

NO. 72310-3-I

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

In re the Matter of:

JOHNATHAN WALKER,

APPELLANT

and

JENNIFER JOHNSON,

RESPONDENT.

APPEAL FROM KING COUNTY SUPERIOR COURT

BRIEF OF RESPONDENT

John S. Stocks
Stephanie L. Beach
Van Siclen, Stocks & Firkins
721 45th St NE
Auburn, WA 98002
253-859-8899
jstocks@vansiclen.com
sbeach@vansiclen.com

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COURT OF APPEALS
STATE OF WASHINGTON


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I. RESTATEMENT OF THE CASE

Appellant Johnathan Walker and Respondent Jennifer Johnson have one child together, MJW. MJW is currently 14 years old. The parties were never married and had no formal parenting arrangement for the first 12 years of MJW's life.

Mr. Walker's involvement with his daughter was anything but consistent over those 12 years. From 2002 through May 2004, Mr. Walker did not visit or contact his daughter at all. CP ___ (Report of GAL).¹ Thereafter, visitation was sporadic; Mr. Walker visited on a random and inconsistent basis and rarely visited MJW during holidays and school breaks. CP 37-38, ___ (Report of GAL), 1 RP 10. Over an eight year period, MJW only spent the night with her father 12 times. CP 37.

Mr. Walker's personal life was also inconsistent, which had a dramatic impact on MJW's relationship with her father. 1 RP 14. Mr. Walker's first wife, Bonnie, was very harsh with MJW, to the point of being abusive. CP 39, 1 RP 11. After divorcing Bonnie, Mr. Walker dated a woman named Holly for approximately a year. CP ___ (Report of GAL). Mr. Walker then dated a woman named Tara, for approximately two years. CP ___ (Report of GAL). Mr. Walker attempted

¹ Respondent has filed an additional Designation of Clerk's Papers in this matter to better inform the Court of the substance of the underlying proceedings.

unsuccessfully to reconcile with both. CP ____ (Report of GAL). Mr. Walker's current wife, Annette, represents at least the fourth significant other that Mr. Walker has intertwined into his daughter's life. 2 RP 19. It was Mr. Walker's marriage to Annette, and the sudden addition of four step-siblings, that provided the final catalyst for MJW's withdrawal from wanting a relationship with her father. CP ____ (Report of GAL). By the time this case went to trial, Mr. Walker and his new spouse, Annette Walker, essentially estranged themselves from MJW.

Mr. Walker filed a petition to establish a parenting plan on April 30, 2013. CP 1-3. The trial court entered a temporary parenting plan granting Mr. Walker residential time as had been proposed by Ms. Johnson. CP 12-19. However, MJW refused to spend time with her father, who had never been a consistent presence in her life and whose current wife was controlling and without appropriate boundaries. CP 38; 1 RP 11. The parties agreed to forego the visitation schedule and arranged for Mr. Walker and MJW to attempt reunification through a family counselor. CP 38, ____ (Report of GAL). MJW also saw another counselor independently during this time. CP 38; 1 RP 14.

Mr. Walker was initially represented by counsel in this matter, but has been acting pro se since his counsel withdrew. Throughout the course of proceedings, Mr. Walker failed to comply with court deadlines, ignored

repeated requests for discovery, did not show up for mediation, failed to appear at his deposition, and failed to show up (or appeared 4 hours late) for court. CP 39; 2 RP 49. Mr. Walker also failed to provide up to date financial information and income statements prior to trial. CP 39; 2 RP 48-49. At trial, Mr. Walker testified that he was unemployed and enrolled in community college; no evidence was presented to verify his college enrollment. 2 RP 4.

Trial in this matter began on May 5, 2014 and concluded on May 15, 2014. The trial court heard testimony from, among others, Mr. Walker, Ms. Johnson, the Guardian ad Litem Lisa Barton, MJW's personal counselor Jennifer Knight, and Annette Walker.² The trial court issued its ruling in a letter to the parties on June 9, 2014. CP 87-89. The trial court scheduled a hearing on the presentation of final orders for June 20, 2014, and directed counsel for Respondent to prepare the orders prior to that date. CP 89.

