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Washington State
Court of Appeals
Division Two

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IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

ELAINE MARIE GEBHARDT, Respondent, v. JOSHUA WAYNE STRICKLAND, Appellant.	No. 55151-9-II UNPUBLISHED OPINION

WORSWICK, J. — Joshua Strickland appeals the July 2020 final parenting plan naming Elaine Gebhardt as the primary residential parent of Gebhardt and Strickland's son, AVS. AVS lived with Strickland, Strickland's girlfriend, Alexa Graham, and Graham's daughter RJS.[1] In April, 2019, the Washington Department of Children, Youth, and Families (DCYF) received reports that Strickland had physically and sexually abused RJS. After RJS was taken into protective custody, Strickland petitioned the court for *de facto* parentage of RJS. The trial court consolidated the RJS *de facto* parentage case and the AVS custodial dispute for purposes of trial. The trial court entered findings that Strickland abused RJS and presented a danger to AVS, and consequently named Gebhardt AVS's primary residential parent.

Strickland argues that the trial court abused its discretion by changing AVS's primary residence. Strickland assigns error to the final parenting plan, the trial court's evidentiary decisions, findings of fact, and conclusions of law. The record Strickland provides on appeal is

[1] Strickland is not RJS's biological father.

inadequate for us to determine that the trial court abused its discretion. Because of the inadequate record, we take the trial court's findings at face value. Accordingly, we affirm.[2]

FACTS

I. BACKGROUND

Strickland and Gebhardt have a son, AVS, who was born in 2010. Although the record is incomplete, the parties appear to have filed multiple parenting proceedings in Washington and Nevada. The record suggests that Gebhardt was AVS's custodial parent until August 2016, when a Nevada court denied Gebhardt's request to relocate with AVS, and "awarded primary physical custody" of AVS to Strickland.[3] Clerk's Papers (CP) at 14.

In June 2018, Strickland began a dating relationship with Alexa Graham. Graham had a minor daughter, RJS, from a prior relationship. RJS was born in 2013. Strickland and AVS moved in with Graham and RJS in August or September, 2018.

II. DCYF INVESTIGATIONS AND PARENTING PETITIONS

Between April 2 and April 6, 2019, DCYF received reports that Strickland sexually abused RJS and AVS.[4] On April 3, Graham obtained a protection order against Strickland. In her declaration, Graham stated that Strickland threatened to take RJS away from her, convinced

[2] Before we heard this case, Strickland filed a motion to allow the trial court to modify the order on appeal. Motion to Allow Trial Court to Alter/Modify Order on Appeal. RAP 7.2(e), No. 55151-9-II (Wash. Ct. App. Oct. 11, 2021). We hereby DENY the motion and we consider the July 2020 final parenting plan in this appeal.

[3] The record on appeal is unclear as to when Strickland moved to Washington with AVS.

[4] Strickland claims that he was named the temporary primary custodian of RJS on April 2, 2019, following a domestic violence protection order against Graham (Cause Nos. 19-2-00258-14, 19-2-00263-14). The record on appeal does not contain a protection order against Graham or any order assigning Strickland temporary custody of RJS.

her that five-year-old RJS, needed diapers, and Strickland allowed RJS to soil herself instead of using the bathroom. Graham stated that Strickland "swung at [her]," and also that he hit RJS. June Trial Ex. at 15. On April 10, DCYF took AVS into protective custody and filed a dependency petition on behalf of AVS (Cause No. 19-7-00125-14).[5]

In May, Strickland petitioned the superior court for *de facto* parentage of RJS (Cause No. 19-3-00137-14). In July, Gebhardt, who lives in Kansas, filed a petition in Grays Harbor Superior Court to modify AVS's Nevada parenting plan and requested to be named AVS's primary parent (Cause No. 19-3-00229-14). In October, DCYF filed a dependency petition on behalf of RJS (Cause No. 19-7-00240-14).

III. PROCEDURAL HISTORY

In August 2019, the superior court found adequate cause to change AVS's placement. However, the court stated that any additional relief Gebhardt requested, such as moving AVS to Kansas, required a trial. The court explained that the parenting plan trial would proceed "with the dependency matter, 19-7-[00]125-14," and that meanwhile the status quo of AVS's dependency would remain in place.

A. *October 2019 Dependency Trial*

In October, a commissioner of the superior court held a trial on AVS's dependency petition (Cause No. 19-7-00125-14). The record of the dependency trial was not present on appeal. However, the commissioner's findings and conclusions were included as an exhibit at the January 2020 and June 2020 parenting plan trials regarding AVS. Strickland submitted the admitted exhibits from those trials to this court.

[5] DCYF also took RJS into protective custody in early April 2019.

The commissioner in the October dependency trial entered the following findings:

1. Based on [Strickland]'s testimony, demeanor, the court's observations of the other witnesses during trial, the many inconsistencies in [Strickland]'s testimony and with that of other witnesses, and lastly his many attempts to explain away the testimony of others, [Strickland] is not a credible witness on the primary issues before the court.

2. [Strickland] held himself out to others as a nurse, knowing he was a Certified Nursing Assistant, and knowing full well the difference. [Strickland] intended to benefit in some way by misrepresenting himself as a nurse. [Strickland]'s denial of these facts is not credible.

3. [Strickland] was rude, overbearing, self-centered, disagreeable, contradictory and abusive during the interview with [RJS]'s physician, Dr. [Tanja] Evans. He attributed that to a misunderstanding. This conduct is a personality trait, not a misunderstanding.

