

No. 74818-1 I

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

In Re:

JENNIFER A. WILEY,
Respondent,

v.

DAVID F. WILEY,
Petitioner.

ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF
WASHINGTON FOR SNOHOMISH COUNTY

The Honorable Lester H. Stewart, Commissioner

BRIEF OF RESPONDENT

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A. ISSUES PRESENTED

1. Whether the trial court acted within its discretion in granting Ms. Wiley a protection order against Mr. Wiley when (1) there was substantial evidence before the court to support its finding that the preponderance standard was met; (2) it considered as evidence bullet-ridden targets placed by Mr. Wiley in front of Ms. Wiley's closet; and (3) it determined Ms. Wiley was reasonably in fear of imminent harm. (Assignments of Error 1, 4, 7, 8).

2. Whether the trial court acted within its discretion when it considered hearsay evidence, as permitted by ER 1101(c)(4). (Assignment of Error 3).

3. Whether Mr. Wiley's due process rights were protected by following the procedures of chapter RCW 26.50 when (1) Ms. Wiley's petition included the allegations; (2) Mr. Wiley submitted a full response to the petition; (3) the court read all materials submitted by both parties; and (4) the court held a hearing that allowed both sides time for oral argument. (Assignments of Error 1, 2, 4)

4. Whether the court acted within its discretion to grant Ms. Wiley's petition when her request did not violate the doctrine of judicial estoppel. (Assignment of Error 5)

5. Whether Mr. Wiley failed to make a valid claim that Ms. Wiley's petition violated the doctrine of equitable estoppel when he failed to allege the required elements of such a claim. (Assignment of Error 6)

6. Whether Mr. Wiley failed to make a valid claim that his equal protection rights were violated when he failed to identify the right infringed upon, what law was applied in a discriminatory way, and what classification he belongs to or what fundamental right was threatened. (Assignment of Error 2)

7. Whether the court erred and acted within its discretion when it asked Mr. Wiley whether he was asserting a freedom of religion claim when Mr. Wiley had made such a claim in a previous hearing. (Assignment of Error 9)

8. Whether the court should award Ms. Wiley reasonable attorney fees on appeal when attorney fees are available by statute at the trial court level and under RAP 18.1.

B. COUNTER-STATEMENT OF THE CASE

On January 6, 2016, Ms. Jennifer Wiley filed a petition for an order for protection in Snohomish County Superior Court under cause number 16-2-00015-9. Her petition alleged specific acts of domestic violence by Mr. David Wiley, stated under penalty of perjury that she is afraid of him, and was supported by a number of declarations, all of which

were signed under penalty of perjury. CP 441-484. The petition included examples of Mr. Wiley's violent and controlling behavior, such as how Mr. Wiley broke down a door during an argument, placed bullet-ridden shooting targets in front of Ms. Wiley's closet (located in the parties' previously-shared bedroom), used physical force against the children, and electronically monitored her. CP 445-447. Ms. Wiley stated that she put a lock on the door of the bedroom she was sharing with her son to feel safe from Mr. Wiley and that she is terrified to be alone with him. CP 445. In the days immediately before she filed for the protection order, Mr. Wiley began harassing her about removing the lock, making Ms. Wiley afraid of what he might do and for her safety. CP 445. Ms. Wiley stated that when Mr. Wiley is angry they "are all scared of him" and that "the slightest things can set him off." CP 447. The supporting declaration of Ms. JoAnne Wasilko describes witnessing Mr. Wiley "spanking a child into submission." CP 459. Ms. Wiley stated that she often felt she "needed to intervene to protect the kids" from Mr. Wiley's abrupt and harsh disciplinary style. CP 453.

Ms. Wiley presented her petition to the ex parte court to obtain a temporary order pending the hearing. She told the ex parte commissioner she was now afraid Mr. Wiley was trying to do something to her. RP (January 6, 2016) at 5. The previous Friday, Mr. Wiley began insisting

Ms. Wiley remove the lock she installed to keep herself safe from him. Id. at 6. Ms. Wiley stated that “if [she] were alone, by [her]self, [she] was very worried that something would happen to [her]” Id. She also told the court that she was afraid that when a motion was served to him, he would become dangerous to her. Id. at 8.

