

IN THE
ARIZONA COURT OF APPEALS
DIVISION TWO

MARILYN LEON,
Plaintiff/Appellee,

v.

MIGUEL HARLAN PLAZA,
Defendant/Appellant.

No. 2 CA-CV 2021-0111
Filed March 9, 2022

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NOT FOR PUBLICATION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 Santa Cruz County
No. PO202100020
The Honorable Sheila L. Dagucon, Judge Pro Tempore

AFFIRMED

COUNSEL

Brenna Larkin, Tumacacori
Counsel for Plaintiff/Appellee

Law Office of Mark L. Williams, Nogales
By Mark L. Williams
Counsel for Defendant/Appellant

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MEMORANDUM DECISION

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

BREARCLIFFE, Judge:

¶1 Appellant Miguel Plaza appeals the trial court's order maintaining Marilyn Leon's order of protection against him and its order denying his request for attorney fees. For the following reasons, we affirm.

Factual and Procedural Background

¶2 "We view the evidence in the light most favorable to upholding the trial court's ruling." *Mahar v. Acuna*, 230 Ariz. 530, ¶ 2 (App. 2012). Plaza and Leon dated for about five years and ended their relationship in early 2020. Notwithstanding their break-up, Leon and Plaza later conceived a daughter, E.L., who was born in December 2020. In June 2021, Leon and Plaza entered into a partial settlement regarding parenting time and legal decision making as to E.L., and a trial date was set for July 2021 on the remaining issues.

¶3 On June 21, 2021, Leon filed a petition for an order of protection against Plaza and listed E.L. as an additional person to be protected under the order. Leon asserted four instances of domestic violence as the basis for the order of protection, occurring on March 28, 2020; February 27, 2021; March 16, 2021; and April 29, 2021. Leon described what happened on March 28 in her petition, stating:

I went to [Plaza's] house to spend the night. [W]e were broken up at the time but I needed a place to stay. While I was there, he kept telling me that we were going to have sex. I kept telling him no. He gave me alcohol and I felt like I needed to lie down. I went to bed in my clothes and with my makeup on and I fell asleep. While I was asleep, he came in, took off my clothes, and had sex with me. I kept telling him no. I kept telling him to get off. But he didn't listen.

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¶4 At an ex parte hearing, the trial court granted Leon’s petition for an order of protection, finding there was “reasonable cause to believe that domestic violence ha[d] occurred,” and included her and E.L. on the order. Plaza contested the order of protection, denied all allegations Leon made, and requested that the order be dismissed and that he be awarded attorney fees and costs. Following a two-day hearing, the court maintained the order of protection as to Leon, stating that it was “very concerned about the actions that took place on March 28th, 2020.” However, the court removed E.L. from the order, permitting Plaza to have parenting time with her. The court also denied Plaza’s request for attorney fees and costs. This appeal followed. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1) and 12-2101(A)(1), (5)(b). *See* Ariz. R. Protective Order P. 42.

Analysis

March 28, 2020 Allegation

¶5 Plaza argues that the trial court abused its discretion by maintaining the order of protection based on the allegation of the March 28, 2020 incident.¹ Specifically, he states the court acted “in an arbitrary manner when [it] elected to disregard” a text message sent by Leon after the incident and his testimony that the incident was consensual. We review the court’s decision to maintain an order of protection for an abuse of discretion. *Michaelson v. Garr*, 234 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

¹Plaza also makes arguments as to the other three allegations Leon made in her petition for an order of protection. But the trial court appeared to uphold the order of protection solely based on the March 28 incident, stating that it was “very concerned about the actions that took place on March 28th, 2020.” It made no explicit findings as to the other allegations. Nonetheless, only one act of domestic violence is required to uphold an order of protection. *See* A.R.S. § 13-3602(E). The events of March 28, as alleged, constitute sexual assault under A.R.S. § 13-1406(A), and sexual assault is an act of domestic violence, A.R.S. § 13-3601(A). Consequently, we need not address Plaza’s claims related to the other allegations. *See Progressive Specialty Ins. Co. v. Farmers Ins. Co.*, 143 Ariz. 547, 548 (App. 1985) (appellate courts should not decide questions unnecessary to disposition of appeal).

