

FILED
Court of Appeals
Division II
State of Washington
5/27/2020 4:55 PM
No. 54203-0-II

**Court of Appeals, Div. II,
of the State of Washington**

Lalani Shelton,

Respondent,

v.

Gary Myers,

Appellant.

Brief of Respondent

Kevin Hochhalter
WSBA # 43124
Attorney for Respondent

Olympic Appeals PLLC
PO Box 55
Adna, WA 98522
360-763-8008
kevin@olympicappeals.com

Table of Contents

1. Introduction.....	1
2. Restatement of the Issues	2
3. Statement of the Case.....	3
3.1 Over the course of their relationship, Myers had a history of controlling behavior toward Shelton, which grew more intense after the parties moved in together.	3
3.2 After an argument in which Shelton would not accede to Myers' wishes, Myers threw Shelton's belongings into the street, dragged her out of the car, and sped off, leaving her by the side of the road.....	6
3.3 Shelton petitioned the court for a domestic violence protection order. Myers denied any wrongdoing. The trial court granted the DVPO.....	8
3.4 Myers sought revision, finding fault in the trial court's failure to agree with his reasoning, and blaming Shelton for causing his own conduct.	10
4. Summary of Argument	12
5. Argument.....	12
5.1 This Court should decline to address most of the issues and arguments raised by Myers.....	12
5.1.1 Myers failed to assign error to specific findings of fact.	13

5.1.2 Myers raises many issues for the first time on appeal.....	14
5.1.3 Myers fails to support his arguments with citations to authority.	15
5.1.4 Myers fails to provide an adequate record for the Court’s review.	16
5.1.5 Chart of issues this Court should decline to address.	17
5.2 Background legal principles for review of a DVPO.....	20
5.2.1 This Court reviews a trial court decision to grant a DVPO for abuse of discretion.....	20
5.2.2 This Court reviews the decision of the trial court judge on revision, not the decision of the commissioner.	21
5.2.3 Upon finding that “domestic violence” has occurred, the trial court has broad discretion to craft a remedy to protect victims.....	23
5.3 This Court cannot second-guess the trial court’s determination that Shelton’s testimony was credible.	25
5.4 The trial court’s findings of fact were supported by substantial evidence.	27
5.5 The trial court’s conclusions were supported by its findings of fact and evidence in the record.	29

5.6	This Court should award Shelton her attorney's fees on appeal as a prevailing petitioner under RCW 26.50.060(1)(g) or as a sanction for Myers' frivolous appeal under RAP 18.9.....	33
6.	Conclusion	36

Table of Authorities

Cases

<i>Aiken v. Aiken</i> , 187 Wn.2d 491, 387 P.3d 680 (2017)	34
<i>Cowiche Canyon Conservancy v. Bosley</i> , 118 Wn.2d 801, 828 P.2d 549 (1992).....	15
<i>Freeman v. Freeman</i> , 169 Wn.2d 664, 239 P.3d 557 (2010).....	20
<i>In re Marriage of Fahey</i> , 164 Wn. App. 42, 262 P.3d 128 (2011)	20
<i>In re Marriage of Fiorito</i> , 112 Wn. App. 657, 50 P.3d 298 (2002)	13
<i>In re Marriage of Littlefield</i> , 133 Wn.2d 39, 940 P.2d 1362 (1997).....	20
<i>In re Welfare of Ca.R.</i> , 191 Wn. App. 601, 365 P.3d 186 (2015)	21
<i>Juarez v. Juarez</i> , 195 Wn. App. 880, 382 P.3d 13 (2016)	23
<i>Larson v. Aetna Life Ins. Co.</i> , 19 Wn.2d 601, 143 P.2d 850 (1943).....	32
<i>Maldonado v. Maldonado</i> , 197 Wn. App. 779, 391 P.3d 546 (2017)	21
<i>Mountain Park Homeowners Ass’n, Inc. v. Tydings</i> , 125 Wn.2d 337, 883 P.2d 1383 (1994).....	22
<i>Olivo v. Rasmussen</i> , 48 Wn. App. 318, 738 P.2d 333 (1987)	13
<i>Prostov v. State, Dep’t of Licensing</i> , 186 Wn. App. 795, 349 P.3d 874 (2015)	26

<i>Rodriguez v. Zavala</i> , 188 Wn.2d 586, 398 P.3d 1071 (2017).....	20, 23
<i>Saunders v. Lloyd's of London</i> , 113 Wn.2d 330, 779 P.2d 249 (1997).....	15
<i>Sheib v. Crosby</i> , 160 Wn. App. 345, 249 P.3d 184 (2011)	34
<i>Spence v. Kaminski</i> , 103 Wn. App. 325, 12 P.3d 1030 (2000)	25, 28
<i>SSG Corp. v. Cunningham</i> , 74 Wn. App. 708, 875 P.2d 16 (1994)	28, 33
<i>State v. Bertrand</i> , 165 Wn. App. 393, 267 P.3d 511 (2011)	14
<i>State v. Camarillo</i> , 115 Wn.2d 60, 794 P.2d 850 (1990)	26
<i>State v. Olson</i> , 126 Wn.2d 315, 893 P.2d 629 (1995).....	13
<i>State v. Scott</i> , 110 Wn.2d 682, 757 P.2d 492 (1988)	14
<i>State v. Wade</i> , 138 Wn.2d 460, 979 P.2d 850 (1999).....	36
<i>State v. Wicker</i> , 105 Wn. App. 428, 20 P.3d 1007 (2001).....	21
<i>Streater v. White</i> , 26 Wn. App. 430, 613 P.2d 187 (1980)	35
<i>Ugolini v. Ugolini</i> , 11 Wn. App. 2d 443, 453 P.3d 1027 (2019)...	24
<i>Yorkston v. Whatcom Cty.</i> , 11 Wn. App. 2d 815, 461 P.3d 392 (2020)	16, 17

Statutes

RCW 2.24.050	21
RCW 26.50.010	24

RCW 26.50.060	23, 25, 29, 30, 33
RCW 9A.16.020.....	31

Rules

RAP 10.3	13, 15
RAP 18.9	34
RAP 2.5	14
RAP 9.2	16

1. Introduction

Gary Myers refuses to accept responsibility for his verbal and physical abuse of his girlfriend of four years, Lalani Shelton. His defense in this domestic violence protection order case started with avoidance and denial of the allegations— according to him, he never did any of it, or at least she failed to prove that he did. Then he shifted responsibility to Shelton—if she had only acted reasonably, things would have turned out differently. Finally, when the trial court did not accept or agree with his denial and victim-blaming, he blamed the court—the court failed to read the record, failed to correctly assess the credibility of the parties, failed to address the nuance in his defense.