The ex parte commissioner explained to Ms. Wiley that an order for protection would not modify the temporary orders entered in the parties’ separate dissolution case (Snohomish County Superior Court cause number 15-3-01947-5) and instructed her to file such a motion in that case by the hearing date to resolve issues related to use of the family home and a residential schedule for the children. Id. at 10; CP 486. Because the ex parte order would result in removing Mr. Wiley from the home without notice, the court signed an order shortening time and set the return hearing for one week out, January 13, 2016. RP (January 6, 2016) at 10; CP 485-488. By agreement of the parties, the hearing was first continued to January 15, 2016, and then to February 1, 2016, so it could be heard at the same time as a motion to modify temporary orders in the dissolution case. CP 439; CP 330-332.

In response to the petition, Mr. Wiley filed two different responsive pleadings. CP 374-421; CP 422-435. In them, he admits he broke the lock on their bedroom door to get into the room in which Ms.

Wiley had locked herself during an argument. CP 378. He admits to keeping paper targets in the bedroom, but disputes where in the bedroom they were located. CP 381. He discussed his use of physical force against the children and said the only time he slapped his children in the face was “on accident.” CP 386. He responded to the allegations in Ms. Wiley’s petition, accusing her of filing the petition to gain an advantage in the dissolution case. *See* CP 374-421| CP 422-435.

Ms. Wiley submitted a reply that challenged Mr. Wiley’s responses and declared under penalty of perjury that she had immediate fear because of his “increasingly erratic behavior, hateful attitude toward [her], and his incessant harassment about the lock on [her] bedroom door,” and that she was not filing for an advantage in the dissolution case. CP 333-334. Ms. Wiley pointed out to the court that Mr. Wiley’s response and allegations against her contradicted the evidence, including his own previous declarations to the court. CP 333, 335. Ms. Wiley stated it was Mr. Wiley “whose behavior and attitude has become increasingly hostile and bizarre.” CP 333. Ms. Wiley presented screen shots that showed tracking software Mr. Wiley had installed on her computer to stalk her computer and internet usage. CP 352-354.

A hearing was held on February 1, 2016, with Commissioner Lester Stewart. Commissioner Stewart reviewed the materials submitted

by both parties and heard oral argument from the attorneys representing each of the parties. Ms. Wiley was represented by Andrea Seymoure and Mr. Wiley was represented by Jeff Jared. During the hearing, The commissioner asked both sides specific factual questions related to Ms. Wiley's petition for a domestic violence protection order. *See* RP (February 1, 2016). This included the following: the placement of bullet-ridden targets (Id. at 9); the incident where Mr. Wiley broke a lock on their bedroom door (Id. at 9-10); the incident where Mr. Wiley slapped their six-year-old son in the face (Id. at 14-15, 18); and, whether the court should be concerned about Mr. Wiley's support of websites like "Duty sex: it does a body good".com and "Forgiven wife crawling out of a pit," which Mr. Wiley sent to Ms. Wiley about her duty to give into his sexual demands without refusal. Id. at 24-25. The court also asked about Mr. Wiley's previously-claimed Constitutionally-protected religious freedom to use corporal punishment against his children and whether he was raising that issue again. Id. at 19. Mr. Wiley's attorney said he was not arguing for this relief or claiming a freedom of religion issue any longer. Id.

The commissioner stated on the record that he had read the materials submitted by both parties and that he had prepared two pages of notes for the hearing after reading the materials submitted by both sides.

Id. at 17-18. He also noted that some of the notes contradicted each other.

Id. at 18.

After hearing oral argument from both parties, the court found that there was preponderance of the evidence to grant Ms. Wiley's petition for a protection order. Id. at 31. The court found that "Based upon the facts presented to the court and by a preponderance of the evidence, the threat of domestic violence is there." CP 327. The court made specific factual reference to some of the reasons it found Ms. Wiley "tip[ped] the balance" to satisfy the preponderance standard: Mr. Wiley's placement of bullet-ridden targets and use of force against one of their children. RP (February 1, 2016) at 31.