4. [Strickland] continued to give [RJS] suppositories, knowing [RJS] had been the victim of sexual abuse. [Strickland] knew this was against medical advice. Dr. Evans testified this would be extremely traumatizing to [RJS], which information was known by [Strickland]. [Strickland] admitted to Detective Mitchell[6] this information came directly from Dr. Evans.

5. The numbers of incidents of [Strickland] giving suppositories to [RJS] exceed the numbers he provided to Detective Mitchell. [Strickland]'s statements given to the Detective, concerning the number of incidents, vary and are inconsistent. [Strickland]'s admission started at one. He ultimately admitted to five incidents. His version is not credible.

6. [Strickland]'s testimony he inadvertently purchased Tylenol suppositories instead of tablets is not credible given his 'nursing' background and the information he had concerning the trauma which would occur to [RJS] by the use of suppositories. A reasonable, conscientious adult, concerned about the physical and psychological welfare of a child, would never utilize suppositories under these circumstances, even if his version of a 'mistake' were to be true.

7. Furthermore, [Strickland] testified he had used Tylenol suppositories at the direction of [RJS's] mother. [Strickland] knew the difference. There was no mistake involved.

[6] Detective Jeremy Mitchell was a Hoquiam police officer apparently assigned to investigate Graham's allegations that Strickland abused RJS.

8. [Strickland] admitted to Detective Mitchell he showered with [RJS] every other day. In the Petition for *De Facto* Parentage he stated every day. He testified these showers were at the direction of [RJS]'s mother, Alexa Graham . . . who he claimed was incapable of doing so. No one else was showering with [RJS]. [Strickland] told the detective he never touched [RJS]'s private area (which, if true, would result in both an unhealthy and unsanitary condition). Furthermore, he claimed the showers were the result of hot water problems in the residence, although no one else took showers together. These statements and testimony are not credible.

9. [Strickland] testified his concern about [Graham]'s drug use arose later in their relationship. This directly contradicts the testimony of [Strickland]'s own witness Brianna Raesol. Raesol testified she was present at the first meeting of [Strickland] and [Graham]. Raesol testified [Graham] was 'totally out of it', 'unable to speak without slurring her words', and that [Graham] 'wasn't capable of focusing on what was going on or around her'. [Strickland] had a need to deny this testimony as [Graham] would later become the primary caregiver for [AVS] at times [Strickland] was at work.

10. [Strickland]'s total lack of judgment as it relates to a child's wellbeing is clearly demonstrated by his admission he changed the diaper of a female child who was previously unknown to him. This incident is also consistent with his having an attraction or fetish relating to diapers.

11. [Strickland] does have an undiagnosed mental or sexual condition of unknown origin relating to diapers. His explanation of having sex while diapered as 'trying something at least once' is not credible.

12. A garbage can found at the residence formally (sic) occupied solely by [Strickland] contained dirty, adult size diapers that were [Strickland]'s. The court does not believe the garbage can was moved, ostensibly by [Graham], from a neighbor's residence. These were diapers of [Strickland]'s which were left behind when he was removed from the residence.

13. [Strickland]'s undiagnosed obsession with diapers, requiring the children to wear diapers when unnecessary, and other issues associated with young children, is clearly something that can result in substantial psychological damage to [AVS]. Until this issue is evaluated and addressed [AVS] continues to be at risk for such damage.

14. [Strickland] has a history of placing [AVS] in locations and/or in the care of people with whom he knows very little. This includes his roommates in Auburn, who [Strickland] at one time believed had sexually abused [AVS]; with [Graham], who he described as being incapable (drug use and mental condition) of caring for herself to the extent he was her 'caregiver'; and with neighbors, [Strickland] testified assisted [Graham] in caring for [RJS] and [AVS]. Other than names, no

testimony was provided to the court concerning [Strickland]'s knowledge or background of these people. [Strickland]'s testimony Lee Q. was at the house 6 to 7 hours a day to assist [Graham] is not credible.[7]

15. [Strickland] claims [Graham] assaulted [AVS] and yet never reported it to law enforcement.

16. [Strickland] has not engaged in any services provided or suggested by [DCYF], which have been made available to him.

17. [AVS] is afraid of and intimidated by his father. [Strickland] has abused [AVS] physically and verbally. [AVS] is not at an age where he can stand on his own and protect himself by reporting his father's abuse. This is especially so when [AVS] is intimidated to the extent he will not be truthful with others.

18. [Strickland] physically and verbally abused [RJS], in addition to the physical contact previously described.

19. [AVS] was coached by [Strickland] and told what to say and not to tell the truth. [AVS] was in fact afraid to tell the truth.

20. [Strickland] is a controlling, abusive and manipulative individual who is willing to mislead and falsify information for his benefit.

21. There was absolutely no pressure brought to bear in [Strickland] providing both verbal and written statements to Detective Mitchell. [Strickland] was provided all the time necessary for him to consider, review and revise the statements provided.

22. [Strickland] endangered the safety of both the foster parents and [AVS] by placing the address of the foster parent home on social media.

23. [Strickland] failed to initially bring [AVS]'s medication to the [DCYF], and in fact never did make it available to [DCYF] and foster care home.

24. [Strickland] claims [DCYF] told him if he didn't file a Petition for *De Facto* Parentage he would never receive custody of [AVS]. This testimony is false. As Ms. Gatlan[8] testified, [DCYF] would never advise a person under investigation for sexual abuse of the child who is the subject of the petition, to seek such an order.

[7] The record on appeal does not adequately identify "Lee Q." It does not appear this person testified at either the January or June 2020 trials before the superior court.

[8] The record is otherwise silent as to who Gatlan is.