In the end, this case is simple. Myers committed domestic violence. Shelton is entitled to a protection order. On October 29, 2019, Myers went into a rage, screaming profanities at Shelton and throwing her belongings out the car window. He exited the car, came around to the passenger side, and forcefully yanked Shelton out of the car and onto the ground before speeding away. There is ample evidence to support the trial court's findings of fact. The findings support the trial court's conclusions. This Court should affirm and award Shelton her attorney's fees on appeal.

2. Restatement of the Issues

Myers identifies numerous issues in his brief. The Court should decline to review most of his issues because either 1) Myers fails to assign error to specific findings of fact; 2) Myers raises the issue for the first time on appeal; 3) Myers fails to support his argument with any authority; or 4) Myers fails to provide an adequate record for review. This Brief will identify each of these issues in a chart in Part 5.1, below. What remains for this Court are the following:

1. Were the trial court's findings of fact supported by substantial evidence?
2. Do the findings of fact support the trial court's conclusions of law?

The answers to these questions should be a resounding "Yes!" There is ample evidence in the record to support a finding that Myers committed domestic violence against Shelton when he pulled her from the car on October 29. Under the applicable statutes, Shelton is entitled to a protection order. The rest of Myers' issues are either immaterial or not properly before the court. The trial court was correct and acted well within its discretion. This Court should affirm.

3. Statement of the Case

3.1 Over the course of their relationship, Myers had a history of controlling behavior toward Shelton, which grew more intense after the parties moved in together.

Gary Myers and Lalani Shelton dated for four years. CP 18. While they were dating, Myers exhibited some signs of controlling behavior. CP 9 (wanting to be the one to drive, controlling the radio station, monopolizing Shelton’s time). Myers would even try to tell Shelton who she could talk or text with and when. *E.g.*, CP 10.

The relationship always went better when Shelton was compliant to Myers’ wishes. RP 5-6.¹ Myers explained to Shelton, “If [you] just learned how to be in a relationship and how to be a partner, things would improve, if you would just learn to ask me before you do things.” RP 7; *see also* CP 10-11.

Shelton and Myers moved in together in 2019. CP 18. They purchased a home together, which they intended to renovate and live in together for a long time. CP 31. After they began working on the renovation, Myers became more and more

¹ The Reports of Proceedings are not consecutively paginated or clearly marked with volume numbers. The only live testimony in this case was given at the December 4, 2019, hearing before Commissioner pro-tem Megan Card. Unless otherwise noted, references in this brief to “RP” are intended to refer to the Dec. 4, 2019, hearing.

aggressive. CP 9; RP 6. They lived in the house less than six weeks before Shelton petitioned for the DVPO. CP 18.

In written submissions and live testimony, Shelton recounted a number of incidents that caused her to fear for her safety in Myers’ presence. The following chart summarizes those incidents and where the relevant testimony can be found in the record:

Wine glass incident	Myers screams profanities, shatters a wine glass	RP 6-7
Insulation incident	Myers swears at Shelton and tears out insulation he says she installed incorrectly.	RP 7-8
Coat rack incident	Myers tears a coat rack out of the wall and throws it on garbage pile because Shelton had redone his work.	CP 18
Popcorn pan incident	Shelton asks Myers to put dishes in the dishwasher before she gets back from work. Myers gets enraged, yells “Do not ask me to do anything, ever! Get the f*** out of my house! Do not tell me what to do!” Myers pushes Shelton into a metal pole. Myers blames Shelton for the outcome.	CP 17, 25, 46; RP 8-9
Fall on the stairs	Myers wanted a piece of furniture moved upstairs. Shelton wanted it where she had placed it downstairs. Myers rams Shelton with the	RP 11

	furniture on his way up the stairs. Shelton falls down onto the stairs.	
Light fixture incident	Shelton came home from shopping. Myers insisted she look at some lighting before putting groceries away. When Shelton did not look where Myers wanted, he screamed, “You look here where I told you to look!” Afterward he told her she needed “to learn how to put your agenda and your routine aside.”	CP 10; RP 12-13
Controlling contact with Karl	Karl was Shelton’s long-time friend. Shelton and Myers hired Karl to work on the home project. Myers and Karl had conflicts and ended on bad terms. Myers told Shelton not to respond to any contact from Karl without consulting Myers first. Shelton continued to have contact with Karl unrelated to the house project. This became a recurring conflict.	CP 5, 16-17, 25, 48; RP 14

Myers denied most of these events or attributed them to “obvious distortions and misperceptions” by Shelton. *E.g.*, CP 48. But ultimately the trial court found Shelton’s testimony more credible. RP, Jan. 3, 2020, at 16-17. The revision judge noted that the incidents Shelton testified to “show a pattern of coercive and controlling behaviors by [Myers].” RP, Jan. 3, 2020, at 17.

3.2 After an argument in which Shelton would not accede to Myers' wishes, Myers threw Shelton's belongings into the street, dragged her out of the car, and sped off, leaving her by the side of the road.

The incident that gave rise to Shelton's petition for a DVPO occurred on October 29, 2019. Shelton called Myers for a ride home while some work was being done on her truck. RP 14. Myers left work to take her home. CP 15. As they drove, Myers was irritated and told Shelton that she should have used her money to buy a new car, not to put new tires on her old truck. CP 24; RP 14. They parked along the curb in front of the house. CP 15. Myers told her it was just like the issue with Karl—it was “absurd,” Myers said, that Shelton was unable to reach a common understanding with him on these issues. CP 24; RP 14.

