

74665-1

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No. 74665-1

**COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON**

KORBY KENCAYD, *et ano.*,

Respondent

v.

BRYEN VON PRIECE,

Appellant

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STATE OF WASHINGTON
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**ON APPEAL FROM KING COUNTY SUPERIOR COURT
(Hon. John H. Chun)**

REPLY BRIEF OF APPELLANT

D. Jack Guthrie, WSBA #46404
Attorney for Bryen Von Priece
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101-4124
(206) 233-2800

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*Mr. Von Priece: I can make it a part of the court record,
Your Honor. I can - -*

*The Court. **You can't.***

RP 26 (emphasis added).

I. INTRODUCTION

In response to the significant evidentiary errors and due process violations identified by Bryen Von Priece that denied him the fair opportunity to defend against his neighbors' fabricated stalking allegations, Korby Kencayd and Randle Kencayd fail to show their flawed protection order should not be reversed. Their arguments instead imply that the trial court had unfettered discretion to grant their protection order, regardless of the evidence presented and statutory threshold requirements, contrary to the standard of review. This Court should reverse the protection order or remand for a new hearing.

II. ARGUMENT

A. THE KENCAYDS' ARGUMENTS FAIL BECAUSE THEY ARE FACTUALLY UNSUPPORTED WITHOUT CITATION TO THE RECORD IN VIOLATION OF RAP 10.3.

The Rules of Appellate Procedure require litigants to support each factual assertion contained within their appellate brief with reference to the record. RAP 10.3(a)(5) (“Reference to the record must be included for each factual statement.”). “The purpose of the rule and related rules ‘is to enable the court and opposing counsel efficiently and expeditiously to review the accuracy of the factual statements made in the briefs and efficiently and expeditiously to review the relevant legal authority.’” *State v. Cox*, 109 Wn. App. 937, 943, 38 P.3d 371, 374 (2002) (quoting *Hurlbert v. Gordon*, 64 Wn. App. 386, 400, 824 P.2d 1238 (1992)); *see also Litho Color, Inc. v. Pac. Employers Ins. Co.*, 98 Wn. App. 286, 305, 991 P.2d 638, 648 (1999).

The Kencayds’ brief contains several pages of factual statements to support their conclusory and misguided arguments without a single citation to the record.¹ *See* Brief of Respondents at 3-5, 7, 9-10. In the absence of

¹ The Washington Supreme Court has characterized similar conduct as “remarkable violation[s]” of the Rules of Appellate Procedure. *Harbor Enterprises, Inc. v. Gunnar Gudjonsson*, 116 Wn.2d 283, 287, 803 P.2d 798, 800 (1991) (concluding 9 pages of asserted facts without citation was a “remarkable violation” of the RAPs).

required citations to the record, the Court should disregard their factually unsupported arguments.

B. THE KENCAYDS FAIL TO SHOW THAT THE RECORD CONTAINS ANY EVIDENCE THAT VON PRIECE COMMITTED “STALKING CONDUCT” AGAINST KORBY KENCAYD.

Each of the three means of committing “stalking conduct”, as defined by RCW 7.92.020(3), requires the stalker to intentionally engage in a course of conduct directed at the victim that would cause or caused the victim fear. *See* RCW 9A.46.110(6)(e); *State v. Kintz*, 169 Wn.2d at 550; RCW 7.92.020(3)(c). Contrary to the Kencayds’ factually unsupported arguments, the trial court did not have unfettered discretion to issue the Order of Protection benefitting Korby Kencayd when the petitioners failed to present any evidence, much less a preponderance, that Von Priece stalked Korby Kencayd. *See* Brief of Respondent at 7. Because the Kencayds failed to carry their burden of proof, the trial court abused its discretion when it found that Von Priece had committed “stalking conduct” as defined by statute.

