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Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

CHERYL LARRIVA, Respondent, v. DIEGO LARRIVA, Appellant.	No. 49868-5-II UNPUBLISHED OPINION

BJORGEN, J. — The superior court granted Cheryl Larriva's petition for a domestic violence protection order (DVPO) restraining Diego Larriva. Diego appeals.[1]

Diego argues the superior court abused its discretion by (1) failing to make findings of fact regarding the petition for a DVPO, (2) finding the evidence was sufficient to support the DVPO, and (3) finding that a "history of domestic violence" provided a sufficient basis to grant a DVPO. Diego also argues the superior court committed an error of law by applying the wrong legal standard. Cheryl disagrees and requests attorney fees and costs on appeal.

We affirm the superior court. We also grant Cheryl attorney fees and costs on appeal.

FACTS

A. DVPO Petition

On November 22, 2016, Cheryl filed a petition for a DVPO, stating that she was a victim of domestic violence. Cheryl stated, under oath, that her former spouse, Diego, committed the

[1] Because Cheryl and Diego share the same last name, we use their first names for clarity. No disrespect is intended.

domestic violence. She identified their two minor children in common as residing with her. In the petition, she also stated that Diego had violated a previous restraining order that the superior court had entered after the dissolution of their marriage.

Cheryl described past incidents of violence as follows:

> The respondent threatened to kill me when I filed the first protection order. He has threatened me countless times. [M]ost recent when I told him I am a stronger person and he cannot [a]ffect me anymore [sic] he threatened 'I guess we will see if you are as strong as you say you are' then acted on it by first stealing my license plates. He knows I am trying to get help – I am scared.

Clerk's Papers (CP) at 7, 12-15. She also stated that on November 15, 2016, "Diego Larriva called me from a blocked number. He told me basically I had 2 options – either be with him or he would continue to harass me and make my life miserable." CP at 12.

She described Diego's stalking behavior as follows: "Diego keeps track of when I am home or not at home. . . . [H]e was even seen jumping out of my window by a neighbor." CP at 7. She stated that Diego "has 10+ years of suicidal behavior and is on medication – I believe he might be off [h]is medication." CP at 8. She claimed Diego owned firearms and that "[h]e has threatened to set things on fire." CP at 8. She stated, "I think he is off of his medication and he has acted violently in the past." CP at 8. She also indicated that substance abuse was an issue. She submitted an e-mail from Diego that said:

> Cheryl,
> We need to figure out a better way than this. And please do not play dumb with me. I know you are purposefully ignoring my messages. I do not think it is wise to continue down this path. I do not want to 'anticipate' anything. However this path does not have a good ending.

CP at 19. She asserted that "Diego [was] trying to scare me into not getting help." CP at 19.

In her petition, Cheryl requested an ex parte temporary protection order. On November 22, the superior court granted Cheryl a temporary order for protection and set a court date for a hearing on the DVPO.

B. DVPO Hearing

Although Diego was not served with the temporary order for protection, the notice of hearing, and the petition for order of protection, Diego filed a declaration[2] on December 5, and appeared and testified at the hearing on December 6.

At the hearing for the permanent order, Cheryl reiterated, under oath, that she feared for her safety. She confirmed she currently had a restraining order that was entered against Diego after their dissolution. She testified that she was seeking a protection order "[b]ecause the restraining order isn't being followed, and it is very scary to me." Report of Proceedings (RP) (Dec. 6, 2016) at 8. She testified that she has "been getting harassed via text, phone, [and] email." RP (Dec. 6, 2016) at 9. She testified that Diego gave her ultimatums, for instance, "if I am not with him, he is going to make my life difficult." RP (Dec. 6, 2016) at 10. At the hearing, the court considered both parties' declarations and affidavits without objection. Diego denied or attempted to explain away Cheryl's allegations.

After Cheryl and Diego provided testimony, the superior court stated, "It seems like you have tried to have an awful lot of contact for somebody that has a restraining order." RP (Dec. 6, 2016) at 12. The court then ruled: "I do find that there has been a history of domestic violence. I am signing an order for one year. This will not impact this parenting plan unless you go back

[2] Diego's declaration denies or attempts to explain away the allegations Cheryl made in her petition. However, the declaration does admit, by implication, that he contacted Cheryl several times.

and change that." RP (Dec. 6, 2016) at 14. The court did not make any additional oral findings of fact or conclusions of law. The court did enter written findings noted below and discussed in the Analysis.

C. Order For Protection

The superior court entered a DVPO dated December 6, 2016, with an expiration date of December 6, 2017. The DVPO stated that the court found, based on the court record, that there was reasonable notice and the opportunity to be heard, Diego appeared and testified, Diego and Cheryl were former spouses, and Diego committed domestic violence as defined in RCW 26.50.010.