Shelton responded, “Yes, this is absurd.” RP 14. Myers erupted with anger. CP 24; RP 14. He grabbed Shelton's briefcase and flung it out the driver's side window into the middle of the street. RP 15. He took her purse and flung it. RP 15. He took her coffee mug and flung it. RP 15.

Myers raised his voice: “Would you get out of the F**** car?!” CP 15. “Please get out of the F**** car. Would you get out of the F**** car please?” CP 15. Myers got out of the car and raged in the street, still screaming profanities. RP 15.

Shelton stayed in her seat, looking down, trying to be small, hoping he would calm down and walk away so she could exit safely. CP 24; RP 15. She did not speak or do anything, “because I have learned that it only makes things worse.” CP 24.

Myers came around to her door and opened it. RP 15. He pushed Shelton against the seat, reached across her body, and removed the seat belt. CP 24; RP 15. He grabbed her arm and dragged her out of the car, pulling her behind him until she fell on the sloped landscape of the front yard. CP 24; RP 15. He quickly closed the door, got back in the car, and sped away, leaving Shelton in the mulch and her belongings broken in the street. CP 24; RP 15.

A few minutes later, Myers sent Shelton a text message: “You baited me and baited me and sat there.. shame on you. ... I asked you repeatedly to please get out of the car. You know better.” CP 33. He returned to the house a short time later, hoping to talk, but Shelton avoided him. CP 24; RP 16. After this incident, Shelton feared to be alone with Myers, not sure what might set him off again or what he might do the next time. CP 11, 27; RP 18.

3.3 Shelton petitioned the court for a domestic violence protection order. Myers denied any wrongdoing. The trial court granted the DVPO.

Shelton filed her petition for a domestic violence protection order on November 8, 2019. CP 1. The trial court granted an ex-parte temporary protection order. *See* RP, Nov. 8, 2019, at 3-8. Shelton’s petition, supporting declarations, and live testimony described the events set forth above. *See, generally*, CP 1-11, 24-27; RP 6-18.

Myers filed written responses and also testified at the hearing. *See, generally*, CP 15-20, 43-49; RP 20-35. Myers focused most of his efforts on analyzing Shelton’s testimony. *See, e.g.*, CP 43 (Myers constructs a hypothetical scenario based largely on Shelton’s testimony but never says what actually happened); RP 41 (the trial court observed, “Mr. Myers focuses a lot on the words that Ms. Shelton has used, but he never actually addresses how she was removed from the vehicle...”).

Myers’ theme of the case was that he was not at fault for what happened—that his actions were reasonable under the circumstances. *See, e.g.*, CP 16 (“I did not show hostile or violent intent...”), 19 (“my state of mind has been defensive”). Myers argued that he used lawful force to put an end to Shelton’s “malicious trespass” in his car. CP 44 (citing RCW 9A.16.020).

Myers described his profanity-laden tirades as “defensive,” not aggressive. CP 58; *See* CP 17, 46. He described his orders to “Get the f*** out!” as “requests,” not threats. *E.g.*, CP 15-16 (“my use of the word ‘please’ and the many repeated requests, both in and out of the car”), 17 (“repeated my request for her to get out”), 46 (“I made repeated requests, used a loud voice, and I pointed”).

In her closing testimony, Shelton reiterated Myers’ pattern of controlling behavior. RP 35. Myers always had an excuse for what he did. RP 35. He would blame her, because she should have known to just follow his wishes so he would not have to become angry. RP 35-36. She feared for her safety because each time it got worse and she never knew what would set him off next. RP 36.

Analyzing the definition of “domestic violence” under RCW 26.50.010, the trial court (Commissioner pro-tem Megan Card) focused in on the question of whether there had been “physical harm, bodily injury, or assault by Mr. Myers against Ms. Shelton.” RP 39. The trial court found that Myers had admitted to having physically removed Shelton from the car on October 29. RP 41. The trial court found that this physical removal was an act of domestic violence under the statutory definition. RP 42. The trial court granted the protection order. RP 42.

3.4 Myers sought revision, finding fault in the trial court’s failure to agree with his reasoning, and blaming Shelton for causing his own conduct.

Myers moved for revision of the protection order by a judge. *See* CP 56. Myers focused primarily on an erroneous statement by the trial court that Shelton had fallen down the stairs (RP 39) when in fact Shelton testified that she “fell down against the stairs” (RP 11). CP 57. Myers argued that the trial court’s failure to get this one fact right “taints the whole decision.” CP 58. The gist of Myers’ argument was that the trial court decision must have been wrong because it disagreed with his arguments. *See* CP 58.²

In addition to blaming the court for not accepting his arguments, Myers went so far as to argue that Shelton should not be entitled to a protection order because she was the cause of Myers’ own conduct: “[Shelton] had many opportunities within the many allegations (and a duty) to de-escalate, or otherwise express verbal or non-verbal boundaries, or otherwise take an easy and reasonable action—like stepping out of the car towards the doorstep of her home.” CP 59.

² Myers argued that the trial court “landed on a theory that [Myers] was offensive, aggressive, and hostile, and ... simultaneously rejected [Myers’] case establishing [Myers] acted from a defensive posture.” As a result, according to Myers, “There can be no assurance the Court properly weighed the subtle nuances and patterns of [Myers’] assertions of defensive posture.”

In a supplemental filing, Myers analyzed the testimony regarding the incident on the stairs and concluded that it was Shelton who assaulted **him** on the stairway, because she did not get out of his way. CP 68. Myers hatched a new theory that Shelton had intentionally instigated these incidents in order to gin up cause to seek a protection order and thereby obtain sole control over the shared residence. CP 71.

The revision judge (Judge Anne Hirsch) held that the commissioner had addressed all of the elements under the statutory definition. RP, Jan. 3, 2020, at 16. The judge noted the commissioner's error regarding the stairs, but also noted that the commissioner's decision was not based on the stair incident, but rather on the car incident. RP, Jan. 3, 2020, at 16. The judge found Shelton's testimony credible (and noted that the commissioner had as well), not only about the October 29 incident in the car but also "others that show a pattern of coercive and controlling behaviors by [Myers]." RP, Jan. 3, 2020, at 16-17. The revision judge found "more than a sufficient basis in the record in front of the commissioner to enter the protection order." RP, Jan. 3, 2020, at 17.