> 25. [DCYF] has acted reasonably in attempting to work out visitation between [Strickland] and [AVS]. The problem lies in [Strickland]'s refusal to cooperate with [DCYF]. Additionally, there is no reason a [sic] visits could not have occurred for the approximate 2 and a half months prior to trial. Obviously, there were times outside [Strickland]'s work schedule a visit could have occurred. [Strickland] did not pursue a visit which was to the detriment of [AVS]'s well-being.
>
> 26. Generally [Strickland] is a controlling, abusive, self-centered personality.
>
> 27. [Strickland]'s conduct in associated cases. [Strickland] petitioned and successfully obtained restraints excluding [Graham] from her residence when it was originally rented by [Graham]. [Strickland] petitioned and successfully received temporary custody of [RJS] to the exclusion of her mother [Graham]. In his Motion to Modify/Terminate [Graham]'s Order for Protection (Exhibit 10) [Strickland] states Ms. Graham (AG) claimed 'that I would touch [RJS] in her genital areas, and that I would give [RJS] glycerin suppositories rectally, but failed to inform the courts that giving these medications were part of a care plan made for minor [RJS] by her pediatrician Tanja Evans'. He then goes on to state he had permission to change diapers, 'thus making the touching by Mr. Strickland in [RJS]'s genital area justifiable to performing hygiene and parenting duties on the minor child, as stated by Honorable Judge David Mistachkin himself at the April 15th 2019 hearing'. Obviously, contrary to his previous statements and his testimony in this trial, [Strickland] admitted he used suppositories on [RJS], and uses Dr. Evans to justify his actions! There is nothing further from the truth. Dr. Evans testified unequivocally her objection to the use of suppositories. [Strickland] not only mislead [sic] the court in these statements but lied in doing so. Furthermore, contrary to his testimony and previous statements, he admits touching [RJS]'s private areas. The court finds [Strickland] is [sic] totally lacks any credibility with this court.
>
> 28. Court finds [Strickland]'s touching [RJS]'s private areas, his use of suppositories on RJS, his showering with her, and his obsession/fantasies involving diapers, are all acts intended for the purpose of [Strickland]'s sexual gratification.
>
> 29. The court has utilized evidence of [Strickland]'s conduct as it relates to [RJS] as relevant to the care, supervision, safety and wellbeing of [AVS] as authorized by statute.

January Trial Ex. at 4-7.

> The commissioner then entered the following conclusions of law:[9]
>
> 1. [Strickland] has substantially demonstrated he is incapable of adequately supervising and caring for [AVS].
>
> 2. Those inadequacies have and will continue to constitute a substantial danger to [AVS]'s psychological and physical wellbeing and development.
>
> 3. [AVS] is a Dependent child as defined by RCW 13.34.060(c).
>
> 4. [DCYF]'s Petition is hereby granted.

January Trial Ex. at 7.

B. *January 2020 Parenting Plan Trial*

In January 2020, the superior court held a trial on Gebhardt's petition to modify the parenting plan (Cause No. 19-3-00229-14). The trial lasted three days, and nine witnesses testified. None of the reports of proceedings from any January trial testimony are in the record on appeal. Only a transcript of the trial court's oral ruling and the admitted trial exhibits were provided to this court.

The trial exhibits included DCYF's determination that the allegation that Strickland had sexually abused RJS was founded.[10] The court also admitted the commissioner's findings listed above, the dependency petition filed by DCYF when it took AVS into protective custody, and the reports to DCYF that Strickland sexually abused RJS and AVS.

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[9] Strickland also appealed the most recent dependency order from the commissioner in case 19-7-00125-14. That appeal is currently pending before us as no. 55105-5-II. As of the date of this opinion, a review date has not been set.

[10] "'Founded' means the determination following an investigation by [Child Protective Services] that based on available information it is more likely than not that child abuse or neglect did occur." WAC 110-30-0020 (boldface omitted). Child Protective Services is a section of DCYF. *Id.*

In its oral ruling, the court denied Gebhardt's petition and also ruled that the dependency for AVS was still active. The trial court also opined that it believed DCYF should not have removed AVS from Strickland's care because Gebhardt "abandoned" AVS. The trial court entered no written findings of fact or conclusions of law and did not incorporate this oral ruling into any parenting plan.

On February 14, the trial court held another hearing and sua sponte vacated its January ruling on Gebhardt's parenting plan petition. The court ruled that a new trial would be held after April 20, 2020, when a commissioner was to enter written findings of fact and conclusions regarding AVS's dependency. The court also joined Gebhardt's petition to modify the parenting plan regarding AVS with Strickland's *de facto* parentage petition regarding RJS for purposes of trial.

C. *April Dependency Hearing*

On April 20, a commissioner held a disposition hearing and entered an order of disposition on AVS's dependency (Cause No. 19-7-00125-14).[11] The commissioner ordered that AVS should be placed with Gebhardt, but noted that she was unavailable as a placement because the Nevada parenting plan placed AVS with Strickland, and that the petition to modify the parenting plan was pending trial. The commissioner's Order of Disposition on Dependency was admitted as an exhibit at the June parenting plan trial. The commissioner entered the following findings:

> (1) There is no evidence before the Court that [Gebhardt] presents any safety issues or concerns. She does not present a danger to the child.
>
> (2) The dependency statute requires a finding by clear, cogent, and convincing evidence that a manifest danger exists that the child will suffer serious abuse or

[11] No report of proceedings from the February or April hearings are in the record on appeal.