The court signed an order of protection, which is currently set to expire on February 1, 2017. CP 321-326. The protection order signed by the court made no specific provision for the possession of the home or personal property of either party. *See* CP 322-323. Mr. Wiley did not request an opportunity to obtain belongings from the home during the hearing. *See* RP (February 1, 2016). The court also entered a temporary order in the dissolution case that addressed possession of the family home, residential schedule, and financial provisions. *See* CP 554-557.

Mr. Wiley filed a Motion for Reconsideration and a Motion to Vacate Judgment on February 11, 2016. CP 23-185; CP 186-317. He

failed to note either motion for a hearing, and so neither motion was considered by the court. He then filed a Notice of Appeal on March 1, 2016, seeking review of the order for protection. CP 1-18.

This Court initially informed the parties that the order being appealed was not a final judgment that could be appealed but it would be treated as a notice of discretionary review. Mr. Wiley filed a motion for discretionary review, Ms. Wiley responded, and both appeared for oral argument in front of Commissioner Mary Neel on April 29, 2016. The Court decided that “Although the dissolution proceeding is ongoing and allegations of domestic violence may be part of the dissolution, the one-year protection order is not the subject of ongoing proceedings in the trial court” and the protection order is final and appealable under RAP 2.2(a). Ruling on Appealability, *Wiley v. Wiley*, No. 74818-1-I (Ct. App. Div. 1, Apr. 29, 2016). The only issue currently before this Court is the issuance of the protection order and not the orders issued in the dissolution case.

C. ARGUMENT

I. THE TRIAL COURT ACTED WITHIN ITS DISCRETION
WHEN IT GRANTED MS. WILEY A PROTECTION ORDER
AGAINST MR. WILEY.

A trial court’s decision to grant a protection order is reviewed for abuse of discretion and will not be disturbed unless the person challenging the order can show that the discretion was manifestly unreasonable, or

exercised on untenable grounds, or for untenable reasons. State ex rel. Carroll v. Junker, 79 Wn.2d 12, 26, 482 P.2d 775 (1971). A court's decision is manifestly unreasonable if it is outside the range of acceptable choices, given the facts and the applicable legal standard; it is based on untenable grounds if the factual findings are unsupported by the record; it is based on untenable reasons if it is based on an incorrect standard or the facts do not meet the requirements of the correct standard. *See In re Marriage of Littlefield*, 133 Wn.2d 39, 47, 940 P.2d 1362 (1997). The trial court's determination of credibility and persuasiveness of the evidence is within the discretion of the trial court and is not reviewable by the appellate court. Barber v. Barber, 136 Wn. App. 512, 515, 150 P.3d 124 (2007) (citing State v. Camarillo, 115 Wn.2d 60, 71, 794 P.2d 850 (1990)); In re Marriage of Akon, 160 Wn. App. 48, 57, 248 P.3d 94 (2011).

The Domestic Violence Protection Act defines domestic violence 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; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

RCW 26.50.010.

Present fear of imminent harm based on past violence is sufficient to support the issuance of a protection order under RCW 26.50. Spence v. Kaminski, 103 Wn. App. 325, 12 P.3d 1030 (2000). Defining domestic violence to include fear of imminent physical harm, bodily injury, or assault permits a court to intervene before injury occurs. *See id.* at 334 (stating that the Legislature’s intent in enacting the Domestic Violence Prevention Act is to intervene before injury occurs). This “imminence” requirement is satisfied when the “continuing relationship of the parties presents ongoing opportunities for conflict.” *Id.* at 333. To grant a petition for a protection order, the court must find that a petitioner has demonstrated by a preponderance of the evidence that the respondent has committed domestic violence.

Review of the record shows substantial evidence presented to support the court’s determination that the preponderance standard was satisfied and that Mr. Wiley committed acts of domestic violence and Ms. Wiley had a present fear of imminent harm. Although the court specifically mentioned the bullet-ridden targets and injuries to the children “tip[ping] the balance,” it did not say the targets or injuries were the only things the court relied on in finding the preponderance standard satisfied. RP (February 1, 2016) at 31. In fact, the court specifically stated that it

reviewed all the materials submitted by both parties for the hearing. Id. at 18.