At the start of the hearing on June 20, 2014, the trial court engaged Mr. Walker in the following colloquy:

THE COURT: Mr. Walker, have you had an opportunity to take a look at them?

MR. WALKER: Yes. So far, I've looked at four of them.

THE COURT: Yeah, do you need some additional time?

² Other individuals may have testified, but reference to their testimony does not appear in the record. Substantial portions of the verbatim report of proceedings, including all testimony on May 6 and 8, were omitted from the record on appeal.

MR. WALKER: Yeah.

3 RP 1. Mr. Walker indicated that he had also signed the parenting plan, and handed it to the trial court for its signature. 3 RP 2. The court then took a recess to allow Mr. Walker to have additional time to review the proposed orders. 3 RP 2.

Following the recess, the trial court inquired as to whether there were additional questions. Mr. Walker responded, “Your Honor, you have to, first off, excuse me, because I obviously didn’t know about this, about the stuff being submitted. I thought that the judgment would be for every – all the way, across the board – for financial, and for the parenting plan.” 3 RP 3. Mr. Walker then objected to the calculation of child support and assessment of the GAL fees. 3 RP 3. In response to Mr. Walker’s objections, the trial court added a provision to the child support order permitting Mr. Walker to seek an adjustment when he obtains employment and stated that he would not be allocating any GAL fees to Mr. Walker. 3 RP 5. The trial court then signed the proposed orders. CP 71-89.

Mr. Walker filed a motion for reconsideration on June 26, 2014. CP 90-116. The only issues raised by Mr. Walker in his motion were related to the visitation schedule, amount of child support, and the award of attorney’s fees; no issues were raised regarding the presentation of final

orders. CP 90-116. The trial court denied the motion. CP 117. This appeal followed.

II. ARGUMENT

A. Appellant cannot assert new arguments on appeal.

Mr. Walker asserts, for the first time on appeal, that he was not presented with a copy of the proposed orders and that he was not given the opportunity to object to the contents of said orders. This argument should be rejected.

Ignoring the fact that Mr. Walker did have notice of the presentation hearing, 3 RP 4, procedural errors may not be raised for the first time on appeal. RAP 2.5. The only relevant exception to this rule is if the asserted error is “(1) manifest and (2) truly of constitutional magnitude.” *State v. WWJ Corp.*, 138 Wn.2d 595, 602, 980 P.2d 1257 (1999) (internal quotations omitted).

The errors Appellant alleges are not of constitutional magnitude, his protests to the contrary notwithstanding. Not every procedural error is a due process violation. No court in this state has ever found a failure to comply with CR 52 and/or CR 54 to be an error of constitutional magnitude.³ Rather, this argument is one that is waived on appeal if not previously asserted. *See e.g. Seidler v. Hansen*, 14 Wn. App. 915, 918,

³ Appellant also asserts that the trial court violated KCLCR 7. This rule governs the filing of motions and is not applicable here.

547 P.2d 917 (1976). Mr. Walker failed to raise this argument both at the presentment hearing and in his motion for reconsideration. *See* 3 RP; CP 90-116. As Mr. Walker did not allege a violation of CR 52 or 54 in the trial court and any such error is not of constitutional magnitude, this issue has been waived.

B. Appellant was not prejudiced by any alleged delay in presentation of the proposed orders.

Assuming *arguendo* that Appellant has not waived the issue regarding notice of presentment, Appellant is still not entitled to relief from this Court. Failure to comply with CR 52 and/or 54 will only support reversal on appeal if such failure actually prejudiced the appellant.⁴ *Nestegard v. Inv. Exch. Corp.*, 5 Wn. App. 618, 626, 489 P.2d 1142 (1971), *overruled on other grounds by Wlasiuk v. Whirlpool Corp.*, 76 Wn. App. 250, 884 P.2d 13 (1994). Actual prejudice must be proved by the party asserting it; “[i]t is not sufficient merely to allege prejudice” from late notice. *Canron, Inc. v. Fed. Ins. Co.*, 82 Wn. App. 480, 491, 918 P.2d 937 (1996).

