IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In re the Marriage of:	)	NO. 65515-9-I
	)	
TAMARA MARIE RODDEN,	)	DIVISION ONE
	)	
Respondent,	)	
	)	
and	)	UNPUBLISHED OPINION
	)	
JAMES FRANCIS RODDEN,	)	FILED: July 11, 2011
	)	
Appellant.	)	

Lau, J. — James and Tamara Rodden petitioned for dissolution and submitted an agreed proposed parenting plan that provided for joint decision making. Relying on the guardian ad litem (GAL) report and information from the Judicial Information System (JIS), the court ordered joint decision making, finding "a history of acts of domestic violence under [RCW] 26.09.191(1)(c)." James Rodden appeals, arguing that neither document establishes a history of acts of domestic violence. Because insufficient evidence supports the trial court's domestic violence finding, we reverse and remand.

FACTS

James and Tamara Rodden married in June 1998, and their only child was born

in September 1999. Tamara Rodden (the mother) petitioned for dissolution of the marriage in April 2, 2008.

In the proposed parenting plan filed with the divorce petition, the mother completed the "parental conduct" section—"Does not apply"—where restrictions for domestic violence would be mentioned if applicable. RCW 26.09.191(1)(2).[1] She proposed that the child reside with her a majority of the time. But she proposed to allow Mr. Rodden (the father) 77 hours a week, including three overnights. The mother also proposed joint decision making and indicated that "there are no limiting factors" that should restrict decision making.

A few days before the mother petitioned for dissolution, the parties cross petitioned for domestic violence protection orders under RCW 26.50.030.[2] On April 14, 2008, a commissioner dismissed the petitions, citing insufficient evidence. The commissioner explained, "Unless I receive more evidence in this case at a later hearing that convinces me otherwise, I'm not going to grant protection orders for anybody in this

[1] Subsection (1) provides for no mutual decision-making if a parent has engaged in a history of acts of domestic violence. And subsection (2) similarly limits a parent's residential time with the child if the parent engaged in a history of acts of domestic violence.

[2] RCW 25.50.030 provides in part:

"There shall exist an action known as a petition for an order for protection in cases of domestic violence.

"(1) A petition for relief shall allege the existence of domestic violence, and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought. Petitioner and respondent shall disclose the existence of any other litigation concerning the custody or residential placement of a child of the parties as set forth in RCW 26.27.281 and the existence of any other restraining, protection, or no-contact orders between the parties."

case." The commissioner signed an order of dismissal for both petitions, finding "Parties did not meet their respective burdens." The commissioner approved the parents agreed temporary parenting plan on May 14, 2008, which provided for joint decision making.

After the mother was arrested for driving while intoxicated in February 2009, the father moved to amend the temporary parenting plan to limit the mother's residential time. The father proposed joint decision making. The court approved a second temporary parenting plan on April 24, 2009 which approved joint decision making and found no limiting factors. On June 16, 2009, the court approved a third temporary parenting plan which increased the mother's residential time, but still left the child with the father a majority of the time. The court again approved joint decision making.

The commissioner appointed a GAL to investigate issues related to the parenting of the parties' child. The court also prohibited corporal punishment of the child and required that the parties contact a professional regarding training in nonviolent communication.

On June 30, after the GAL issued his report, the parties participated in a settlement conference conducted by a court commissioner pursuant to Whatcom County Special Proceeding Rules (WCSPR) 94.08(h). The GAL report included recommendations that the parenting plan prohibit the mother from using alcohol and require the father be evaluated for violence intervention and training and to refrain from corporal punishment. The report also recommended joint decision making. The parties, represented by counsel, signed a settlement conference agreement related to the parenting plan, which expressly adopted the GAL's recommendations. The parties also agreed to allow the child to live with

the father for the majority of the time and to joint decision making. Remaining issues primarily involving child support, property division, and financial issues were reserved for trial.

At the one-day trial on July 15, the parties presented evidence on all remaining issues except the parenting plan. After close of evidence, the court gave its oral decision on the issues tried. But the court said it was concerned about the parents' proposal for joint decision making because “when I read RCW 26.09.191, and when there is a history of domestic violence, I think the Court is constrained not to allow for joint decision-making on major issues.” Report of Proceedings (RP) (July 15, 2009) at 16. The court added: “It appears there has been a finding by a court to that effect with regards to Mr. Rodden.” RP (July 15, 2009) at 16. The court never explained its reference to “finding by a court”[3] It reserved ruling until the presentation hearing to enter the final degree and support order. The court explained:

> I’m not going to make that decision right now. I’m going to let you give me some reason why you think it’s appropriate to maintain that [joint decision-making], and if you want to continue that in your final parenting plan, and I might change my mind, but right now, I think there’s an issue that has to be addressed by the parties at some point before the Court.

