IN THE

ARIZONA COURT OF APPEALS

DIVISION TWO

ROBERT UMBOWER,
Petitioner/Appellant,

v.

AMY MARTELL,
Respondent/Appellee.

No. 2 CA-CV 2021-0011
Filed November 2, 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NOT FOR PUBLICATION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 Gila County
No. DO202000028
The Honorable Timothy M. Wright, Judge

AFFIRMED

COUNSEL

Daniel J. Yamauchi PLLC, Prescott
By Daniel Yamauchi
Counsel for Petitioner/Appellant

The Shaw Law Group PLLC, Prescott
By Bryan C. Shaw
Counsel for Respondent/Appellee

MEMORANDUM DECISION

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

E S P I N O S A, Presiding Judge:

¶1 Robert Umbower appeals from the trial court's judgment resolving paternity, legal decision-making, parenting time, and child support. He argues the court made various errors in its award of parenting time to him and sole legal decision-making to the children's mother, Amy Martell. For the reasons that follow, we affirm.

Factual and Procedural Background

¶2 We view the facts in the light most favorable to sustaining the trial court's findings and orders. *See Alvarado v. Thomson*, 240 Ariz. 12, n.1 (App. 2016). Martell, who already had one child, M.A., and Umbower began living together in 2010. During their relationship, Umbower and Martell had two children together, C.U. and A.U. They separated in May 2019, and in September, Martell obtained an order of protection against Umbower covering M.A., C.U., and A.U., based on M.A.'s allegation that Umbower had "touched her inappropriately under her underwear" during a trip to California in August.

¶3 In February 2020, Umbower filed a petition to establish paternity, legal decision-making, parenting time, and child support, seeking joint legal decision-making and that he be named the primary residential parent of C.U. and A.U. Martell contested the petition, denied that Umbower should be the primary residential parent, and requested that she be awarded sole legal decision-making. At the bench trial, they stipulated to Umbower's paternity of C.U. and A.U. Umbower testified that he had been very involved in his children's lives but had not seen them since the allegation regarding M.A., which he repeatedly denied. Martell testified that following the children's trip to California, M.A. had been "very upset" and acting out of character and that she had not recanted the accusation she first made in a handwritten letter to Martell. Martell acknowledged that Umbower had been a loving and involved father and stated she would be willing to work out a parenting plan. She was open to

joint legal decision-making if the ongoing investigation into M.A.'s allegation eventually cleared Umbower.

¶4 The trial court issued a written ruling finding "that it is more likely than not that the abuse took place." The court listed its findings with regard to each best interests factor under A.R.S. §§ 25-403 and 25-403.01, found that Umbower had committed an act of domestic violence against M.A. pursuant to § 25-403(A)(8), and awarded sole legal decision-making to Martell. But the court also found Umbower had proven "that some Parenting Time with the children can be accomplished without endangering" them, ordering that the children would primarily reside with Martell, but Umbower would have parenting time every other weekend.[1] Umbower subsequently appealed, and we have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 12-2101(A)(1).

Discussion

¶5 Umbower raises several arguments on appeal regarding the trial court's legal decision-making and parenting time orders. He asserts the domestic violence findings were insufficient, the court applied an incorrect standard of proof, the court erred by admitting M.A.'s letter into evidence, and there was insufficient evidence to support the allegation of abuse. We review the court's legal decision-making and parenting time orders for abuse of discretion. *See Christopher K. v. Markaa S.*, 233 Ariz. 297, ¶ 15 (App. 2013). In reviewing the court's findings of fact, we "examine the record only to determine whether substantial evidence exists to support the trial court's action"; that is, "evidence which would permit a reasonable person to reach the trial court's result." *In re Estate of Pouser*, 193 Ariz. 574, ¶ 13 (1999). We "give due regard to the trial court's opportunity to judge the credibility of the witnesses," and we do not "re-weigh[] conflicting evidence or redetermin[e] the preponderance of the evidence." *Hurd v. Hurd*, 223 Ariz. 48, ¶ 16 (App. 2009). We will reverse only if there exists "a clear absence of evidence to support" the court's actions. *Pridgeon v. Superior Court*, 134 Ariz. 177, 179 (1982).

[1] The court's ruling also resolved issues of child support, tax exemptions, and attorney fees, which Umbower has not challenged on appeal.