A. There was substantial evidence presented to the court of Mr. Wiley's domestic violence behavior.

There was evidence presented that Mr. Wiley has a history of being a domineering person willing to use physical force or menacing behavior to get what he wants and be in charge, including against his wife and his children. *See, e.g.*, CP 446 (describing use of violence and threats against the children); CP 447 (describing the spyware and keylogger Mr. Wiley installed to track and monitor Ms. Wiley's computer use); CP 459 (describing how Mr. Wiley would spank a child into submission); CP 466-468 (describing an incident between Mr. Wiley and a neighbor); CP 470 (a description by Mr. Wiley's family member of how he has spread lies about Ms. Wiley to make himself the victim since separating). The court also considered Mr. Wiley's own admission that he broke a lock on the bedroom door during an argument with Ms. Wiley, forcing his way into the room when she was clearly trying to separate and distance herself from him. CP 378; CP 445. He says this violent reaction was justified because Ms. Wiley locked him out "from [his] clothes and personal effects." CP 378.

There was evidence presented of Mr. Wiley's increased focus on guns and that he would leave evidence of his increased focus in places Ms. Wiley would find them and how Ms. Wiley felt threatened by this. *See, e.g.*, CP 445, 472, 481 (describing the bullet-ridden shooting targets left in front of her closet, including one of a wolf man attacking a woman where all the bullet holes were in the woman's body); CP 475-478, 480 (screenshots of the Facebook posts about guns shared by David that were constantly popping up on Ms. Wiley's newsfeed).

B. The trial court's consideration of the paper targets found in front of Ms. Wiley's closet did not violate Mr. Wiley's 4th amendment privacy rights.

Mr. Wiley appears to argue that granting the protection order somehow violated his 4th amendment right to privacy. However, there is no general right to privacy under the 4th amendment. The right to privacy is alluded to by declaring that no person shall be subject to unreasonable search and seizure by the government. *Id.* But, a search by a private person is not a constitutional violation unless the government officials affirmatively facilitate or encourage an unreasonable search. Kalmas v. Wagner, 133 Wn.2d 210, 218, 943 P.2d 1369 (1997). The "right to privacy" that Mr. Wiley cites to in State v. Parker, 139 Wn.2d 486, 493-94, 987 P.2d 73 (1999), State v. Ferrier, 136 Wn.2d 103, 111, 960 P.2d 927 (1998), and State v. Hendrickson, 129 Wn.2d 61, 69 n.1, 917 P.2d 563

(1996), is the right to be “safe from governmental trespass absent a warrant.” Parker, 139 Wn.2d at 494. In this case, there was no governmental search or trespass, making this claim inappropriate.

Even if Mr. Wiley can establish such a right to privacy, such a right cannot be violated by a person sharing the “private” space. Although a court may have authority under chapter 26.09 RCW to make a temporary or final determination that one spouse’s right to community property is superior to another as part of a dissolution proceeding, there was no such court order in this case relating to the use of the family home until the hearing on February 1, 2016. At that hearing, the court awarded temporary use of the family home to Ms. Wiley in the dissolution case. *See* CP 555; RP (February 1, 2016) at 28. Before this, there was no order on use of the home and both parties had equal rights to its use.

Mr. Wiley claims a right to privacy in his “solely occupied bedroom.” Brief of Appellant at 21. However, the record is clear from Mr. Wiley’s own filings that the bedroom was not solely occupied by him, as Ms. Wiley was still using a closet located in the bedroom to store her belongings. *See* CP 381 (referencing the bedroom closet that “Jen has not vacated”). While Mr. Wiley may have been the only one sleeping in the bedroom, his own statement is that Ms. Wiley was still using the closet in the bedroom. Ms. Wiley’s statements on this issue are also clear. *See* CP

335 (stating that she goes into the bedroom because “all of my things are still in there and there is nowhere else for them to go”); CP 445 (stating that her clothes are in the closet). Mr. Wiley knew Ms. Wiley was accessing the closet and would by necessity have to enter the bedroom to get to the closet.