There were some additional proceedings, parts of which are present in the record, but this brief will only address them as may be necessary in the arguments.

4. Summary of Argument

Myers' brief raises numerous issues that are not reviewable by this Court. Once these extraneous issues are eliminated, what remains is simple. This Court cannot second-guess the trial court's determination that Shelton's testimony is credible. Shelton's credible testimony was substantial evidence to support the trial court's findings of fact. The findings of fact support the trial court's conclusions of law. There was no error in the trial court's decision. This Court should affirm. And because Shelton prevails and Myers' appeal had no reasonable chance of success, the Court should award Shelton her attorney's fees on appeal under RCW 26.50.060(1)(g) or RAP 18.9.

5. Argument

5.1 This Court should decline to address most of the issues and arguments raised by Myers.

Myers' brief raises numerous issues. This Court should decline to review most of them. Most of Myers' issues are not reviewable because either 1) Myers fails to assign error to specific findings of fact; 2) Myers raises the issue for the first time on appeal; 3) Myers fails to support his argument with any authority; or 4) Myers fails to provide an adequate record for review.

5.1.1 Myers failed to assign error to specific findings of fact.

“A separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number.” **RAP 10.3(g)**. A general assignment of error to all of the trial court’s findings is insufficient under this rule. *Olivo v. Rasmussen*, 48 Wn. App. 318, 319 n.1, 738 P.2d 333 (1987). If the relevant issues are argued in the body of the brief and citations are supplied so that the court is not greatly inconvenienced and the respondent is not prejudiced, the appellate court may exercise its discretion to consider the merits of the issue. *State v. Olson*, 126 Wn.2d 315, 323, 893 P.2d 629 (1995). Otherwise, the findings become verities on appeal. *In re Marriage of Fiorito*, 112 Wn. App. 657, 665, 50 P.3d 298 (2002); *Olivo*, 48 Wn. App. at 319 n.1.

Myers did not separately assign error to any specific finding of fact. Nowhere in his brief does he refer to any challenged finding by number. It is at times difficult to discern from his arguments what exactly he believes is not supported by evidence. Indeed, many of his arguments actually point to the evidence that supports the trial court’s findings on the identified subjects.

5.1.2 Myers raises many issues for the first time on appeal.

“RAP 2.5(a) states the general rule for appellate disposition of issues not raised in the trial court: appellate courts will not entertain them.” *State v. Scott*, 110 Wn.2d 682, 685, 757 P.2d 492 (1988). The rule is a matter of fundamental fairness with a long history in Washington’s courts. *State v. Bertrand*, 165 Wn. App. 393, 406-07, 267 P.3d 511 (2011) (Quinn-Brintnall, J., concurring). “The appellate courts will not sanction a party’s failure to point out at trial an error which the trial court, if given the opportunity, might have been able to correct to avoid an appeal and a consequent new trial.” *Scott*, 110 Wn.2d at 685.

There is an exception for “manifest error affecting a constitutional right.” **RAP 2.5(a)(3)**. For this exception to apply, the appellant must demonstrate, among other things, that the alleged error “implicates a specifically identified constitutional right.” *Bertrand*, 165 Wn. App. at 400. The appellate court must be satisfied that the asserted error “is truly of constitutional magnitude” and not merely ordinary error framed in constitutional language. *Scott*, 110 Wn.2d at 688.

Although Myers frames some of his errors in terms of “due process,” “equal protection,” or an “unenumerated constitutional right” to complete construction of the shared

property, he provides no authority to demonstrate that there was an error “truly of constitutional magnitude.” Myers fails to show any support for his alleged “unenumerated right.” He fails to present or argue the constitutional framework for analyzing a due process or equal protection violation. Myers was given a reasonable opportunity to be heard in response to the petition. He presented numerous written declarations and live testimony and argument at the trial. There was no manifest constitutional error in this case. The Court should decline to address any issues raised for the first time on appeal.

5.1.3 Myers fails to support his arguments with citations to authority.

RAP 10.3(a)(6) requires parties to provide “argument in support of the issues presented for review, together with citations to legal authority and references to relevant parts of the record.” Arguments that are not supported by pertinent authority or meaningful analysis should not be considered. *See Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (arguments not supported by authority); *Saunders v. Lloyd’s of London*, 113 Wn.2d 330, 345, 779 P.2d 249 (1997) (arguments not supported by adequate argument and authority).

The body of Myers' brief cites a grand total of five cases and two statutes. Although he cites more in his Table of Authorities, he fails to connect any of these authorities to his arguments. Most of his arguments are not supported by any authority. Some of his issues do not appear to be supported by any meaningful legal argument. Many simply boil down to Myers' disagreement with the trial court's findings of fact (to which he fails to specifically assign error). The Court should disregard any issues not supported by argument or citations to authority.

5.1.4 Myers fails to provide an adequate record for the Court's review.

The appellant bears the burden of perfecting the record so that the Court is presented with all information relevant to deciding the issues presented. *Yorkston v. Whatcom Cty.*, 11 Wn. App. 2d 815, 824, 461 P.3d 392 (2020). "If the party seeking review intends to urge that a verdict or finding of fact is not supported by the evidence, the party should include in the record all evidence relevant to the disputed verdict or finding." **RAP 9.2(b)**. When an appellant fails to perfect the record, the Court is "necessarily compromised" in its ability to review the alleged errors. *Yorkston*, 11 Wn. App. 2d at 824. In such situations, the court may accept the trial court's findings as

verities or may decline to reach the merits of the issue altogether. *Id.* at 824-25.

The record designated by Myers does not include a transcript on the hearing on Shelton’s motion for revision. This deprives the Court of the ability to review the trial court’s reasoning in prohibiting Myers from contacting Shelton by phone or text. Without a record of the trial court’s reasoning, this Court cannot review the reasonableness of the decision under the abuse of discretion standard. The Court should decline to reach the merits of the trial court’s decision to grant Shelton’s request to add the no-contact provisions to the DVPO.

