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IN THE COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

STACY L. JONES,

Respondent,

and

MANUEL E. BOLIVAR,

Appellant.

ON APPEAL FROM THE
SUPERIOR COURT OF LEWIS COUNTY
The Honorable Joely A. O'Rourke, and
The Honorable R.W. Buzzard

BRIEF OF RESPONDENT

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A. APPELLANT'S ASSIGNMENTS OF ERROR

Appellant makes three assignments of error. These can be summarized as follows:

1. Did the trial court erred when it denied appellant's motion for change of venue to Grays Harbor County or to appoint a visiting judge because a fair trial was not possible due to a photograph of appellant posted in the Court Administrator's office in the Lewis County superior court, every judicial officer in the court had knowledge of the case and of Mr. Bolivar, and Court Commissioner Mitchell communicated by email with a superior court judge about the case two months after the Court Commissioner recused herself?

2. Did the court erred by denying appellant's motion to continue the hearing?

3. Did the court err by allowing admission of appellant's domestic violence evaluation in the respondent's declaration because it was the product of settlement negotiations, in violation of ER 408?

B. STATEMENT OF THE CASE

Appellant Manuel Bolivar is prohibited from having contact with respondent Stacy Jones and their four children for five years in Lewis

County cause number 12-5-00062-9. Report of Proceedings (RP)¹ at 37-38; Clerk's Papers (CP) at 7, 246. Prior to having contact with his children, Bolivar is also required to complete services including a domestic violence assessment, chemical dependency evaluation and comply with all recommendations. CP at 7, 32. Under the parenting order involving the children, Bolivar is required complete a drug and alcohol evaluation, domestic violence treatment program, and a mental health evaluation before having contact with the children. RP at 60.

Bolivar was convicted of domestic violence against Jones in 2011, and attempted eluding, DUI, felony harassment, and has two third degree assault convictions for assault against police officers. RP at 51, 58; CP at 312.

Bolivar posted threats against Court Commissioner Mitchell and Stacy Jones on Facebook and on a personal blog he created as well as in the comment sections of videos he created and uploaded to YouTube. RP at 39; CP at 83-94, 246-47. Bolivar created stickers designed to intimidate Jones and to compel contact with the children, and put them on public spaces such as stores and businesses where Jones and the children were likely to see them, and put a large banners up on a fence at the middle school attended by some of the children, again in an effort to

¹This brief refers to the consecutively paginated verbatim report of proceedings of hearings on November 14, 2019 and November 25, 2019.

threaten or intimidate Jones and to compel prohibited contact with the children, in violation of the restraining order. RP at 39, 41, 42. Bolivar created a YouTube channel, which he filled with over one hundred videos of the children, some of them depicting the children while nude. CP at 9, 83-94.

Jones filed a police report regarding the public campaign of posters and stickers, but the police took no action. CP at 182-86. Jones filed a petition for a protection order for her and the children on June 4, 2019. CP at 1-6. After he was served with the pleadings, Bolivar called the Washington Bar Association with threats against Commissioner Mitchell, and also made generalized threats against Lewis County. RP at 11; 231-32, 233-234. The Bar Association, following courthouse safety protocol, notified Commissioner Mitchell and the Lewis County Superior Court. The presiding superior court judge, following General Rule 36, pertaining to trial court security² and Washington State Courtroom Public Safety

² General Rule 36 states in relevant part:

(a) Purpose. A safe courthouse environment is fundamental to the administration of justice. Employees, case participants, and members of the public should expect safe and secure courthouses. This rule is intended to encourage incident reporting and well-coordinated efforts to provide basic security and safety measures in Washington courts.

(b) Definition. "Incident" is defined as a threat to or assault against the court community, including court personnel, litigants, attorneys, witnesses, jurors or others using the courthouse. It also includes any event or threatening situation that disrupts the court or compromises the safety of the court community.

(c) Incident Reports.

Standards, notified the other superior court judges of the threats made by Bolivar. CP at 248, 249, 255. Commissioner Mitchell recused herself from the case on or about July 19, 2019. CP at 228, 238. Due to the safety concerns presented by Bolivar's threats, a picture of Bolivar was posted in the Lewis County court administrator's office. CP at 243.

Bolivar filed a motion for change of venue to Grays Harbor County or appointment of a visiting judge to hear the case, asserting that his own threats against the court would prevent him from having a fair hearing and moved for change of venue to Grays Harbor County. CP at 213-16.

The motion was heard by Judge O'Rourke on November 14, 2019. RP at 3-21. The court denied the motion to change venue and stated that if Bolivar felt that he could not get a fair hearing, he could file an affidavit of prejudice against the judge. RP at 20. The invitation to file an affidavit of prejudice is based to file the affidavit of prejudice was not based on the contention that the court was biased based on the security concerns, but because Judge O'Rourke was a deputy prosecutor in Lewis County at the

(1) Reporting Method.

- (i) The court should make a record of each incident as soon as practicable, but no later than two days after the incident. The report shall be kept on file by the local court administrator.
- (ii) The court shall report all incidents electronically to the Administrative Office of the Courts (AOC) on the AOC Threat/Incident Report Form within one week of the incident.

time one of Bolivar's criminal cases was prosecuted in 2011, although the case was assigned to another deputy and the judge did not recall having contact with Mr. Bolivar or his criminal case. RP at 20. Appellant filed an affidavit of prejudice on November 14, 2019. CP at 449.

The DVPO hearing was held on November 25, 2019 before District Court Judge R.W. Buzzard. RP at 23-132. After hearing argument, the court granted the petition for a lifetime domestic violence protection order for Jones and one year for the children. CP at 461, 467.

C. ARGUMENT

1. THIS COURT SHOULD NOT REVIEW THIS CASE BECAUSE THE APPELLANT HAS NOT COMPLIED WITH RAP 10.3(A)(4)

The Rules of Appellate Procedure "are designed to promote the considered adjudication of legal issues raised by the parties." *Rich v. Starczewski*, 29 Wn. App. 244, 250, 628 P.2d 831 (1981). This Court should not review this case because Bolivar failed to identify any issues pertaining to his assignments of error as required under RAP 10.3(a)(4), which provides:

(4) Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error.