Mr. Wiley fails to make a valid right to privacy claim, but seems to disagree with the court’s factual determination that Mr. Wiley left the targets somewhere where Ms. Wiley could see them and that they reasonably caused her fear. He admits to the targets being in the room, and his counter-position on the condition of the paper targets and their representation in the photographs was presented to the trial court in his response to the petition. *See, e.g.* 380-382. As such, Mr. Wiley already attempted to impeach Ms. Wiley on the photographs, but Ms. Wiley’s sworn statement about where she found the targets is not undermined by a photograph showing the target being held up or draped on a chair, as it would be reasonable for someone to move an item to take a better photograph of its condition. The court stated it read all the materials, meaning Mr. Wiley’s contrary position on the importance and condition of the paper targets was considered by the court. RP (February 1, 2016) at 18-19. The trial court’s determination of credibility and persuasiveness of the evidence is within the discretion of the trial court and is not reviewable

by the appellate court. Barber, 136 Wn. App. at 515 (citing Camarillo, 115 Wn.2d at 71); In re Marriage of Akon, 160 Wn. App. at 57. The trial court's determination that Mr. Wiley had these paper targets in view of Ms. Wiley and that Ms. Wiley was reasonable in being afraid was within the court's discretion.

C. There was substantial evidence presented to the court to support its finding that Mr. Wiley's conduct inflicted fear of imminent harm against Ms. Wiley.

There was evidence presented that Ms. Wiley had a present fear of imminent harm because of the escalating conflict caused by their divorce and the harassing and obsessive focus Mr. Wiley had on trying to make her remove a lock from her door after their unsuccessful mediation. Notably, Mr. Wiley's sudden concern about his son's safety in the room shared with Ms. Wiley for about six months started the same day as the mediation, during which Ms. Wiley did not give in to his demands. *See* CP 375 (stating mediation was December 29, 2015) and CP 377 (where Mr. Wiley claims he suddenly discovered dangers in his son's room for the first time on the evening of December 29, 2015). Ms. Wiley satisfied the imminence requirement, as at the time, they were both still residing in the same home and forced to interact with each other and share common living space. Ms. Wiley has a continuing relationship with Mr. Wiley because they have children together, and this continuing relationship

presents many opportunities for conflict and violence in the future. *See Spence v. Kaminski*, 103 Wn. App. at 333. Given Mr. Wiley's history of breaking the lock on her bedroom door, Ms. Wiley was reasonable in her fear that his behavior might escalate to that level once again, particularly when considered with his other behaviors.

The evidence provided to the court, including Mr. Wiley's own admissions, shows that Mr. Wiley committed acts of domestic violence as defined by RCW 26.50.010. His recent behavior toward Ms. Wiley was escalating and causing her reasonable fear. Based on the evidence of Mr. Wiley's past and present conduct before the court, there are tenable grounds to support the court's ruling. The court did not abuse its discretion when it found that "based on the facts presented to the court and by a preponderance of the evidence, the threat of domestic violence is there." CP 327. The court did not abuse its discretion when it granted her petition for a protection order.

II. THE TRIAL COURT DID NOT ERR WHEN IT ALLOWED HEARSAY EVIDENCE.

As Mr. Wiley himself concedes, ER 1101(c)(4) states that following the rules of evidence in protection order proceedings under RCW 26.50 is not required, permitting consideration of hearsay statements. ER 1101(c)(4); *Gourley v. Gourley*, 158 Wn.2d 460, 467, 145

P.3d 1185 (2006); *see also* Hecker v. Cortinas, 110 Wn. App. 865, 870, 43 P.3d 50 (2002).

Mr. Wiley seems to argue that the court should not have permitted hearsay because of the ongoing dissolution case. However, the protection order was not requested as part of the dissolution, and is a separate legal action from the dissolution. This is why Ms. Wiley had to file a separate motion to deal with the issues in the dissolution. The cases were not consolidated or linked, but simply heard at the same time for purposes of judicial efficiency.

The plain language of the rule is clear that the rules of evidence do not need to be applied in protection order proceedings. ER 1101(c)(4). Thus, the court did not err when it considered hearsay evidence submitted by the parties.