> neglect if the child is not removed from the home. There is no evidence to support such a finding and, therefore, placement with [Gebhardt] is appropriate and is a statutory directive.
>
> (3) The child has been in foster care for more than a year. Further delay presents a real possibility that continued foster care will only inflict further damage to the child. This finding is based on evidence of the child's acting out, and negative behavior has escalated.
>
> (4) It is apparent to the Court that [Gebhardt]'s agreement to a dependency finding was to ensure the safety of her son. Otherwise, the Court would not have found the child dependent as it relates to [Gebhardt].
>
> (5) There is existing legal authority supporting the Court's belief that the [Interstate Compact on the Placement of Children] is not applicable to the out-of-state placement of a child with a natural parent, especially so when there exists no safety or danger concerns relating to the child, e.g. *In re: the Dependency of D.F. v. Miller*, 157 Wn. App. 179 (2010).
>
> (6) It is in the best interests of the child that further foster care not be imposed.
>
> (7) The dependency statute requires that a disposition hearing take place within 14 days unless otherwise delayed for good cause. The statutory scheme is intended to prevent delays such as have arisen in this case. The delays here are unacceptable and contrary to the interests of all the Parties.
>
> (8) This Court has continuing jurisdiction over this matter.
>
> (9) [Gebhardt] is unavailable because of a Nevada custody order granting Joshua Strickland primary physical custody of the child. Elaine Gebhardt has filed a petition to modify the Nevada custody order in Gebhardt v. Strickland under Grays Harbor County Super Court cause number 19-3-00229-14. The matter is pending trial.

June Trial Ex. at 43-44.

D. *June 2020 Parenting Plan Trial*

Gebhardt's parenting plan petition for AVS and Strickland's *de facto* parentage petition for RJS proceeded to trial in June. During a hearing on pretrial motions, the trial court dismissed the *de facto* parentage case regarding RJS (Cause No. 19-3-00137-14) for lack of subject matter

jurisdiction. During the two-day trial on the parenting plan, nine witnesses testified.[12] The only transcript of the report of proceedings from any June trial testimony in the record on appeal is Dr. Tanja Evans's testimony. Otherwise, only the admitted trial exhibits were provided to this court.

The June trial exhibits include the following information: Before Graham's relationship with Strickland, RJS had been sexually abused by a preschool caregiver. Additionally, Annemarie Vazquez, Strickland's former girlfriend, filed a petition for a protection order against Strickland in January 2018. In her statement, Vazquez reported that Strickland had been attempting to gain custody of her 2-year-old daughter, who was not Strickland's biological child.

The June trial exhibits also show that in May 2018, Graham took RJS to Dr. Tanja Evans, her pediatrician, for care related to RJS having incontinence and constipation. Dr. Evans prescribed RJS an oral medication, Miralax, and noted that RJS was in intensive therapy for PTSD related to the prior abuse.

At trial, Dr. Evans testified to the following:

Dr. Evans had been RJS's pediatrician for her whole life. Graham and RJS visited her office in May 2018 and Dr. Evans prescribed the oral medications as described above.

Graham returned with RJS to Dr. Evans in August 2018. Strickland and AVS accompanied them. Up until that point, Dr. Evans had only ever prescribed oral medication for RJS. During the August 2018 visit, Dr. Evans discussed this treatment with Graham and Strickland. Strickland then asked Dr. Evans about whether RJS could be treated with suppositories. Dr. Evans told Strickland "most definitely not" because it was contraindicated in

[12] Although several witnesses testified at both the January and June trials, more than a dozen witnesses testified over the course of the two trials.

a toilet-trained child with a history of sexual abuse. Verbatim Report of Proceedings (VRP) (June 9, 2021) at 36.

During that visit, Strickland claimed he was a nurse with extensive medical experience.[13] Dr. Evans became concerned by Strickland's pushy behavior in the doctor's office because he was rude and would not let Graham speak for herself. As a result, Dr. Evans asked Strickland and AVS to leave the room and spoke with Graham alone.

After that visit, Dr. Evans received a request to approve a prescription for RJS for pull-up diapers and other supplies. Dr. Evans approved the request because she thought it had been sent by Graham and she wanted to help Graham with purchasing supplies for RJS. Later, Dr. Evans noticed that she continued to get diaper requests after RJS was too old for them and that the requests were coming from a medical supply company. Through June 2021, Dr. Evans continued to get consistent diaper requests for RJS. At some point, Dr. Evans also noticed that Graham's name had been removed from RJS's medical file and Strickland's information had been inserted.

On completion of the trial, the court entered the following findings on the parenting plan based on evidence from both the January and June trials:

> The court found that Mr. Strickland's behaviors and patterns regarding the minor children of his former girlfriends concerning. The court was concerned that Mr. Strickland attempted to gain custody of non-biological children of his ex-girlfriends. The court found that Mr. Strickland sexually abused the five-year-old [RJS] while [AVS] was in the care and custody of Mr. Strickland. The court found based on the testimony [of] Dr. Tanja D. Evans that she told Mr. Strickland not to give [RJS] suppositories as credible and compelling. . . . Based upon this and other testimony the court finds that Mr. Strickland presents a danger to [AVS].

[13] As stated above, the superior court commissioner had found Strickland was only a certified nursing assistant.

