

NO. 49868-5

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

CHERYL LARRIVA, RESPONDENT

v.

DIEGO LARRIVA, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Garold E. Johnson

No. 16-2-03695-9

BRIEF OF APPELLANT

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A. APPELLANT'S ASSIGNMENTS OF ERROR.

1. The trial court erred when it failed to make sufficient findings a permanent one-year protection order was warranted.
2. The trial court erred when it found the facts presented by Respondent were sufficient to warrant a one-year protection order.
3. The trial court erred when it 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.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the trial court abuse its discretion when it failed to make any findings of fact? (Assignment of Error 1).
2. Did the trial court abuse its discretion when it found there was sufficient evidence to grant a Domestic Violence Protection Order? (Assignment of Error 2).
3. Did the trial court abuse its discretion when it found a “history of domestic violence” was sufficient under the statute to warrant entry of a Domestic Violence Protection Order? (Assignment of Error 3).
4. Did the trial court commit an error of law when it found a

“history of domestic violence” was sufficient to warrant entry of a Domestic Violence Protection Order? (Assignment of Error 3).

C. STATEMENT OF THE CASE.

1. Procedure

On November 22, 2016, Cheryl¹ filed a Petition for a Domestic Violence Protection Order. CP 4-8. A commissioner of the Pierce County Superior Court granted her a Temporary Ex-Parte Protection Order pending a full hearing on December 6, 2016. CP 1-3.

Diego was not served with her Petition, the Ex-Parte Domestic Violence Protection Order, or the Notice of Hearing. CP 20.

At the full hearing, a commissioner found Diego had been personally served. CP 40. The commissioner went on to order a number of restraints against Diego, protecting Cheryl. CP 41-42. The order is effective for one year. CP 40.

On December 16, 2016, Diego filed a Motion for Revision, but did not proceed with a hearing on his motion. CP 48-50.

Diego filed a timely notice of appeal. CP 55.

2. Facts

Cheryl filed a petition alleging Diego “violated the current

¹ I refer to the parties by their first names for clarity; I intend no disrespect.

restraining order and threatened” her. CP 7. Her reference to his threat was prior to the first protection order she filed and was not a new threat. CP 7. Cheryl testified that the only violations since entry of the restraints in the dissolution case were a series of text messages that she described as “harassing”. CP 9. Diego has never laid on her or physically harmed her in any way. CP 22.

Diego left his home at 4:45 a.m. on the morning of November 16th, and crossed the narrows bridge at 4:55 a.m. CP 22, 27, 29.

That same day, Diego and Cheryl spoke on the phone for 46 minutes and 53 seconds. CP 22. It was a long, in depth conversation. Id. Diego did not tell Cheryl he would make his life miserable. Id. He did not give her an ultimatum. Id.

Cheryl asked Diego to leave her alone in a text message on November 15, 2016 at 10:42 p.m. CP 22. Diego agreed to do so. Id., CP 37. Cheryl then continued the conversation. Id.

Diego does not know anyone named Sophie, or anyone associated with the phone number sending Cheryl text messages. CP 22.

Diego did not take Cheryl’s license plates. CP 23. Yet, after their son’s dance classes on November 16, 2016, she interrogated him about it for 20 minutes. CP 23. Their son was in the car while Cheryl interrogated Diego. Id. After they left, Cheryl called Diego because the license plates

were on the seat of her car. CP 23.

Diego did text Cheryl “happy hunting” but it was in reference to her searching for a new boyfriend, not in reference to her looking for her license plates. CP 24.

Diego did text Cheryl, “I guess we will see if you are as strong as you say you are” but he provided the complete text message string indicating that he meant she hoped she was a stronger person, in a positive way. CP 24, CP 33.

Diego’s contact with Cheryl was an attempt to “smooth things” over with her. CP 24. Cheryl’s filing of a Petition for a Domestic Violence Protection order coincides with Diego’s vacation time with his children, and his requests to get the children passports for out of country travel. CP 24-25, CP 35.

Diego does not own a firearm, does not use drugs, or consume alcohol and does not have any RCW 26.09.191 restrictions in his parenting plan. RP 8, CP 25. He sees his counselor on a weekly basis, and takes his medication as prescribed. CP 25.

Cheryl alleged Diego has “10+ years of suicidal behavior, but there was only one incident 12 years ago when he was 18 years old. CP 8, 25. His counselor provided prior declarations to the court and opined Diego was not a danger. CP 25.