Here, Bolivar assigned error to the trial court's decision denying his motion to change venue or have a visiting judge, the court's denial of

Bolivar's motion to continue the hearing, and the use of a domestic violence evaluation Bolivar completed in 2019. Appellant's Brief (App. Br.) at 2. Bolivar, however, failed to identify the specific legal issues pertaining to the assignments of error and the respondent and this Court are compelled to ferret out the precise legal arguments the appellant attempts to make. Similarly, Bolivar also fails to apply the applicable standard of review to the issues he raises. See RAP 10.3(a)(6). This Court should not be required to search the entire record to determine the legal issues pertaining to Bolivar's assignments of error.

Jones requests this Court dismiss this appeal on the grounds that Bolivar has failed to perfect his appeal by failing to designate legal issues pertaining to the assignments of error. See, e.g. *Harbord v. Safeway, Inc.*, (unpublished) 199 Wn. App. 1022, 2017 WL 2539461 at *6 (June 12, 2017).³

2. THE COURT CORRECTLY DENIED THE MOTION FOR A CHANGE OF VENUE. APPELLANT HAS FAILED TO MEET HIS BURDEN; THE ACTIONS OF THE TRIAL COURT SHOULD BE UPHELD.

The issue is whether the trial court erred by abusing its discretion

³ Pursuant to GR 14.1, unpublished opinions filed after March 1, 2013 may be cited as non-binding authorities if identified as such by the citing party, and may be accorded such persuasive value as the court deems appropriate. *Karanjah v. Washington State Dep't of Soc. & Health Servs.*, 199 Wn.App. 903, 401 P.3d 381 (2017).

in denying appellant's change of venue motion. Bolivar claims that notification of a safety concern presented by Bolivar to Lewis county judges, email from a court commissioner to a judge regarding a safety concern presented by Bolivar, and display of the appellant's picture in the Lewis County administrator office prevented Bolivar from receiving a fair trial in Lewis County. App. Br. at 6. The Court should find there was no abuse of discretion by denying the motion for change of venue.

a. Standard of Review.

The appellant urges this court to address the denial of his motion to change venue as a question of law under a de novo standard. App. Br. at 6-7. The appellant seems to argue that the email and picture of Bolivar in the Court Administrator's office constitutes "pre-trial publicity" and relies on *State v. Hillman*, 42 Wash. 615, 85 P. 63 (1906), a case involving pre-trial publicity. App. Br. at 7.

Venue in Washington is governed by statute. See *Shoop v. Kittitas County*, 108 Wn.App. 388, 396, 30 P.3d 529 (2001), aff'd, 149 Wn.2d 29, 65 P.3d 1194 (2003). Venue rules limit a plaintiff's choice of forum to ensure that the lawsuit's locality has some logical relationship to the litigants or to the dispute's subject matter. *Shoop*, 108 Wn.App. at 396.

No new test or standard of review is needed. The appellant's claim of error fails under any standard of review. This Court should reject the

appellant's contention that the standard of review is de novo; it is well settled in Washington law that a decision to change venue is reviewed for abuse of discretion. *State v. Jackson*, 150 Wn.2d 251, 269, 76 P.3d 217 (2003); *State v. Stearman*, 187 Wn. App. 257, 264, 348 P.3d 394 (2015). A trial court abuses its discretion when it bases its decision on untenable grounds or for untenable reasons. *Kappelman v. Lutz*, 167 Wn.2d 1, 6, 217 P.3d 286 (2009); *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). Courts are reluctant to overturn a trial court's discretionary decision to deny a change of venue motion. *State v. Rupe*, 108 Wn.2d 734, 750, 743 P.2d 210 (1987).

b. The trial court did not err by denying the appellant's motion to change venue

Due process requires a trial court to change venue when the defendant demonstrates a probability of prejudice without the change. *Unger v. Cauchon*, 118 Wn.App. 165, 170, 72 P.3d 1005 (2003). Washington courts have consistently applied the nine factors identified in *State v. Crudup*, 11 Wn.App. 583, 524 P.2d 479 (1974) review denied, 84 Wn.2d 1012, and its progeny in determining whether a trial court abused its discretion by granting or denying a motion for a change in venue:

- (1) the inflammatory or noninflammatory nature of the publicity;
- (2) the degree to which the publicity was circulated throughout

the community; (3) the length of time elapsed from the dissemination of the publicity to the date of trial; (4) the care exercised and the difficulty encountered in the selection of the jury; (5) the familiarity of the prospective or trial jurors with the publicity and the resultant effect upon them; (6) the challenges exercised by the defendant in selecting the jury, both peremptory and for cause; (7) the connection of government officials with the release of the publicity; (8) the severity of the charge; and (9) the size of the area from which the venire is drawn.

Unger v. Cauchon, 118 Wn.App. at 170–71, (quoting *State v. Crudup*, 11 Wn.App. at 587.) See also, *State v. Boot*, 89 Wn.App. 780, 950 P.2d 964, review denied, 135 Wn.2d 1015 (1998).

Bolivar challenges the trial court's denial of his request to change venue to Grays Harbor County, and contends that he cannot receive a fair trial in Lewis County due to “the clear existence of prejudice against the Appellant” due to the picture posted in the court administrator’s office, notification of “safety concern” sent by the presiding judge to the two other superior court judges, and an email sent by the Court Commissioner to Judge O’Rourke. App. Br. at 7.