> The court is convinced that Ms. Gebhardt has a career, stable home, stable family life, and is not in the position that she was once in. The court is not, however, giving her a pass and believes that she abandoned [AVS] from October 2016 to April 2019.
>
> The court is concerned with the criminal history of Ms. Gebhardt's husband, Garrett Gebhardt. Based upon Mr. Gebhardt's admission of having sexual contact with a 14-year-old girl whom he was told was 16, in 1999 when Mr. Gebhardt was 19. Also, the exchange with an online girlfriend in 2007 where Mr. Gebhardt plead to a charge of attempted unlawful imprisonment when charged with inappropriate touching and unlawful imprisonment. It is based upon these admissions that the court is requesting that Mr. Gebhardt complete a parenting evaluation with a psychological/mental health component, prior to be [sic] unsupervised with [AVS].
>
> Mr. Strickland shall have no unsupervised visitation with [AVS] until a Psychological-sexual evaluation is completed. Ms. Gebhardt shall have sole authority over who any lay supervisor is if Mr. Strickland cannot afford a professional supervisor.
>
> Finally, the parents will engage in services as ordered in the dependency of [AVS], 19-7-00125-14.

CP at 237-38.

In the revised parenting plan, the trial court named Gebhardt as AVS's custodian. The court limited Strickland's contact with AVS due to child abuse.[14] The court also ordered that Gebhardt must modify the parenting plan through Kansas jurisdiction after AVS has lived there with her for six months. The parenting plan placed restrictions on Strickland under RCW 26.09.191. It stated that Strickland has a problem with child sex abuse and noted the "Open Dependency Case, cause number 19-7-00125-14, which is based upon allegations of sexual mistreatment of minors by Joshua Strickland." CP at 355-56. It further provided that Strickland undergo a psychological-sexual evaluation in either Washington or Kansas. The parenting plan explained what would happen if Strickland does not follow the evaluation:

[14] The trial court ticked the "child abuse" box in the parenting plan order under "reasons for putting limitations on a parent (under RCW 26.09.191)." CP at 240-41.

> No unsupervised visitation. If Joshua Strickland were to complete the above required evaluations, Elaine Gebhardt will consider a modification of this parenting plan through Kansas Jurisdiction after [AVS] has lived in Kansas for six (6) months. No modification of this parenting plan will be considered until after Kansas has retained jurisdiction on the child.

CP at 357.

Strickland made a motion for a new trial, which the court denied. He then moved for reconsideration, which the trial court denied. Strickland appeals.

ANALYSIS

Strickland argues that the trial court abused its discretion when it sua sponte vacated its oral ruling from the January trial. Strickland then argues that the trial court abused its discretion and violated his liberty interest under the Fifth and Fourteenth Amendments when it ordered him to undergo a psychological-sexual evaluation, including a penile plethysmograph. Both of these arguments fail. Strickland's remaining arguments challenge the trial court's findings and fail because he fails to provide us with an adequate record to review his alleged errors or the findings are supported by substantial evidence.

I. STANDARD OF REVIEW

Trial courts have broad discretion to develop parenting plans. *In re Marriage of Katare*, 175 Wn.2d 23, 35, 283 P.3d 546 (2012). We review a trial court's parenting plan for abuse of discretion, which occurs when a decision is manifestly unreasonable or based on untenable grounds or reasons. *In re Marriage of Black*, 188 Wn.2d 114, 127, 392 P.3d 1041 (2017). We determine whether a trial court's findings of fact are supported by substantial evidence. *In re Marriage of Black*, 188 Wn.2d at 127. We do not review credibility determinations or reweigh the evidence to determine if we would reach a different conclusion from the trial court. *In re Marriage of McNaught*, 189 Wn. App. 545, 561, 359 P.3d 811 (2015). We are reluctant to

disturb child placement decisions "[b]ecause the trial court hears evidence firsthand and has a unique opportunity to observe the witnesses." *In re Parenting & Support of C.T.*, 193 Wn. App. 427, 441-42, 378 P.3d 183 (2016). The party challenging the parenting plan order "'bears the heavy burden of showing a manifest abuse of discretion on the part of the trial court.'" *In re Marriage of Kim*, 179 Wn. App. 232, 240, 317 P.3d 555 (2014) (quoting *In re Marriage of Landry*, 103 Wn.2d 807, 809, 699 P.2d 214 (1985)).

Under RAP 9.2(b), the party seeking review has the burden to provide and perfect the record so that we have all the relevant evidence before us. *State v. Sisouvanh*, 175 Wn.2d 607, 619, 290 P.3d 942 (2012); *Stiles v. Kearney*, 168 Wn. App. 250, 259, 277 P.3d 9 (2012). "An insufficient appellate record precludes review of the alleged errors." *Stiles*, 168 Wn. App. at 259. We may decline to address an alleged error when the appellant does not provide a complete record. *Sisouvanh*, 175 Wn.2d at 619. We may affirm a challenged decision where the incomplete record is sufficient to support the trial court's decision or fails to affirmatively establish an abuse of discretion. *Sisouvanh*, 175 Wn.2d at 619.

II. TRIAL COURT'S ORDER TO VACATE ITS JANUARY ORAL RULING

Strickland argues that the trial court abused its discretion when it vacated its oral ruling from the January 2020 trial sua sponte.[15] We disagree.

"An oral decision 'is necessarily subject to further study and consideration, and may be altered, modified, or completely abandoned. It has no final or binding effect, unless formally

[15] Strickland supports this argument by arguing that the trial court erred when it allowed DCYF to intervene as a party in this case and consolidated this case with the DCYF dependency motion regarding AVS (Cause No. 19-7-00125-14). But DCYF was not a party and the trial court did not consolidate the cases. To the extent the court consolidated cases, it joined for purposes of trial Strickland's *de facto* parentage motion regarding RJS and the parenting plan dispute with Gebhardt. The court dismissed the *de facto* parentage case before the first day of trial.

incorporated into the findings, conclusions, and judgment.'" *Stiles*, 168 Wn. App. at 258 (quoting *Ferree v. Doric Co.*, 62 Wn.2d 561, 567, 383 P.2d 900 (1963)). Trial courts have the authority to sua sponte modify initial judgments. *Ledcor Indus. (USA), Inc., v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 14 n.33, 206 P.3d 1255 (2009).