III. THE TRIAL COURT DID NOT VIOLATE MR. WILEY'S DUE PROCESS RIGHTS.

A. The court did not violate Mr. Wiley's due process rights by issuing an ex parte order because the procedures of RCW 26.50 were followed.

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" Gourley v. Gourley, 158 Wn.2d 460, 467, 145 P.3d 1185 (2006) quoting Mathews v. Eldridge, 424 U.S. 319, 333, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). Due

process is also a flexible concept requiring differing levels of procedural protection in different situations. Gourley, 158 Wn.2d at 467 citing Mathews, 424 U.S. at 334. In the context of a domestic violence protection order hearing, a respondent's right to be heard at a meaningful time and in a meaningful manner "are protected by the procedures outlined in chapter 26.50 RCW." Gourley, 158 Wn.2d at 468. Those procedures include: "(1) a petition to the court, accompanied by an affidavit setting forth facts under oath, (2) notice to the respondent within five days of the hearing, (3) a hearing before a judicial officer where the petitioner and respondent may testify, (4) a written order, (5) the opportunity to move for revision in superior court, (6) the opportunity to appeal, and (7) a one-year limitation on the protection order if it restrains the respondent from contacting minor children." Id. at 468-69; *see State v. Karas*, 108 Wn. App. 692, 699-700, 32 P.3d 1016 (2001); Chapter 26.50 RCW.

Here, the procedures were followed and Mr. Wiley does not argue otherwise, so his due process rights were not violated by the issuance of the ex parte order. In fact, Mr. Wiley's due process rights were even greater protected when the ex parte commissioner instructed Ms. Wiley to file a motion in the dissolution case to resolve the parenting and property issues. RP (January 6, 2016) at 10.

B. The trial court acted within its discretion and did not violate Mr. Wiley's due process rights when the time for oral argument exceeded five minutes per side and was not the same for both parties.

Mr. Wiley also argues that his right to due process was violated because Ms. Wiley's attorney received more time for oral argument than his attorney. This argument is misplaced because domestic violence protection orders in Snohomish county are heard by affidavit and declaration, although the court has discretion to take testimony if it appears necessary to the court for an adequate determination of the matter. SCLR 94.04(f)(6). Because the facts are submitted by affidavit and declaration, oral argument is less critical. Regardless, another local rule gives the court discretion to set or limit the time for oral argument beyond the typical five minutes per side. SCLR 7(b)(2)(D)(10)(C).

The commissioner acted within his discretion when he permitted both sides to go longer than five minutes each and allowed Ms. Wiley's attorney more time, as the additional time from both parties would serve only to make the commissioner even more familiar with each side's arguments. Even if Ms. Wiley's attorney received a few extra minutes, Mr. Wiley has not shown any prejudice, especially given that the attorney's oral argument is not evidence. Further, Mr. Wiley was given an opportunity to compile his evidence into a full written response that was

reviewed by the court prior to the hearing and considered before the court granted Ms. Wiley's petition. Prior to making his ruling, the commissioner stated on the record that he had reviewed everything submitted by both parties and had written up two pages of notes on their submissions. RP (February 1, 2016) at 18.

C. The trial court did not violate Mr. Wiley's 5th Amendment due process rights when it granted Ms. Wiley's petition for a protection order.

Mr. Wiley seems to argue that the court's determination that he caused injury to the children was not supported by evidence or even alleged by Ms. Wiley and that such a finding violated his 5th Amendment due process rights. Brief of Appellant at 15-17. The 5th amendment applies to the federal government only, but is made applicable to the states by the 14th amendment. See Tiffany Family Trust Corp. v. City of Kent, 155 Wn.2d 225, 251, 119 P.3d 325 (2005). Mr. Wiley does not specifically identify how the 5th amendment is applicable, but it requires the same analysis as that of the 14th amendment. Due process requires that one must be given notice and an opportunity to be heard. Mathews, 424 U.S. at 333. Mr. Wiley cites a loss of liberty, but does not argue how that is connected to the 5th amendment and fails to cite any authority. Failure to cite authority to support an argument constitutes a concession that the argument lacks merit. State v. McNeair, 88 Wn. App. 331, 340, 944 P.2d

