Supreme Court No. _____

SUPREME COURT
OF THE STATE OF WASHINGTON

No. 74018-1

COURT OF APPEALS
OF THE STATE OF WASHINGTON,
DIVISION ONE

In re the Parenting and Support of:

DANIEL RAINBOW;

NATHAN BRASFIELD,

Appellant,

and

LAUREN RAINBOW,

Respondent.

ON APPEAL FROM KING COUNTY SUPERIOR COURT
Honorable Suzanne R. Parisien

PETITION FOR REVIEW

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I. IDENTITY OF PETITIONER

Nathan Brasfield asks this Court to accept review of the Court of Appeals decision terminating review identified in Part II.

II. COURT OF APPEALS DECISION

The Court of Appeals, Division One, on October 17, 2016, issued its decision terminating review, a copy of which is attached as Appendix 1 ("Slip op."). Motions for reconsideration and publication were timely filed, then denied by orders entered on November 16, 2016. A copy of the order denying reconsideration is attached as Appendix 2. Mr. Brasfield seeks review of those portions of the decision which affirmed the trial court's orders in all respects and affirmed findings to which he assigned error but were not founded upon substantial admissible evidence.

III. ISSUES PRESENTED FOR REVIEW

This case concerns the outer bounds of "a history of acts of domestic violence," a criterion for imposition of restrictions in parenting plans. The overarching issue is whether incidents and traits having no relation to the societal problem addressed by domestic-violence law can become a basis for depriving parents of a meaningful role in raising their own children. This issue and its inherent sub-issues are of substantial public importance because their resolution requires balancing important public interests in the protection of children and adults from actual acts of domestic violence against parents' fundamental liberty interest in the care, custody, and control of their children. Review by this Court is thus warranted under RAP 13.4(b)(4).

A. Primary Issues.

1. Can "a history of acts of domestic violence" consist of acts, incidents, and traits not individually "domestic violence" as defined by statute?

Where there has been no physical violence or assault and no physical harm ever threatened, can a combination of acts and traits of the alleged aggressor, attested to have caused "continuing fears"[1] of physical harm but none of which fit the statutory definition of domestic violence, constitute the multiple inflictions of fear of imminent physical harm required to establish "a history of acts of domestic violence as defined by RCW 26.50.010[3]" for purposes of imposing parenting restrictions under RCW 26.09.191(1) and (2)?

Inherent in this issue are two questions of law: (1) May the phrase "infliction of fear of imminent physical harm" in RCW 26.50.010(3) be interpreted such that "infliction of" means merely "causal contribution to" and "imminent" means only "future," thus bringing inadvertent, unintended, and indirect causation of a general and ongoing fear within the definition? And (2) Where there is no past interpersonal violence, and no evidence showing any intention or threat to commit such violence, can an attested fear of physical harm be reasonably founded upon behaviors and traits not logically implying impending interpersonal violence?

[1] This quotation is from the trial court's findings. CP 1034 (FOF 22). The Court of Appeals inferred "a growing and continuing fear" (*Slip op*. 13), but "growing" is not supported by the findings or the record. This is detailed in section IV, below.

2. May a trial court determine a parenting plan based on hearsay in a consolidated parenting-plan modification and DVPO-renewal trial?

Where the trial to determine how a parenting plan will be modified has been consolidated[2] with a hearing to decide whether a protection order will be renewed, can determinative findings of fact relating to parental conduct and fitness be based solely upon hearsay, in contravention of the requirements set by RCW 26.09.010(1) and RCW 26.09.191(6), and does so making such findings violate the constitutional due process rights of the parent against whom they are made where the resultant parenting plan effects a severe, nearly total curtailment of that parent's role as a parent, thereby infringing upon one of his fundamental liberty interests?

3. For how long, if at all, may a DVPO restrain contact with one's minor child unaffected by any domestic violence?

Can a domestic violence protection order, consistent with a parent's fundamental liberty interests, restrain a parent's contact with his minor child who was neither exposed to domestic violence nor subjected to it, where no evidence portends such harm and the order is founded on the other parent's fear rather than any violent tendency? If permissible, can such an order, issued under RCW 26.50, have a five-year duration in direct contravention of the requirement, set by RCW 26.50.060(2), that any such order "shall be for a fixed period not to exceed one year"?

[2] Such consolidation is implicitly authorized by RCW 26.50.025(2).

B. Ancillary Issues

If this Court accepts review, Mr. Brasfield asks that the following issues also be decided to facilitate expeditious resolution of this case:

1. Can non-threatening speech to which a putative victim is not privy constitute domestic violence?

Can private speech[3] to third parties, where no threat of harm is stated, and where no evidence indicates that such speech was intended to reach the putative victim, be held[4] to constitute an act of domestic violence without impermissibly infringing the speaker's constitutional right to speech free of governmental regulation?

2. Can a finding of "abusive use of conflict" stand absent any evidence of actual or potential harm to the child?

Where no substantial or admissible evidence supports a finding of abusive use of conflict, no evidence of actual or potential harm to a child due to alleged such abuse has been entered, no such harm or risk has been argued,[5] and no such harm or risk has been explicitly found, must the imposition of restrictions authorized by RCW 26.09.191(3)(e) be vacated?

3. Can invocation of the RCW 26.09.191(3)(f) "catchall" clause stand absent any explicit basis or justification?

Where no explicit finding states any specific risk of harm which is comparable to what is required to invoke any of subsections (a)-(f) of

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[3] Such speech was posted in a social media sub-forum to which Mr. Brasfield blocked access by Ms. Rainbow, which restriction was evidenced and undisputed at trial. RP 498, 144-45; *see also* Appellant's Reply Brief, Appx. C, CP 859.

[4] Oddly, it is unclear whether the Court of Appeals so held or the trial court so found.

[5] No resulting or prospective harm to D.R. was argued to the trial court. This issue, undecided by the Court of Appeals, was argued to be error at OB 30-31.

RCW 26.09.191(3),[6] must the imposition of restrictions authorized under RCW 26.09.191(3)(g) (the "catchall" clause) be vacated?[7]

IV. STATEMENT OF THE CASE

Ms. Rainbow and Mr. Brasfield began their intimate relationship[8] in 2008, leading to the birth of their son, D.R., in September 2009. RP 440, CP 1139. Around that time, allegedly,[9] there were a few scary driving and property destruction incidents. The parties split in June 2011[10] and soon reached an oral separation agreement regarding parenting, child support, and property distribution. CP 1033 (finding of fact (FOF) 20); RP 446, 448, 543-45. Per their agreement, D.R. spent about half the time with each parent, child support costs were equally borne, and Ms. Rainbow was given exclusive use of a car they jointly owned.[11] RP 544-45; CP 275-76; CP 867, 1033 (FOF 20); RP 402-03, 544-45; RP 39, 449; CP 863-867.

In September 2011, Ms. Rainbow alleged to Child Protective Services (CPS) that Mr. Brasfield took D.R. to a work site, locked him in a

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[6] The trial court cited only "the totality of circumstances in this case" as the basis. CP 1040. The findings of fact which could reasonably be conjectured to be the basis were mostly not founded on admissible evidence, as argued at OB 37-39.

[7] Yes, per *Marriage of Chandola*, 180 Wn.2d 632, 643, 648 327 P.3d 644 (2014).

[8] It was a long-distance relationship, at first, RP 440, and became closer later.

[9] These much later raised allegations, detailed below, were disputed and unproven at trial. They are relevant here only because the Court of Appeals relied upon them, (at *Slip op*. 13), effectively becoming a fact-finder while overlooking precedent cited at OB 17, "In the absence of a finding on a material fact issue, the appellate court presumes that the party with the burden of proof failed to sustain its burden on that issue. *Smith v. King*, 106 Wn.2d 443, 451, 722 P.2d 796 (1986)."