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favorable to upholding the trial court's decision, is devoid of competent evidence to support the decision.'" *Id.* (quoting *Mahar*, 230 Ariz. 530, ¶ 14).

¶6 The trial court must continue a contested order of protection if the plaintiff shows by a preponderance of the evidence that "there is reasonable cause to believe . . . [t]he defendant has committed an act of domestic violence 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)(2).² Sexual assault, *see* A.R.S. § 13-1406, is an act of domestic violence under A.R.S. § 13-3601(A).

¶7 At the contested order of protection hearing, Plaza introduced as evidence a text Leon had sent him four days after the March 28 incident, which said: "Hey thanks again for letting me stay, it means a lot. Please take care of yourself. If you need anything let me know." Plaza then testified that, on March 28, Leon never told him to not undress her or to stop what he was doing. He also stated that Leon was not asleep and that she was conscious "the whole time" they had sex that day. Plaza asserts on appeal that the later text from Leon, in addition to his testimony about the incident, is "uncontradicted evidence" that they had consensual sex on March 28, which could not be arbitrarily rejected by the trial court. While the trier of fact is not required to accept uncontradicted evidence of an interested party as true, "[t]he trier of fact 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. Nor may it be rejected where it is corroborated by a disinterested witness or an independent document." *Goats v. A. J. Bayless Markets, Inc.*, 14 Ariz. App. 166, 170 (1971) (quoting *Reliable Elec. Co. v. Clinton Campbell Contractor, Inc.*, 10 Ariz. App. 371, 376 (1969)). However, Plaza's evidence was not uncontradicted, but rather was contradicted by Leon's testimony and other evidence.

¶8 Although Leon confirmed that she had sent the text to Plaza, she also testified that, after drinking some alcohol, she fell asleep on Plaza's bed on the night of March 28 and when she woke up, Plaza was on top of her trying to take her clothes off. Leon said that she had told Plaza "no" several times, told him that she "didn't want to have sex and to get off of

²Plaza does not assert on appeal the absence of good cause for the court's consideration of the March 28, 2020, incident in support of the order of protection, despite it predating the petition by nearly fifteen months.

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[her],” and tried to struggle against him, but had difficulty doing so because she was not sober. Leon testified that after the incident, she had gone outside and called M.C., who testified and acknowledged receiving the call. Although in that call Leon did not tell M.C. what had just happened, M.C. testified that he could tell that “there was something wrong” and that Leon “wasn’t herself.” M.C. also testified that Leon had later told him that her subsequent pregnancy (presumably with E.L.) was the result of rape and that Leon had seemed depressed throughout her pregnancy.

¶9 When evidence conflicts, as it does here, we defer to the trial court’s “determination of witnesses’ credibility and the weight to give conflicting evidence.” *Gutierrez v. Gutierrez*, 193 Ariz. 343, ¶ 13 (App. 1998). Because competent evidence in the record, seemingly accepted by the trial court, supports the court’s ultimate finding that Plaza committed an act of domestic violence by “intentionally or knowingly engaging in sexual intercourse” with Leon on March 28 without her consent, *see* § 13-1406(A), the court did not abuse its discretion in continuing the order of protection, *see Michaelson*, 234 Ariz. 542, ¶ 5. *Cf. State v. Williams*, 111 Ariz. 175, 177-78 (1974) (“A conviction may be had on the basis of the uncorroborated testimony of the [victim] unless the story is physically impossible or so incredible that no reasonable person could believe it.”).

Stated Basis for Continuing Order of Protection

¶10 Plaza also argues that the trial court erred in maintaining the order of protection because it did not comply with Rule 38(g)(4), Ariz. R. Protective Order P. ³ “We review any questions of law *de novo*.” *Michaelson*, 234 Ariz. 542, ¶ 5.

¶11 Rule 38(g)(4) provides that, at the conclusion of a hearing on a contested order of protection, “the judicial officer must state the basis for continuing, modifying, or revoking the protective order.” Plaza states in his opening brief that the trial court did not identify what allegation was the basis for the order of protection and therefore he and “this Court . . . are left to guess at what [Plaza] did that may have violated any subpart of A.R.S. § 13-3601(A).” We disagree. The court stated at the conclusion of

³Plaza cites to the previous version of the rule, which was in effect at the time of the hearing, in his opening brief. *See* Ariz. Sup. Ct. Order R-20-0002 (Aug. 26, 2020). For ease of reference, “[w]e cite to the current version of applicable statutes or rules when no revision material to this case has occurred.” *Bobrow v. Bobrow*, 241 Ariz. 592, n.2 (App. 2017).