RCW 4.12.030(2)⁴ provides that a trial court may transfer a case

⁴ RCW 4.12.030 provides:

The court may, on motion, in the following cases, change the place of trial when it appears by affidavit, or other satisfactory proof:

- (1) That the county designated in the complaint is not the proper county; or,
- (2) That there is reason to believe that an impartial trial cannot be had therein; or,
- (3) That the convenience of witnesses or the ends of justice would be forwarded by the change; or,

to a different county when it appears by affidavit or other satisfactory proof “that there is reason to believe that an impartial trial cannot be had therein [.]”

Bolivar claims the trial court erred when it refused to grant his motion for a change of venue based on (1) the display of Bolivar’s picture in the inside of the Court Administrator’s office, (2) notification of a “safety concern” regarding Bolivar that was sent by Lewis County Superior Court Judge James Lawler to Superior Court Judges Andrew Toynbee and Joely O’Rourke, and an email by Court Commissioner Mitchell to Judge O’Rourke regarding Bolivar sent after Commissioner Mitchell recused herself. App. Br. at 7.

Initially, it should be noted that Bolivar does not assert that any of the information regarding the court’s safety concerns about him was in any way not factual or not warranted. The appellant does not deny making threats against the Court Commissioner, and essentially argues that he should be rewarded for making threats against Commissioner Mitchell and against Lewis County by being able to select a different venue.

Although Bolivar refers to RCW 4.12.030, he does not even

(4) That from any cause the judge is disqualified; which disqualification exists in either of the following cases: In an action or proceeding to which he or she is a party, or in which he or she is interested; when he or she is related to either party by consanguinity or affinity, within the third degree; when he or she has been of counsel for either party in the action or proceeding.

attempt to address the nine *Crudup* factors used by Washington courts to evaluate a motion for change of change of venue, and instead urges the court to overlook the body of case law applying the factors and argues the “clear existence of prejudice against the Appellant.” App. Br. at 7. At the hearing on the motion, appellant’s counsel asserted that the factors are “not particularly what my motion is based on[.]” RP at 16.

Bolivar did not address the *Crudup* factors for good reason: none support his motion. Regarding the first factor, no evidence was presented that the case received media attention. Bolivar appears to analogize the “publicity,” such it was, in internal communication by Judge Lawler to the other superior court judges, an email from Commissioner Mitchel to Judge O’Rourke that Bolivar made threats, and Bolivar’s picture in the administrator’s office to the prejudice created by pre-trial publicity, and argues the prejudice is “as overwhelming as it was in *Hillman*.” App. Br. at 7.

Neither the first, second or third factors show a probability of prejudice from pretrial publicity. As to the second factor, the “publicity” was confined to the court building. No evidence was presented that it was made known to the public in general. Moreover, Bolivar fails to show, under either factor, that a change of venue to Grays Harbor County would have mitigated any alleged prejudice, and in fact the Bar Association and

Lewis County presiding superior court judge may well be required to make a similar referral to the Grays Harbor County Administrative Office under GR 36 and Washington State Courthouse Public Safety Standards for investigation of the threats by Bolivar.

The fourth, fifth, and sixth and ninth factors relate to jury selection and are not relevant in this case.

Under the seventh factor, the threat was transmitted by the Bar Association to the superior court and the presiding judge and Commissioner Mitchell disseminated the information as required by GR 36. The record does not support Bolivar's argument that the judges "targeted" him or were somehow prejudiced against him or expressed an endorsement of Jones' petition for protection orders. Bolivar does not establish a probability of prejudice under this factor.

As to the eighth factor, the case involves petitions for protection orders. Although of considerable importance to Ms. Jones, a DVPO is a "routine" petition and not a matter that would generate public interest or an unwarranted degree of interest among the judges. Courts have denied motions for change of venue involving charges of highest severity. *Jackson*, 150 Wn.2d at 273 (first degree murder); *Crudup*, 11 Wn. App. at 559 (second degree murder); *State v. Hoffman*, 116 Wn.2d 51, 73, 804 P.2d 577 (1991) (first degree aggravated murder and first degree assault).

The motion to change venue is not supported by the factors, and if followed to its logical conclusion, would allow litigants to blithely browse through forums by making outrageous threats until the desired venue is obtained.

Bolivar argues that “the trial court targeted the Appellant in internal communications and posted a picture of him in their main office” and “specifically targeted him as a threat.” App. Br. at 9, 12. Bolivar argues that the case is distinguishable from *Unger* and *Crudup* and that the issue is whether the court had reason to believe that Bolivar could not receive an impartial trial in Lewis County. App. Br. at 11-12. Referring to RCW 4.12.0303(2), Bolivar argues that in this case “the Court need only concern itself with the statutory standard of [‘]there is reason to believe that an impartial trial cannot be had therein[‘] to decide whether or not a change of venue should have been granted.” App. Br. at 11. Bolivar engages in pure speculation by arguing, without citation to the record, that “[i]t is not unduly speculative to imagine that there were verbal conversations concerning the Appellant had amongst Lewis County Superior Court judicial officers that staff[.]” App. Br. at 9. Bolivar argues that he was singled out by the judges and that the “internal circulation of the emails concerning the Appellant and their decision to single him out by placing a picture of him clearly on the instead of court

administration's window prejudiced him the Appellant[.]” App. Br. at 9. The contention that he was somehow “singled out” is contradicted by Bolivar's own counsel, who stated that Bolivar was not the only individual with a picture in the court administrator's office; that there were two other pictures of litigants who were apparently considered to be safety concerns to the court who pictures were posted in September, 2019. Declaration of Counsel, CP at 218; RP at 10.

Despite his claim that there is “a mountain” of evidence that the judges and court administration had “prior knowledge and, frankly a fear of my client” (RP at 7), Bolivar provided no evidence that he could not receive a fair hearing in Lewis County. Bolivar states that the picture of him was displayed in the court administrator's office, but engages in pure speculation that he was targeted by the judges and that the courts were somehow afraid of him or prejudiced against him.