5.1.5 Chart of issues this Court should decline to address.

The issues raised by Myers are summarized in the table below, along with the reasons to decline review of each, as appropriate, or a reference to where the issue is addressed in this response brief:

Assignment of Error 1: “Lawful Contact: Assault not met”	The Court should address Myers’ disagreement with the trial court’s findings and conclusions and should affirm the trial court. See Parts 5.2 through 5.5, below
---	--

Assignment of Error 2: “Lawful Contact: Court Silent on Force”	The Court should address Myers’ disagreement with the trial court’s findings and conclusions and should affirm the trial court. See Parts 5.2 through 5.5, below
Assignment of Error 3: “No Standard Relating to Risk of Domestic Violence”	Failed to address specific findings. Raised for first time on appeal. Not supported by authority. Inadequate record. But see Parts 5.2 and 5.5, below.
Assignment of Error 4: “Trial Court Conflates Foundation”	Failed to address specific findings. Not supported by authority. But see Part 5.2, below.
Assignment of Error 4b: “Due process: Lower Court Error: Misrepresented Testimony”	Failed to address specific findings. Not supported by authority. But see Part 5.4, below.
Assignment of Error 2a: “credibility”	Failed to address specific findings. Not supported by authority. But see Part 5.3, below.
Assignment of Error 5: “Due Process: Manifest Errors: Sprawling Record”	This is essentially a repeat of other assignments of error. Failed to address specific findings. Raised for first time on appeal (no manifest constitutional error). Not supported by authority.
Assignment of Error 6: “Equal Protection: Building Permit-Right to Finish” (RCW 26.50 is unconstitutionally broad)	Failed to address specific findings. Raised for first time on appeal (no manifest constitutional error). Not supported by authority.

Assignment of Error 7: “Ex-parte: Insufficient Service”	Failed to address specific findings. Raised for first time on appeal. Not supported by authority. Inadequate record.
Assignment of Error 8: “Legislative Mandate: Prejudicial Materials and Resources”	Failed to address specific findings. Raised for first time on appeal. Not supported by authority. Inadequate record.
Assignment of Error 8: “Legislative finding: Protection Order Expiration”	This issue is not ripe for review because it relates to the legal standards for extending the duration of the DVPO, which has not happened yet.
Assignment of Error 9: “Motion for Modification No-contact Order”	Failed to address specific findings. Not supported by authority. Inadequate record.

The deficiencies noted in the chart above take into consideration the later portions of the brief addressing the Issues (Br. of App. at 9-19) and Arguments (Br. of App. at 27-44).

Myers’ appeal boils down to his disagreement with the trial court’s credibility determinations, findings of fact, and conclusions of law. As will be shown below, Myers’ disagreement is unfounded. The trial court applied correct legal principles. Substantial evidence supported the trial court’s findings of fact. The findings supported the trial court’s conclusions of law. This Court should affirm the DVPO.

5.2 Background legal principles for review of a DVPO.

5.2.1 This Court reviews a trial court decision to grant a DVPO for abuse of discretion.

This court reviews a trial court decision to grant a DVPO for abuse of discretion. *Rodriguez v. Zavala*, 188 Wn.2d 586, 590-91, 398 P.3d 1071 (2017). This court should reverse those parts of the trial court orders that were manifestly unreasonable or based on untenable grounds or reasons. *Freeman v. Freeman*, 169 Wn.2d 664, 671, 239 P.3d 557 (2010). “A court’s decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard.” *In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997).

The trial court’s findings of fact are reviewed for substantial evidence. *In re Marriage of Fahey*, 164 Wn. App. 42, 55, 262 P.3d 128 (2011). Substantial evidence exists if the record contains evidence that, if believed, would persuade a fair-minded, rational person that the finding is correct. *Id.* The Court reviews conclusions of law to determine whether the findings support the conclusions. *Id.* at 55-56.

5.2.2 This Court reviews the decision of the trial court judge on revision, not the decision of the commissioner.

On a motion for revision of a commissioner's decision, the superior court reviews the decision de novo based on the evidence and issues presented to the commissioner. *In re Welfare of Ca.R.*, 191 Wn. App. 601, 607, 365 P.3d 186 (2015). Under RCW 2.24.050, the findings and orders of a court commissioner not successfully revised become the orders and findings of the superior court. To the extent the revision judge does not make separate findings and conclusions, a revision denial constitutes an adoption of the commissioner's decision. *Maldonado v. Maldonado*, 197 Wn. App. 779, 789, 391 P.3d 546 (2017).

On appeal, this Court reviews the superior court's ruling, not the commissioner's. *Maldonado*, 197 Wn. App. at 789. This Court's review of the superior court decision is more deferential than the superior court's review of the commissioner's decision. *State v. Wicker*, 105 Wn. App. 428, 432-33, 20 P.3d 1007 (2001). For example, as noted above, this Court reviews the decision to grant a DVPO under the more deferential abuse of discretion standard.

Here, the revision judge reviewed the record and reached the same ultimate conclusion as the commissioner but differed

slightly in her reasoning. For example, the judge corrected the commissioner's factual error and clarified that the finding of domestic violence was not dependent on that factual error. The reasoning of the judge, set forth in her oral ruling, supports the DVPO. The reasoning of the commissioner is no longer relevant. The judge found Shelton's testimony credible. The judge found that Shelton's testimony provided substantial support for the essential findings of fact and the ultimate conclusion that Shelton was entitled to the DVPO.

Myers is incorrect in taking issue with the judge's process and analysis on revision. The judge properly undertook a de novo review of the record presented to the commissioner. The judge did not rely on any errors committed by commissioner. Myers had the opportunity in his motion to raise any alleged errors that he thought should be corrected. The judge was not persuaded by Myers' arguments. There were no procedural or due process errors.

Myers mistakenly argues that the trial court should have viewed the facts and inferences favorably to him as the nonmoving party, citing *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 125 Wn.2d 337, 341, 883 P.2d 1383 (1994). But *Mountain Park* was appealed from a trial court decision on summary judgment under CR 56. *Id.* This is not a summary

judgment case, so the rule of viewing facts favorably to the nonmoving party does not apply.