RP (July 15, 2009) at 17.

The mother then proposed a plan, based on alleged domestic violence, that allocated to her sole responsibility for education, religion, and health care decisions

[3] While unclear, the record indicates neither party knew then that the court’s comment was based on its review of the sealed file containing the JIS data on the mother’s and father’s criminal history. Such judicial review is required whenever a judicial officer presides over entry of the permanent parenting plan. WCSPR 94.08.

and no decision making to the father. The father filed a response, arguing no evidence of domestic violence, "The information is related to records brought up by the court on its computer, such information is not sworn to, nor may it be challenged or cross examined." Appellant's Br., Attachment 1, at 1-2.

At the September 22, 2009 presentation hearing, the court explained that it was concerned about records in the JIS that it believed indicated a history of domestic violence by the father. The court clerk had generated a JIS printout and placed it in a sealed court file in accordance with local court rule WCSPR 94.08(0).[4] The JIS printout shows two single-line entries related to domestic violence for the father—a March 30, 2008 fourth degree assault charge and a July 21, 2008 violation of protection order charge. The judgment status for both charges is shown as "D."

The court stated that if there is a history of domestic violence, it must deny mutual decision making under RCW 26.09.191. After the court reviewed the JIS report, the following colloquy took place:

> THE COURT: My recollection from the guardian ad litem's report and the file is that there's an indication that he was charged and had a deferred

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[4] WCSPR 94.08(o) provides: "Prior to presenting a permanent parenting plan to the court for approval, the party or parties shall submit a completed judicial information service (JIS) background check form to the Whatcom County Clerk. Such request shall include the names and dates of birth of all persons residing in each residence and must be submitted no fewer than fourteen days prior to the date of presentation of the final parenting plan. Upon receipt of a completed JIS background check form, the Court shall complete a search of the Judicial Information System for the existence of any information and proceedings relevant to the placement of the child. This search shall be performed no more than 30 days prior to the proposed date of presentation of the permanent parenting plan. The results of such search shall be available to the judicial officer presiding over the entry of the permanent parenting plan at least two court days prior to the proposed presentation date. Both the completed JIS background check form and the results of the search shall be filed under seal in the GR 22 file."

> prosecution or disposition of some sort of an assault charge.
>
> . . . .
>
> [MOTHER'S ATTORNEY]: I think the Court's required to look at the JIS before looking at a final parenting plan, and I don't know if the Court —
>
> THE COURT: I have.
>
> [MOTHER'S ATTORNEY]: -- has seen anything that indicates what his history was.
>
> THE COURT: It just says deferred, and there's a violation of a protection order charge that has the same resolution. It shows deferred, both out of district court.
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> . . . .
>
> . . . . I think if there's been a prosecution for fourth degree assault, and if there's been prosecution for violation of a no contact order, and even if it resolves in some sort of a deferred, it doesn't mean that there wasn't something that happened.

RP (Sept. 22, 2009) at 5-8. The court continued:

> In addition, the district court has a violation of a protection order matter which also ended as a deferred.
>
> Now, a deferred, as I understand it, says if I do all these things, there's not going to be a conviction, but if I don't comply with these things, then I'm back in court, and I can be found guilty.
>
> So I'm saying that that doesn't indicate that there is no history, or that somehow that nothing happened. It indicates that something did happen, and he's getting an opportunity to avoid being punished for it.

RP (Sept. 22, 2009) at 10. The court noted that its domestic violation conclusion was also supported by the GAL report which also referenced "deferred prosecutions." RP (Sept. 22, 2009) at 11. The court stated that if the father could produce contrary district court records, it would reconsider its decision.

That same day, the court signed a permanent parenting plan that provided the child would reside with the father a majority of the time—including 8 out of every 14 nights, but allocated sole decision making to the mother. The court denied mutual decision making based on the GAL report and JIS record purporting to show a history

of acts of domestic violence.

The father moved for reconsideration of the final parenting plan, arguing domestic violence was not proven, improper reliance on a GAL report without an opportunity to cross-examine the GAL, and the JIS record fails to establish domestic violence.[5] The father submitted family friend Eric Yurk's declaration explaining that the violation of a protection order charge stemmed from Yurk's visit to the family home at the father's request "to look at some damage." Yurk also clarified that someone doing work on the house allowed him inside because no one was home. The father also submitted a declaration stating that the protection order violation and the fourth degree assault charges had been dismissed and the court ordered no treatment or probation.