The crux of the motion concerns the appearance of impartiality, which was addressed when Commissioner Mitchell recused herself in July 2019. If Bolivar believed that a superior court judge was biased, he took no steps to counter that by filing an affidavit of prejudice against any of the superior court judges until November 14, 2019 when he filed an affidavit of prejudice regarding Judge O'Rourke. CP at 449; RP at 19, 22.

Last, any concern about dissemination of the security concern

presented by Bolivar is moot; the petition for DVPO was heard on November 25, 2019 by District Court Judge R.W. Buzzard. RP at 23. The appellant has presented no evidence that Judge Buzzard was alerted to the security concerns, let alone prejudiced by the security concern or the Court Commissioner's email to Judge O'Rourke.

c. *Hillman* is not persuasive authority

Bolivar relies extensively on *State v. Hillman*, 42 Wash. 615, 617-19, 85 P. 63 (1906). App. Br. at 7, 8, 9. *Hillman* is still valid law but it is, to say the very least, dated and of little precedential value.

First, *Hillman* is inapposite. In that case, a large section of the public had been victimized by the alleged offenses. *Hillman*, 42 Wash. at 618-19. Most of the jury venire had been exposed to accusatory pretrial publicity in which newspapers assumed defendants' guilt and misstated facts. The *Hillman* court seated only jurors who believed they could rise above the publicity and render an unbiased decision. *Id.* The reviewing court reversed the convictions, concluding that the defendants could not receive a fair trial in King County and it was reversible error to deny a change of venue. *Hillman*, 42 Wash. at 620. The facts of *Hillman* are not applicable to the facts of the present case.

Second, *Hillman* is an outlier. This case has only been cited in 12 cases in the 114 years since it was first published, none more recently

than 1978. It has only been cited three times in the last fifty years. In *Russell v. Marenakos Logging Co.*, 61 Wn.2d 761, 380 P.2d 744 (1963), the Supreme Court reviewed cases touching on instances in which a new trial was granted because a party had been prejudiced by reason of adverse publicity, and observed in a footnote that *only one case* had been found in which, on appeal, a new trial was granted because a party had been prejudiced by reason of publicity in the county in which the trial was held, and that case was *State v. Hillman*. *Russell*, 61 Wn.2d at 765, n. 6. See also, *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 578, 573 P.2d 1316 (1978).

d. Bolivar waived any challenge to change of venue.

When a change of venue motion is denied, the error is waived unless the party seeks interlocutory review of the ruling. *Lincoln v. Transamerica Inv. Corp.*, 89 Wn.2d 571, 578, 573 P.2d 1316 (1978); *In re Marriage of Hennemann*, 69 Wn. App. 345, 348 n.3, 848 P.2d 760 (1993) (noting that the Supreme Court “has encouraged discretionary review of interlocutory review of venue decisions,” citing *Lincoln*, because doing so avoids the problems of “a second trial and the attendant expense and waste of judicial resources.”); *Hauge v. Corvin*, 23 Wn. App.

913, 915-916, 599 P.2d 23 (1979); *Matter of Estate of Owen*,⁵ unpublished, No. 35879-8-III, December 17, 2019, 11 Wash.App.2d 1049 2019 WL 6876791.

e. Bolivar must prove that he was prejudiced by the court's ruling

In *Lincoln*, the court explained that if a plaintiff objects to a venue decision,

[the plaintiff's] proper remedy [is] to seek [discretionary review] and not to wait until the trial [is] concluded and then ask an appellate court to set aside an unfavorable judgment on the basis that the venue was laid in the wrong county. If the latter course is followed, it is incumbent upon an appellant to show that he was prejudiced by the denial of a change of venue; otherwise a new trial will not be granted.

Lincoln, 89 Wn.2d at 578 (footnote omitted.) Accord, *Hauge v. Corvin*, 23 Wn.App. 913, 915–16, 599 P.2d 23 (1979).

If an appellant who foregoes discretionary review of an order concerning venue brings a posttrial challenge to venue, the party must show prejudice by the denial of a change of venue. *Lincoln*, 89 Wn.2d at 578. This is an extraordinarily high threshold. As argued at pp. 14-15 of this brief, very rarely in a case involving pretrial publicity has prejudice been established. *Lincoln*, 89, Wn.2d at 578. Here, because Bolivar did not seek interlocutory review pursuant to RAP 2.3(a) and RAP 2.1(a)(2),

⁵ Cited pursuant to GR 14.1.

he has waived his venue challenge and must show he was prejudiced by the lower court's ruling.

In *Lincoln*, the Supreme Court addressed a party's failure to seek discretionary review of a pretrial ruling regarding venue. *Id.*, at 577-78. After trial, the party appealed the venue ruling. In dicta, the court stated that the proper remedy would have been to seek review by certiorari following the trial court's denial of the motion for change of venue instead of waiting until trial concluded and then asking an appellate court to reverse an unfavorable judgment. *Id.*, at 578. The Court did not foreclose the posttrial review of a venue ruling; the Court held that, if a party brings a posttrial challenge to venue, the party must show prejudice by the denial of a change of venue. *Id.* The court held that a successful posttrial challenge to venue required the challenger to show prejudice on the grounds that the court presume justice is applied equally across the State. *Id.* at 573, 578.

Five years later, the Supreme Court reiterated this, but was blunter: "error without prejudice is not grounds for reversal." *Thomas v. French*, 99 Wn.2d 95, 104, 659 P.2d 1097 (1983) (citing *Ashley v. Lance*, 80 Wn.2d 274, 282, 493 P.2d 1242 (1972)). "Error will not be considered prejudicial unless it affects, or presumptively affects, the outcome of the trial." *Thomas v. French*, 99 Wn.2d at 104 (citing *James S. Black & Co.*

v. P & R Co., 12 Wn.App. 533, 537, 530 P.2d 722 (1975)).

