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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
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NO. 33975-1-III

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

LUCIA SUAREZ

Respondent,

v.

LAURO OLMOS,

Appellant,

BRIEF OF APPELLANT

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INTRODUCTION

On September 13, 2015, Sandra Solorza and Armondo Solorza Villa, husband and wife, witnessed, the daughter of Lauro Olmos, Esmeralda Olmos, begin striking her father in the face three times before Lauro Olmos struck his daughter back. Both Sandra and Armondo Solorza witnessed Esmeralda continue attacking her father after he had struck her, and saw him backing away from her. Sandra and Armondo Solorza further witnessed Esmeralda continue to try and attack her father even when her mother, Eva Olmos, tried to separate Esmeralda from her Father.

The witnesses saw Eva Olmos finally able to stop Esmeralda from attacking her father and leave with her in the car. The witnesses stayed behind and observed injuries to Lauro Olmos' face, chest, and stomach.

On September 22, 2015, nine days after the incident, Lucia Suarez, the maternal aunt of Esmeralda Olmos, filed a Petition for Order for Protection on behalf of Esmeralda Olmos.

A hearing was eventually held on November 10, 2015 to address the matter and the court issued a Protection Order finding that “given the natural history of the criminal case, Respondent [Lauro Olmos] went beyond reasonable actions that were necessary” in acting in self defense. See CP 042.

II. ASSIGNMENTS OF ERROR

1. The trial court erred by considering a pending criminal charge that was not properly before the court in denying Mr. Olmos' claim of self-defense and issuing the Order for Protection. See CP 042.
2. The trial court erred in not applying the correct standard for determining if Mr. Olmos acted in self-defense in consideration of whether to grant the issuance of an Order for Protection. See CP 042.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

Does the court have discretion to consider a pending criminal matter that is not before the court in determining whether to grant a Protection Order?

(Assignment of error 1).

Is a pending criminal charge evidence that the Respondent used more force than necessary when claiming self-defense in responding to a Petition for Order for Protection? (Assignment of error 2).

IV. STATEMENT OF THE CASE

A. Background Facts.

On September 13, 2015, Sandra Solorza and Armondo Solorza Villa, husband and wife, pulled up to the residence of Lauro Olmos in Entiat, Washington at approximately 7:00 p.m. They were there to pay rent and while they were there they observed, Eva Olmos, the wife of Lauro Olmos, pull up behind them in a car. While talking to Eva Olmos, Sandra and Armondo Solorza observed Esmeralda Olmos, the daughter of Lauro and Eva Olmos, get out of the

car with her boyfriend and walk quickly towards the house. Sandra and Armondo Solorza saw Lauro Olmos block the door to the house and heard Lauro Olmos tell his daughter that her boyfriend was not allowed in the house. See CP 028 – CP 033.

Sandra and Armondo Solorza then saw Esmeralda hit her father, Lauro Olmos, in the face three times and saw Lauro Olmos respond by hitting her in the face once. Even after Lauro had hit Esmeralda, Sandra and Armondo Solorza saw Esmeralda continue to try and fight with her father even while he was trying to step away, and even after Eva Olmos, the mother, had run over and try to separate Esmeralda from Lauro. See CP 028 – CP 033.

Finally, Eva was able to get their daughter, who was still yelling at her father, back in the car and leave the scene. After Eva had left with Esmeralda, Sandra and Armondo Solorza were talking with Lauro Olmos and witnessed him bleeding from his mouth, observed that the side of his face was red, and saw scratches around his stomach and chest. See CP 028 – 033.

On September 22, 2015, Lucia Suarez, the maternal aunt of Esmeralda Olmos, filed a Petition for Order for Protection in the Superior Court for the State of Washington for Chelan County. See CP 001 – CP 009. In the Petition for Order for Protection, Lucia Suarez, who was not present on September 13, 2015, wrote a statement on behalf of Esmeralda Olmos in which she described being punched by her father in the side of the head without any provocation, bleeding, and having to go to the Doctor and being told she had a concussion. See CP 005.

On October 3, 2015, counsel for Mr. Olmos, filed a Notice of Appearance, and prepared a Motion to Continue the Hearing on October 6, 2015 for Mr. Olmos to present to the court. See CP 017 – 019.

B. Issuance of Protection Order.

On October 6, 2015, Mr. Olmos appeared before the court and requested a continuance of the hearing with the aid of an interpreter. The Court granted the request, reissued the Temporary Order for Protection, and continued the matter to November 3, 2015. See CP 021 – CP 022.

On November 3, 2015, Mr. Olmos appeared with counsel, an interpreter, and witnesses that were able to testify. Petitioner, Lucia Suarez, objected and the matter was continued one week to November 10, 2015 and the Temporary Order for Protection was reissued. See CP 024 – 025.