Despite being diagnosed as bi-polar, Diego manages his condition with medication and regular counseling. CP 25, 36. He has a job and cares for his children on regular basis. CP 25

Since prior restraining orders were dropped, Cheryl and Diego were in regular contact, about their children, and the state of their relationship. CP 25. Cheryl led Diego to believe there was a chance for their relationship and they would be able to reconcile. CP 25-26.

Diego acknowledged his behavior was not ideal, but came from his pain over the realization their relationship was truly over. CP 26.

Commissioner Kiesel granted the order finding “there has been a history of domestic violence.” RP 14

D. ARGUMENT.

1. THE COURT ABUSED ITS DISCRETION WHEN IT ENTERED A DOMESTIC VIOLENCE PROTECTION ORDER.

Courts of appeal review the trial court's decision to grant or deny a protection order for an abuse of discretion. See Hecker v. Cortinas, 110 Wn.App. 865, 869, 43 P.3d 50 (2002). They will not disturb such a decision on appeal, unless the court's discretion was manifestly unreasonable, exercised on untenable grounds, or for untenable reasons, Id. Where the trial court has weighed the evidence, this court's role is to determine whether substantial

evidence supports the findings of fact and whether the findings in turn support the conclusions of law. In re Marriage of Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999). Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the stated premise. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). The reviewing court will not substitute their judgment for that of the trial court, weigh the evidence, or determine witness credibility. Greene, 97 Wn. App. at 714.

- i. There is insufficient evidence of domestic violence as defined by RCW 26.50.010.

Under chapter 26.50 RCW, a victim of domestic violence may petition the court for an order of protection. RCW 26.50.030. The petition must allege the existence of domestic violence. RCW 26.50.030(1). And, it must be supported by an affidavit made under oath which states the specific facts and circumstances supporting relief. Id. “Domestic violence” is defined in part as, “[p]hysical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members.” RCW 26.50.010(3)(a).

Here, here Cheryl provided no evidence of physical harm,

bodily injury, or assault nor did she make any allegations of physical harm, bodily injury or assault. Cheryl stated at the hearing, she was “scared of what it could lead to.” RP 10.

Her allegations of Diego’s behavior consisted of (1) contact with Diego via text message, (2) an uncorroborated allegation he took her license plates, and (3) text messages from a third party.

Diego admits they communicated via text message and email, but alleges that those communications were mutual, and Cheryl engaged in them. Had Cheryl wanted to stop communicating with Diego via text message, or email, she could have simply not responded to him. Instead, she engaged with him, and communicated with him regarding a number of issues. Additionally, she could have blocked his number from her phone, so that he could no longer text message or call her. She did none of these things. In fact, *she called him* on November 16, 2016 regarding the license plates, which is not indicative of an individual who fears the infliction of imminent physical harm, bodily injury or assault.

Even if it is true that Diego stole her license plates, and had a third party contact her, it is still not domestic violence as defined by RCW 26.50.010 (3) that requires Cheryl to demonstrate she was

in fear of the “infliction of fear of *imminent* physical harm, bodily injury or assault”. Further, Commissioner Kiesel made no such finding that Cheryl did fear the infliction of *imminent* physical harm, bodily injury or assault.

The facts, as alleged, do not meet the statutory definition, Commissioner Kiesel abused her discretion, and therefore the trial court’s findings should be reversed.

ii. Commissioner Kiesel applied the incorrect standard.

Commissioner Kiesel erred when she found only that there was a “history of domestic violence” and granted Cheryl’s request for a Protection Order. Nowhere in the statute, nor in the case law, does this standard appear. She was required to find:

(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 (3). She made no such finding and her decision to grant Cheryl’s Protection Order should be reversed.

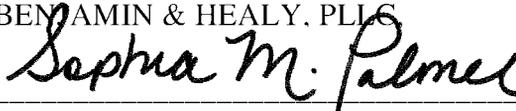
E. CONCLUSION.

For the foregoing reasons, Diego respectfully requests this Court

reverse Commissioner Kiesel's ruling, and vacate the protection order.

DATED: May 22, 2017

BENJAMIN & HEALY, PLLC



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Certificate of Service:

The undersigned certifies that on this day she delivered by U.S. mail or ABC-LMI delivery to the attorney of record for the appellant and appellant c/o his attorney true and correct copies of the document to which this certificate is attached. This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Tacoma, Washington, on the date below.

5/23/2017 
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BENJAMIN & HEALY PLLC
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