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the contested hearing that it was “very concerned about the actions that took place on March 28th, 2020,” and that “the plaintiff has shown that, more likely than not, the facts that were presented are true,” and “the protective order should . . . remain in place, with respect to Ms. Leon and Mr. Plaza.” Because it did not address any of the other allegations in its findings, we can infer the court’s basis for continuing the order of protection was the allegation of sexual assault. *See Cardoso v. Soldo*, 230 Ariz. 614, ¶ 21 (App. 2012) (“[W]e may infer additional findings of fact . . . sufficient to sustain the [superior] court’s order as long as those findings are reasonably supported by the evidence.” (alterations in *Cardoso*) (quoting *Johnson v. Elson*, 192 Ariz. 486, ¶ 11 (App. 1998))). Moreover, in signing the modified order of protection at the conclusion of the hearing, the court adopted the language on the pre-printed order of protection form “finding reasonable cause to believe that Defendant may commit an act of domestic violence or has committed an act of domestic violence within the past year (or good cause exists to consider a longer period).” Such a finding is all that is required by the Rule. Therefore, the court did not fail to comply with Rule 38.

Attorney Fees Below

¶12 Plaza also argues that the trial court abused its discretion by not awarding him his attorney fees. He argues that, because he “successfully had the parties’ daughter removed from the Order of Protection,” the court should have awarded him his attorney fees. We will only reverse the court’s decision regarding attorney fees if there is an abuse of discretion. *See Gutierrez*, 193 Ariz. 343, ¶ 32.

¶13 Rule 39, Ariz. R. Protective Order P., grants the trial court the discretion to award reasonable attorney fees and costs following a contested order of protection hearing. A court may consider “the merits of the claim or the defense asserted by the unsuccessful party,” “whether the award will pose an extreme hardship on the unsuccessful party,” and “whether the award may deter others from making valid claims,” when determining whether to grant an award. Ariz. R. Protective Order P. 39(b). The trial court here found that, while Plaza prevailed on removing E.L. from the order of protection, he “did not prevail on the Protective Order to be revoked with respect to [Leon]” and his “asserted defense” – that he had not committed domestic violence at all – “was not successful.” Furthermore, the court found that awarding fees and costs to Plaza “would be a hardship to [Leon] and may deter others from making valid claims.” Based on the findings and considerations of the court, we cannot say it

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abused its discretion in refusing to award Plaza his attorney fees and costs below.

Attorney Fees and Costs on Appeal

¶14 Plaza requests his attorney fees and costs on appeal pursuant to Rules 21 and 25, Ariz. R. Civ. App. P.; Rule 39, Ariz. R. Protective Order P.; and § 13-3602(T). Other than citing to statutory authority, Plaza provides no argument in support for his request, and he is not the prevailing party on appeal. Therefore, we decline his request for attorney fees and costs. See *In re Marriage of Margain & Ruiz-Bours*, 251 Ariz. 122, ¶ 27 (App. 2021).

¶15 Leon also requests her attorney fees and costs on appeal pursuant to Rules 21 and 25, Ariz. R. Civ. App. P.; Rule 39, Ariz. R. Protective Order P.; and A.R.S. § 12-349. In our discretion, we decline to award Leon her fees on appeal as sanctions under Rule 25. See *Ariz. Dep't of Revenue v. Gen. Motors Acceptance Corp.*, 188 Ariz. 441, 446 (App. 1996) (determination to award or decline attorney fees under Rule 25 is within court's discretion). Further, after considering the factors of Rule 39(b) – the merits of Plaza's claims and “whether the award will pose an extreme hardship on [him]” or “deter others from making valid claims” – we deny Leon's request for reasonable attorney fees under that rule. As the prevailing party, however, Leon is entitled to her costs upon compliance with Rule 21, Ariz. R. Civ. App. P. See *In re Marriage of Margain & Ruiz-Bours*, 251 Ariz. 122, ¶ 27.

Disposition

¶16 For the foregoing reasons, we affirm the trial court's decision to continue Leon's order of protection against Plaza.