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Division III
State of Washington

Court of Appeals No. 333051-III
Benton County Superior Court Cause No. 15-2-00655-7

WASHINGTON STATE COURT OF APPEALS
DIVISION III

KIMBERLY MAY,

Appellee/Petitioner,

vs.

MARK SCOPA,

Appellant/Respondent.

REPLY BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES	ii
I. INTRODUCTION	1
II. CLARIFICATION OF FACTS	1
III. SUMMARY OF REPLY	4
IV. ARGUMENT	5
1. <u>None of the Interactions Between the Parties from August 2014 through November 2014 Rise to the Level of Domestic Violence as Defined by RCW 26.50.010</u>	8
2. <u>Ms. May Did Not Address Mr. Scopa's Primary Argument on Appeal</u>	9
3. <u>Mr. Scopa's Actions Do Not Constitute Stalking, Nor Did the Superior Court Grant Ms. May's Petition on that Basis</u>	10
V. CONCLUSION	15

TABLE OF AUTHORITIES

WASHINGTON STATE SUPREME COURT CASES:

<i>Freeman v. Freeman</i> , 169 Wn. App. 644, 239 P.3d 557 (2010)	10
<i>State v. Ainslie</i> , 103 Wn. App. 1, 11 P.3d 318 (2000)	13, 14

REVISED CODE OF WASHINGTON PROVISIONS:

RCW 26.50	5
RCW 26.50.030	5
RCW 26.50.020(1)(a)	6
RCW 26.50.020(1)	6
RCW 26.50.030(1)	6
RCW 26.50.010(1)	6
RCW 26.50.010(3)(c)	10, 11, 15
RCW 26.50.010(3)(a)	11, 15
RCW 9A.46.110	11, 13
RCW 9A.46.110(1)	11
RCW 26.50.010	11

I. INTRODUCTION

Appellant/Respondent, Mark Scopa (“Mr. Scopa”), hereby submits this Reply Brief of Appellant.

II. CLARIFICATION OF FACTS

The Respondent’s Brief (hereinafter “*Brief of Respondent*”) presents a number of facts that were identified in her Petition for Order of Protection (hereinafter “Petition”), but were not necessarily relied upon as a basis for a protective order during oral argument on April 3, 2015.¹ Ms. May also improperly asks the Appellate Court to find that she reasonably feared for her safety by relying upon new facts never presented to the trial court.

- “From September 2014 to November 2014, the Parties were in a platonic relationship; not a romantic one as alleged by the Appellant. Ms. May paid for the whole trip [to the Oregon Coast] and slept on the couch while allowing Mr. Scopa to accompany.” *Brief of Respondent, page 1* ¶ 3 (1: ¶ 3). Ms. May did not allege that the Parties had a platonic relationship in her Petition and did not dispute the romantic nature of the parties trip to the Oregon Coast during oral

¹ The Appellant acknowledges that many of the facts presented by the Respondent in *Brief of Respondent* were identified in her Petition, but it appeared, at least from the pleadings and her oral argument, that she was not relying upon these facts as a basis for a protective order. Thus, the Appellant did not identify or argue these incidents within *Brief of Appellant*.

argument. (*See* VRP, 2:12-15).

- “During the course of their relationship, there were three incidences listed in Ms. May’s testimony in the initial petition for the Protection Order where Mr. Scopa intentionally physically restrained Ms. May from leaving her residence.” *Brief of Respondent*, 1: ¶ 4. Ms. May did not assert in her Petition that any of the interactions between the Parties included “physical” restraint, implying that Mr. Scopa had been “physical.”
- “In the first incident, Mr. Scopa blocked Ms. May in the detached shop by positioning his body to prevent her from leaving the building despite repeated and prolonged pleas to be allowed to leave. Mr. Scopa blocked Ms. May in the shop for over 20 minutes before Ms. May was eventually able to push her way past.” *Brief of Respondent*, 4: ¶ 1. This fact was mentioned in Ms. May’s Petition, but she did not say and/or argue that she feared imminent physical harm, bodily injury or assault during the incident. (CP 26: ¶ 4).
- “The second and third occurrences were on August 28, 2014. During an argument, Mr. Scopa first blocked Ms. May in her walk in closet for 30 minutes. Mr. Scopa had a loaded gun on his person. Ms. May was very afraid for her safety and

well being.” *Brief of Respondent*, 2: ¶ 1. Ms. May mentioned her interaction with Mr. Scopa on August 28, 2014 in her Petition, but there was absolutely no mention of a handgun on Mr. Scopa’s person and no mention by Ms. May of feeling “very afraid for her safety and well-being.” (See CP 26 ¶ 8). She also did not present this information during the hearing on April 3, 2014. (See VRP 2-4:14).