The trial court did not reduce its January oral ruling to writing or otherwise formally incorporate this oral ruling into any findings, conclusions, or judgments. Accordingly, the court acted within its authority when it vacated its January oral decision. We hold that the trial court did not abuse its discretion when it sua sponte vacated its January oral ruling.

III. TRIAL COURT'S FINDINGS

Strickland makes multiple challenges to the trial court's rulings and findings. Strickland first argues that the trial court's finding that he sexually abused RJS was contrary to law. Next, he argues that the court abused its discretion when it admitted Dr. Evans's testimony, named Gebhardt as AVS's primary parent, and excluded certain evidence at trial. However, Strickland failed to provide us with an adequate record to evaluate these arguments, thus each of his arguments fail.

We determine whether a trial court's findings of fact are supported by substantial evidence. *In re Marriage of Black*, 188 Wn.2d at 127. We do not review the trial court's credibility determinations or reweigh the evidence to determine if it would reach a different conclusion from the trial court. *In re Marriage of McNaught*, 189 Wn. App. at 561. As explained above, when an appellant does not provide an adequate record, we may decline to address an alleged error or may affirm the trial court's decision where the incomplete record fails to affirmatively establish an abuse of discretion. *Sisouvanh*, 175 Wn.2d at 619.

A. *Sexual Abuse of RJS*

First, Strickland argues that the trial court's finding that he sexually abused RJS was contrary to WAC 110-30-0030(3) and RCW 9A.44.010. This argument fails.

WAC 110-30-0030(3) provides:

> Sexual abuse means committing or allowing to be committed any sexual offense against a child as defined in the criminal code. The intentional touching, either directly or through the clothing, of the sexual or other intimate parts of a child or allowing, permitting, compelling, encouraging, aiding, or otherwise causing a child to engage in touching the sexual or other intimate parts of another for the purpose of gratifying the sexual desire of the person touching the child, the child, or a third party. A parent or guardian of a child, a person authorized by the parent or guardian to provide childcare for the child, or a person providing medically recognized services for the child, may touch a child in the sexual or other intimate parts for the purposes of providing hygiene, child care, and medical treatment or diagnosis.

In the criminal code, RCW 9A.44.010 defines "sexual intercourse" and "sexual contact" for the purposes of sex offenses.

Strickland appears to argue that the record does not support the trial court's finding that Strickland sexually abused RJS for the purposes of WAC 110-03-0030(3) and did not have sexual contact with her for the purposes of RCW 9A.44.010. He argues that he was providing medically necessary care for RJS. His arguments fail for two reasons.

First, Strickland appears to confuse the criminal standard for sex crimes with the civil standard in child dependency and parenting plan cases. This was not a criminal trial and there is nothing in the record to show that Strickland has been charged or convicted of a sex crime.

Second, the record Strickland provided on appeal is inadequate for us to make a determination that the trial court erred. All of Strickland's arguments are rooted in evidentiary questions, and the record on review is insufficient for us to review these issues. Strickland did not provide us with any of the transcripts from either the January or June trials, with the

exception of Dr. Evans's testimony. Dr. Evans's testimony, which the trial court found credible, supports the trial court's determination that Strickland sexually abused RJS. Thus, based on the record provided, we cannot determine that sufficient evidence does not support the findings, nor can Strickland affirmatively establish an abuse of discretion.

B. *Dr. Evans's Testimony*

Next, Strickland argues that the trial court erred when it admitted Dr. Evans's testimony. However, the content of Strickland's argument makes it plain that he is arguing that Dr. Evans's testimony is insufficient by itself for the trial court to have made a determination that Strickland sexually abused RJS.[16] Again, the record is insufficient for Strickland to establish an abuse of discretion.

Moreover, Strickland makes no showing as to why the trial court should have excluded Dr. Evans's testimony and asks only that we deem Dr. Evans's testimony not credible. We do not review credibility determinations and Strickland's argument fails.

C. *Major Modification to the Parenting Plan*

Strickland then argues that the trial court abused its discretion when it named Gebhardt AVS's primary parent. He argues that the trial court erred when it did not place restrictions on Gebhardt under RCW 26.09.191(2)(a) (abandonment) and RCW 26.09.191(2)(b) (sexual abuse and neglect). The record is insufficient for us to address these alleged errors.

1. *RCW 26.09.191(2)(a): Abandonment*

Under RCW 26.09.191(2)(a)(i), a parent's residential time shall be limited if the parent

[16] Strickland argues, "In this current case, Dr. Evans testifies her opinion that [RJS] was sexually abused based upon her claims she told Ms. Graham not to give suppositories to [RJS] in front of Mr. Strickland. That's it. The allegation that giving a child a suppository for constipation constitutes as [*sic*] child sexual abuse." Br. of Appellant at 46.

has engaged in "[w]illful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions." Strickland argues that the trial court erred in not restricting Gebhardt from being the primary parent because she has not been in AVS's life since 2016.

As stated previously, Strickland failed to provide us with any verbatim report of proceedings except for Dr. Evans's testimony. Other than a brief mention of abandonment in the trial court's decision, the record on appeal is silent as to any other findings or conclusions on willful abandonment under the statute. Thus, the record is inadequate for us to review this alleged error.