In a summary judgment hearing, the court is only seeking to determine whether there are material facts in dispute that would require a trial. In a summary judgment hearing, the court does not weigh conflicting evidence or make credibility determinations. In contrast, in this DVPO case, the trial court already sat as fact-finder at trial, charged with weighing and resolving conflicting evidence and finding the facts on a more-likely-than-not basis. The trial court correctly carried out its role, viewing the facts as a neutral fact-finder, not favorable to either party.

5.2.3 Upon finding that “domestic violence” has occurred, the trial court has broad discretion to craft a remedy to protect victims.

RCW 26.50.060 authorizes the trial court, after notice and a hearing, to issue a protection order upon a finding that domestic violence has occurred. *Juarez v. Juarez*, 195 Wn. App. 880, 886, 382 P.3d 13 (2016). The trial court has broad discretion under the statute to protect victims and their loved ones.

Rodriguez v. Zavala, 188 Wn.2d 586, 593, 398 P.3d 1071 (2017).

The statute defines “domestic violence” as “Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, sexual assault, or

stalking as defined in RCW 9A.46.110 of one intimate partner by another intimate partner.” **RCW 26.50.010(3)(a)**. “Intimate partners” are “adult persons presently or previously residing together who have or have had a dating relationship.” **RCW 26.50.010(7)(d)**.

“Assault” is not defined in the statute, but it is well-defined in the common law. There are three forms of assault: 1) assault by actual battery, 2) assault by attempt to cause injury, and 3) assault by attempt to cause fear or apprehension of injury. *Ugolini v. Ugolini*, 11 Wn. App. 2d 443, 447, 453 P.3d 1027 (2019). Assault by actual battery occurs when there is any “intentional touching or striking of another person that is harmful or offensive.” *Id.*

Under these definitions, domestic violence occurs when 1) an adult person 2) presently or previously residing with 3) another adult person with whom he has had a dating relationship 4) inflicts upon the other person any of the following: a) physical harm, b) bodily injury, c) assault, d) fear of imminent physical harm, bodily injury, or assault, e) sexual assault, or f) stalking. Note that the statutory language establishing these alternative elements a-f uses the disjunctive “or.” Only one of these alternatives is necessary for a finding that domestic violence has occurred.

Upon finding these four elements, the trial court is empowered to exercise its discretion to craft an appropriate protection order to protect the victims of domestic violence, guided by **RCW 26.50.060**. Contrary to Myers’ arguments, there is no requirement in the statute or in case law to demonstrate a likelihood that the person will continue to commit acts of domestic violence. Indeed, there is not even a requirement that the predicate act of domestic violence be a recent one. *Spence v. Kaminski*, 103 Wn. App. 325, 333, 12 P.3d 1030 (2000). Only when the petitioner seeks to renew a protection order does the issue of future acts come into play, at which point “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...” **RCW 26.50.060(3)**.³

5.3 This Court cannot second-guess the trial court’s determination that Shelton’s testimony was credible.

Myers’ major contention with the trial court was the fact that the court believed Shelton’s testimony and rejected his excuses, deflections, and victim-blaming (which he calls his “defensive posture”). As Myers himself recognizes, this was a

³ Myers attempts to raise an issue about this standard and an alleged conflict between the statute and the *Freeman* case. *See* Br. of App. at 2, 8, 16-17. Shelton has been unable to identify the conflict. This issue is not ripe, raised for the first time on appeal, and not supported by analysis or authority. The Court should disregard it.

credibility determination. Myers argues that the trial court failed in its role to determine the credibility of the parties. His assignment of error is not reviewable.

“It is not the role of appellate courts to weigh and evaluate conflicting evidence.” *Prostov v. State, Dep’t of Licensing*, 186 Wn. App. 795, 820, 349 P.3d 874 (2015).

“Credibility determinations are for the trier of fact and cannot be reviewed on appeal.” *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990). The appellate court must defer to the trier of fact on issues of conflicting testimony, credibility of witnesses, and the persuasiveness of the evidence. *Prostov*, 186 Wn. App. at 820. The trial court, as trier of fact, determined that Shelton was more credible than Myers. This Court cannot change that determination.

The only role for this Court in regards to the facts of the case is to review for substantial evidence. In reviewing for substantial evidence, “this court need consider only whether the evidence most favorable to the prevailing party supports the challenged findings, even if the evidence is in conflict.” *Prostov*, 186 Wn. App. at 820. In other words, it makes no difference how much evidence there may be on the opposing side—this Court only considers whether the evidence **in favor of the finding** was sufficient, if believed, to convince a reasonable person of the truth of the finding. The choice of who to believe is the exclusive

province of the trial court. Myers fails to provide any authority for the notion that this Court has any authority to review the trial court's credibility determinations.

Myers spends considerable time arguing that he had refuted ten allegations of misconduct. *See* Br. of App. at 28-32 (listing only eight). Each of these arguments is nothing more than an attempt to get this Court to improperly interfere with the trial court's credibility determinations. The trial court believed Shelton's version of events and rejected Myers' excuses, deflection, and victim-blaming. As will be shown below, substantial evidence supported the trial court's findings of fact. This Court should affirm the DVPO.

5.4 The trial court's findings of fact were supported by substantial evidence.

The trial court necessarily found the elements to establish that domestic violence occurred: 1) Myers, an adult person, 2) resided with 3) Shelton, another adult person with whom Myers had a dating relationship, 4) inflicted upon Shelton c) assault. The commissioner expressly found the first three elements, that Myers and Shelton were adults residing together in a dating relationship. RP 38. The revision judge adopted these findings by not revising them. Myers has not assigned error to these findings, and his own testimony supports them. CP 18.