Factual Findings

¶6 Umbower first contends the trial court erred "by failing to make, and to place on the record, its findings with respect to the factors provided in A.R.S. § 25-403.03(C)." "In a contested legal decision-making or parenting time case, the court shall make specific findings on the record about all relevant factors and the reasons for which the decision is in the best interests of the child." § 25-403(B). "Because A.R.S. § 25-403.03 requires the superior court to consider domestic violence evidence and any evidence that may rebut the statutory presumption when determining the child's best interests, a superior court must make findings regarding *both* of those issues." *Olesen v. Daniel*, 251 Ariz. 25, ¶ 17 (App. 2021).

¶7 As noted above, the trial court made specific findings for each factor under §§ 25-403 and 25-403.01. With regard to its finding that Umbower had committed an act of domestic violence against M.A., the court summarized the testimony of the parties and the evidence offered in support of the allegation and found "it is more likely than not that the abuse took place." The court further found that Umbower's conduct amounted to "child abuse."[2] Umbower nevertheless complains the court "failed to list any of the factors included in A.R.S. § 25-403.03(C)." That subsection states,

> To determine if a person has committed an act of domestic violence the court, subject to the rules of evidence, shall consider all relevant factors including the following:
>
> 1. Findings from another court of competent jurisdiction.
>
> 2. Police reports.
>
> 3. Medical reports.
>
> 4. Records of the department of child safety.

[2]We note that although the court's repeated use of the term "child abuse" in discussing the alleged conduct during trial was arguably inaccurate, the court made the correct legal ruling in concluding Umbower had committed "domestic violence" under § 25-403(A)(8).

5. Domestic violence shelter records.

6. School records.

7. Witness testimony.

Umbower appears to argue that because the court did not expressly state it had weighed each of those factors, its findings were insufficient. We disagree.

¶8 First, Umbower has pointed to no authority requiring the trial court to expressly list the factors it considered in determining whether an act of domestic violence occurred. *See* § 25-403.03(C). Second, and significantly, the court's written findings clearly demonstrate it considered all relevant factors in making its determination, a fact Umbower appears to concede. Specifically, the court referenced both parties' testimony, M.A.'s letter detailing the abuse, and a non-substantiation letter from the department of child safety. The parties testified that they were not in possession of any police reports or forensic interview transcripts, and no medical reports were submitted into evidence. Moreover, absent contrary evidence, "we presume [the trial court] fully considered the relevant evidence." *See In re Marriage of Gibbs*, 227 Ariz. 403, ¶ 21 (App. 2011). Thus, Umbower has failed to demonstrate the court abused its discretion on this basis.

Standard of Proof

¶9 Umbower next argues the trial court erred by applying the preponderance of the evidence standard for determining whether an act of domestic violence had occurred. Umbower asserts his parental rights have been "seriously and permanently impaired" by the court finding him "guilty of child abuse and limiting his parental rights" and argues the clear-and-convincing-evidence standard that applies when the state seeks to terminate parental rights should have applied in his case. But Umbower's argument overlooks that even in severance cases, the preponderance of the evidence standard applies to the best interests inquiry. *See Kent K. v. Bobby M.*, 210 Ariz. 279, ¶ 22 (2005); § 25-403(A).

¶10 More importantly, although Umbower claims "there is little controlling case law in family court regarding the standard of proof to be used in allowing parenting time," this court in *Chapman v. Hopkins* recognized that the best interests considerations under § 25-403(A)—which expressly includes "[w]hether there has been domestic violence or child

abuse"—"normally require proof by a preponderance of the evidence." 243 Ariz. 236, ¶ 17 (App. 2017). Furthermore, because the preponderance of the evidence standard applies when a court is determining whether "there has been a significant history of domestic violence" for purposes of precluding an award of joint legal decision-making, we are satisfied that such a standard is not "impermissibly low" for determining whether there has been a single act of domestic violence or child abuse for purposes of determining legal decision-making and parenting time in accordance with the best interests of the children. *See* §§ 25-403(A)(8), 25-403.03(A). Accordingly, the trial court applied the correct standard of proof here.

Admission of M.A.'s Letter

¶11 Umbower also contends the trial court abused its discretion by admitting, over his objection, M.A.'s undated letter describing the abuse allegation. He argues admission of the letter violated Rules 49 and 65 of the Arizona Rules of Family Law Procedure because Martell failed to timely disclose the letter. He correctly points out that Rule 49 requires parties to disclose information in their possession and control and that "[t]he duty of disclosure is a continuing" one. Ariz. R. Fam. Law P. 49(b)(2)(A). And, "[a] party prejudiced by a failure to disclose . . . or untimely disclosure . . . may seek the remedies identified in Rule 65," Ariz. R. Fam. Law P. 49(b)(3), which sets forth various sanctions a court may order for a party's failure to comply with disclosure rules, including prohibiting the offending party from introducing designated matters into evidence, Ariz. R. Fam. Law P. 65(b)(1)(B). But his objection below "on the basis of authentication" did not preserve the issue he now raises on appeal. *See Ruben M. v. Ariz. Dep't of Econ. Sec.*, 230 Ariz. 236, ¶ 13 (App. 2012) ("[A]n objection on one ground does not preserve the issue on another ground." (quoting *State v. Lopez*, 217 Ariz. 433, ¶ 4 (App. 2008))). Umbower has thus waived this issue, and we need not consider it further.[3] *See Cullum v. Cullum*, 215 Ariz. 352, n.5 (App.