On November 10, 2015, Mr. Olmos appeared with counsel, and an interpreter before the Honorable Judge Small of the Chelan Superior Court. The court reviewed the Declarations of Armondo Solorza Villa, CP 028 – 030, the Declaration of Sandra Solorza, CP 031 – 033, and the Petition for Order for Protection, CP 001 – 009.

The Court issued the Order of Protection finding that “given the natural history of the criminal case, Respondent [Lauro Olmos] went beyond reasonable actions that were necessary” in defending himself. See CP 042.

VI. ARGUMENT

A. Standard of Review.

An order granting or denying a domestic violence protection order is reviewed for an abuse of discretion. Hecker v. Cortinas, 110 Wn.App. 865, 869, 43 P.3d 50 (2002). A trial court abuses its discretion when its decision is based on untenable grounds or reasons. In re Marriage of Cota, 177 Wn. App. 527, 312 P.3d 695, 699 (2013).

A 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), *review denied*, 173 Wn.2d 1019 (2012). Substantial evidence exists if the record contains sufficient evidence to persuade a fair-minded, rational person of the finding's truth. Fahey, 164 Wn.App. at 55. The party challenging a finding bears the burden of showing that it is not supported by the record. Standing Rock Homeowners Ass'n v. Misich, 106 Wn.App. 231, 243, 23 P.3d 520 (2001). Unchallenged findings are verities on appeal, and challenged findings are also binding on appeal if they are supported by substantial evidence. Standing Rock, 106 Wn.App. at 238, 243.

Evidence may be substantial even if there are other reasonable interpretations of the evidence. Sherrell v. Selfors, 73 Wn.App. 596, 600-01, 871 P.2d 168 (1994). A trial court's determinations on the persuasiveness of the evidence, witness credibility, and conflicting testimony is given deference. Snyder v. Haynes, 152 Wn.App. 774, 779, 217 P.3d 787 (2009). Therefore, a trial court's finding of fact if substantial, though conflicting, evidence supports the finding

will not be disturbed on appeal. Merriman v. Cokeley, 168 Wn.2d 627, 631, 230 P.3d 162 (2010).

Questions of law are reviewed de novo on appeal. Sunnyside Valley Irrigation Dist. v. Dickie, 149 Wn.2d 873, 880, 73 P.3d 369 (2003).

Under Washington State Law, the requirement to prove self-defense, requires that there must be indication that first, the [person claiming self defense] subjectively feared that he was [about to be injured], WPIC 17.02, RCW 9A16.020; second, this belief was objectively reasonable, State v. Janes, 121 Wash.2d 220, 238, 850 P.2d 495, 22 A.L.R.5th 921 (1993); third, the [person claiming self defense] exercised no greater force than was reasonably necessary, State v. Hendrickson, 81 Wash.App. 397, 400, 914 P.2d 1194 (1996); and finally, the [person claiming self defense] was not the aggressor, State v. King, 24 Wash.App. 495, 501, 601 P.2d 982 (1979). RCW 9A.16.020(3). Further, if there is no evidence that the [person claiming self defense] intentionally used force, a self-defense instruction is not appropriate. Hendrickson, 81 Wash.App. at 400, 914 P.2d 1194.

It is well settled in the State of Washington that a trial court determines whether there is sufficient evidence to consider self-defense by reviewing the entire record in the light most favorable to the [person claiming self-defense] with particular attention to those events immediately preceding and including the alleged act. State v. Allery, 101 Wash.2d 591, 594, 682 P.2d 312 (1984); State v. McCullum, 98 Wash.2d 484, 488-89, 656 P.2d 1064 (1983). It should consider self-defense if there is credible evidence supporting the person's claim of self-

defense. State v. Gogolin, 45 Wash.App. 640 at 643, 727 P.2d 683 (1986). Because the person claiming self-defense is entitled to the benefit of all the evidence, Id., a person's claim of self-defense may be based upon facts inconsistent with their own testimony. "The law does not require an explicit statement of intent." Hendrickson, 81 Wash.App. at 401, 914 P.2d 1194. Further, the conduct of the person claiming self-defense "is to be judged by the condition appearing to them at the time, not by the condition as it might appear to the [trial court] in light of testimony before it." State v. Miller, 141 Wash. 104, 105-106, 250 P. 645 (1926).

B. The trial court abused its discretion by issuing the Protection Order.

1. The trial court issued the Protection Order based on the pending criminal matter that was not properly before the court.

As stated above, the issuance of a protection order is reviewed for an abuse of discretion, Hecker, 110 Wn.App at 869, which is a decision based on untenable grounds or reasons. In re Marriage of Cota, 312 P.3d. at 699.