Therefore, following this line of cases, a party is not allowed to acquiesce to the interlocutory order and wait to appeal the allegedly adverse interlocutory ruling until it knows the outcome of the proceedings without any consequences; otherwise a new trial will not be granted. *Lincoln*, at 578.

f. Bolivar cannot demonstrate prejudice

Because Bolivar did not seek discretionary review of the trial court's order, he bears the burden of showing that he was harmed by court's ruling denying the change of venue. Here, instead of immediately seeking discretionary review of the court's order denying change of venue, the appellant opted to continue with the hearing. Disappointed with the outcome, Bolivar now seeks to "forum shop" and reverse of the trial court's order granting the DVPO regarding Jones and the children. Under *Lincoln* and *Thomas v. French*, Bolivar must affirmatively establish that the trial court's order denying change of venue was prejudicial. *Lincoln*, 89 Wn.2d at 578.

Even assuming that the emails and picture in the administrator's office somehow constitute "publicity," the mere existence of the court's internal process regarding safety concerns does not warrant a change of venue. Moreover, Bolivar has not even attempted to show that he was

prejudiced by denial of his motion, nor can he. Bolivar has offered no argument that he was prejudiced by the trial court's ruling denying his motion nor demonstrated that the denial deprived him of due process that would be afforded in another county.

Saleemi v. Doctor's Assocs., Inc., 176 Wn.2d 368, 387, 292 P.3d 108 (2013) is illustrative of the requirement of showing the prejudicial effect of the court's ruling. In *Saleemi* the Washington Supreme Court found that any showing of prejudice was lacking because the party could not show that the order granting arbitration deprived the appellant of any defense or exposed appellant to damages or relief which would have been otherwise been prohibited but for the order compelling arbitration. *Id.* at 380-387. A party failing to seek review of an order compelling arbitration until after an arbitration award is known must show prejudice before an appellate court will reach the merits and grant relief.

Here, the appellant's brief wholly fails to explain how a trial in Grays Harbor County would somehow be different from trial in Lewis County. In either Lewis County or Grays Harbor County, the substantive law, statutory law, and due process rights afforded to Bolivar are identical. Moreover, as noted earlier, it may have been incumbent upon the Bar Association or Lewis County superior court judges to transmit the same warning about threats made by Bolivar to the Grays

Harbor County superior court, and in fact it would have been irresponsible not to do so.

As stated in *Lincoln*, 89 Wn.2d at 578, plaintiffs tend to have difficulty demonstrating prejudice because “ ‘except in rare instances, the mills of justice grind with equal fineness in every county in the state.’ ” *Lincoln*, 89 Wn.2d at 578, 573 P.2d 1316 (quoting *Russell v. Marenakos Logging Co.*, 61 Wn.2d 761, 765, 380 P.2d 744 (1963)).

f. Bolivar waived review of the court’s denial of appointment of a visiting judge

In Assignment of Error 1, Bolivar assigned error to the court’s denial of his motion for change of venue and motion for appointment of a visiting Judge. App. Br. at 2. Bolivar did not provide argument or cite to any authority for his contention that the trial court erred in failing to appoint a visiting judge.

“It is well settled that a party’s failure to assign error to or provide argument and citation to authority in support of an assignment of error, as required under RAP 10.3, precludes appellate consideration of an alleged error.” *Escude ex rel. Escude v. King County Pub. Hosp. Dist. No. 2*, 117 Wn.App. 183, 190, 69 P.3d 895 (2003).

Under RAP 10.3(a)(4) and (6), an appellant’s brief must include “assignments of error, arguments supporting the issues presented for

review, and citations to legal authority” and references to relevant parts of the record. *Bercier v. Kiga*, 127 Wn.App. 809, 824, 103 P.3d 232 (2004). If an appellant's brief does not include argument or authority to support its assignment of error, the assignment of error is waived. *Smith v. King*, 106 Wn2d 443, 451-52, 722 P.2d 796 (1986). “We need not consider arguments that are not developed in the briefs and for which a party has not cited authority.” *Kiga*, 127 Wn.App. at 824; *State v. Thomas*, 150 Wn.2d 821, 874, 83 P.3d 970 (2004) (“Without argument or authority to support it, an assignment of error is waived.”) See also, *Norcon Builders, LLC v. GMP Homes VG, LLC*, 161 Wn.App. 474, 486, 254 P.3d 835 (2011) (court will not consider an inadequately briefed argument); *Bohn v. Cody*, 119 Wn.2d 357, 368, 832 P.2d 71 (1992) (appellate court will not consider inadequately briefed argument); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Bolivar does not present any argument as to how the trial court abused its discretion when it denied the motion for appointment of a visiting judge. Accordingly, because Bolivar did not provide argument in support of that assignment of error, he has waived the issue and this Court should decline to consider this issue. RAP 10.3(a)(6).

3. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION BY DENYING THE REQUEST FOR CONTINUANCE

In both criminal and civil cases, the decision to grant or deny a motion for a continuance rests within the sound discretion of the trial court. The grant or denial of a continuance will not be disturbed on appeal absent a showing of manifest abuse of discretion. *State v. Campbell*, 103 Wn.2d 1, 14, 691 P.2d 929 (1984), cert. denied, 471 U.S. 1094, 105 S.Ct. 2169, 85 L.Ed.2d 526 (1985). *In re Det. of G.V.*, 124 Wash.2d 288, 295, 877 P.2d 680 (1994) A manifest abuse of discretion occurs when a court's decision is based on untenable grounds or is made for untenable reasons. *Davis v. Globe Mach. Mfg. Co.*, 102 Wn.2d 68, 77, 684 P.2d 692 (1984). *Weyerhaeuser Co. v. Commercial Union Ins. Co.*, 142 Wn.2d 654, 683, 15 P.3d 115 (2000).

Here, the case had been continued repeatedly in July, August and September. RP at 25. On November 25, 2019, Bolivar's counsel asserted that his client's flight was "cancelled" and that he was in "the middle of nowhere," which was then revealed to be Hobbs, New Mexico. RP at 23, 24. Bolivar's counsel then asserted that he "missed the flight, missed his connection in Denver," and requested a one week continuance. RP at 24. Jones' counsel stated that she had received a screen shot showing that Bolivar's flight was *delayed* on the afternoon of November 24 for an hour and a half and was not cancelled. RP at 25.