[10] This date has been subject to continuing confusion, but there is no genuine dispute over it; the record resolves it with logic applied. *See* CP 822, 829, 844; RP 441, 447, 496.

[11] Mr. Brasfield has always maintained that the car belonged to him with Ms. Rainbow having only a nominal, legally insurable interest. CP 867 (and CP 278).

room for half a day, and sporadically attended him[12]; Ms. Rainbow then refused to return D.R. to Mr. Brasfield's care per their prior agreement, leading him to commence this parenting action in late September 2011. RP 446-448; CP 276, 1139, 1213-19. The CPS investigation determined these allegations of abuse and neglect to be unfounded. Exh. 41 3, RP 228, 480.

In May 2012, Ms. Rainbow obtained temporary orders with terms including child support to be paid to her. CP 1222-45. In June 2012, an agreed, final parenting plan was entered which essentially reflected the division of parenting in the parties' mid-2011 agreement. CP 2. Except for the above-stated, unfounded abuse allegation, there were no allegations of neglect, abuse, or domestic violence in this initial litigation (or elsewhere, *see* CP 1220-21) and no interim or final parenting plan included any restrictions as authorized under RCW 26.09.191. CP 2; CP 1262-74.

In August 2012, with the child support issue yet to be resolved in their litigation, Mr. Brasfield informed Ms. Rainbow that if she did not drop her child support demand, she would have to return the car. RP 449, CP 877. On August 14, he sent an acquaintance to repossess it, without informing Ms. Rainbow before or afterward; she discovered it missing on August 15 and reported it stolen to Seattle police. RP 45, 452, 588, CP 873. Six weeks later, the parties exchanged words via telephone which are

[12] Mr. Brasfield has long denied these allegations and testified as to the benign care D.R. received at the work site and circumstances there. RP 480-482. No other competent evidence exists in the entire record to support the allegations. This remains an issue on appeal because the trial court, relying on hearsay alone (or "no evidence" as was argued at OB 39), made finding 24.c (at CP 1036) and the Court of Appeals affirmed it.

poorly remembered and disputed,[13] still unproven,[14] and seemingly a threat of some vaguely bad future (as noted). Hours later, Ms. Rainbow telephoned a complaint about this call to Seattle police, leading to no further action beyond a warning to Mr. Brasfield. RP 45, Exh. 33 4, CP 280-81 ¶23. Consistent with the absence of any threat or then-induced fear of physical harm reported that year (or the next) associated with either incident (Exh. 33, RP 589-90), this dormancy lasted for nineteen months.

During this lull, Ms. Rainbow asked Mr. Brasfield to drive her to where the car was found; when he did, she released her interest in it in exchange for his payment of towing charges. Exh. 41 6 (3rd ¶), CP 281. Later in this lull, upon learning that he took their car some sixteen months earlier, she solicited and obtained, from a cooperative informant, a copy of a Facebook post evidencing the repossession, which also indicated Mr. Brasfield's resentment of her past action(s) and a sentiment, "she's lucky that's all I did." Exh. 22 4-5 (March 2), Exh. 3 7-8. This post, inaccessible to her except with the assistance of her informer, whose access to the sub-forum was not blocked, became a "threat" in her testimony. RP 498, 144-145, RP 75-76. It perhaps underlays the trial court's finding of "direct and

[13] Ms. Rainbow has reported drifting brief "quotes" or summaries of what was threatened. Exh. 33, CP 1116 ("see if you come out of this unharmed"); RP 44, 136 ("see what's coming to you"). Later, she seems to agree with Mr. Brasfield about the "threat." RP 137, 586 (prepare to return the car). Mr. Brasfield remembers it being about the car and denies making such a vague threat. RP 449. His version of the "harm" threat could not induce reasonable fear. CP 636 ¶25 (specific undesirable consequences likely).

[14] The trial court did not resolve this factual dispute except implicitly and vaguely, finding that there had been "direct and indirect threats" CP 1027 (FOF 6). This judge saw "coercion and control," in the repossession, as domestic violence, RP (4/24/15) 9, so there is no reason to presume that the trial court decided there was any threat of violence.

indirect threats" (CP 1027 (FOF 6) emphasis added), and was cited in the decision below as a valid basis for Ms. Rainbow's fear, but was not there deemed or held to be a threat or an act of domestic violence. *Slip op*. 12.

While with Mr. Brasfield in February 2014, D.R. swallowed some isopropyl alcohol by accident, harmlessly, yielding another CPS report by Ms. Rainbow, also resolved as unfounded. RP 569-73, 228; Exh. 41 at 3.

In late March 2014, Ms. Rainbow told police for Mr. Brasfield's municipality that he had an illegal marijuana grow[15] in his house and that their son said he saw "guns" there months earlier.[16] This led to an inquiry of Ms. Rainbow by an FBI agent followed by a raid of Mr. Brasfield's home on April 22, 2014, where FBI agents found three firearms on an upper closet shelf. Due to past conviction of non-violent property crimes, he was taken into custody and charged with a firearm possession crime.[17]

Ms. Rainbow ended the lull on April 29, 2014,[18] with her ex-parte petition for a domestic violence protection order in which she listed numerous reasons to consider Mr. Brasfield "dangerous" but little or nothing amounting to domestic violence. CP 1108-37. This petition, the earliest assertion of domestic violence by Ms. Rainbow, attested that Mr.

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[15] RP 157; Exh. 11 ¶19. The competent evidence establishes a legal grow, as shown by a report Ms. Rainbow already had from her informant. RP 493-494, 564; CP 1126.

[16] There has been much conflation of toy guns with real firearms in this case, this hearsay being one early instance. RP 74, 78-79, 114, 461-62, 475-77, 548; Exh. 14, 22.

[17] *See* Exh. 11, admitted to establish Mr. Brasfield's awareness of Ms. Rainbow's role in instigating the raid, as "motive…for his animosity" contributing to "her fears"; RP 54.

[18] Ms. Rainbow's DVPO petition was made and granted the same day that Mr. Brasfield was denied bail, ostensibly because of certain suspicions. CP 1092, 1094-96.

Brasfield had been "aggressive toward" her and "threatened [her] on multiple occasions." CP 1116. Her petition attested "uncountable … road rage acts," a witnessed TV toss which "scared [her]," "punched holes in walls," scary posture, the incidents as reported to CPS, and fear of lethal retaliation for her role as an informant, all in support of her "need" for a protection order. *Id*. It mentioned fear of physical harm only connected to her role in Mr. Brasfield's arrest. *Id*. She was granted a temporary domestic violence protection order (DVPO) which, in June 2014, by agreement, was extended to one year, modified to allow limited remote contact between D.R. and his father.[19] CP 1208-12.

On the day after Ms. Rainbow's petition, Mr. Brasfield wrote to his mother, asking her, if she talked to Ms. Rainbow, to tell her "[he] will not harm her" and "[he had] thought about it," followed by his considerations; soon afterward, he aborted any such communication.[20] Exh. 12; RP 492.

The vague and summary nature of Ms. Rainbow's assertions of domestic violence necessitated deposition, revealing them to be much less dramatic than her petition suggested. In particular: The acts of "road rage" were (1) an incident of never known or forgotten evolution with associated cursing, (2) a passing maneuver without overt anger, and (3) a driveway

[19] Mr. Brasfield, due to his detention and pending criminal matter, considered this modified DVPO to be an acceptable quid pro quo since he saw little chance of successfully opposing it when he could not testify on his own behalf. He has always disputed committing any domestic violence. RP 560; CP 426, 631-32.