2. *RCW 26.09.191(2)(b): Sexual Abuse and Neglect*

Under RCW 26.09.191(2)(b)(i), a parent's residential time shall be limited if the parent resides with a person who has engaged in "[p]hysical, sexual, or a pattern of emotional abuse of a child." Strickland argues that the trial court erred in not restricting Gebhardt's contact with AVS because of her husband, Garrett Gebhardt's criminal history.

The trial court had concerns that Garrett Gebhardt had a criminal history and the trial court noted its concerns in its findings following the June trial. However, Strickland did not provide us with any of the transcripts from either Elaine or Garrett Gebhardt's testimony. We do not review credibility determinations and cannot determine whether the trial court abused its discretion based on an incomplete record. Accordingly, we do not address this argument.

D. *Excluded Evidence*

Strickland argues that the trial court erred when it excluded "relevant" evidence from the June trial. Strickland argues that the trial court should have admitted Exhibits 35 and 76 from the June trial. But without a trial transcript, it is impossible for us to determine from the record

on appeal what each of the trial court's rulings on admissibility were based on. Thus we cannot review this issue.

E. *Substantial Evidence*

Strickland argues that substantial evidence does not support the trial court's findings of fact. First, Strickland argues substantial evidence does not support the trial court's finding that his behavior regarding his ex-girlfriends' minor children was "concerning." Second, Strickland argues substantial evidence does not support the court's finding where the court expressed "concern[] that Mr. Strickland attempted to gain custody of non-biological children of his ex-girlfriends." CP at 237. Third, Strickland argues that substantial evidence does not support the court's finding that Dr. Evans told Strickland not to give RJS suppositories. Fourth, Strickland argues that substantial evidence does not support the finding that he had known RJS for only a short period of time before administering suppositories to her. Finally, Strickland argues that substantial evidence does not support that he presents a danger to AVS.

We review a trial court's findings of fact following a bench trial to determine whether those findings are supported by substantial evidence. *In re G.W.-F.*, 170 Wn. App. 631, 637, 285 P.3d 208 (2012). Substantial evidence is that which is sufficient to persuade a fair-minded person of the truth of the premise. *In re Marriage of Condie*, 15 Wn. App. 2d 449, 459, 475 P.3d 993 (2020).

Here, Strickland failed in his duty to provide us with a record as required. RAP 9.2(b); *Sisouvanh*, 175 Wn.2d at 619; *Stiles*, 168 Wn. App. at 259. Thus, many of Strickland's challenges fail because he provided us with an inadequate record, and the minimal record on appeal supports the remaining findings of fact. We conclude that each of the challenged trial court findings are supported by substantial evidence.

First, Strickland admits in his brief that he gave RJS suppositories. And Dr. Evans testified that she explicitly prescribed against it. A petition for an order of protection, which was admitted in the June trial, shows that Graham sought a protection order against Strickland based on allegations that he forced RJS to wear diapers and soil herself, and that he hit her. Furthermore, the superior court commissioner found that Strickland knew such action would be traumatizing to RJS because of her past abuse.

Another petition for a protection order, filed by Vasquez and admitted as an exhibit at trial, alleged that after a brief dating relationship, Strickland sought visitation with Vasquez's minor daughter.

Even without a complete record, there is sufficient evidence to convince a fair-minded person that Strickland exhibited "concerning" behavior towards Strickland's ex-girlfriends' children.

Second, the record shows, and Strickland admits in his brief, that he has filed a petition for *de facto* parentage of RJS. As explained above, a fair-minded person could plainly be convinced that Strickland's behavior, combined with his attempt to gain custody of RJS is, at the least, concerning.

Third, Dr. Evans testified that Strickland asked Dr. Evans about whether RJS could be treated with suppositories. Dr. Evans told Strickland "most definitely not." VRP (June 9, 2021) at 36. The trial court found Dr. Evans's testimony "credible and compelling." CP at 237. We do not review credibility determinations on appeal. Accordingly, substantial evidence supports the trial court's finding.

Fourth, Strickland began his relationship with Graham in June 2018. Strickland admits in his brief to giving RJS a suppository as early as June 28, 2018. Thus, by his own admission,

Strickland administered suppositories to RJS within a month of beginning his relationship with her mother.

Finally, even without an adequate record, for all the reasons in the record as explained above, substantial evidence here is sufficient to convince a fair-minded person that Strickland presents a danger to AVS. Accordingly, we hold that substantial evidence supports the trial court's findings.

IV. PSYCHOLOGICAL-SEXUAL EVALUATION ORDER

Next, Strickland argues that the trial court abused its discretion when it ordered him to undergo a psychological-sexual evaluation with a penile plethysmograph. He further argues that the order violates his right to be free from personal restraint under the Fifth and Fourteenth Amendments to the U.S. Constitution, and his fundamental liberty interest in the care of his son. We disagree.

As an initial matter, the record shows that the trial court did not order Strickland to undergo a penile plethysmograph. It is written nowhere in the court's findings from the June trial and the box on the DCYF professional services referral form in the June trial exhibits for "plethysmograph" is unchecked.[17] June Trial Ex. at 75. Thus, Strickland's argument fails because he misstates the record.

A. *Psychological-Sexual Evaluation and Personal Restraint*

The trial court ordered Strickland to undergo an evaluation before any unsupervised visitation with AVS. To the extent Strickland argues this was error violates his right to be free from personal restraint, we disagree.

[17] The DCYF referral form is from May 2020 and predates the June trial. The box for "polygraph" was selected. June Trial Ex. at 75.

