after Callejas’s apology. Such messages could have supported Callejas’s version of events. Finally, the messages do not fully corroborate Carrillo’s allegation. While the messages corroborate that Callejas had choked her, they do not indicate whether this had occurred in anger in the context of an argument, as she alleged, or during consensual sexual relations, as Callejas maintained.

¶10 Carrillo nonetheless contends that the trial court arbitrarily rejected her evidence, citing *Goats*, 14 Ariz. App. at 170, for its proposition that a fact finder “may not arbitrarily reject uncontradicted evidence of a party when nothing intrinsic in the evidence itself or extrinsic in the circumstances casts suspicion upon it.” But Callejas contradicted Carrillo’s version of events. Although he admitted that he had choked her on more than one occasion, and he admitted sending the text messages apologizing for choking her, he denied choking her on November 27 during an argument. Carrillo contends that “no weight” can be given to Callejas’s testimony because he contradicted himself in several respects, including denying choking her before admitting doing so. But it was within the trial court’s discretion to give weight to Callejas’s testimony despite any inconsistencies in it. *See State v. Clemons*, 110 Ariz. 555, 557 (1974) (fact finder free to believe all, part, or none of witness’s testimony).

¶11 Similarly, the trial court was not required to accept Carrillo’s testimony, even if it was, as she asserts, “consistent.” *See id.* The

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circumstances support inferences that could have cast doubt on Carrillo's veracity. For example, the court could infer a motive to embellish or fabricate parts of the alleged incident from the fact that Carrillo waited to file for the order of protection until several months after the alleged incident and while she was involved in a family law matter with Callejas. In any event, because the trial court is in the best position "to assess the credibility of the witnesses, to observe their demeanor and to determine possible bias," *State v. Gerlaugh*, 134 Ariz. 164, 167 (1982), we decline to second-guess its credibility determinations, *see Cardoso*, 230 Ariz. 614, ¶ 17.

¶12 Carrillo argues that Callejas's testimony was further undermined because his counsel elicited it through improper leading questions. But because she did not object, any issue regarding leading questions is waived. *See State v. Prince*, 160 Ariz. 268, 274 (1989). Even if the issue were not waived, we would defer to the trial court's assessment of whether the leading questions affected Callejas's credibility. *See Cardoso*, 230 Ariz. 614, ¶ 17; *see also State v. Pierce*, 59 Ariz. 411, 415 (1942) (trial court has discretion whether to allow leading questions). And although Carrillo argues that Callejas's story of a consensual sexual encounter was "highly unlikely to be true," given Carrillo's involvement in another romantic relationship and other circumstances, these arguments simply invite us to reweigh the evidence, which we decline to do. *See Williams v. King*, 248 Ariz. 311, ¶ 26 (App. 2020).

¶13 Finally, Carrillo contends that even if the trial court accepted Callejas's version of events, his admission that he choked her during sex amounted to an assault or aggravated assault constituting domestic violence. But Callejas denied the particular instance of domestic violence she alleged in the petition: a choking that occurred on November 27 when he got upset because of a conversation. Indeed, the choking incidents Callejas admitted to, Carrillo denied. The trial court was thus entitled to conclude that she had not proved the allegation in the petition. It therefore did not abuse its discretion by quashing the petition. *See Savord v. Morton*, 235 Ariz. 256, ¶¶ 15-18 (App. 2014) (due process violated where trial court affirmed order of protection based on matters not alleged in petition).²

²Of course, nothing prevents a party from timely petitioning for a new order of protection for an instance of domestic violence not alleged in a previous petition.

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Disposition

¶14 For the foregoing reasons, we affirm the trial court's decision to quash the order of protection against Callejas. We deny Callejas's request for attorney fees pursuant to A.R.S. § 25-324. As the prevailing party, however, Callejas is entitled to his costs on appeal upon compliance with Rule 21(b), Ariz. R. Civ. App. P. *See* A.R.S. § 12-341.