[20] The provenance and purpose of this email and the abort was attested at RP 458-459, 490-492 and CP 932. Ms. Rainbow construed it at trial as thoughts of murder. RP 57.

exit she deemed too close to a neighbor.[21] She conceded they did not result from anger at her.[22] The "multiple" threats by Mr. Brasfield were (1) "See what's coming to you."[23] from the disputed telephone call, (2) telling his sister that he hopes Ms. Rainbow dies,[24] and (3) posting in a forum (to which she had no access), "Lauren is lucky that's all she got" when he took the car. CP 665. The attested property destruction was, at first, all witnessed by Ms. Rainbow (with the wall "holes" ebbing to one), but significant inconsistencies in her stories led to her evolved testimony that Mr. Brasfield had merely told her of said destruction, not witnessed by her, along with admitted ignorance of why he was angry or with whom.[25]

Upon Mr. Brasfield's initiative, a guardian ad litem (GAL) was appointed to investigate and make recommendations. CP 172-77; RP 184.

With Ms. Rainbow's domestic violence claims shown to be illusory or involving no threat of physical harm, Mr. Brasfield moved for summary judgment in March 2015 on the issue of whether there was "a history of acts of domestic violence." CP 183-291. No evidence of

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[21] These driving incidents, recounted at CP 659-661, were shown the same day to likely be among the domestic violence claims. CP 781. Mr. Brasfield denied that they happened as Ms. Rainbow attested. RP 444; CP 633 (¶16), CP 281-284 (¶28-38). All of this was before the trial court, in April and July of 2015. They remain unproven.

[22] This admission, at CP 970, was reiterated at trial. RP 144.

[23] Mr. Brasfield denied uttering this vague threat. CP 907; RP 449. When moving for summary judgment, and later, he attested the substance of the conversation which he thought those words misleadingly characterized. CP 280 (¶21), 907.

[24] There was no competent evidence of this.

[25] The shifting nature of Ms. Rainbow's property abuse story was documented to the trial court in Mr. Brasfield's opposition to the DVPO renewal. CP 633-634 (¶18, 20). The seen-to-unseen vacillation occurred at trial also (RP 47, 139-42), so the absence of any findings on those allegations aligns well with the fact-finder's view of the evidence.

domestic violence meeting criteria set by CR 56(e) was submitted in response. Instead, Ms. Rainbow argued that Mr. Brasfield had effectively admitted there was a material factual issue by seeking to have the GAL investigate domestic violence[26] and that the agreed DVPO[27] was conclusive. CP 292-418. Reply to this (CP 419-530) was futile; the motion was denied on the (ultimately revealed) basis that the agreed DVPO rendered it "inappropriate."[28] CP 546-47; RP 559.

In May 2015, Ms. Rainbow petitioned to modify the DVPO and renew it for more than one year. CP 548-627. Mr. Brasfield filed his sworn opposition and motion for continuance. CP 528-38. On June 3, the matter was consolidated with the parenting plan modification trial scheduled for July 15, 2015, and held then with Mr. Brasfield attending remotely and via a preservation deposition. CP 1275; RP 1-4, 43-44. The trial court entered final orders in September 2015, which were timely appealed. CP 1050-51.

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

A. Primary Issues.

1. Whether "a history of acts of domestic violence" may consist of acts, incidents, and traits not individually "domestic violence" as defined by statute.

The Parenting Act provides for mandatory imposition of restrictions in a parenting plan where the trial court finds that a parent has

[26] In fact, such investigation was initiated by Ms. Rainbow. CP 421 note 3.

[27] The agreed DVPO says nothing about ***acts*** of domestic violence. CP 1208-12.

[28] The trial court never distinguished "some DV" from "a history of acts of DV," a mingling which remains in the findings and survived the carefully briefed appeal below.

engaged in "a history of acts of domestic violence as defined in RCW 26.50.010[3]." RCW 26.09.191(1), (2)(a). The scope of "a history of acts of domestic violence" and the referenced definition of "domestic violence" are issues warranting review under RAP 13.4(b)(4).

Divergent opinions abounded in this case as to what would constitute domestic violence. The trial court determined that "[Mr. Brasfield's] aggressive behavior, escalating criminal conduct, open fascination with fire arms, direct and indirect threats to [Ms. Rainbow] and unrepentant animosity toward [her] constitute domestic violence as a matter of law." CP 1026 (FOF #6). Without approving (or discussing) this disputed[29] ruling, the Court of Appeals held that an ongoing, subjective fear suffices to establish a history of acts of domestic violence when that fear is attested to be induced by the accused's collective actions, without regard for whether such fear induction was intentional[30] or whether the actions are, individually, acts of domestic violence[31] as statutorily defined. *Slip op*. 8-14. The GAL (tasked with investigating the subject, CP 173) testified there was nothing meeting the statutory definition of domestic violence. CP 243, 246. Ms. Rainbow's expansive notion[32] was attested at RP 58, 135-37. Mr. Brasfield urged a plain, narrow reading. RP 620-28.

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[29] Mr. Brasfield assigned and argued its error. OB 2, Appx. A; OB 20-28.

[30] In particular, as explanation for affirming the history of DV finding, the Court of Appeals revived unproven, disputed acts of property destruction and driving incidents which Ms. Rainbow admitted either did not involve her or had not been targeted at her, and cited writings from Mr. Brasfield to third parties. *Slip op.* 12, 13; RP 91, 139-44.

[31] The Court of Appeals' opinion does not discuss whether the litany of reasons claimed by Ms. Rainbow (RP 135-38) for her fear identify any acts of domestic violence.

[32] "[T]he collective of all of Nate's words, actions and general demeanor" was DV.

Presently, no Washington precedent speaks to whether any of the two courts below or three parties (GAL included) was mistaken about the conduct that may constitute "domestic violence" as statutorily defined. Absent any published authority, those seeking to expand or maintain the definition's boundaries can cite only nonbinding decisions. This situation encourages conflict over this inherently acrimonious issue.

The domestic violence claims in this case fail when words in the definition, "infliction of fear of imminent physical harm," are given the meanings appellate courts in other states have given them.[33] A pair of Minnesota opinions[34] held that an identical statutory definition means there must be evidence that the alleged aggressor *intended* to cause the alleged fear. A North Dakota opinion[35] sensibly interpreted the wording, "fear of imminent physical harm," as "fear of immediate or soon to be inflicted physical harm." An Ohio opinion[36] held that a threat must be specific as to intention to inflict *physical harm*.

Here, the word "imminent" was rendered superfluous. A vague fear of ever-impending harm, arising long after the alleged acts, was ruled

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[33] These meanings were argued at OB 23. That intention to incite fear must be evidenced to have "infliction" was also argued to the trial court. CP 189-90, 640.

[34] What "infliction" means: *Kass v. Kass*, 355 N.W.2d 335, 337 (Minn. Ct. App. 1984); and *Bjergum v. Bjergum*, 392 N.W.2d 604, 605-06 (Minn. Ct. App. 1986).

[35] On "imminent": *Lawrence v. Delkamp*, 620 N.W.2d 151, 155 (N.D. 2000).

[36] In *Newhouse v. Williams*, 167 Ohio App. 3d 215, 854 N.E.2d 565, 569 (2006) (at ¶ 10-13), interpreting a clearer statutory definition, "placing another person by the threat of force in fear of imminent serious physical harm," the court held that a vague prognosis ("things could get really, really bad"), lifted from the context of discussion of litigation, did not meet the definition.

within the defining language as if the word "imminent" was simply absent; it must mean something.[37] Similarly, a fear of physical harm, in no way suggested or implied by the acts cited as the cause of the putative victim's fear, extrapolated from those acts via conjecture alone, was deemed sufficient to fall within the definition, giving the word "infliction" a meaning whereby its occurrence is determined by the alleged victim rather than anything the putative aggressor elected to do.