This was not a case of illness or of unforeseeable or extraordinary circumstances. Bolivar was aware of the hearing date. Bolivar's failure to appear was entirely within his own control and it was incumbent on Bolivar to make sure he was available at the time of hearing, particularly because the hearing only a few days before Thanksgiving, when the volume of air travel is extremely heavy. Every traveler knows the unpredictability of air travel, including being bumped from a flight, cancellations or delays caused by weather conditions causing cancellations or delay, overbooked flights, cancellation due a flight not being full, a crew being grounded due to being over allowable shift hours, and mechanical problems causing delays or cancellations. All of these are entirely foreseeable. The trial court acted within its proper discretion when it denied the motion for continuance and the court also properly proceeded with the hearing. See *In re Marriage of Daley*, 77 Wn.App. 29, 32, 888 P.2d 1194 (1994).

**4. BOLIVAR'S DOMESTIC VIOLENCE
EVALUATION WAS A COURT-ORDERED
PREREQUISITE TO VISITATION AND NOT
OBTAINED AS PART OF SETTLEMENT
NEGOTIATIONS.**

The court denied Bolivar's objection to the admission of a domestic violence evaluation. RP at 19. Bolivar's counsel argued that the DV evaluation was obtained as part of settlement negotiations. RP at 27.

Under ER 408⁶ courts may admit settlement evidence for other purposes, such as proving bias or prejudice of a witness. The rule does not “require the exclusion of such evidence when it is offered for another purpose.”

Evidence of conduct or statements made in compromise negotiations is not admissible to prove liability. ER 408. The rule does not, however, require the exclusion of such evidence when it is offered for another purpose, such as proving bias, prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. ER 408. The rule allows evidence of settlements and settlement negotiations for purposes other than to prove liability. See, e.g., *Brothers v. Pub. School Employees of Wash.*, 88 Wn.App. 398, 408–09, 945 P.2d 208 (1997) ER 408 “does not ... require the exclusion of such evidence when it is offered for another purpose.” *Brothers*, 88 Wn. App. at 406.

⁶ ER 408 provides: In a civil case, evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

a. Bolivar waived challenge to the September 26, 2019 ruling denying the motion to seal Jones' Second Declaration

Here the appellant argues that the court erred by failing to seal a Second Declaration of Jones (CP 187-205) at a hearing on September 26, 2019, which referred to the domestic violence evaluation. App. Br. at 16; RP at 27. Jones' attorney noted that the request to not use the evaluation was previously ruled on by Judge O'Rourke, and that the court allowed the evaluation to be considered by the court. RP at 30. Bolivar's attorney agreed that that was the ruling of Judge O'Rourke. RP at 30-31. Bolivar did not assign error to the court's ruling, and has not provided a record of the hearing. Because he did not give notice of intent to challenge the September 26, 2019 ruling and did not assign error to the ruling, this Court should not consider his claim of error. The scope of a given appeal is determined by the notice of appeal, the assignments of error, and the substantive argumentation of the parties. See RAP 5.3(a) ("A notice of appeal must ... designate the decision or part of decision which the party wants reviewed..."). After a decision or part of a decision has been identified in the notice of appeal, the assignments of error and substantive argumentation further determine precisely which claims and issues the parties have brought before the court for appellate review. See, e.g., *State v. Sims*, 171 Wn2d 436, 441-42, 256 P.3d 285 (2011) (rejecting argument

that broad notice of appeal brought entire order and all related issues before the Court of Appeals because “[s]uch a cursory conclusion fails to account for established limiting principles, including, for example, that an appellant is deemed to have waived any issues that are not raised as assignments of error and argued by brief”); *Johnson v. Johnson*, 53 Wn.2d 107, 113–14, 330 P.2d 1075 (1958) (holding that although entire judgment was referenced in notice of appeal, separate and distinct portion not assigned as error, “not having been raised on ... appeal, was *res judicata*.”) See also *Virgil v. Spokane County*, 42 Wn.App. 796, 799, 714 P.2d 692 (1986) (holding that an unchallenged ruling becomes the law of the case).

b. The trial court did not err by allowing the Second Declaration regarding the domestic violence evaluation to be admitted

Bolivar asserts that the trial court erred by considering portion of Jones’ Second Declaration, dated September 24, 2019. App. Br. at 16. The Second Declaration states that in the evaluation, Bolivar was found to be an extreme risk of harm to the children and to Jones, that he shows stalking behavior, that he has emotional outbursts and fits of rage, that he has antisocial traits, “a medium or high level of psychopathy,” and scored at a high risk range and that he “presents an overall high risk range for

lethality and recidivism.” CP at 188-190.⁷ The evaluation recommended a psychological evaluation. CP at 190.

The appellant argues that the trial court erred by admitted the reference to a domestic violence evaluation at trial on November 24, 2019. App. Br. at 16. Bolivar argues that at the time of evaluation, the parties “were actively disputing the DVPO” and that “[b]ut for the settlement negotiations that the parties engaged in, the evaluation would not have been produced.” App. Br. at 16. That is not supported by the record. Although the parties may have discussed settlement--although that is not shown by the record before this Court--the domestic violence assessment dated September 5, 2019, was not prepared for the purpose of settlement. The domestic violence evaluation was ordered in section 10 of the order for Protection entered in cause number 11-2-01109-5. CP at 30-35. Section 10 of the protection order states: “Respondent shall participate in treatment and counseling as follows: domestic violence perpetrator treatment program approved under RCW 26.50.150 or counseling at: state certified agency[,] drug/alcohol treatment at: state certified agency[.]”