- “On September 19, 2014, Mr. Scopa let himself into Ms. May’s residence at 1:30 in the morning highly intoxicated and with a loaded gun on his person.” *Brief of Respondent*, 2: ¶ 2. Ms. May mentioned her interaction with Mr. Scopa on September 19, 2014 in her Petition, but there is absolutely no mention of a loaded gun on Mr. Scopa’s person and she made no claim to fear for her safety. (CP 26 ¶ 6). In fact, Ms. May admitted to letting Mr. Scopa sleep on her couch after the exchange. (See CP 26: ¶ 6).
- During a September 22, 2014 interaction between the parties, which appears to be the same interaction Ms. May references occurred in “the shop”, Ms. May states, “Ms. May was afraid for her safety and well-being. Mr. Scopa had three loaded hand guns on his body and reported having multiple loaded rifles in his car out front of the house.” *Brief of*

Respondent, 2: ¶ 3- 3: ¶ 1. Again, Ms. May mentioned this interaction in her Petition, but there was absolutely no mention of Ms. May being “afraid for her safety and well-being.” (*See* CP 26: ¶ 4). It appears, at least from Ms. May’s pleadings, she felt no fear due to the presence of Mr. Scopa’s father during the exchange.

III. SUMMARY OF REPLY

There is no dispute that Ms. May’s Petition identified numerous interactions between the Parties that occurred throughout the course of their two (2) year romantic relationship. (*See* CP 25-26). More specifically, Ms. May identified interactions between the Parties from August 28, 2014 through March 21, 2015. *See Id.* However, at the hearing on April 3, 2015, when asked by the trial court to “[g]o ahead and tell the court what you’re asking for and why”, Ms. May pointed to the Parties interactions on November 22, 2014 and September 22, 2014. (VRP 2: 4-5; 2:20-3:1). Additionally, she relied upon email, text message exchanges, and telephone calls that occurred after she returned from Europe on February 14, 2015. (VRP 3:2-7; *See* VRP 3:11-4:14).

In response, Mr. Scopa argued that the court should not consider any interactions prior to the termination of the Parties romantic relationship in November 2014 because Ms. May voluntarily maintained and actively engaged in a romantic relationship with Mr. Scopa. (VRP, 5:

3-21). Ms. May cited no instances of physical violence or fear of imminent bodily injury during that time. (VRP, 5: 3-21).² The contact between the Parties after November 2014 through March 2015 consisted of text message, email, phone calls, a note left on Ms. May's mailbox, and the events at Kadlec Regional Medical Center (KRMC) on March 21, 2015. (See CP 26).³ Thus, Mr. Scopa's appeal focused primarily on the Court's analysis of the Parties interactions after they terminated their romantic relationship and only loosely upon the incidents prior. Since those incidents have been identified by Ms. May as a basis for her Petition on appeal, her arguments will be addressed below.

IV. ARGUMENT

1. None of the Interactions Between the Parties from August 2014 through November 2014 Rise to the Level of Domestic Violence as Defined by RCW 26.50.010.

RCW 26.50, the Domestic Violence Protection Act (DVPA), creates a right of action known as a petition for an order of protection in cases of domestic violence. RCW 26.50.030. Any person may seek a petition for order of protection by filing a petition with the court alleging that the person has been the victim of domestic violence. RCW

² Mr. Scopa also maintained that Ms. May had never alleged an act of domestic violence or that he had committed any acts that would cause her to fear imminent infliction of domestic violence.

³ Ms. May also alleged in her Petition that on March 21, 2015 she "heard my chain link fence shake very loudly and thought it was a VERY large cat jumping on the fence to make it shake like that." (CP 25: ¶ 1). She later states she found a note on her mailbox

26.50.020(1)(a). A petition must be accompanied by a sworn affidavit, setting forth the specific facts supporting the request of for a protective order. RCW 26.50.020(1); RCW 26.50.030(1).

“Domestic violence” is defined, in pertinent part, as:

(a) Physical harm, bodily injury, assault, or *the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members...*

RCW 26.50.010(1) (Italics added).