Statutory domestic violence should not be found based on subjective, irrational fear where a would-be victim need only cite attributes and actions of the alleged aggressor which do not objectively justify the fear. Such fear can feed upon imagination or factors having nothing to do with the real societal problem the legislature addresses in RCW 26.50, which is actual violence and threats of violence levied against family and ex-family members. Nothing like that exists here. (Instead, a factor unrelated to Mr. Brasfield's acts toward Ms. Rainbow was clearly operative.[38])

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[37] "[A] court may not construe a statute in a way that renders statutory language meaningless or superfluous." *Ballard Square Condo. v. Dynasty Constr. Co.*, 158 Wn.2d 603, 610, 146 P.3d 914 (2006). This Court, in *Freeman v. Freeman*, 169 Wn.2d 664, 674, 239 P.3d 557 (2010), approached but did not reach the issue of what "imminent" means with respect to immediacy of allegedly feared action.

[38] Ms. Rainbow attested that, because her efforts were instrumental in Mr. Brasfield's arrest for a firearms crime, he must be about to kill or hurt her, even though he has never hurt anybody nor said he will or intends to do violence against her. CP 1116 (last paragraph); RP 57. The relevance of this factor in the trial court's view of the domestic violence issue was made explicit when it admitted Exhibit 11. RP 54.

Where domestic violence as statutorily defined is found to have occurred, a single non-violent[39] act does not call for restrictions under RCW 26.09.191(1) and (2)(a); rather, there must be "a *history of act**s*** of domestic violence."[40] (Emphasis added.) And "isolated, de minimus incidents which could technically be defined as domestic violence" do not count toward "a history of acts" under RCW 26.09.191. *See Marriage of CMC*, 87 Wn. App. 84, 88, 940 P.2d 669 (1997) (quoting legislative commentary), *aff'd sub nom. Caven v. Caven*, 136 Wn.2d 800, 966 P.2d 1247 (1998). Nothing in the statute or any precedent provides that a singular "continuous fear of imminent harm" can establish a history of acts, absent proof or findings of specific acts meeting the statutory definition. *Slip op.* 13 (emphasis removed). Yet the Court of Appeals so held here.[41]

As shown by the decisions and their rationales in this case, guidance is needed to clarify the outer bounds of domestic violence absent actual or threatened physical violence and what constitutes a history of

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[39] There is no allegation of "an assault which causes grievous bodily harm or fear of [it]," as would suffice to mandate restrictions under RCW 26.09.191(1), (2)(a).

[40] This issue is critical in this case. Depending on how expansively the statutory definition of "domestic violence" is interpreted by this Court, there could be zero, one, or more distinct acts of domestic violence found in this case.

[41] If any domestic violence occurred here, it can only be characterized as isolated and de minimus. The years-past, incidental driving scares and unseen property abuse (if revived from their unproven status and deemed DV) are the essence of "de minimus incidents," are isolated, differ in kind from words allegedly said to Ms. Rainbow or in fact uttered to others, and constitute no pattern which has any bearing on whom D.R. should continue to have as non-token parents in his life. Similarly, even if the vague oral threat inconsistently quoted by Ms. Rainbow was found to be real domestic violence, it would stand alone as a de minimus incident, unrelated to words Mr. Brasfield shared privately with others or the unproven, incidental scares around when D.R. was born.

acts of it. The lack of guiding authority regarding statutes interpreted variously by the courts now invites legal dispute over matters irrelevant to the parenting of children.

2. Whether a trial court may determine a parenting plan based on hearsay in a consolidated parenting-plan modification and DVPO-renewal trial.

A trial court "need not" apply the rules of evidence in a DVPO hearing under chapter 26.50 RCW, ER 1101(c)(4), but under the Parenting Act, in determining whether any of the conduct described in RCW 26.09.191 occurred, the court "shall apply the civil rules of evidence, proof, and procedure." RCW 26.09.191(6); *see also* RCW 26.09.010(1).

Here, after conducting a trial in which the rules of evidence, including the hearsay rule, ostensibly were applied, the trial court entered findings in which its reliance upon unsworn, out-of-court hearsay was plainly stated. They contained significant findings that were based only on hearsay (or no evidence at all). Mr. Brasfield assigned error to those findings and argued it to the Court of Appeals, to little avail.[42] App. Opening Br. (OB) 37-39, 44-46. The trial court apparently saw no reason to confine its findings regarding parental conduct to what the admissible evidence supported, and the Court of Appeals decided this was harmless

[42] The decision did state that it was error to make the most egregious finding (that Mr. Brasfield left loaded guns on the floor where D.R. could find them, at *Slip op.* 8), but expressly vacated no findings, even upon a motion for reconsideration, having found the inclusion of this single finding to be harmless error.

error and not a denial of due process by reasoning Mr. Brasfield inadequately argued those findings adversely affected the parenting plan.[43]

Present Washington cases provide no guidance for courts conducting consolidated trials which involve parenting plan determination and DVPO (re)issuance, matters which are normally determined under different evidentiary standards. As this case demonstrates, such guidance is needed, making review warranted under RAP 13.4(b)(4).

3. Whether or for how long a DVPO may restrain contact with one's minor child unaffected by any DV.

The Court of Appeals held that a five-year DVPO restraining a parent's contact with his minor child does not run afoul of the plain language of RCW 26.50.060(2) stating that such a "restraint shall be for a fixed period not to exceed one year." Adopting a reading of the statute not advocated by Ms. Rainbow, the court read RCW 26.50.060(3), which governs DVPO renewal and does not explicitly override that subsection (2) limit, as allowing *unlimited* duration for such orders upon renewal. The court denied a motion for reconsideration which cited settled rules of statutory interpretation[44] that require vacating the five-year DVPO.

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[43] Mr. Brasfield faulted the "consideration of hearsay evidence in determining issues affecting the parenting plan" (OB 45) without specifically urging that leaving loaded guns in a child's reach and imprisoning him alone in a room for much of a day, as the trial court erroneously found, constitute such serious neglect and abuse that such must have affected the parenting plan provisions. The trial court related no findings to its parenting plan, explicitly, so arguing such connections would have been merely stating the obvious, amounting to mere urging susceptible to being deemed conjecture.

[44] Briefly: "plain meaning" is to be given effect, *Dep't of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 11-12, 43 P.3d 4 (2002), then apparent inconsistencies among the provisions "harmonized to ensure proper construction." *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000) (citation

(Footnote continued next page)

The allowable duration of a DVPO upon renewal warrants review under RAP 13.4(b)(4). This Court's clarification is needed to honor the legislature's intent that restrained contact between parents and their own children be subject to periodic reevaluation for necessity in light of the importance of their bond. Given the low evidentiary standard and abbreviated process allowed for DVPO issuance, the fundamental liberty interests of parents at stake, and the state interest in preventing harm to children from genuine domestic violence, brought into mutual tension by RCW 26.50, the legislature's clear duration limit should be respected so as to avoid a constitutional infirmity. It needs this Court's clear reassertion.