⁷Jones also filed a Declaration on November 21, 2019 in cause no. 19-2-00595-21 that quotes Bolivar’s domestic violence evaluation of September 5, 2019, stating that the evaluator placed him “in the highest risk level (Level 4) to commit further acts of domestic violence.” CP at 451. Bolivar does not argue that court erred by entering the Jones November 21,2019 Declaration, (CP at 451-57) and instead only refers to the Second Declaration, filed September 24, 2019. CP at 187-205.

Bolivar is also required to have a domestic violence evaluation in cause number 12-5-00062-9 before being able to be able to resume visitation with the children. CP at 189. Jones testified that the evaluation placed Bolivar in an even higher risk than a previous evaluation that he had in 2012. RP at 40.

The trial court did not err by admitting the contents of the domestic violence assessment and the court did not violate ER 804.

c. Even if the trial court erred in allowing reference to the domestic violence evaluation, any error was harmless

Even assuming, for purposes of argument, that it was an abuse of discretion and error to admit evidence of the domestic violence assessment, any such “error” was harmless. An erroneous evidentiary ruling does not result in reversal unless the defendant was prejudiced. *State v. Thomas*, 150 Wn.2d 821, 871, 83 P.3d 970 (2004). Where the error results from a violation of an evidentiary rule, the “ ‘error is not prejudicial unless, within reasonable probabilities, the outcome of the trial would have been materially affected had the error not occurred.’ ” *Thomas*, 150 Wn.2d at 871, 83 P.3d 970 (quoting *State v. Tharp*, 96 Wn.2d 591, 599, 637 P.2d 961 (1981)). “ ‘The improper admission of evidence constitutes harmless error if the evidence is of minor significance in reference to the overall, overwhelming evidence as a whole.’ ” *Thomas*,

150 Wn.2d at 871, 83 P.3d 970 (quoting *State v. Bourgeois*, 133 Wn.2d 389, 403, 945 P.2d 1120 (1997)).

“[I]mproper admission of evidence constitutes harmless error if the evidence is cumulative or of only minor significance in reference to the evidence as a whole.” *Hoskins v. Reich*, 142 Wn. App. 557, 570, 174 P.3d 1250 (2008).

Here, the record shows that Bolivar engaged in an outrageous pattern of stalking behavior, intimidation and harassment by putting up a banner at the children’s school and plastering many stickers in areas in which Jones worked, shopped, and conducted charity events, all designed to foment contact with the children, and by encouraging third party contact with Jones in an effort to have her agree to visitation between Bolivar and the children, by creating a web blog containing pictures of the children and revealing personal information about them, and by creating a YouTube channel containing over one hundred videos of the children.

Jones testified that she has a domestic violence protection order against Bolivar in which he is required to have treatment, but that he has not done treatment. RP at 38. After entry of the most recent DV protection order, Jones said that Bolivar created a blog called www.thebolivarchildren.com which ran for a year, which was threatened and intimidated her and the children. RP at 38-39. She testified that

stickers appeared for many months starting in October, 2018 through September, 2019, and appeared in public places, including around a parking lot where she was having a fundraiser carwash. RP at 39.

Vickie Elliot, a friend of Bolivar's, repeatedly contacted Jones by text, telling her that she would regret it by not letting Bolivar be able to see the children and harassed her to allow Bolivar to have visitation. RP at 55. She left notes on her front door and on her car stating that it was important to talk to her. RP at 55. Elliot stopped for a while, then resumed contact with Jones in 2016, again telling her that she wanted to talk to her about dropping the previous protection order. RP at 56.

On August 9, 2019, Vickie Elliot showed up at Jones' workplace where she was teaching a class and demanded to know why she would not drop the protection order. RP at 82. Elliot told Jones that she would regret not letting Bolivar see the children. RP at 83. In subsequent text messages to Jones, Elliot wrote "you will regret this. Karma is a bitch. You just wait" and left voice mail messages that alternated between crying and telling Jones that she was a horrible mother. RP at 83. Jones said that after getting the messages and after Jones showed up at her work and told her she was going to regret it, she was scared. RP at 84.

Shortly after Elliot went to Jones' workplace in August, 2018, a large professionally made banner was hung on a fence at the Chehalis

Middle School, attended by two of her children. RP at 39, 41; CP at 453.

A second banner with an identical message was hung on a fence about a mile from Jones's house on road that she drives each day. RP at 42. Both banners read:

BOLIVAR KIDS
YOUR DADDY LOVES YOU!!!
6bolivars@gmail.com

CP at 18, 19.

Jones filed a police report about the banners on August 13, 2019.

CP at 95-97.

In her Second Declaration, Jones stated that multiple stickers were put around Ace Hardware in Chehalis on or around September 7, 2019, to coincide with a fundraiser carwash held in the Ace Hardware parking lot. CP at 187. Jones stated in her declaration that she also found stickers around Grocery Outlet and a nearby liquor store. Exhibit B of the Second Declaration is a picture of the stickers:

Thebolivarchildren.com
Your daddy loves you!!!
6bolivars@gmail.com
They're lying to you!!!

CP at 194, 198.

Another type of sticker had a different message:

Bolivar Children
Your Daddy loves you
Youtube: Ed Bolivar

CP at 195, 197.

Jones filed a police report regarding the stickers on September 7, 2019. CP at 182-86.

Bolivar set up a YouTube channel containing over 100 videos of the children and extensive commentary by Bolivar about the cases involving protection order, one stating that “Lewis County WA has taken my children from me.” CP at 83-94. RP at 85. The channel had inappropriate pictures of the girls, including one depicting one of her daughters completely naked, which was viewed by people many more times than some of the other videos. CP at 9.

In addition to the YouTube channel, Bolivar set up a website www.thebolivarchildren.com containing the children’s names, the school they attended, sports they were participating in, and over one hundred videos of the children. RP at 52-53. The website was up for a year. RP at 85. The children were aware of the YouTube channel and the website. RP at 95.