Where the rubber hits the road is the finding of assault. The commissioner found that Myers' physical removal of Shelton from the car was assault—an intentional touching that was harmful or offensive. RP 42. The revision judge agreed. RP, Jan. 3, 2020, at 16-17. The judge also added an alternative ground for the finding of domestic violence, finding that there was “a pattern of coercive and controlling behaviors by [Myers].” RP, Jan. 3, 2020, at 17. This additional finding supports alternative element 4)d) fear of imminent physical harm, bodily injury, or assault. *See Spence*, 103 Wn. App. at 333 (a history of abuse and the court's belief that the victim feared future abuse were sufficient to persuade a rational person that she had been put in fear of imminent physical harm).

Myers complains about the commissioner's factual error regarding Shelton falling on the stairs. The revision judge corrected the trial court's factual error. That error is no longer part of the trial court's decision. Substantial evidence supported the remaining findings.

Myers complains that the trial court failed to find that Shelton assaulted him on the stairs. “The absence of an express finding of fact gives rise to a presumption the party having the burden of proof has failed to sustain that burden.” *SSG Corp. v. Cunningham*, 74 Wn. App. 708, 714, 875 P.2d 16 (1994). Myers failed to sustain his burden of proving he was assaulted. The

trial court did not believe him. This Court cannot second-guess that determination.

There is abundant evidence supporting the trial court's findings of the essential elements of domestic violence under RCW 26.50.010. Some of that evidence is summarized in Parts 3.1 and 3.2, above. Even more evidence can be found elsewhere in the record. Myers' arguments themselves provide additional evidence of his pattern of coercive and controlling behaviors, as he continues to blame Shelton for causing his actions by not complying with his vision of a reasonable person. The trial court's findings of fact are supported by substantial evidence. This Court should affirm.

5.5 The trial court's conclusions were supported by its findings of fact and evidence in the record.

Once the trial court found that domestic violence occurred, it had broad discretion to craft an appropriate protection order. **RCW 26.50.060** provides a non-exhaustive list of relief that a court may provide as part of a DVPO. The trial court did not order any restraints outside of this statutorily-approved list.

Myers argues that the trial court should not have modified the DVPO to add no-contact provisions that were not in the original order. But Myers failed to provide this Court with a

record of the trial court's hearing on this issue, depriving the Court of the ability to review the trial court's reasoning under an abuse of discretion standard. Nevertheless, it is clear that the trial court had authority to impose the no-contact provisions as a consequence of the finding that Myers committed domestic violence. **RCW 26.50.060(1)(h)**. Myers provides no authority for the proposition that a trial court would need to make any additional findings of fact before imposing a restriction that it would have been authorized to make in the original order. Indeed, to require additional findings would defeat the legislature's stated policy of providing protection to victims of domestic violence. Shelton demonstrated that the protections of the original DVPO were not enough. The trial court agreed and provided the protections it deemed necessary. Myers has not shown that this was an abuse of discretion.

Myers is also wrong when he argues that the trial court abused its discretion in granting Shelton use of the shared home. The statute expressly authorizes the trial court to "Exclude the respondent from the dwelling that the parties share." **RCW 26.50.060(1)(b)**. Myers' own testimony established that the parties resided together in the commonly-owned home. It was reasonable for the trial court to allow Shelton to remain in the shared residence and to exclude Myers. The reasonableness of this decision is not diminished by any of

Myers' concerns for the construction or his finances. Those concerns would have been present even without the DVPO if the parties simply broke up. The trial court correctly held that Myers' concerns about the property were not properly before the court.

Myers asserts that he had an affirmative defense to the finding of domestic violence. **RCW 9A.16.020** codifies the affirmative defenses of self-defense and defense of property, providing that use of force is "not unlawful" under certain circumstances:

- (3) Whenever used by a party about to be injured, or by another lawfully aiding him or her, in preventing or attempting to prevent an offense against his or her person, or a malicious trespass, or other malicious interference with real or personal property lawfully in his or her possession, in case the force is not more than is necessary...
- (5) Whenever used by a carrier of passengers or the carrier's authorized agent or servant, or other person assisting them at their request in expelling from a carriage, railway car, vessel, or other vehicle, a passenger who refuses to obey a lawful and reasonable regulation prescribed for the conduct of passengers, if such vehicle has first been stopped and the force used is not more than is necessary to expel the offender with reasonable regard to the offender's personal safety.

Subsection (5) does not apply because Myers is not a "carrier of passengers." A common carrier of passengers is one

who makes the carrying of passengers a “regular and constant business ... hold[ing] himself ready to carry for all persons, indifferently, who choose to employ him.” *Larson v. Aetna Life Ins. Co.*, 19 Wn.2d 601, 605, 143 P.2d 850 (1943). Myers was giving his girlfriend a ride home. He was not a “carrier of passengers.”

Subsection (3) also does not apply. Myers does not cite to any authority applying defense of property as a defense to a finding of domestic violence under RCW 26.50.010. Before the defense can apply, Myers must establish that he was attempting to prevent “malicious trespass” or “malicious interference” with the car. Shelton was not maliciously trespassing in the car or maliciously interfering with Myers’ use or possession of the car. She was an invited guest sitting peacefully in the passenger seat. She was not threatening any damage to the car. She was not attempting to steal the car. She was not preventing Myers from making use of the car.

To the extent Myers may have felt that her presence was interfering with his use, he failed to prove that it was “malicious interference.” Shelton’s only intent in staying in her seat was self-protection. Myers was the aggressor. Myers was the first to maliciously interfere with property, throwing Shelton’s briefcase, purse, and coffee cup out the car window into the street. Myers was the only one acting aggressively, screaming at Shelton to

“get out of the f*** car!” Shelton’s testimony supports a finding that in that moment she feared what Myers might do to her. *See* RP 15-16. Defense of property does not apply under the facts of this case.

The absence of any findings of fact relating to Myers’ asserted affirmative defense gives rise to a presumption that the trial court found he had failed to sustain his burden of proof. *See SSG Corp. v. Cunningham*, 74 Wn. App. 708, 714, 875 P.2d 16 (1994). Myers has not shown that he would have been entitled to this defense. Even if he could have demonstrated that his physical removal of Shelton from the car was not an assault, the remaining facts—and the trial court’s finding that Myers had a demonstrated pattern of coercive and controlling behavior—still support the finding of domestic violence because Shelton had a reasonable fear of imminent physical harm, bodily injury, or assault.