In the case before the court Mr. Olmos, the appellant, believes that the court improperly considered the pending criminal charge in making its decision on whether to grant the protection order. Neither party present made a motion for the court to consider the pending criminal matter, its Affidavit of Probable Cause, or Information in making a determination of whether to issue or deny the protection order. It is apparent from the record that the court was made aware of the pending criminal matter, but neither party asked the court to consider its existence in determining whether to grant the protection order. It is also apparent that the court based its decision on evidence that was not properly before the court

and seemingly considered the existence of the pending criminal matter as a basis to issue the protection order on its own initiative. See CP 042.

It is Mr. Olmos' contention and argument that the trial court's consideration of the pending criminal matter on its own initiative was an abuse of the court's discretion. Further, that as a result of the improper consideration of the pending criminal matter, the findings in support of the issuance of the protection order and the denial of Mr. Olmos' claim of self-defense are untenable and not supported by the law.

2. The trial court erred in not applying the law correctly when it denied that Mr. Olmos lawfully acted in self-defense in consideration of whether to grant the issuance of the Protection Order.

At the hearing on November 10, 2015, there were three documents that contained all of the facts that were before the court as to the incident on September 13, 2015. Those documents were: The Petition for Order for Protection dated September 22, 2015, CP 001 – 009; The Declaration of Armondo Solorza Villa, CP 028 – 030; and The Declaration of Sandra Solorza, CP 031 – 033. It is clear from the record that the court found that Mr. Olmos was asserting a claim of self-defense based on the evidence that was before the court. The court found that “Respondent agreed to hitting minor Esmeralda, the issue was did the action go beyond self-defense.” See CP 042.

The evidence before the court was that Esmeralda was the primary aggressor as both witnesses observed Esmeralda begin striking her father, Mr. Olmos. Further, the witnesses observed the father, Mr. Olmos, strike Esmeralda once and began to try to back away. Even though Mr. Olmos had struck his

daughter, Esmeralda did not stop and continued to attack her father even as he was backing away. The witnesses further observed Esmeralda to continue to try and attack her father even when her mother tried to get her daughter to stop. Finally, after Esmeralda had left with her mother, the witnesses observed blood coming from Mr. Olmos' mouth, redness on his cheeks, and scratches on his stomach and chest. See CP 028 – 033.

The court then went on to find that “given the natural history of the criminal case, Respondent went beyond reasonable actions that were necessary.” See CP 042.

It is clear from the record of the proceeding that there was no evidence in regards to the criminal matter that was pending other than its existence. See CP 042. The fact that a criminal matter is pending is not evidence that a person's actions in self-defense were not reasonable. The only facts before the court were that Esmeralda had hit her father, Mr. Olmos, hard enough to injure him, and he responded by hitting her once and tried to back away as she continued to “carry on” the fight. There is no support for the court's finding in the law that a pending criminal matter is dispositive in determining if a person acted reasonably in defending themselves. As cited earlier, the conduct of the person claiming self-defense “is to be judged by the condition appearing to them at the time, not by the condition as it might appear to the [trial court] in light of testimony before it,” State v. Miller, 141 Wash. 104, 105-106, 250 P. 645 (1926), or the fact that there is a pending criminal matter.

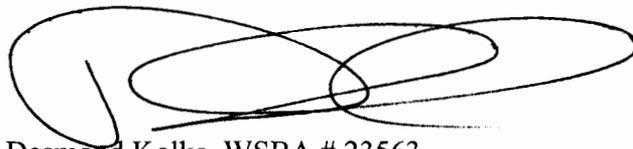
Therefore in the case before the court, Mr. Olmos asserts that under the

case law of the State of Washington, and in consideration of the entire record in the light most favorable to him, there is no support in the law for the court's finding that his actions were not reasonably necessary in defending himself against the attacks from his daughter, Esmeralda, and the issuance of the protection order was not supported by the evidence or the law.

VII. CONCLUSION

Based on the foregoing argument and authority, Mr. Olmos respectfully asks the Court to reverse the trial court, vacate the issuance of the protection order, and remand this matter for further proceedings consistent with this request.

Submitted this 16th day of March, 2016.

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Desmond Kolke, WSBA # 23563
Attorney for Lauro Olmos

CERTIFICATE OF SERVICE

I certify that on the 16th day of March, 2016, I caused a true and correct copy of the Appellant's Brief to be served on the following in the manner indicated below:

Lucia Suarez
2978 Hedding Street
Entiat, WA 98822

U.S. Priority Mail

Dated this 16th day of March, 2016, in Tacoma, Washington.

A handwritten signature in black ink, appearing to read "Desmond Kolke", written over a horizontal line.

Desmond Kolke, WSBA# 23563
Attorney for Lauro Olmos