To be clear, the record contains no evidence that any of Von Priece’s alleged conduct toward Randall Kencayd was directed towards Korby Kencayd, as required by the statute to obtain an Order of Protection for his

benefit.² Every specific instance of alleged conduct was directed toward Randle Kencayd. CP 3-4. On appeal, the Kencayds' speculative conclusion that "there was certainly indirect contact that was harassing and caused Korby Kencayd fear for himself and Randall Kencayd," Brief of Respondent at 7, is unsupported by the record and contradicted by Korby Kencayd's own testimony to the court in a prior proceeding, Ex. 1 at 1:38:43 – 1:39:07.³ Without evidence that Von Priece engaged in a course of conduct toward Korby Kencayd, the trial court abused its discretion by granting an order benefitting Korby Kencayd on speculation or unsupported assumptions. *See State v. Rohrich*, 149 Wn.2d 647, 654, 71 P.3d 638 (2003) (holding that the court abuses its discretion when it relies "on facts unsupported in the record"); *In re Personal Restraint of Dyer*, 164 Wn.2d 274, 286, 189 P.3d 759 (2008) ("Reliance upon speculation and conjecture

² Additionally, Korby Kencayd is not a minor who can benefit from the restrictions placed on Von Priece from Randle Kencayd's separate Order of Protection. *See* RCW 7.92.100(d).

³ That testimony reads as follows:

The Court: Ah, have you had any interaction with Mr. Von Priece other than that (a single incident in June of 2013 regarding dogs being off leash)? Direct contact with him?

Mr. K. Kencayd: Just one time, and that was when I was leaving the bread store to walk back to my house, and I started to catcall him, and he told me to stop, and I immediately stopped and continued walking on.

The Court: Okay. . . .

Ex. 1 at 1:38:43 – 1:39:07.

with disregard of the evidence . . . constitutes an abuse of discretion.”). The protection order must be reversed regarding Korby Kencayd.

C. VON PRIECE’S PROFFERED VIDEO EVIDENCE WAS RELEVANT, SHOULD HAVE BEEN ADMITTED, AND SHOULD HAVE BEEN MARKED AS AN EXHIBIT IN THE RECORD.

Evidence Rule 402 “requires only a showing of minimal logical relevance.” 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence* ch. 5, § 401:2 (2015-16) (citing *State v. Bebb*, 44 Wn. App. 803, 723 P.2d 512 (1986) (citing *State v. Wilson*, 28 Wn.2d 593, 231 P.2d 288 (1951))). The Kencayds have never disputed that Von Priece’s video evidence depicted the October 12, 2015, incident of alleged “stalking conduct.” See RP 10, 12. Von Priece made a two-part offer of proof when arguing for the video’s admissibility: an oral description of the video’s contents and the video itself. RP 12-13. The objective evidence of a video recording of the alleged “stalking conduct” was relevant and material; the recording made the central issue to be decided by the trial court (whether the incident constituted “stalking conduct”) more or less likely. Significantly, the video recording proves the Kencayds’ allegation that Von Priece threatened to assault them with a weapon was false, which completely undermines the Kencayds’ credibility regarding the remaining

self-serving allegations in their petition.⁴ Under these circumstances, the trial court abused its discretion when it excluded Von Priece's video evidence, which showed a protection order was not warranted.

The trial court's error was compounded by its refusal to allow Von Priece to have his video marked as an exhibit for the record. RP 21-22, 26, 30-31. Von Priece, despite his lack of legal training, tried doggedly to enter the video into the record to preserve issues related to its admissibility for appellate review, consistent with proper evidentiary practice standards in Washington. *See* 5D Karl B. Tegland, *Washington Practice: Courtroom Handbook on Washington Evidence* ch. 5, § 103:5 (2015-16); Brief of Appellant at 21. The trial court's error needlessly complicated this Court's review of the video's admissibility. Only remand with specific instructions to admit and consider Von Priece's objective video evidence depicting the incident can remedy this error. As a significant concession, the Kencayds' response does not defend the trial court's refusal to allow Von Priece to have the video marked for the record.

⁴ Because the court prevented Von Priece from effectively preserving this issue by refusing to mark his video as a non-admitted exhibit in the record, Von Priece supports this assertion by referencing the audio transcript of the December 28, 2015, Anti-Harassment hearing, *Von Priece v. Potter*, King Co. Dist. Ct. No.: 151-00526. Exhibit 1 at 1:46:00 – 1:50:00. In that hearing, the video was viewed in its entirety by the trial court and the parties, and no mention of Von Priece making violent threats with a firearm were noted. *Id.*

D. THE TRIAL COURT DEPRIVED VON PRIECE DUE PROCESS WHEN IT PREVENTED HIM FROM PRESENTING HIS CASE-IN-CHIEF AND CONDUCTING MEANINGFUL CROSS-EXAMINATION.