Ms. May identified the following interactions between the parties from August 2014 to November 2014. At no time in her Petitioner, does she say that she feared imminent bodily injury or assault:

- **August 28, 2014:** Ms. May identified an interaction between the Parties, during their relationship, where Mr. Scopa told her “not to leave.” (CP 26: ¶ 8). Ms. May was packing a bag in her walk-in closet and Mr. Scopa was sitting on the steps that led into the closet. (CP 26: ¶ 8). She alleged he “blocked her in the closet for 25 minutes” and she was able to move past him and leave. (CP 26: ¶ 8). There was also another thirty-five (35) minute period where Mr. Scopa allegedly wouldn’t allow Ms. May to close the door of her truck to leave. (CP 26: ¶ 8). At no point during the almost hour long interaction does Ms. May say that she feared imminent physical harm, bodily injury or assault. (See CP 26: ¶ 8).

from Mr. Scopa and implies Mr. Scopa was at the fence. (See CP 25: ¶ 1). There was no

- **September 18, 2014:** Ms. May identified a situation where Mr. Scopa left her property to “camp out.” (CP 26: ¶ 7). In no way does Ms. May indicate this interaction caused her to fear imminent physical harm, bodily injury or assault. (CP 26: ¶ 7).
- **September 19, 2014:** Ms. May identified an interaction where Mr. Scopa came to her house late at night, turned on the lights, and the Parties argued over flip flops. (CP 26: ¶ 6). At no point during this interaction does Ms. May say that she feared imminent physical harm, bodily injury or assault. (See CP 26: ¶ 6). In fact, she allowed Mr. Scopa to sleep on her couch the rest of the night and he left without incident the next morning. (CP 26: ¶ 6).
- **September 20, 2014:** Ms. May referenced an interaction she had with Mr. Scopa’s sister. It has very little, if anything, to do with her Petition other than to give context.
- **September 22, 2014:** Ms. May referenced an incident where Mr. Scopa came to her house and would not leave. (CP 26: ¶ 5). Ms. May explains that she left Mr. Scopa at her house with his father, and when she returned to the house, an argument ensued in the shop. (CP 26: ¶ 5). At no point during this interaction does Ms. May say that she feared imminent physical harm, bodily injury or assault until she filed *Brief of Respondent*. (See CP 26: ¶ 5).

evidence to suggest Mr. Scopa was responsible for shaking the fence.

- **September 25, 2014:** Ms. May referenced a text message she received from Mr. Scopa in which he says he will “be in the desert for 40 days like Jesus did to atone for his sins.” (*See* CP 26: ¶ 3). At no point during this interaction does Ms. May say that she feared imminent physical harm, bodily injury or assault. (*See* CP 26: ¶ 3). It has little or nothing to do with Ms. May’s Petition.
- **November 22, 2014:** Ms. May referenced an interaction where Mr. Scopa expressed his desire to maintain a sexual relationship. (CP 26: ¶ 2). She alleges she locked herself in the bathroom for an hour while telling Mr. Scopa to leave. (CP 26: ¶ 2). She states that she locked herself in the bathroom for “safety”, but she does not state any conduct by Mr. Scopa that would cause her to fear for imminent physical harm, bodily injury or assault. (CP 26: ¶ 2). Moreover, her statement indicates that she invited Mr. Scopa to her house, presumably in furtherance of the relationship the two still shared. (*See* CP 26: ¶ 2). Any context of the interaction was omitted from the pleadings and was not presented during oral argument. The conversation, although perhaps unwanted by Ms. May, was not indicative of domestic violence or the threat of imminent infliction of domestic violence.
- **November 23, 2014:** Ms. May referenced an interaction Mr. Scopa had with a mutual friend of the Parties. (CP 26: ¶ 1). It has little

or no bearing on Ms. May's Petition.

Even assuming the trial court viewed Ms. May's recollection of events in their totality, Mr. Scopa did not engage in any behavior that rises to the level of infliction of fear of imminent physical harm, bodily injury or assault. Other than in vague reference, Ms. May does not even state that these interactions caused her to fear for her safety.

The simple truth is that Ms. May actively communicated and engaged Mr. Scopa, at least to some extent, from August 2014 through November 2014. (*See* CP 25-26). Now, realizing she did not argue that these instances caused her fear she introduces new facts, curiously omitted in her Petition. Whether the Parties interactions were to discuss their romantic relationship or their platonic relationship it is clear that Ms. May did not fear imminent infliction of physical injury, bodily harm or assault. Her inclusion of these interactions in her Petition appear to be more of convenience than actual fear of bodily injury.