1099 (1997). Appellate courts do not consider claims unsupported by citation to legal authority. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 809, 828 P.2d 549 (1992); RAP 10.3(a)(5). When a person endeavors to represent himself and take on “the role of a lawyer, he also assumes the duties and responsibilities and is accountable to the same standards of ethics and legal knowledge.” Batten v. Abrams, 28 Wn. App. 737, 751 n. 1, 626 P.2d 984 (1981) (citing Hecomovich v. Nielsen, 10 Wn. App. 563, 571-72, 518 P.2d 1081 (1974)).

Even if Mr. Wiley had made a fully supported argument, the basis upon which he makes his claim is contradicted by the record. He claims that “there was no evidence or accusation for the trial court to make this finding with.” Brief of Appellant at 16. However, Ms. Wiley’s petition includes specific acts of violence committed by Mr. Wiley against the children. *See* CP 446-447; 453-454; 459; 471. Although Mr. Wiley may deny these allegations and blame Ms. Wiley for different injuries to the children, the court’s determination that the allegations and concerns in Ms. Wiley’s petition were credible was within its discretion and is not reviewable on appeal. Barber, 136 Wn. App. at 515; Akon, 160 Wn. App. at 57. Mr. Wiley had an opportunity to be heard on this issue. His due process rights were not violated.

IV. GRANTING MS. WILEY'S PETITION FOR A
PROTECTION ORDER DOES NOT VIOLATE ESTOPPEL
DOCTRINES.

A. Granting Ms. Wiley's petition for a protection order does not violate the doctrine of judicial estoppel.

Mr. Wiley claims that Ms. Wiley's petition for a protection order violates judicial estoppel, which "is an equitable doctrine that precludes a party from asserting one position in a court proceeding and later seeking an advantage by taking a clearly inconsistent position." Skinner v. Holgate, 141 Wn. App. 840, 847, 173 P.3d 300 (2007) quoting Arkison v. Ethan Allen, Inc., 160 Wn.2d 535, 538, 160 P.3d 13 (2007). The doctrine serves three purposes: (1) to preserve respect for judicial proceedings; (2) to bar as evidence statements by a party that would be contrary to sworn testimony the party gave in prior judicial proceedings; and (3) to avoid inconsistency, duplicity, and waste of time. Skinner, 141 Wn. App. at 848. Judicial estoppel is traditionally applied in subsequent litigation. For example, in *Skinner*, the plaintiff filed for bankruptcy, but failed to disclose an estimated \$1,000,000 claim against Holgate and received a discharge in bankruptcy, finding that there were no assets. Id. at 843. After filing bankruptcy, Skinner brought a claim against Holgate and the court granted summary judgment because he had failed to disclose his partnership relationship with Holgate, and his interest in certain properties. Id. at 846.

Here, Mr. Wiley's claim seems to be that because Ms. Wiley did not request a protection order when she filed for dissolution that she is estopped from later making such a request. Mr. Wiley never raised this issue with the trial court. Issues not raised at trial are not preserved for appeal. East Lake Water Ass'n v. Rogers, 52 Wn. App. 425, 761 P.2d 627 (1988); See RAP 2.5(a).

Even if Mr. Wiley had raised the issue with the trial court, the judicial estoppel doctrine does not apply because Ms. Wiley's concerns of Mr. Wiley's controlling and demanding character were not new and were alleged when she first filed for dissolution and have continued to increase since. *See, e.g.* CP 1053-1054; 1022-1024; 857; 859. Although she may not have requested a protection order in her petition for dissolution, the situation has clearly changed since filing. Based on the statements of both Mr. Wiley and Ms. Wiley, the level of conflict between them had clearly been escalating and become an unlivable situation. Ms. Wiley's petition describes recent incidents of behavior by Mr. Wiley causing her fear, including harassment about her room lock, leaving bullet-ridden targets in front of her closet, and initiating constant arguments, and that his behavior had become increasingly hostile and erratic; Mr. Wiley's responses describe recent altercations around parenting issues, including times he

called the police and CPS. *See, e.g.* CP 445-447; CP 333-334; CP 382-383.