More fundamentally, however, the restraint of Mr. Brasfield's contact with D.R., effected by the DVPO (and parenting plan), is an extreme consequence unwarranted by any rational consideration for the welfare of a child who was never exposed to the incidents which may have been held[45] to be acts of domestic violence. No evidence suggests the child is likely to be so exposed, or to ever be victimized. Hence, there is no nexus between the imposed restrictions and the welfare of the child. *See State v. Ancira*, 107 Wn. App. 650, 654-55, 27 P.3d 1246 (2001) (holding that a protection order impermissibly restrained a father's contact with his children because it was not "reasonably necessary to prevent the

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omitted). "Related statutory provisions are interpreted in relation to each other and all provisions harmonized." *CJC v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 708 985 P.2d 262 (1999). These rules save the duration limit as there is no inherent conflict.

[45] It is impossible, now, to determine what specific acts are held to be DV in this case.

children from witnessing domestic violence" and was therefore an unconstitutional "interference with fundamental parental rights"). Whether restrictions may be imposed consistent with a parent's fundamental liberty interest in the care, custody, and control of his or her children,[46] where such a nexus is lacking, warrants review under RAP 13.4(b)(4).

B. Ancillary Issues.

1. Whether non-threatening speech to which a putative victim is not privy may constitute "domestic violence."

This issue, if this case turned on it, would warrant acceptance of review as it implicates a constitutional right. Both the trial court and the Court of Appeals apparently adopted Ms. Rainbow's contention that an observation never directed to her or even accessible to her can be strangely read as a vague threat, one which can be made into a threat of physical harm only by her imaginative conjecture. If this kind of grasping for "acts of domestic violence" were to become known as a viable tactic for family law litigants, the speech chilling effect is obvious. Mr. Brasfield contends that such non-threatening, private speech cannot be domestic violence against a non-privy party, but if it can, bounds are needed for this strained and expansive application of the definition. As applied in this case, the statute defining domestic violence is unconstitutionally vague because, with its presently broad reach, it can, effectively, punish speech protected by the First Amendment.

[46] This right is guaranteed by the Fourteenth Amendment. *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972).

2. Whether baseless finding of "abusive use of conflict" and invocation of the RCW 26.09.191(3)(g) "catchall" clause may stand.

In this case, parenting plan restrictions under RCW 26.09.191(3) were asserted to be necessary with no tie to any facts found; only pro forma and ultimate conclusions were stated, (CP 1040 ¶2.2), contrary to this Court's holding in *Marriage of Chandola*, 180 Wn.2d 632, 643, 648 327 P.3d 644 (2014), establishing a requirement for reviewable findings. Courts can appear capricious when their decisions cannot be seen to have a rational basis in the law, which is likely to diminish public respect for our system of law. With respect to accepting review, this Court's resolution of these ancillary issues will reinforce and perhaps amplify the necessity for trial courts to make evident, in their written findings and conclusions, that their decisions are well founded in fact and law.

VI. CONCLUSION

Mr. Brasfield asks this Court to accept review, vacate the unfounded findings, and reverse the decisions below which now effect the near-elimination of his role as a parent for D.R.

Respectfully submitted this 16th day of December, 2016.

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per Christopher R. Carney,
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Attorneys for Petitioner

CERTIFICATE OF SERVICE

The undersigned certifies under penalty of perjury under the laws of the State of Washington that I am an employee at Carney Badley Spellman, P.S., over the age of 18 years, not a party to nor interested in the above-entitled action, and competent to be a witness herein. On the date stated below, I caused to be served a true and correct copy of the foregoing document on the below-listed attorney(s) of record by the method(s) noted:

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DATED this 16th day of December, 2016.

Patti Saiden, Legal Assistant

APPENDIX 1

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Parenting and Support of:	)	DIVISION ONE
Daniel Rainbow	)	No. 74018-1-I
NATHAN BRASFIELD, Appellant,	)	UNPUBLISHED OPINION
and	)	
LAUREN ELIZABETH RAINBOW, Respondent.	)	FILED: October 17, 2016

DWYER, J. — Nathan Brasfield appeals four trial court orders: an order modifying the parenting plan between Brasfield and Lauren Rainbow, an order entering a permanent parenting plan, an order granting an extension of Rainbow's existing order of protection against Brasfield, and an order denying Brasfield's motion for partial summary judgment on the matter of attorney fees. Finding no error, we affirm.

I

Brasfield and Rainbow met in 2008, began living together in 2009, and were separated by June 2010. The parties have one child together, Daniel Rainbow (Danny). After they separated, Brasfield and Rainbow orally agreed to a parenting plan that provided Brasfield with shared parental responsibility over

Danny. The oral agreement did not require either party to pay child support to the other and, in exchange, Rainbow was given exclusive use of a car jointly owned by the parties. In May 2012, Rainbow obtained a court order for child support. In June of that year the parties agreed to a formal, temporary parenting plan that provided Brasfield with shared parental responsibility over Danny.

In April 2014, Rainbow cooperated in an FBI investigation of Brasfield that ultimately led to his arrest on April 22, 2014. Shortly after Brasfield's arrest, and at least partially in response to Brasfield's conduct upon learning of her cooperation with the FBI, Rainbow filed a pro se petition seeking a domestic violence protection order (DVPO). The DVPO was entered on June 3, 2014. Rainbow also petitioned for a modification to the parenting plan, seeking to eliminate the rights to visitation and decision-making previously afforded to Brasfield. Brasfield, represented by counsel, voluntarily agreed to the entry of the June 3 DVPO, but later moved for summary judgment seeking a determination that the incidents supporting issuance of the DVPO did not constitute domestic violence as a matter of law. The motion, including a request for an award of attorney fees, was denied.

In December 2014, the trial court appointed a guardian ad litem (GAL) to represent Danny's interests and investigate specific issues for trial. On March 31, 2015, Brasfield entered a federal court guilty plea to being a felon in possession of a firearm and was sentenced to 48 months in prison.

In May 2015, Rainbow filed a petition seeking renewal of the June 2014 DVPO. In anticipation of trial, the court consolidated the petition to renew the DVPO with the petition to enter a permanent parenting plan.

During trial, the court heard extensive testimony over five days. Rainbow, Brasfield, Brasfield's parents, the GAL, and various lay witnesses all testified, as did Rainbow's expert witness, Danny's therapist Jenna Genzale.

After trial, the court entered a number of factual findings and legal conclusions, ruling that parenting restrictions pursuant to RCW 26.09.191[1] were appropriate. In reaching this conclusion, the court considered—but ultimately rejected—suggestions made by the GAL, including the GAL's opinion that Brasfield's parents were appropriate supervisors for Danny and that Danny would benefit from visitation with his father during Brasfield's incarceration. The permanent parenting plan entered by the court provides Brasfield no visitation with Danny during his incarceration, and provides for professionally supervised visits following his release. The trial court also entered an order renewing the DVPO, with an expiration date of September 1, 2020. Brasfield appeals.

II

Brasfield challenges the trial court's admission of certain testimony and exhibits.

We review a trial court's admission of evidence for abuse of discretion. State v. Magers, 164 Wn.2d 174, 181, 189 P.3d 126 (2008). An error in the

[1] RCW 26.09.191(1) and (2) requires the trial court to limit mutual decision-making and residential time if a parent has engaged in domestic violence. Subsection (3) permits the court to limit any provision of the parenting plan if it is in the child's best interests.

admission of evidence requires reversal when the error is prejudicial. Carnation Co. v. Hill, 115 Wn.2d 184, 186, 796 P.2d 416 (1990). An error is prejudicial if it has a substantial likelihood of affecting the outcome of the case. Hill, 115 Wn.2d at 186.

However, "[e]rror may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike is made, stating the specific ground of objection." ER 103(a)(1). We may decline to review claims of error which were not raised in the trial court. RAP 2.5(a).