The trial court’s findings of fact support its conclusions of law. Myers has not shown any abuse of discretion in the trial court’s decision to grant the DVPO. This Court should affirm.

5.6 This Court should award Shelton her attorney’s fees on appeal as a prevailing petitioner under RCW 26.50.060(1)(g) or as a sanction for Myers’ frivolous appeal under RAP 18.9.

RCW 26.50.060(1)(g) authorizes the court to “Require the respondent ... to reimburse the petitioner for costs incurred in

bringing the action, including reasonable attorney's fees." Such an award of fees is permitted on appeal to a prevailing petitioner, even if fees were not requested in the trial court.

Aiken v. Aiken, 187 Wn.2d 491, 506, 387 P.3d 680 (2017); *Sheib v. Crosby*, 160 Wn. App. 345, 353, 249 P.3d 184 (2011).

Shelton has been forced to incur significant expense in defending Myers' appeal. Myers himself admitted in the trial court that he had submitted "long and tedious responses," creating an unmanageable record in the case. CP 123. Shelton's appellate counsel has had to fully review that tedious record and Myers' poorly organized, nearly 50-page brief and its myriad issues and assignments of error, most of which unreviewable by this Court. The appeal itself serves only as another avenue for Myers to continue to abuse Shelton. *E.g.*, Br. of App. at 17 (accusing Shelton of being unable to "independently manage her life" or "step up to [her] obligations" like he can), 31 (claiming Shelton is a "highly sensitive person" who lives in a distorted reality). This Court should award Shelton her reasonable attorney's fees on appeal as a deterrent to further misconduct, as provided by RCW 26.50.060(1)(g).

Additionally, "The appellate court ... may order a party or counsel ... who uses these rules for the purpose of delay [or] files a frivolous appeal ... to pay terms or compensatory damages to any other party who has been harmed." **RAP 18.9(a)**. The

primary inquiry under this rule is whether, when considering the record as a whole, the appeal is frivolous, *i.e.*, whether it presents no debatable issues and is so devoid of merit that there is no reasonable possibility of reversal. *Streater v. White*, 26 Wn. App. 430, 434-35, 613 P.2d 187 (1980).

“In determining whether an appeal is frivolous and was, therefore, brought for the purpose of delay, justifying the imposition of terms and compensatory damages, we are guided by the following considerations: (1) A civil appellant has a right to appeal under RAP 2.2; (2) all doubts as to whether the appeal is frivolous should be resolved in favor of the appellant; (3) the record should be considered as a whole; (4) an appeal that is affirmed simply because the arguments are rejected is not frivolous; (5) an appeal is frivolous if there are no debatable issues upon which reasonable minds might differ, and it is so totally devoid of merit that there was no reasonable possibility of reversal.” *Streater*, 26 Wn. App. at 434-35.

In *Streater*, the court found the appeal frivolous where “the assignments of error challenge findings of fact that are amply supported by substantial evidence as well as the conclusions of law which are clearly supported by the findings.” *Streater*, 26 Wn. App. at 435. The same is true here. Myers’ appeal is primarily a factual one, challenging the trial court’s findings and credibility determinations, even though they are

amply supported by substantial evidence. There is no reasonable possibility of reversal.

Myers presented numerous issues for the first time on appeal, without supporting his arguments with citations to authority, or without providing an adequate record for this Court's review. The trial court's decision is presumed correct and must be affirmed unless the appellant can demonstrate error. *State v. Wade*, 138 Wn.2d 460, 464, 979 P.2d 850 (1999). On those issues which Myers has failed to properly preserve or present error, there is no reasonable possibility of reversal. This Court should award Shelton her reasonable attorney's fees as a sanction for Myers' frivolous appeal, under RAP 18.9.

6. Conclusion

Myers' appeal boils down to a disagreement with the trial court's credibility determinations, findings of fact, and conclusions of law. This Court cannot review the trial court's credibility determinations—the trial court found Shelton more credible than Myers. The trial court's findings of fact are supported by substantial evidence in the form of Shelton's written and oral testimony and even some admissions by Myers. The findings support the trial court's conclusions of law. Myers committed domestic violence, and Shelton was entitled to a

protective order. Myers has not demonstrated any abuse of the trial court's broad discretion in crafting an appropriate order.

Shelton should prevail on appeal. As prevailing party, she is entitled to an award of reasonable attorney's fees under RCW 26.50.060(1)(g). Alternatively, the Court should award Shelton her fees as a sanction for Myers' frivolous appeal.

Respectfully submitted this 27th day of May, 2020.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Respondent
kevin@olympicappeals.com
Olympic Appeals PLLC
PO Box 55
Adna, WA 98522
360-763-8008

Certificate of Service

I certify, under penalty of perjury under the laws of the State of Washington, that on May 27, 2020, I caused the foregoing document to be filed with the Court and served on counsel or parties listed below by way of the Washington State Appellate Courts' Portal.

Gary Lee Myers
2008 Golden Maple Ct NW
Olympia, WA 98502
garymyers222@yahoo.com
Appellant, pro se

SIGNED in Lewis County, WA, this 27th day of May, 2020.

/s/ Kevin Hochhalter
Kevin Hochhalter, WSBA #43124
Attorney for Respondent
kevin@olympicappeals.com
Olympic Appeals PLLC
PO Box 55
Adna, WA 98522
360-763-8008

OLYMPIC APPEALS PLLC

May 27, 2020 - 4:55 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 54203-0
Appellate Court Case Title: Lalani Shelton, Respondent v. Gary Myers, Appellant
Superior Court Case Number: 19-2-30827-1

The following documents have been uploaded:

- 542030_Briefs_20200527165342D2996752_6346.pdf
This File Contains:
Briefs - Respondents
The Original File Name was Brief - Respondent 2020-05-27.pdf

A copy of the uploaded files will be sent to:

- garymyers222@yahoo.com

Comments:

Sender Name: Kevin Hochhalter - Email: kevin@olympicappeals.com
Address:
PO BOX 55
ADNA, WA, 98522-0055
Phone: 360-763-8008

Note: The Filing Id is 20200527165342D2996752