⁴ Furthermore, Mr. Walker has presented no actual evidence that Respondent failed to comply with CR 52 and 54. The only thing Mr. Walker told the trial court was “I obviously didn’t know about this, about the stuff being submitted.” 3 RP 2. Mr. Walker did not once state that he had never been served with copies of the proposed orders. Given Mr. Walker’s repeated history of showing up to hearings unprepared, CP 39, and his admission that he does not read all of his email despite having agreed to electronic service, 2 RP 22, there was nothing inherent in Mr. Walker’s brief statement to the court that would indicate that he never received the proposed orders.

Here, Mr. Walker has presented no evidence that he was actually prejudiced by his supposedly late receipt of the proposed orders. Nor can he produce such evidence. The final orders presented to the trial court did not differ from the trial court's earlier findings, which the trial court transmitted to the parties on June 9, 2014.⁵ Mr. Walker admits that he received this letter from the court. Br. of Appellant, at 4. The proposed final orders in fact incorporated the trial court's findings by reference. CP 83-89.

Further, Mr. Walker was in court when the final orders were entered. When the trial court asked Mr. Walker whether he had reviewed the proposed orders, he responded "*Yes*. So far I've looked at four of them." 3 RP 1 (emphasis added). Mr. Walker then asked for additional time to further review the orders before the hearing, which the court granted by calling a recess. 3 RP 1-2. Appellant had the opportunity upon reconvention of the hearing to object to any language in the proposed orders that was not consistent with the trial court's prior findings. He in fact did so, informing the court that he did not agree with the imputation of income and the order to pay for a GAL. 3 RP 3. Based on these objections, the trial court inserted a provision for future revision of the

⁵ The provisions to which Mr. Walker objects in the Parenting Plan were also included in Ms. Johnson's proposed parenting plan, received by Mr. Walker a year before trial. At the hearing on June 20, 2014, Mr. Walker indicated that he had reviewed the parenting plan. 3 RP 2. Mr. Walker's signature appears on this order. CP 82.

income computation and ordered that Mr. Walker should not contribute to the GAL fees. 3 RP 4. The trial court was clearly willing to entertain Mr. Walker's objections. Prejudice does not result from his own failure to raise additional ones.

Finally, courts will ordinarily not find prejudice when the aggrieved party can still challenge the trial court's findings and conclusions on appeal. *224 Westlake, LLC v. Engstrom Properties, LLC*, 169 Wn. App. 700, 728, 281 P.3d 693 (2012). In his opening brief, Appellant could have challenged the trial court's findings and conclusions for lack of evidence. He simply chose not to pursue this argument on appeal.

Appellant's assertions that he was entitled to special treatment by virtue of his pro se status are without merit.⁶ Pro se litigants are held to the same standards as an attorney, and are bound by the same rules. *Westberg v. All-Purpose Structures Inc.*, 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). Mr. Walker should have, could have, and indeed did, raise his objections to the proposed orders before the trial court. His failure to raise any further objections should not be excused simply because of his pro se status.

⁶ Appellant cites only one case in support of his contention. This case, *Rabin v. U.S. Dep't of State, C.I.A.*, 980 F. Supp. 116 (E.D.N.Y. 1997), is (1) not a Washington case, (2) not properly cited, and (3) a decision on summary judgment.

In summary, Mr. Walker has not proven that he was in fact prejudiced by any alleged delay by Respondent in sending the proposed orders. Without a showing of prejudice, his argument lacks merit.

C. This Court cannot review Appellant's challenge to the trial court's findings of fact.

In his assignments of error, Appellant contends that "The trial court erred by including findings not based in testimony or evidence at trial, and by entering orders, which included typographical errors." Br. of Appellant, at 1. This Court cannot review this alleged error for multiple reasons.

First, Appellant has not fully developed the record on appeal. It is the duty of the appealing party to adequately develop the record for this Court's review. RAP 9.2, 9.6. A trial court's findings of facts are reviewed for substantial evidence. *Ridgeview Properties v. Starbuck*, 96 Wn.2d 716, 719, 638 P.2d 1231 (1982). Since the substantial evidence standard requires the Court to examine the record as a whole, *City of Fed. Way v. Pub. Emp't Relations Comm'n*, 93 Wn. App. 509, 512, 970 P.2d 752 (1998), the Court cannot undergo this analysis when it has only been provided with a small portion of the evidence presented at trial. The trial in this matter took place over four days. CP 83. Appellant has provided reports of proceeding for only two of those days, one of which does not

even contain the entire day's worth of testimony. *See* 1 RP 50 (the transcript provided by Mr. Walker ends when the court merely took a 15 minute recess). An extensive number of exhibits were entered as evidence in this matter, yet Appellant designated only a small portion of them for review on appeal. *Compare* CP 45-53 *with* Designated Exhibits. This Court cannot examine the record for substantial evidence when Appellant has provided very little of the evidence presented at trial.