A

Brasfield first asserts that the trial court erred by admitting the expert testimony of Genzale, a therapist Danny had seen prior to trial. The trial court erred, Brasfield contends, because the judge never determined that Genzale was qualified to testify as an expert and because Genzale's testimony was inadequate given that she had never met Brasfield and never visited the prison in which he was incarcerated.

"If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise." ER 702. "The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing." ER 703. In determining whether expert testimony is admissible, trial courts are

afforded broad discretion and rulings admitting or excluding such testimony will not be disturbed on appeal absent an abuse of such discretion. In re Marriage of Katare, 175 Wn.2d 23, 38, 283 P.3d 546 (2012). If the basis for admission of the evidence is "'fairly debatable,'" we will not disturb the trial court's ruling. Grp. Health Coop. of Puget Sound, Inc. v. Dep't of Revenue, 106 Wn.2d 391, 398, 722 P.2d 787 (1986) (quoting Walker v. Bangs, 92 Wn.2d 854, 858, 601 P.2d 1279 (1979)).

At trial, before offering opinion testimony, Genzale testified to her qualifications and education. Brasfield then objected to the admission of Genzale's expert testimony on the ground that he had not received a summary of her testimony prior to trial. This objection was overruled after the court determined that Brasfield received a witness list identifying Genzale as an expert witness and that Brasfield never requested a summary of her opinions. Genzale then testified that she had diagnosed Danny with generalized anxiety disorder and that it was her opinion that Danny might be harmed by visits to a prison. Brasfield never objected to Genzale's qualifications to testify as an expert regarding a diagnosis of generalized anxiety disorder. Nor did Brasfield object on the basis that Genzale's testimony was factually premised on a basis not authorized by ER 703.

On appeal, Brasfield asserts that the trial court erred by never ruling that Genzale was qualified to testify as an expert. This assertion is without merit. Brasfield did not object to Genzale's qualifications at trial and, consequently, the

trial court was never called upon to rule that she was qualified to testify as an expert.

Brasfield also asserts that Genzale's diagnosis and her opinion that it would not be in Danny's best interests to visit his father in prison were based on insufficient facts. This is so, he contends, because Genzale had never met Brasfield and had never seen the visitation room in the prison where Brasfield is incarcerated.

Brasfield did not object on this basis at trial. Therefore, we need not entertain his objection on appeal. Brown v. Labor Ready Nw., Inc., 113 Wn. App. 643, 655, 54 P.3d 166 (2002). However, even if we did, Brasfield would not prevail on the merits. Genzale testified that she diagnosed Danny with generalized anxiety disorder based on 10 to 12 one-hour sessions with him, providing her with sufficient information on which to base her diagnosis. Brasfield's present assertions go only to the weight to be given to Genzale's testimony, not to its admissibility. The trial court was free to credit Genzale's testimony.

B

Brasfield next asserts that the trial court erred by relying on hearsay evidence in rendering its findings of fact.

"A trial court's determination that a hearsay exception applies is judged on an abuse of discretion standard." Magers, 164 Wn.2d at 187. An error in the admission of evidence requires reversal when the error is prejudicial. Hill, 115

Wn.2d at 186. An error is prejudicial if it has a substantial likelihood of affecting the outcome of the case. Hill, 115 Wn.2d at 186.

A GAL may properly rely on hearsay evidence when making a recommendation to the court. In re Guardianship of Stamm, 121 Wn. App. 830, 837, 91 P.3d 126 (2004). However, "[t]he GAL's testimony must not be used as a vehicle to present and reiterate otherwise inadmissible hearsay." Stamm, 121 Wn. App. at 838.

Brasfield assigns error to the trial court's factual findings that there were firearms in Brasfield's house that were "unlocked and/or otherwise [un]secured from Danny" and "loaded guns in a duffle bag on the floor." The first of these findings—that there were firearms in Brasfield's house that could have been accessible to Danny—was based on the testimony of Brasfield's father. The context of the trial court's opinion, however, makes it clear that the court was not considering opinions expressed by Brasfield's parents for the truth of the matter asserted but, rather, was opining on the suitability of Brasfield's parents as potential supervisors for Danny. The trial court noted that Brasfield's father was "surprised" when he learned that his son had firearms in an unlocked closet, but that he still "does not believe Nate was reckless with Danny's safety." The trial court found that Brasfield's mother displayed a similar disregard for Danny's safety, noting that she was "unwilling to accept the undisputed facts about her son and the dangerous situations to which Danny was persistently exposed." The trial court found particularly troubling Brasfield's mother's testimony that she refused to reveal to Rainbow where Brasfield was living because she did not

want to break her word to her son—testimony that showed that she is "willing to put her 'word' to her son above the safety and well-being of Danny." The testimony of Brasfield's parents formed part of the court's determination that they were unsuitable supervisors and was not inadmissible evidence when considered for that purpose.

With regard to the trial court's finding that the FBI located "loaded guns in a duffle bag on the floor," however, the trial court did consider inadmissible hearsay evidence. As an initial matter, this finding is not supported by the record before us. Rather, the finding is supported by the FBI report and the GAL report, neither of which were admitted at trial for the truth of the statements therein.[2] The FBI report identified various guns and drug paraphernalia discovered in Brasfield's home. The GAL report contained hearsay statements regarding what the FBI found in Brasfield's home. Thus, although the trial court did not admit either report for the truth of the matters stated therein, its findings relied on those reports for that purpose.

Nevertheless, there is no possibility that this error affected the outcome of the case. Substantial evidence supports the trial court's other factual findings and the facts found amply support the court's conclusions.

III

Brasfield next contends that the trial court abused its discretion by concluding that RCW 26.09.191 restrictions in the permanent parenting plan

[2] The trial court admitted the FBI report into evidence to show Rainbow's motive for seeking a DVPO and parenting plan, not for the truth of the matters asserted therein.

were appropriate. This is so, he asserts, because the trial court's finding of domestic violence, warranting the restrictions in the parenting plan, was not supported by substantial evidence.

We review a trial court's ruling entering a parenting plan for abuse of discretion. In re Marriage of Kovacs, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A court abuses its discretion if its decision is manifestly unreasonable or based on untenable grounds or reasons. In re Marriage of Littlefield, 133 Wn.2d 39, 46-47, 940 P.2d 1362 (1997). A 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." Littlefield, 133 Wn.2d at 47. We do not review the trial court's credibility determinations or weigh conflicting evidence. In re Marriage of Rich, 80 Wn. App. 252, 259, 907 P.2d 1234 (1996). "Findings of fact supported by substantial evidence, i.e., evidence sufficient to persuade a rational person of the truth of the premise, will not be disturbed on appeal." State ex rel. J.V.G. v. Van Guilder, 137 Wn. App. 417, 423, 154 P.3d 243 (2007).

A

Brasfield asserts that substantial evidence did not support the trial court's conclusion that Brasfield's actions toward Rainbow constituted domestic violence, as defined by statute.

"Substantial evidence exists so long as a rational trier of fact could find the necessary facts were shown by a preponderance of the evidence." In re Welfare of A.W., 182 Wn.2d 689, 711, 344 P.3d 1186 (2015). "The fact that the evidence may be subject to different interpretations does not authorize this court to substitute its findings for those of the trial court." Peter L. Redburn, Inc. v. Alaska Airlines, Inc., 20 Wn. App. 315, 318, 579 P.2d 1354 (1978).