[3]In any event, Umbower has not demonstrated how the untimely disclosure of the letter prejudiced him. *See Fuentes v. Fuentes*, 209 Ariz. 51, ¶ 27 (App. 2004) ("[W]e will not disturb the trial court's admission of the document absent both a clear abuse of discretion and resulting prejudice."). He claims he had "no time to authenticate the letter or compare its contents against police reports, the order of protection, or personnel at DCS," but the exhibit is a single-page handwritten letter containing six sentences regarding M.A.'s abuse allegation, the substance of which, as the trial court pointed out, was also set forth in Martell's petition for order of protection. And to the extent he repeats his authentication argument on appeal, we note that neither party had invoked Rule 2, Ariz. R. Fam. Law P.; thus,

2007) ("As a general rule, a party cannot argue on appeal legal issues not raised below."); *In re Marriage of Johnson & Gravino*, 231 Ariz. 228, ¶ 25 (App. 2012) ("Absent extraordinary circumstances, errors not raised in the trial court cannot be raised on appeal because the court and opposing counsel should have the opportunity to correct any asserted errors or defects.").

Sufficiency of the Evidence

¶12 Umbower also appears to challenge the sufficiency of the evidence supporting the trial court's legal decision-making and parenting time orders based on the finding that he had committed an act of domestic violence, asserting "[t]he evidence submitted in this matter cannot reasonably be interpreted to support the [trial court's] decision." We disagree. Each of the court's material findings with regard to the abuse allegation is supported by testimony and evidence presented at trial. Viewing that evidence in a light favoring the court's findings, *Alvarado*, 240 Ariz. 12, n.1, Martell testified about M.A.'s allegations, provided the court with M.A.'s letter reporting what occurred, and described M.A.'s markedly changed behavior toward Umbower and her siblings following the trip to California. The fact that there is no corroborating evidence from police reports or medical records does not diminish the weight of that testimony or render it insufficient.[4] *Cf. State v. Jerousek*, 121 Ariz. 420, 427 (1979) ("In child molestation cases, the defendant can be convicted on the uncorroborated testimony of the victim.").

Arizona Rule of Evidence 901 (regarding authentication of evidence) did not apply and was therefore not a basis for exclusion of the letter. *See* Ariz. R. Fam. Law P. 2(b)(1).

[4]Martell also testified that M.A. had been forensically interviewed by the Yavapai Family Advocacy Center and she requested a transcript but was informed "it was under the jurisdiction of San Diego," and no records would be released while the investigation was ongoing. Umbower asserts that "multiple law enforcement agencies [have] dismiss[ed] the claims or end[ed] their investigations" without charging any crime. But as the trial court noted, "[e]ven if California law enforcement does not move forward with a criminal case, it does not mean that the incident did not take place, it only means that law enforcement does not have evidence sufficient to convince a jury of the allegations beyond a reasonable doubt." *See In re Pima Cnty. Juv. Dependency Action No. 118537*, 185 Ariz. 77, 79-80 (App. 1994).

¶13 Finally, to the extent Umbower challenges the weight the trial court gave to certain evidence and its determination that Martell was a more credible witness than him, we reject such an argument. As noted above, those considerations are within the trial court's purview as the fact finder. *See Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13 (App. 1998) ("We will defer to the trial court's determination of witnesses' credibility and the weight to give conflicting evidence."); *Hurd*, 223 Ariz. 48, ¶ 16 ("Our duty on review does not include re-weighing conflicting evidence or redetermining the preponderance of the evidence.").

Attorney Fees on Appeal

¶14 Martell requests her attorney fees and costs on appeal, citing A.R.S. § 25-809(G) and Umbower's "unreasonable and unsupported legal positions." In the exercise of our discretion, we decline her request. Although we found Umbower's arguments on appeal unpersuasive, we do not agree they are unreasonable, and in any event, we lack recent information regarding the parties' financial resources. *See* § 25-809(G).

Disposition

¶15 Because Umbower has not demonstrated the trial court abused its discretion with regard to legal decision-making and parenting time, the court's judgment is affirmed.