Additionally, Appellant does not develop a substantial evidence argument anywhere in his brief. Rather, the entirety of Appellant's brief is devoted to his argument that CR 52 and 54 were violated. Arguments that are not developed on appeal are forfeited. *State v. Farmer*, 116 Wn.2d 414, 432, 805 P.2d 200 (1991). Appellant makes no attempt to identify which findings of fact were not supported by evidence, much less explain why the evidence demands a finding otherwise. This assignment of error has therefore been forfeited.

As Appellant has failed to perfect the record on appeal and failed to develop the argument in his brief, this Court should not entertain Mr. Walker's challenge to the sufficiency of the evidence.

D. Appellant's appeal is frivolous, and Respondent should be awarded attorneys' fees and costs.

Respondent respectfully requests that she be awarded attorneys' fees and costs, pursuant to RAP 18.1 and 18.9. Attorneys' fees may be awarded under RAP 18.1 if such fees were available in the underlying action. The trial court awarded Respondent \$5,000 in attorneys' fees, as Respondent had requested for Appellant's intransigence. CP 54; ____ (Declaration of Counsel Re: Application for Fees). Appellant's intransigent behavior has continued on appeal. Appellant has delayed at every stage of this appeal, including the filing and service of relevant documents, missing deadlines, being reminded of missed deadlines, providing an incomplete record and more. As of now, it has been over a year since the notice of appeal was filed in superior court. These actions justify an award of fees pursuant to RAP 18.1.

Under RAP 18.9(a), the Court may award compensatory damages to a party for having to respond to a frivolous appeal. An appeal is frivolous if "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, 613 P.2d 187 (1980). The sole issue Appellant actually develops in his brief is one that he waived by failing to raise in the trial

court proceedings. Mr. Walker's appeal is devoid of merit, and Respondent should be awarded attorney's fees and costs.

III. CONCLUSION

An appellant cannot raise new arguments for the first time on appeal, nor may he rely on assignments of error that he fails to develop in his brief. Mr. Walker has violated both of these well-established rules. Therefore, Respondent respectfully requests that the decision of the trial court be AFFIRMED, and that she be awarded fees and costs pursuant to RAP 18.1 and 18.9.

Respectfully submitted this 20th day of August, 2015

VAN SICLEN, STOCKS & FIRKINS



JOHN S. STOCKS, WSBA# 21165
STEPHANIE L. BEACH, WSBA #47017
Attorneys for Respondent
721 45th Street NE
Auburn, WA 98002
Telephone: (253) 859-8899
Email: jstocks@vansiclen.com and
sbeach@vansiclen.com

CERTIFICATE OF MAILING

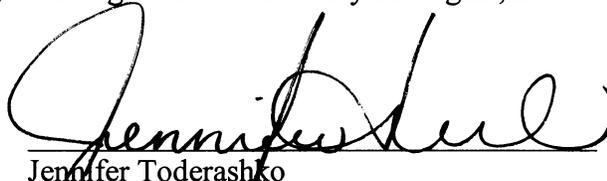
I hereby certify that on the 20th day of August, 2015, I mailed a true and correct copy of the foregoing Brief of Respondent to:

JOHNATHAN L. WALKER
1514 210TH AVE E.
LAKE TAPPS, WA 98391

I also mailed the original Brief of Respondent to the Court of Appeals Clerk's office for filing with Division I Court.

I, Jennifer Toderashko, declare under penalty of perjury under the laws of the State of Washington that the above stated statements are true and correct.

SIGNED at Auburn, Washington on this 20th day of August, 2015.


Jennifer Toderashko
Paralegal for John S. Stocks, WSBA #21165