In adopting a parenting plan, the trial court must consider a variety of applicable provisions in the Parenting Act, including RCW 26.09.191, which sets forth a number of limiting factors that require or permit restrictions of a parent's actions or involvement with a child. Littlefield, 133 Wn.2d at 52. "[T]he court may not impose limitations or restrictions in a parenting plan in the absence of express findings under RCW 26.09.191." In re Marriage of Katare, 125 Wn. App. 813, 826, 105 P.3d 44 (2004). "Mere accusations, without proof, are not sufficient to invoke the restrictions under the statute." In re Marriage of Caven, 136 Wn.2d 800, 809, 966 P.2d 1247 (1998).[3]

Pursuant to RCW 26.09.191(1) and (2), a trial court is required to limit a parent's residential time with the children if that parent has engaged in certain conduct, including having "a history of acts of domestic violence as defined in RCW 26.50.010(1)."

Domestic violence is defined as:

> (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or

[3] Brasfield wrongly contends that such restrictions must be reviewed pursuant to a strict scrutiny analysis. To the contrary, a parenting plan that "complies with the statutory requirements to promote the best interests of the children" does not violate either parent's constitutional rights. Katare, 125 Wn. App. at 823 (holding that a strict scrutiny analysis was not appropriate).

> 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).

Although "a history of acts of domestic violence" is not defined, the phrase "was intended to exclude 'isolated, de minimus incidents which could technically be defined as domestic violence.'" In re Marriage of C.M.C., 87 Wn. App. 84, 88, 940 P.2d 669 (1997) (quoting 1987 PROPOSED PARENTING ACT, REPLACING THE CONCEPT OF CHILD CUSTODY, *Commentary and Text* 29 (1987)), aff'd, 136 Wn.2d 800, 966 P.2d 1247 (1998).

At trial, both Rainbow and Brasfield testified as to their personal history and experiences co-parenting Danny. In her testimony, Rainbow conceded that Brasfield had never attempted or carried out any actual physical violence against her or Danny.

Rainbow did testify, however, to several incidences over the course of their relationship that caused her to fear Brasfield. One such incident occurred after a heated telephone call between Rainbow and Brasfield, in which Brasfield demanded that Rainbow drop her demands for child support. Rainbow testified that Brasfield threatened her and that she had called the police as a result, stating, "Nate told me, quote, drop the child support or see what's coming to you. I responded, are you threatening me? Nate responded, you figure that out, B-I-T-C-H. I said, Nate you are not allowed to threaten me, I'm going to call the police." Later that night, Brasfield sent an individual to Rainbow's house to take

away the car—and all of Rainbow's personal property inside the car—without Rainbow's knowledge or permission.

Later, Rainbow became aware of a Facebook posting in which Brasfield had written, "[a]gain, it wasn't Laurens [sic] car. Her interest in it was void the moment she failed to honor the agreement we had. Considering what she tried to do, *she's lucky that's all I did.*" (Emphasis added.)

Rainbow also became aware of an e-mail from Brasfield to his mother. This e-mail included the following statements:

- "I can't parent Danny. I have way too much anger built up towards his mom, and I don't see it ever going away."
- "If you decide to talk to Lauren, please tell her that I will not harm her. Tell her that I've thought about it many times, and every time I think about it, I have to decide if Danny's better off having a mom or a dad."
- About his sister, Brasfield wrote: "She's betrayed my trust, sent Lauren a lot of stuff that was never meant for her to see, and quite possibly provided Lauren with the evidence she needed to get the FBI to raid my house. At this point, she's dead to me too."

At trial, Rainbow, pro se, questioned Brasfield regarding the incident with the car:

> Q: Do you recall a phone call in which we were discussing child support in which you told me to drop the child support, or I would see what was coming to me?
>
> A: I don't believe that was the language I used. But I remember talking to you about child support, demanding that you drop it, and telling you that if you didn't, that you'd need to return the car.
>
> Q: Okay. You do not recall saying, "see what's coming to you"?

A: No, I don't.

Q: Okay. Do you remember me asking you if you were threatening me?

A: Yeah, I do.

Q: Do you remember what your response was?

A: Yeah, I think my response was, "you figure it out".

Throughout the trial, Rainbow testified to her growing and continuing fear for her life based on her interactions with Brasfield, stating, "[m]y continued fear of Nate, even though he's in prison at this time, is that he certainly would not hesitate to send someone over to hurt me," and "I have tried very hard, and it has resulted in threats, and retaliation, and . . . now I have a fear for my life when it comes to Nate Brasfield."

Rainbow was entitled to rely on her personal knowledge of Brasfield's dangerous capabilities when she was confronted with threats and demonstrations of force, including her knowledge of the reasons for his present incarceration and previous felony convictions. Rainbow testified to multiple incidences in which Brasfield lost his temper and destroyed his own and others' personal property. Rainbow testified to multiple incidents in which Brasfield endangered her life and the lives of others after losing his temper. Although Brasfield often couched his threats in language indicating that he would not follow through on them, Rainbow's own experiences with Brasfield reasonably led her to fear otherwise.

Rainbow testified to a *continuous* fear of imminent harm. That Brasfield was able to send someone to Rainbow's house in the middle of the night, immediately after threatening her, demonstrates his capacity to have third parties

do his bidding. Thus, his incarceration did not negate the danger he posed. The multiple, serious threats to Rainbow's safety, along with Brasfield's demonstrated ability to carry out those threats from a remote location, inflicted on Rainbow a continuous fear for her safety—consistent with the statutory language of "infliction of fear of imminent physical harm, bodily injury or assault." RCW 26.50.010(1). Although Brasfield disagrees with the trial court's finding that Rainbow's testimony regarding her fear was credible, we do not reweigh the evidence on appeal. Substantial evidence supports the trial court's determination. There was no abuse of discretion.[4]

B

Brasfield further contends that the trial court erred by concluding that visitation at the prison, even if supervised by Brasfield's parents, would not be in Danny's best interests. He asserts that the trial court abused its discretion by relying on witness testimony that conflicted with the GAL's findings. But the trial court is free to credit or not credit evidence as it sees fit. There was no error.

The GAL's charge is to investigate the child and the family situation and make recommendations.

> In effect, she acts as a neutral advisor to the court and, in this sense, is an expert in the status and dynamics of that family who can offer a commonsense impression to the court. But the court is also free to ignore the guardian ad litem's recommendations if they are not supported by other evidence or it finds other testimony more convincing.

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[4] The restrictions in the parenting plan entered by the trial court were entered pursuant to RCW 26.09.191(1), (2), and (3). Because substantial evidence exists supporting the trial court's findings of domestic violence—and a finding of domestic violence is alone sufficient to impose RCW 26.09.191 restrictions in a parenting plan—we need not reach the trial court's other bases for imposing the restrictions.

Fernando v. Nieswandt, 87 Wn. App. 103, 107, 940 P.2d 1380 (1997).

The GAL made a number of findings and recommended to the court that Danny be allowed to visit his father in the prison's visitation room under the supervision of Brasfield's parents.

The trial court found that visitation at the prison would be contrary to Danny's best interests. In so concluding, the trial court credited testimony from several individuals, including Genzale, Rainbow, and Danny's school principal, Candace Mangum. The trial court also found, after hearing testimony from Brasfield's parents, that Brasfield's parents were unsuitable supervisors for Danny.

Contrary to Brasfield's assertions, substantial evidence supports the trial court's findings, including the grandparents' own testimony. Although the trial court considered the findings and recommendations of the GAL, the court was not bound by the GAL's recommendations or evaluation of the facts. Fernando, 87 Wn. App. at 107. While Brasfield may not agree with the trial court's assessment of the evidence, substantial evidence exists to support these findings and we will not reweigh the evidence on appeal.