Diego appeals.[3]

ANALYSIS

I. DVPO: THE PRESENCE OF FINDINGS OF FACT

One of Diego's assignments of error claims the superior court abused its discretion when it failed to enter any findings of fact. However, Diego fails to make any argument or cite any authority to support this contention. In his reply brief, Diego makes the conclusory statement that "[i]t defies all logic that the trial court is not required to make findings, or conclusions of law, when it is required for this Court to make a determination on appeal." Reply Br. of Appellant at 3. Again, Diego cites no authority to support his claim.

[3] The DVPO was issued by a superior court commissioner. On December 16, Diego filed a motion for revision, and the superior court set a hearing for January 6, 2017. The record on appeal suggests that Diego chose not to proceed with his hearing on the motion, but instead filed an appeal with our court.

We decline to review Diego's claim. RAP 10.3(a)(6) directs each party to supply, in their briefing, "argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record." We do not consider conclusory arguments unsupported by citation to authority. *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 629, 285 P.3d 187 (2012). "'Passing treatment of an issue or lack of reasoned argument is insufficient to merit judicial consideration.'" *West v. Thurston County*, 168 Wn. App. 162, 187, 275 P.3d 1200 (2012) (quoting *Holland v. City of Tacoma*, 90 Wn. App. 533, 538, 954 P.2d 290 (1998)). Diego's argument falls well short of these standards and does not merit judicial review.

II. DVPO: SUBSTANTIAL EVIDENCE SUPPORTS THE COURT'S FINDINGS

Although Diego contends that the court failed to enter any findings, he also argues that the evidence was insufficient to support the court's findings that his actions constituted domestic violence. We disagree.

A. Standard of Review

We review a superior court's decision to grant a DVPO for abuse of discretion. *Rodriguez v. Zavala*, 188 Wn.2d 586, 590-91, 398 P.3d 1071 (2017). Thus, a superior court's decision will not be disturbed on appeal unless its decision was manifestly unreasonable or based on untenable grounds or reasons. *Freeman v. Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557 (2010).

> A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.

In re Marriage of Littlefield, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

We review a superior court's findings of fact for substantial evidence. *In re Marriage of Fahey*, 164 Wn. App. 42, 55, 262 P.3d 128 (2011). Substantial evidence exists if the record contains sufficient evidence to persuade a fair-minded, rational person of the finding's truth. *Id.* at 55. The party challenging a finding bears the burden of showing that it is not supported by the record. *Standing Rock Homeowners Ass'n v. Misich*, 106 Wn. App. 231, 243, 23 P.3d 520 (2001). Unchallenged findings are verities on appeal, and challenged findings are also binding on appeal if they are supported by substantial evidence. *Id.* at 238, 243.

We defer to the superior court's determinations on the persuasiveness of the evidence, witness credibility, and conflicting testimony. *Snyder v. Haynes*, 152 Wn. App. 774, 779, 217 P.3d 787 (2009). Therefore, we will not disturb a superior court's findings of fact if substantial, though conflicting, evidence supports the finding. *Merriman v. Cokeley*, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

Because a DVPO is a civil remedy, it must be supported by a preponderance of the evidence. *Reese v. Stroh*, 128 Wn.2d 300, 312, 907 P.2d 282 (1995); *City of Tacoma v. State*, 117 Wn.2d 348, 351-52, 816 P.2d 7 (1991). This standard required the court to find that it was more likely than not that domestic violence occurred. *Freeman*, 169 Wn.2d at 673.

B. Legal Principles

RCW 26.50.020(1)(a) provides that "[a]ny person may seek relief under this chapter by filing a petition with a court alleging that the person has been the victim of domestic violence committed by the respondent." The petition for relief must allege the existence of domestic violence, and must be accompanied by an affidavit made under oath stating the specific facts and

circumstances from which relief is sought. RCW 26.50.030(1). "Domestic violence" is defined, in part, as follows:

> (a) Physical harm, bodily injury, assault, or the infliction of *fear* of imminent physical harm, bodily injury or assault, between family or household members . . . or (c) stalking as defined in RCW 9A.46.110[4] of one family or household member by another family or household member.

RCW 26.50.010(3)(a), (c) (emphasis added). In *Muma v. Muma*, 115 Wn. App. 1, 6-7, 60 P.3d 592 (2002), Division One of our court held that evidence demonstrating a present fear based on past violence provides sufficient basis on which to grant a DVPO because the legislature has made it clear that the intent of chapter 26.50 RCW is to *prevent* acts of domestic violence.

RCW 26.50.060 authorizes the superior court to consider a DVPO petition. *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P.3d 50 (2002). The court may, among other conditions, restrain a respondent from committing domestic violence, from entering the petitioner's residence or workplace, and from contacting the petitioner. RCW 26.50.060(1); *Spence v. Kaminski*, 103 Wn. App. 325, 331, 12 P.3d 1030 (2000).