At the reconsideration hearing on October 27, 2009, the parties and the court agreed that there had been no fact finding on the parenting plan or domestic violence issue because the parties had previously agreed on a parenting plan that included joint decision making. Yet, the court continued to cite the GAL report as a basis for finding domestic violence. The court stated that the GAL report indicated that the assault charge "ended up in a deferred prosecution," which suggested to the court that the father must have agreed that he would "be found guilty of the offense" if he did not complete requirements for deferral. RP (Oct. 27, 2009) at 9. The court stated that it was relying on the GAL account of the "events:" "However it's resolved in the court doesn't mean that the event did not occur, and it's the event that this Court must look

[5] The father also argued that collateral estoppel barred awarding sole decision making on the ground of a history of domestic violence because the commissioner had previously rejected the parties' cross petitions for protection.

at, and the events are set forth in the [GAL]'s report." RP (Oct. 27, 2009) at 11. The court denied the motion for reconsideration on the ground that "there exists sufficient admissible evidence of a history of domestic violence pursuant to RCW 26.09.191(2)(a)(iii) [sic][6] to support a conclusion that joint decision-making shall not be required in the Parenting Plan."

The father appeals.

ANALYSIS

The father challenges the final parenting plan on the grounds that the court erred when it allocated sole decision making authority to the mother under RCW 26.09.191(1) after finding he had engaged in a history of acts of domestic violence. The principle issue here is whether sufficient evidence supports the court's order and finding. The court found:

> Mutual decision-making shall not be required, because the father has engaged in the conduct which follows:
>
> A history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

The current version of RCW 26.09.191(1) provides:

> The permanent parenting plan shall not require mutual decision-making or designation of a dispute resolution process other than court action if it is found that a parent has engaged in . . . . (c) a history of acts of domestic violence as defined in RCW 26.50.010(1) or an assault or sexual assault which causes grievous bodily harm or the fear of such harm.

(Emphasis added.)

"Domestic violence" means:

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[6] The order erroneously cites to an unrelated provision. The correct statutory provision is RCW 26.09.191(1)(c).

> (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010(1).

We review findings of fact for substantial evidence and conclusions of law de novo. In re Marriage of Zier, 136 Wn. App. 40, 45, 147 P.3d 624 (2006). Substantial evidence is a quantum of evidence sufficient to persuade a rational fair-minded person that the premise is true. Thompson v. Hanson, 142 Wn. App. 53, 60, 174 P.3d 120 (2007). We defer to the trier of fact for purposes of resolving conflicting testimony and evaluating the persuasiveness of the evidence and credibility of the witnesses. Thompson, 142 Wn. App. at 60, 174 P.3d 120.

The trial court relied principally on the father's criminal history as recorded in JIS and the GAL report to support its domestic violence finding. But this evidence fails to support a finding of "a history of acts of domestic violence" under RCW 26.09.191(1)(c). The record indicates that the trial court misconstrued the JIS in concluding the father had two domestic violence related deferred prosecutions—one for fourth degree assault and one for violation of a protection order. The JIS record shows a charge for "Assault 4th Degree" on March 30, 2008, and a charge for "Protection Order Violation" on July 21, 2008. Both entries show "D" [7] under the column marked "Jg" for judgment.

[7] From the comments, it appears the court assumed the "D" meant either a deferred prosecution or deferred sentence. But as shown in the mother's criminal history from the JIS report, a deferred prosecution judgment would have been

According to the JIS-Link Code Manual, judgment of “D” means “dismissed,” whereas “OD” indicates “other deferral.”[8] The court misconstrued the JIS coding information and presumed that the father received a deferred prosecution, when the charges, according to JIS, were dismissed.[9]

In addition, the court’s domestic violence finding is not supported by substantial evidence because the violation of protection order charge (even assuming a conviction) does not meet the statutory definition of a domestic violence offense. Indeed, the alleged violation of a protection order occurred when the father asked a family friend to contact the mother. “Domestic violence” means:

> (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010(1). Family friend Erik Yurk submitted an unrebutted declaration which describes the events leading to this charge. Yurk testified that on July 21, 2008, he went to the mother's house to check on its condition at the father's request. Yurk said

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designated “DP.” The mother received a deferred prosecution for her February 25, 2009 DUI. Similarly, the March 30, 2008 fourth degree assault was dismissed as shown by the “D” under judgment status.