2. Ms. May Did Not Address Mr. Scopa's Primary Argument On Appeal.

On appeal, Mr. Scopa asserted that the trial court erred in finding (1) Ms. May produced sufficient evidence to establish *infliction of fear* of physical harm, bodily injury or assault, and (2) Ms. May produced sufficient evidence to establish fear of *imminent* physical harm, bodily injury or assault. (*Brief of Appellant*, i).

Ms. May provided almost no analysis relative to Mr. Scopa's claimed errors. Her brief includes one subsection, titled "The Trial Court Did Not Err In Finding Ms. May Provided Sufficient Evidence to Establish Infliction of Fear of Imminent Physical Harm, Bodily Injury, or Assault by the Appellant." (*Brief of Respondent*, 9). Ms. May reiterated the law set forth by Mr. Scopa, primarily his citation to *Freeman v. Freeman*, 169 Wn. App. 664, 239 P.3d 557 (2010), and simply states, "Ms. May provided the facts to support the requirements that her fear reasonably related based on Mr. Scopa's stalking and harassment." (*Brief of Respondent*, 9). She does not analyze how or why any of the conduct by Mr. Scopa, nearly four (4) months after she terminated her relationship with Mr. Scopa would cause her to fear *imminent* physical harm, bodily harm or assault nor does she address how his conduct was rationally related to conduct during the relationship. Thus, the decision of the trial court should be reversed.

3. Mr. Scopa's Actions Do Not Constitute Stalking, Nor Did the Superior Court Grant Ms. May's Petition On That Basis.

In her *Brief of Respondent*, Ms. May has asserted that her Petition was properly granted because she established "domestic violence" under RCW 26.50.010(3)(c), even if she did not meet her evidentiary burden

under RCW 26.50.010(3)(a).⁴

RCW 26.50.010(3)(c) defines domestic violence stalking in accordance with RCW 9A.46.110 as being of one family or household member by another family or household member. A person is guilty of stalking if, without lawful authority:

(a) He or she intentionally and repeatedly harasses or repeatedly follows another person; and

(b) *The person being harassed or followed is placed in fear that the stalker intends to injure the person, another person, or property of the person or of another person. The feeling of fear must be one that a reasonable person in the same situation would experience under all the circumstances;* and

(c) The stalker either:

(i) Intends to frighten, intimidate, or harass the person; or

(ii) Knows or reasonably should know that the person is afraid, intimidated, or harassed even if the stalker did not intend to place the person in fear or intimidate or harass the person.

RCW 9A.46.110 (Italics added). All three elements of RCW 9A.46.110(1) must be met in order to meet the definition of domestic violence under RCW 26.50.010. That cannot be said in this case.

Even if Ms. May presented evidence to show Mr. Scopa's communication constituted harassment, the evidence was insufficient to

⁴ Counsel for the Appellant is paraphrasing Ms. May's argument on appeal. As stated above, Ms. May does not directly address Mr. Scopa's assigned error of failure to establish domestic violence as defined by RCW 26.50.010(3)(a). She instead alleges that her Petition was properly granted because she presented evidence of "domestic violence" as defined by RCW 26.50.010(3)(c).

show Mr. Scopa engaged in any action that would place Ms. May in fear of injury or harm. There was no evidence Mr. Scopa wanted to do anything other than talk to Ms. May. Her Petition is void of any evidence to suggest he exhibited conduct that would cause her to reasonably fear harm. Obnoxious behavior does not automatically constitute harassment where fear of imminent bodily harm cannot be shown.

Additionally, a reasonable person in the same situation as Ms. May, and knowing all of the circumstances, would not fear harm by Mr. Scopa. A reasonable person would know the following:

- Mr. Scopa has never harmed, injured or assaulted Ms. May (*See generally*, CP 18-63);
- Mr. Scopa has never threatened to injure or assault Ms. May (*See generally*, CP 18-63);
- Mr. Scopa has no criminal history (*See generally*, CP 18-63; *See also* CP 15-17);
- Mr. Scopa has severe physical limitations (*See*, CP 15:15-21);
- There was obviously a lack of clear understanding about the Parties' relationship status during a majority of the interactions Ms. May now claims caused her "fear." (*See generally*, CP 16:14-22; CP 25-26);

Viewing all of this information, in its entirety, a reasonable person would not fear Mr. Scopa. At the very most, one can make the argument, as Ms. May did, that Mr. Scopa's actions were annoying because she felt he would not leave her alone and he was obviously troubled by their

break-up. Therefore, the second element of RCW 9A.46.110 cannot be and is not satisfied.