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[4] RCW 9A.46.110 defines "stalking" as follows:

> (1) A person commits the crime of stalking if, without lawful authority and under circumstances not amounting to a felony attempt of another crime:
> (a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and
> (b) The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances; and
> (c) The stalker either:
> (i) Intends to frighten, intimidate, or harass the person; or
> (ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

C. Substantial Evidence Supports a Finding of Domestic Violence

First, we note that the superior court did enter written findings as to the ultimate facts. The DVPO states that the court found, based on the court record, that there was reasonable notice and the opportunity to be heard, Diego appeared and testified, Diego and Cheryl were former spouses, and Diego committed domestic violence as defined in RCW 26.50.010. In addition, the superior court orally found that there was "a history of domestic violence." RP (Dec. 6, 2016) at 14.

Substantial evidence supports these findings of fact. Cheryl and Diego are former spouses and have two children in common, which meets the definition of family or household member under RCW 26.50.010(6). As required by RCW 26.50.030(1), Cheryl's affidavit accompanying the petition outlined the specific facts and circumstances which justified the DVPO. She stated that Diego "threatened to kill" her and "has threatened [her] countless times." CP at 7. She stated she was "scared." CP at 7. She also described Diego's stalking behavior as follows: "Diego keeps track of when I am home or not at home. . . . [H]e was even seen jumping out of my window by a neighbor." CP at 7. Cheryl submitted text messages and an email Diego wrote, which could be construed as harassing and threatening. Even if Diego did not intend to place Cheryl in fear or intimidate or harass her, a reasonable person would know or should have known that she was afraid, intimidated, or harassed, by virtue of the fact she already had a restraining order in place and she repeatedly requested him to stop contacting her. *Cf.* RCW 9A.46.110(c)(ii).

These documents constitute substantial evidence that Diego placed Cheryl in fear of imminent physical harm, bodily injury or assault, thus constituting domestic violence under

RCW 26.50.010(3)(a). They also constitute substantial evidence that Diego stalked Cheryl as defined by RCW 9A.46.110, thus constituting domestic violence under RCW 26.50.010(3)(c).

This evidence supports the court's oral finding that "there has been a history of domestic violence." RP (Dec. 6, 2016) at 14. In *Spence*, Division Three of our court held that proof of a recent act of domestic violence is not required before a permanent DVPO is granted. 103 Wn. App. at 333-34. The same conclusion can be reached in this context, where the superior court granted a one year DVPO. As we concluded above, substantial evidence supported that Cheryl was in fear of imminent harm and that Diego engaged in stalking behavior as defined in RCW 26.50.010(3).

III. DVPO: THE COURT APPLIED THE CORRECT LEGAL STANDARD

Diego argues the superior court applied the incorrect legal standard. Specifically, he argues that "[t]he trial court . . . misapplied the law, finding that there was a 'history of domestic violence' and that was sufficient to meet the standard set out by RCW 26.50.010 and RCW 26.50.030." Br. of Appellant at 5. We disagree with his contentions.

RCW 26.50.030 states, in pertinent part, as follows:

> 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.

RCW 26.50.010(3) defines "domestic violence" as follows:

> 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.

Cheryl's petition for relief alleged the existence of domestic violence and was accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief was sought under RCW 26.50.030(1). At the hearing, the superior court specifically found that Diego "committed domestic violence as defined in RCW 26.50.010." CP at 40. The legal standard the superior court applied, RCW 26.50.010, appears directly on the face of the DVPO. As noted above, a DVPO is warranted if the petitioner demonstrates a current fear of harm based on past domestic violence. *Muma*, 115 Wn. App. at 6-7; *see also Spence*, 103 Wn. App. at 333.

Accordingly, the superior court did not apply the incorrect legal standard.

III. ATTORNEY FEES

Cheryl contends she should be awarded attorney fees and costs on appeal under the attorney fee provision of the Domestic Violence Protection Act, chapter 26.50 RCW, and RAP 18.1. *See* RCW 26.50.060(1)(g). In reply, Diego argues Cheryl's request should be denied because she failed to request a DVPO during their dissolution proceedings. In opposition to Cheryl's request, he argues that because Cheryl brought this as a separate action, he has incurred his own attorney fees.

RCW 26.50.060(1)(g) authorizes the trial court to require the respondent to pay the administrative court costs and service fees incurred by the county or municipality and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorney fees. In *Freeman*, 169 Wn.2d at 676, the court acknowledged that the Domestic Violence Protection Act authorizes an award of reasonable attorney fees incurred by a party seeking an order of protection. The plain language of RCW 26.50.060(1)(g) does not limit recovery of costs

and fees to dissolution proceedings. Further, Cheryl's cause of action did not arise until after the dissolution proceedings concluded. Finally, Diego provides no citation to authority to support his argument, and we do not consider conclusory arguments unsupported by citation to authority. *Joy*, 170 Wn. App. at 629.

Therefore, we grant Cheryl's request for attorney fees and costs under RCW 26.50.060(1)(g), conditioned on her compliance with RAP 18.1.

CONCLUSION

We affirm the superior court and award Cheryl attorney fees and costs on appeal.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Bjorgen, J.

We concur:

Worswick, P.J.

Melnick, J.