[8] JIS-Link Code Manual, “Status Codes” http://www.courts.wa.gov/jislink/index.cfm?fa=jislink.codeview&dir=clj_manual&file=status (last visited June 20, 2011).

[9] The father also submitted an unrebutted sworn declaration to the court stating that both charges had been dismissed and no treatment, classes, or probation had ever been ordered by a court on these charges.

that he "felt it would not be an issue" because he had known the Roddens for years, their children are friends, and he had been their guest numerous times. After he pulled into the driveway "to look at some damage," a man who was doing repair work at the house invited Yurk inside. Yurk stated "At no time were either Jim or Tamara present nor did I ever attempt to contact Tamara." Similarly, the GAL report stated: "In this case father had a friend go to the former family home to retrieve belongings." These unchallenged facts[10] do not meet the statutory definition of domestic violence, which requires physical injury, infliction of fear, sexual assault, or stalking. Accordingly, even if we assume the father was convicted of fourth degree assault, that conviction alone is insufficient as a matter of law to deny joint decision making. RCW 26.09.191(1)(c) requires a finding of "a history of acts of domestic violence." (Emphasis added.) A single misdemeanor assault conviction does not constitute "a history of acts of domestic violence."

Nor does the GAL report constitute sufficient evidence to support the court's finding of domestic violence. First, the report was never admitted into evidence. Rather, it was attached to the parents agreed parenting plan because they had agreed to follow most of its recommendations.[11] Indeed, the GAL recommended joint decision

[10] Notably, our record shows that the mother submitted no evidence rebutting Yurk's and the father's declarations filed in support of the motion for reconsideration.

[11] We decline to view this as a stipulation to the facts because the parties agreed only to follow its recommendations. The agreement stated, "A parenting plan shall be entered consistent with the recommendations of the GAL contained in his 10/24/08 report and his revised recommendations dated 6/17/09 . . . . " It did not include a stipulation to facts.

making. And both the court and the mother acknowledged that there was no admitted evidence of domestic violence. The court stated: "I looked back at the case and my notes, and I didn't take any [trial] testimony about the parenting plan. You told me it was agreed beforehand." RP (Sept. 22, 2009) at 4. At the reconsideration hearing, the mother stated, "We didn't have a trial on that [joint decision making] matter, so you know, one could argue as Mr. Hunter is that, you know, none of it was before the Court and that none of the findings that are made were, were, — should be in parenting plan, because there wasn't a fact finding on that [joint decision making]. RP (Oct. 27, 2009) at 6-7. And neither the mother nor anyone else testified about events constituting domestic violence.[12] The judge explicitly acknowledged that the GAL report was not admissible evidence:

> [Father's attorney]: That is not evidence. . . .
> COURT: I know it's not evidence.
> [Father's attorney]: It is not admissible evidence.
> COURT: This Court, for purposes of deciding [parental] decision making, only has to determine whether it believes that there was a history of domestic violence.
> [Father's attorney]: It has to decide - - it has to make a finding.
> COURT: And I am making a finding.
> [Father's attorney]: By a preponderance of the evidence?
> COURT: We will disagree on that. You and I will have to disagree on that.
> I think the Court may consider the [GAL]'s report in this particular decision.

RP (Oct. 27, 2009) at 11-12 (emphasis added).

Even assuming the court properly relied on the JIS and GAL reports, the reports

[12] And our review of the record shows no exhibits were admitted to establish the father engaged in acts of domestic violence.

fail to establish a history of domestic violence acts. The October 2008 GAL report refers to "conflicting statements" and the "father denies" the mother's allegations of domestic violence. In describing the March 30, 2008 incident that was the subject of the assault charge, the GAL wrote, “Father allegedly grabbed mother's arms.” Thus, the GAL report described only allegations. But “RCW 26.09.191(1)(c) requires a finding by the court that there is ‘a history of acts of domestic violence.’ Mere accusations, without proof, are not sufficient to invoke the restrictions under the statute.” Caven v. Caven, 136 Wn.2d 800, 809, 966 P.2d 1247 (1998).