In its rush to judgment, the trial court deprived Von Priece of due process when it granted the petition prior to the conclusion of Von Priece's case-in-chief. The Kencayds do not dispute that Von Priece had a due process interest in a fair hearing, although they misunderstand the third *Matthews v. Eldridge* factor. See Brief of Respondents at 8-9. The third factor, the administrative burden of preventing the erroneous deprivation of Von Priece's rights, constitutes the few minutes that would have allowed Von Priece to conclude his case-in-chief prior to the trial court ruling on the petition. In that time, Von Priece could have argued to the court that the video evidence contradicted the Kencayds' false allegation that he threatened them with a gun, that there were other demonstrable and deliberate falsehoods in their petition, and that the Kencayds had not met their burden of proving by a preponderance of the evidence a course of "stalking conduct" by Von Priece toward Korby Kencayd. Instead, without inquiring as to the remainder of Von Priece's arguments, the trial court arbitrarily ended his case-in-chief with an unjustified ruling to grant the petition.

Von Priece was also deprived due process when the trial court prevented him a meaningful opportunity to cross-examine the Kencayds by ruling on the petition before allowing cross-examination. Contrary to the Kencayds' unsupported argument, *see* Brief of Respondents at 10, Von Priece was afforded no opportunity to cross-examine the Kencayds prior to the court making its adverse ruling, *see* RP 20, despite Von Priece's stated, but unaddressed, requests for cross-examination, *see* RP 22, 24, 25, 29.

Von Priece could have cross-examined Randle Kencayd regarding his self-serving and selective recollection of the October confrontation (making the previously excluded video evidence additionally relevant and admissible for impeachment purposes) and other incidents of hostile conduct toward Von Priece, and he could have cross-examined Korby Kencayd on the lack of interaction of any kind between them, a *prima facie* element necessary for a finding of "stalking conduct", *see* §II.B. *supra*. Had this testimony been developed through standard cross-examination, Von Priece's credibility would have been bolstered, the Kencayds' credibility would have been substantially undermined, the trial court would have better understood Randle Kencayd's verbally abusive conduct towards Von Priece, and the trial court would have understood that Von Priece did not commit "stalking conduct" towards Korby Kencayd. Von Priece's de minimus questioning, after the order of protection had already issued, did

not constitute a meaningful opportunity to cross-examine. While cross-examination may not be necessary in all cases, it is critical in any case with competing versions of the same facts; here a he said/she said contest. The trial court abused its discretion by not allowing Von Priece to cross-examine his accusers.

III. CONCLUSION

The trial court erroneously issued the protection order, maligning Von Priece as a “stalker” without sufficient evidence and restraining his ability to walk freely within his own neighborhood. The order should be reversed regarding Korby Kencayd and vacated regarding Randle Kencayd with instructions for a remanded hearing to remedy significant evidentiary and constitutional errors so that Von Priece can fairly defend himself from the Randle Kencayd’s fabricated allegations.

DATED this 26th Day of August, 2016.

Respectfully submitted,



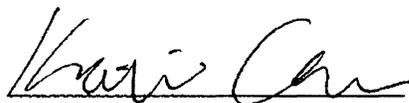
D. Jack Guthrie, WSBA #46404
Attorney for Bryen Von Priece
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101-4124
(206) 233-2800
djg@mckay-chadwell.com

CERTIFICATE OF SERVICE

I, Katie Chan, certify under penalty of perjury under the laws of the State of Washington that on this day I caused a copy of Brief of Appellant to be filed with the court and served by electronic mail on:

Bradley G. Barshis
Attorney for Korby and Randle Kencayd
Newton & Hall, Attorneys at Law
610 Central Avenue South
Kent, WA 98032
(253) 852-6600
brad@newtonandhall.com

Signed at Seattle, Washington, this 26th Day of August.



Katie D. Chan
Legal Assistant
McKay Chadwell, PLLC
600 University Street, Suite 1601
Seattle, WA 98101
Phone: (206) 233-2800
Facsimile: (206) 233-2809
Email: kdc@mckay-chadwell.com

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