Jones stated that she was scared and harassed by the third party contact by Elliot, trying to tell her to drop the protection order and that she would regret it if she did not do so. RP at 40. Jones stated that she felt threatened by the website and YouTube channel, and was shocked, scared, embarrassed and felt threatened by the banner on the fence at the school

and the banner posted on her route to work. RP at 53. She stated that on the morning the banner was put up, a representative from the Chehalis School District called her to tell her about the banner and that people were taking pictures of the banner and sending them to her children. RP at 53. A parent drove by the school and took a picture of the banner and sent it to Jones. RP at 54.

Jones testified that she and her children received a Pinterest friend request from “Buzz Oliver,” which Jones said was from Bolivar and noted that by omitting the “U Z Z” from the first name resulting in “B. Oliver,” or Bolivar. RP at 49; CP at 211-212. Jones testified that “Buzz Oliver” made posts through Facebook, including one that mentions Stacy Jones and the case and directs readers to Bolivar’s webpage, www.thebolivarchildren.com. RP at 50.

Assuming that the case turned on the domestic violence evaluation, the information was already before the court through the November 21, 2019 Jones Declaration (CP at 451-57), to which Bolivar did not object. Even with no mention of the evaluation whatsoever, the court would have reached the same conclusion, because there was overwhelming evidence in support of the protection orders for Jones and the children.

5. REQUEST FOR ATTORNEYS' FEES AND COSTS ON APPEAL PURSUANT TO RCW 26.50.060 AND RAP 18.1 AND SANCTIONS PURSUANT TO RAP 18.9

a. RAP 18.1

An appellate court may award attorney fees where allowed by statute, rule, or contract. *Malted Mousse, Inc., v. Steinmetz*, 150 Wash.2d 518, 535, 79 P.3d 1154 (2003). If attorney fees are allowable at trial, the prevailing party may recover fees on appeal. RAP 18.1.

RCW 26.50.060(1)(g) authorizes an award of petitioner's costs and attorney fees related to obtaining a domestic violence protection order.

Respondent requests that the Court award reasonable attorneys' fees and costs incurred on appeal pursuant to RCW 26.50.060 and RAP 18.1. RCW 26.50.060(1) provides that:

(1) Upon notice and after hearing, the court may provide relief as follows:

...

(g) Require the respondent to pay the administrative court costs and service fees, as established by the county or municipality incurring the expense and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees or limited license legal technician fees when such fees are incurred by a person licensed and practicing in accordance with the state supreme court's admission to practice rule 28, the limited practice rule for limited license legal technician[.]

RCW 26.50.060(1)(g).

Jones should not have to bear the expense of defending this appeal. Bolivar's attorney stated that his client is an engineering inspector and works in remote locations. RP at 23. Bolivar is presumably well compensated for his engineering skills. Accordingly, if Respondent prevails on this appeal, she is entitled to an award of her reasonable attorneys' fees and costs incurred. See, e.g., *Freeman v. Freeman*, 169 Wn.2d 664, 676, 239 P.3d 557 (2010).

b. RAP 18.9 sanctions

Jones requests an award of sanctions under RAP 18.9(a) for a frivolous appeal. RAP 18.9(a) provides this court may require the payment of fees by a party who files a frivolous appeal. "An appeal is frivolous if the appellate court is convinced that the appeal presents no debatable issues upon which reasonable minds could differ and is so lacking in merit that there is no possibility of reversal." *In re Marriage of Foley*, 84 Wn. App. 839, 847, 930 P.2d 929 (1997); *Protect the Peninsula's Future v. City of Port Angeles*, 175 Wn.App. 201, 220, 304 P.3d 914 (2013). "A frivolous action is one that cannot be supported by any rational argument on the law or facts." *Rhinehart v. Seattle Times*, 59 Wn.App. 332, 340, 798 P.2d 1155 (1990).

RAP 18.9(a) authorizes the Court to order a party or counsel who files a frivolous appeal "to pay terms or compensatory damages to any

other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.” “Appropriate sanctions may include, as compensatory damages, an award of attorney fees and costs to the opposing party.” *Yurtis v. Phipps*, 143 Wn.App. 680, 696, 181 P.3d 849 (2008).

Here, Bolivar’s appeal raises no debatable issues upon which reasonable minds could differ. The issues presented by Bolivar on appeal are entirely without merit. His claim regarding change of venue is based almost entirely on an inapplicable, outdated case, and he does not address the relevant caselaw regarding venue. Moreover, there is no debatable issue that it is within the court’s discretion to deny a motion for continuance in a civil matter when a party, represented by counsel, does not appear due to a missed or cancelled flight. There is no debatable issue that the court ordered domestic violence evaluation was not prepared as part of settlement negotiations. Bolivar’s claims are controlled by settled law and the case is so devoid of merit that there was no reasonable possibility of Bolivar’s success. The appeal has no merit and is a clear case for an award of costs and fees, as well as sanctions on appeal against Bolivar in favor of Jones under RAP 18.9(a).

D. CONCLUSION

Based on appellant's failure to comply with RAP 10.3(a)(3), Stacy Jones requests that this appeal be dismissed. In the alternative, Jones requests that the appeal be denied.

Fees and Sanctions. Per RAP 18.1, fees are sought. Per RAP 18.9 sanctions are sought because the appellant's claims without merit and frivolous.

DATED: June 29, 2020.

Respectfully submitted,
THE TILLER LAW FIRM



PETER B. TILLER-WSBA 20835
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CERTIFICATE OF SERVICE

The undersigned certifies that on June 29, 2020, that this Brief of Respondent was sent by the JIS link to Mr. Derek M. Byrne, Clerk of the Court, Court of Appeals, Division II, 950 Broadway, Ste. 300, Tacoma, WA 98402, a copy was emailed to Lorenzo Raymond Leoni and copies were mailed by U.S. mail, postage prepaid, to the following:

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This statement is certified to be true and correct under penalty of perjury of the laws of the State of Washington. Signed at Centralia, Washington on June 29, 2020.



PETER B. TILLER

THE TILLER LAW FIRM

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