The GAL report did state that the father “was granted a Deferred Prosecution on the assault charge" involving the mother, and on the alleged protection order violation, the GAL wrote, “this case has also been resolved with a Deferred Prosecution.” These conclusions are questionable given the JIS report indicating both criminal charges resulted in dismissal judgments as discussed above. Finally, the GAL report establishes that the protection order violation was not a domestic violence offense under RCW 26.09.091(1)(c) and 26.50.010(1) because it involved the “father [asking] a friend [to] go the former family home to retrieve belongs.”

The mother counters that the father waived any objection to the use of the JIS[13] and GAL reports by not moving in limine to limit their use or by calling, before trial, the GAL to testify at trial. But this contention lacks merit because the parties negotiated

[13] It is doubtful whether such a motion in limine would have been successful given WCSPR 94.08’s requirement that the presiding judicial officer must review JIS information before entry of a permanent parenting plan.

and signed a court-facilitated settlement conference agreement on the parenting plan. Neither party anticipated a trial on an issue that had been resolved by agreement before trial. And the parties were unaware that the court was concerned about the father's alleged domestic violence history until after it had ruled on the contested trial issues.

And, as the father correctly notes, "The problem is the trial court's mischaracterization of the report, not the report itself. A motion in limine cannot stop a court from misreading a JIS code." Appellant's Reply Br. at 7.

We conclude insufficient evidence exists to support the court's finding that the father engaged in a history of acts of domestic violence.

The mother also argues that the trial court properly relied on an alternative basis to order sole decision making. She argues that the court rejected mutual decision making because the parents did not have a "demonstrated ability and desire to cooperate with one another in decision making" under RCW 26.09.187(2)(c)(iii). The father responds that RCW 26.09.187(2)(c)(iii) does not apply where the parents have a binding settlement agreement regarding decision making authority.[14]

RCW 26.09.187(2)(a) provides:

> The court shall approve agreements of the parties allocating decision-making authority . . . when it finds that:
> (i) The agreement is consistent with any limitations on a parent's decision-making authority mandated by RCW 26.09.191; and

[14] And the mother's reliance on In re Marriage of Coy, 160 Wn. App. 797, 805, 248 P.3d 1101 (2011) is misplaced. Coy dealt with a parenting plan that "deprive[d] the trial court of its jurisdiction and statutory responsibilities to consider changes to a parenting plan [specifically, residential time] and review whether such changes are in the best interests of the child," not with RCW 26.09.191 limitations.

(ii) The agreement is knowing and voluntary.

(Emphasis added.) The record shows that the mother and father agreed to share decision making following a commissioner-facilitated settlement conference in which both parties were represented by counsel. Under the above quoted provision, the court must approve such a voluntary agreement unless limitations are mandated by RCW 26.09.191. Because the record establishes a voluntary and knowing agreement and no RCW 29.09.191 limitations, "the court shall approve [the] agreement[ ]." Under the circumstances here, RCW 26.09.187(2)(c)(iii) does not apply.

ATTORNEY FEES

Each party seeks an attorney fees award in accordance with RAP 18.1 and RCW 28.09.140. Because the application for fees is untimely, we deny the requests. RAP 18.1(c).[15]

CONCLUSION[16]

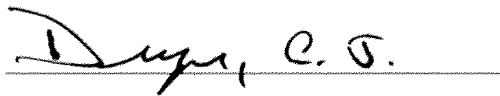
In sum, we conclude insufficient evidence exists to support the trial court's finding that the father engaged in a history of acts of domestic violence. We reverse the

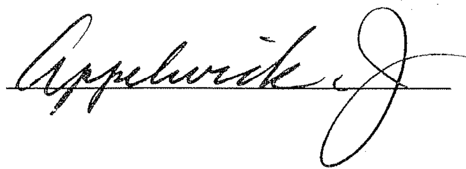
[15] Given this resolution, we decline to address appellant's motion to strike the mother's financial declaration.

[16] We deny the mother's June 24, 2011 RAP 9.11 motion to supplement evidence on the merits of the case. She fails to demonstrate (1) additional proof is necessary, (2) additional evidence would change the decision on review, (3) inequity justifies excusing the failure to present evidence at trial, (4) postjudgment motions are inadequate, (5) a new trial remedy on appeal is inadequate, and (6) to decide the case on the present record is inequitable. And in particular, the mother fails to show that the father engaged in "a history of acts of domestic violence" as discussed above.

trial court's ruling allocating sole decision making to the mother and remand with instructions to approve the parties' agreement to joint decision-making.[17]

WE CONCUR:





[17] The father raises several alternative theories for reversing the trial court, including constitutional, statutory, and collateral estoppel grounds. Given our resolution here, we decline to address these arguments.