IV

A

Brasfield next argues that the DVPO extension entered by the trial court must be vacated. This is so, he asserts, because the DVPO "mirrors" the parenting plan restrictions and the existence of a DVPO may not be the basis for the terms of a parenting plan.

Although it is true that the issuance of a DVPO cannot serve as the basis for restrictive terms in a parenting plan, In re Marriage of Stewart, 133 Wn. App. 545, 554, 137 P.3d 25 (2006), there is no evidence that the reissued DVPO herein affected the restrictions imposed in the permanent parenting plan ordered by the trial court.

The trial court specifically acknowledged, in response to Brasfield's objection, that a finding of domestic violence could not be predicated on the existence of the DVPO. Indeed, the renewed DVPO here at issue incorporates the restrictions found in the parenting plan, not the other way around. This is unremarkable, given that the motions for modification of the parenting plan and extension of the DVPO were consolidated for trial. There is no evidence to support the assertion that the trial court relied on the existence of the DVPO to support its finding of domestic violence as a basis for imposing RCW 26.09.191 parenting plan restrictions.

B

Brasfield also contends that the DVPO extension must be vacated because it exceeds one year in duration. RCW 26.50.060(2) provides, "[i]f a protection order restrains the respondent from contacting the respondent's minor children the restraint shall be for a fixed period not to exceed one year."

Although a one-year limitation applies to initial protection orders, no such limitation applies to renewals of protection orders issued pursuant to chapter 26.50 RCW. The pertinent statute provides,

> If the court grants an order for a fixed time period, the petitioner may apply for renewal of the order by filing a petition for renewal at

> any time within the three months before the order expires. . . . The court shall grant the petition for renewal unless the respondent proves by a preponderance of the evidence that the respondent will not resume acts of domestic violence against the petitioner or the petitioner's children or family or household members when the order expires. *The court may renew the protection order for another fixed time period or may enter a permanent order as provided in this section.*

RCW 26.50.060(3) (emphasis added). It does not follow that a trial court is permitted to enter a permanent order upon renewal, but not an order with a five-year durational period.

The DVPO in question was a renewal. The statute sets no durational restrictions for renewals. The trial court did not err.

V

Brasfield contends that the consolidation of the parenting plan petition and the DVPO petition into a single trial resulted in an unconstitutional denial of due process.

Brasfield did not object to consolidation of the hearings in the trial court. Nevertheless, he contends that review is appropriate because the trial court's decision to consolidate the hearings was a manifest error affecting a constitutional right, excusing his failure to raise the issue at trial.

RAP 2.5(a) provides that "[t]he appellate court may refuse to review any claim of error which was not raised in the trial court. However, a party may raise the following claimed errors for the first time in the appellate court: . . . (3) manifest error affecting a constitutional right." There are four steps in analyzing an alleged constitutional error raised for the first time on appeal:

> "First, the reviewing court must make a cursory determination as to whether the alleged error in fact suggests a constitutional issue. Second, the court must determine whether the alleged error is manifest. Essential to this determination is a plausible showing by the defendant that the asserted error had practical and identifiable consequences in the trial of the case. Third, if the court finds the alleged error to be manifest, then the court must address the merits of the constitutional issue. Finally, if the court determines that an error of constitutional import was committed, then, and only then, the court undertakes a harmless error analysis."

City of Seattle v. Heatley, 70 Wn. App. 573, 585, 854 P.2d 658 (1993) (quoting State v. Lynn, 67 Wn. App. 339, 345, 835 P.2d 251 (1992)).

In considering whether to issue a DVPO under chapter 26.50 RCW, courts need not apply the rules of evidence. ER 1101(c)(4). However, under the Parenting Act, courts must apply the rules of evidence when considering restrictions in a parenting plan. RCW 26.09.191(6). Further, consolidation of a hearing on a parenting plan with a hearing on a DVPO is expressly permitted under RCW 26.50.025. Nevertheless, Brasfield contends that the trial court relied on hearsay evidence in making its findings of fact and, thus, consolidation of the hearings was a manifest constitutional error that violated his right to due process.

Essential to a determination of manifest constitutional error, providing the basis for review under RAP 2.5(a)(3), is a plausible showing by the claimant that the error had practical and identifiable consequences in the trial of the case. Heatley, 70 Wn. App. at 585. It is not sufficient when raising a constitutional issue for the first time on appeal to merely identify a constitutional issue. "The appellant must first make a showing how, in the context of the trial, the alleged error actually 'affected' the defendant's rights. Some reasonable showing of a

likelihood of actual prejudice is what makes a 'manifest error affecting a constitutional right.'" Lynn, 67 Wn. App. at 346 (quoting RAP 2.5(a)(3)).

As discussed herein, although the trial court did consider some hearsay evidence during trial, the admissible evidence credited by the court amply supports the court's ruling. The consideration of some hearsay evidence did not change the outcome of the trial and Brasfield has made no showing that the consolidation of the hearings into a single trial had any practical and identifiable consequences that affected the outcome. Thus, Brasfield has not shown a manifest constitutional error that he may object to for the first time on appeal.

But Brasfield's claim has yet another fatal failing. Three distinct factors must be considered when reviewing a due process claim:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976).

In asserting that an unconstitutional denial of due process resulted from the consolidation of the hearings, Brasfield argues only the first of the three Mathews factors: that Brasfield's interest in the care, custody, and control of Danny is a fundamental liberty interest. Stanley v. Illinois, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). However, Brasfield does not even attempt to establish the remaining two factors, as required by Mathews. Rather, Brasfield simply asserts that, because the court consolidated the hearings and then

considered hearsay evidence, a denial of due process has necessarily resulted. By failing to engage in a suitable analysis of the Mathews factors, Brasfield fails to establish a due process claim.

VI

Finally, Brasfield requests an award of attorney fees pursuant to either RCW 26.26.140, which authorizes an award of attorney fees to a prevailing party, or RCW 26.09.260(13), which authorizes an award of attorney fees when a motion to modify a parenting plan is found to be brought in bad faith. Because we affirm the trial court's rulings, Brasfield's claim for relief fails.

Affirmed.

We concur:

APPENDIX 2

RICHARD D. JOHNSON,
Court Administrator/Clerk

The Court of Appeals
of the
State of Washington

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November 16, 2016

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CASE #: 74018-1-I
In re the Parenting and Support of: D.R.; Nathan Brasfield, App. and Lauren Rainbow, Res.
King County No. 11-3-06434-8 SEA

Counsel:

Enclosed please find a copy of the order denying motion for reconsideration entered in the above case.

Within 30 days after the order is filed, the opinion of the Court of Appeals will become final unless, in accordance with RAP 13.4, counsel files a petition for review in this court. The content of a petition should contain a "direct and concise statement of the reason why review should be accepted under one or more of the tests established in [RAP 13.4](b), with argument." RAP 13.4(c)(7).

In the event a petition for review is filed, opposing counsel may file with the Clerk of the Supreme Court an answer to the petition within 30 days after the petition is served.

Sincerely,

Richard D. Johnson
Court Administrator/Clerk

khn

Enclosure

c: The Hon. Suzanne Parisien
Reporter of Decisions

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

In the Matter of the Parenting and Support of:	)	DIVISION ONE
Daniel Rainbow	)	No. 74018-1-I
NATHAN BRASFIELD, Appellant,	)	ORDER DENYING MOTION FOR RECONSIDERATION
and	)	
LAUREN ELIZABETH RAINBOW, Respondent.	)	

The appellant having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

DATED this 16th day of November, 2016.

For the Court:

Judge

CARNEY BADLEY SPELLMAN

December 16, 2016 - 3:26 PM

Filing Petition for Review

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	Case Initiation
Trial Court Case Title:	

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