As stated above, we review orders in a child placement case for an abuse of discretion. *Marriage of Black*, 188 Wn.2d at 127.

Here, Strickland is unable to show from the record on appeal that the court's order would affect his right to be free from personal restraint. Moreover, to the extent that the psychological-sexual evaluation affects Strickland's right to be free from restraint, the trial court appropriately ordered a limitation that was reasonably calculated to address identified harm to the child. *See* RCW 26.09.191(2)(m)(i) (stating that the trial court may impose limitations that are reasonably calculated to protect the child from the sexual abuse or harm that could result, such as supervised contact between the child and the parent or completion of relevant counseling or treatment). Thus, the record is insufficient to support a conclusion that a psychological-sexual evaluation would affect Strickland's Fifth Amendment rights.

B. *Psychological-Sexual Evaluation and Liberty Interest in Care of a Child*

Strickland also argues that being ordered to undergo a psychological-sexual evaluation before being allowed visitation violates his liberty interest in caring for his son.[18] This argument fails for two reasons.

First, Strickland argues that under *Marriage of Parker*, 91 Wn. App. 219, 223, 957 P.2d 256 (1998), a penile plethysmograph order raises a substantial claim of due process. And the *Parker* court so held. 91 Wn. App. at 223-24. But no such order exists here and *Parker* is inapt.

[18] In his reply brief, Strickland argues for the first time that the trial court ordered a polygraph as part of the test, thus violating his "freedom to act" and substantive due process rights. But the trial court's order mentions nothing of a polygraph—that was included only in DCYF's referral form that predates the June trial. Moreover, an issue raised and argued for the first time in a reply brief is too late to warrant consideration. *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992).

Moreover, *Parker* does not stand for the proposition that psychological-sexual evaluations are generally unconstitutional.

Second, as explained above, the trial court found that Strickland sexually abused RJS, that Strickland attempted to gain custody of non-biological children, and that Strickland presents a danger to AVS. Under the court order, Strickland need only undergo the evaluation before Gebhardt may consider a modification to the parenting plan. It is unclear from the parenting plan how the outcome of the evaluation itself could impact Strickland's interest in caring for AVS. The parenting plan's requirement that Strickland undergo an evaluation is only a minor incursion on Strickland's interest in caring for his son, especially given the State's compelling interest in providing for the safety of children. *In re Custody of Smith*, 137 Wn.2d 1, 17, 969 P.2d 21 (1998) (explaining that courts may interfere with a parent's constitutional right to care for a child if it appears the parent will jeopardize the health or safety of the child); *see also Wisconsin v. Yoder*, 406 U.S. 205, 233-34, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972). Thus, the record shows that the State's compelling interest in AVS's wellbeing outweighs any small liberty interest that Strickland has in avoiding a psychological-sexual evaluation. For these reasons, we hold that the trial court did not abuse its discretion when it ordered Strickland to undergo a psychological-sexual examination.

V. MOTION FOR NEW TRIAL

Strickland argues that the trial court abused its discretion when it denied his motion for a new trial. We disagree.

We review a trial court's decision to grant or deny a new trial for an abuse of discretion. *In re Marriage of McCann*, 4 Wn. App. 2d 896, 915, 424 P.3d 234 (2018). "A court abuses its

discretion when an order is manifestly unreasonable or based on untenable grounds." *Marriage of McCann*, 4 Wn. App. 2d at 915-16.

Here, Strickland restates his argument that the trial court's findings were not supported by substantial evidence and were contrary to law. As explained above, these arguments fail. Strickland makes no showing of abuse of discretion and we hold that the trial court properly denied his motion for a new trial.

ATTORNEY FEES

Gebhardt argues that we should award her attorney fees under RAP 18.1(b) and RCW 26.09.140. We agree.

We may award attorney fees on appeal after we examine the merit of the issues on appeal and the financial needs of the parties. *In re Marriage of Mansour*, 126 Wn. App. 1, 17, 106 P.3d 768 (2004); RCW 26.09.140.

Here the record is inadequate for us to make a full consideration of Strickland's financial resources. However, Gebhardt filed an affidavit of financial need at least 10 days before we heard this case as required by RCW 26.09.140 and RAP 18.1(c).[19] Moreover, there is no evidence of Strickland's finances elsewhere in the record on appeal. Accordingly, based on Gebhardt's affidavit and because Strickland did not counter with an affidavit demonstrating his inability to pay or otherwise challenge Gebhardt's request for fees, we grant Gebhardt's request for attorney fees. RAP 18.1(e); *Mansour*, 126 Wn. App. at 17. The determination of the appropriate amount of attorney fees will be determined by a commissioner of this court. RAP 18.1(f).

[19] *See* Respondent's Affidavit of Financial Need, No. 55151-9-II (Wash. Ct. App. Oct. 2, 2021).

CONCLUSION

We hold that the trial court did not abuse its discretion when it sua sponte vacated its January oral ruling. Strickland has failed, on this record, to affirmatively establish that the trial court abused its discretion when it found Strickland sexually abused RJS, admitted Dr. Evans's testimony, named Gebhardt as AVS's primary parent, and excluded exhibits 76 and 35 in the June trial. We further hold that the trial court did not abuse its discretion when it ordered Strickland to undergo a psychological-sexual evaluation before any unsupervised visitation with AVS. Likewise, we conclude that the trial court did not abuse its discretion when it denied Strickland's request for a new trial. Accordingly, we affirm.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record in accordance with RCW 2.06.040, it is so ordered.

Worswick, J.

We concur:

Glasgow, A.C.J.

Cruser, J.