Ms. May mistakenly cites *State v. Ainslie*, 103 Wn. App. 1, 11 P.3d 318 (2000) in support of her assertion that Mr. Scopa is guilty of stalking. *Ainslie* is factually distinct from the present case. In *Ainslie*, the Defendant would park his car, three to four times a week, near some mailboxes in a residential neighborhood to observe a 14 year old girl. 103 Wn. App. at 3. On one particular occasion, the Defendant followed the girl as she was walking to a friend's house. *Id.* The Defendant pulled over, got out of his car, and stood behind it, causing the little girl to fear for her safety. *Id.*

One day, the Defendant was approached by the little girl's father who reported the Defendant to law enforcement. *Id.* at 4. The little girl's parents sent her to live with her sister in Spokane for approximately one month, and the Defendant was not seen parked in front of the mailboxes during that time. *Id.* A month after the girl returned, she observed the Defendant parked in front of a mattress store near her home about three times per week. *Id.*

The Defendant was convicted of stalking under RCW 9A.46.110 and appealed. *Id.* at 5. As part of his appeal, the Defendant argued that the little girl's fear was not objectively reasonable. *Id.* at 7. However, the Court rejected his argument:

We disagree. An unknown man repeatedly parked within sight of a 14-year-old girl. While she was walking alone, the girl witnessed the man exit and stand near his car. And even after this man was chased by the girl's father, he continued to park in the same place near her home. These facts are sufficient to elicit fear that is objectively reasonable.

Ainslie, 103 Wn. App. at 7. *Ainslie* is a far cry from the facts currently before the Court in this case.

The Court is not dealing with a random stranger who was obviously making a concerted effort to follow a 14 year old girl multiple times per week, even after he was confronted by the girls' father and after the girl was sent to live with her sister for a month in Spokane. Nor is this Court dealing with a person who has been convicted by a jury of the crime of stalking.

Here, the Court is dealing with two parties that were intimately involved for two years and actively engaged each other in communication even after their romantic relationship ended. Unlike in *Aineslie*, Ms. May, or the reasonable person standing in her shoes, knows the person she is claiming caused her fear and would know that there is no objective reason to fear physical harm, bodily injury or assault from Mr. Scopa. The facts of this particular case also bear out the front of this proposition. The parties interacted fairly frequently right after their relationship ended in November 2014, and while somewhat contentious, there were absolutely no incidences of harm or threatened harm. (*See generally*, CP 26). Ms.

May simply decided alleging fear was the easiest way to define their post break-up interactions. Mr. Scopa's interactions with Ms. May became less frequent and less contentious as time passed. (*See generally*, CP 25).

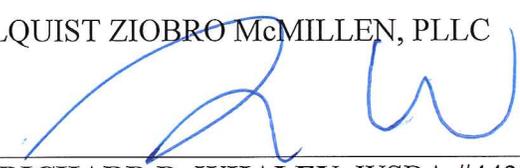
Finally, the Court did not apply RCW 26.50.010(3)(c) when determining whether Ms. May had met her evidentiary burden. The trial courts decision was rendered based on RCW 26.50.010(3)(a) and it held Ms. May did fear imminent physical harm, bodily injury or assault. That is the decision now posited as error on appeal and that is the decision that should be analyzed by this Court. Please refer to *Brief of Appellant* for arguments on this issue.

V. CONCLUSION

Based on the foregoing analysis, the Appellant/Respondent respectfully requests that the decision of the trial court to grant Ms. May's Petition for Protection Order be reversed.

SUBMITTED THIS 25 day of January, 2016.

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby declares, under penalty of perjury, under the laws of the State of Washington, that on January 25, 2016, I filed the original of the foregoing document with the Court of Appeals, Division III. I also caused a true and correct copy of the foregoing document to be served on the following counsel, via e-mail and first class U.S. Mail to:

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DATED this 25th day of January, 2016, at Richland, Washington.

TELQUIST ZIOBRO McMILLEN CLARE, PLLC

By: 

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