Although Ms. Wiley may have been optimistic in hoping that her safety would not be at risk when she filed for dissolution in July 2015, the situation had changed substantially by January 2016 and she is now afraid. Ms. Wiley's petition for the protection order included new and recent facts to support her allegations of domestic violence and her current fear of imminent harm. *See* CP 445-447. The judicial estoppel doctrine does not apply here.

B. Granting Ms. Wiley's petition for a protection order is not barred by equitable estoppel.

A party asserting equitable estoppel against either the government or a private party must prove each element of estoppel with clear, cogent and convincing evidence. Kramarevcky v. Dep't of Soc. and Health Servs., 122 Wn.2d 738, 744, 863 P.2d 535 (1993). Equitable estoppel is based on the position that "a party should be held to a representation made or position assumed where inequitable consequences would otherwise result to another party who has justifiably and in good faith relied thereon." Norcon Builders, LLC v. GMP Homes VG, LLC, 161 Wn. App. 474, 484, 254 P.3d 835 (2011) (quoting Lybbert v. Grant County, 141 Wn.2d 29, 35, 1 P.3d 1124 (2000)).

Equitable estoppel has three required elements: "(1) an admission, statement or act inconsistent with a claim afterwards asserted, (2) action by another in [reasonable] reliance upon that act, statement or admission, and (3) injury to the relying party from allowing the first party to contradict or repudiate the prior act, statement or admission." Norcon Builders, 161 Wn. App. at 484 (quoting Lybbert, 141 Wn.2d at 35). "[I]t is essential to an equitable estoppel that the person asserting the estoppel changed his position in reliance upon the representations or conduct of the party sought to be stopped." Norcon Builders, 161 Wn. App. at 487 (quoting Sorenson v. Pyeatt, 158 Wn.2d 523, 540, 146 P.3d 1172 (2006)).

Here, Mr. Wiley fails to make a valid equitable estoppel claim. Mr. Wiley does not identify how any of the alleged statements made by Ms. Wiley cause him to change his position in reliance upon such statements. As such, equitable estoppel does not apply.

V. MR. WILEY FAILS TO MAKE A LEGITIMATE EQUAL PROTECTION CLAIM.

The equal protection clauses of the Fourteenth Amendment and Washington Const. art. 1, § 12 require that persons similarly situated with respect to the legitimate purpose of the law receive like treatment. State v. Smith, 117 Wn.2d 263, 276-77, 814 P.2d 652 (1991). The court applies one of the following three tests: (1) The rational relationship test, in which

a law is subjected to minimal scrutiny and will be upheld "unless it rests on grounds wholly irrelevant to the achievement of a legitimate state objective;" (2) The strict scrutiny test, in which a law will be upheld only if it necessary to accomplish a compelling state interest; or (3) The intermediate or heightened scrutiny test, in which a law will be upheld if it furthers a substantial interest of the State. Id. at 277. Strict scrutiny applies if an allegedly discriminatory statutory classification affects a suspect class or a fundamental right. Id. A suspect class typically are based on race, alienage or national origin. Id.

Here, although he seems to claim equal protection was violated, Mr. Wiley has failed to identify a constitutional right that is being infringed upon. He has failed to identify what law is being applied in a discriminatory way and he has failed to identify what suspect classification he belongs to or what fundamental right is being threatened. He failed to cite any authority to support this claim, which constitutes a concession that it lacks merit. McNeair, 88 Wn. App. at 340. The appellate courts do not consider unsupported claims. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d at 809; RAP 10.3(a)(5). When a person endeavors to represent himself and take on "the role of a lawyer, he also assumes the duties and responsibilities and is accountable to the same standards of ethics and legal knowledge." Batten v. Abrams, 28 Wn. App. at 751 n. 1

(citing Hecomovich v. Nielsen, 10 Wn. App. at 571-72). Thus, Mr. Wiley has a duty and responsibility to provide support for his numerous claims in order for this Court to consider them. Since Mr. Wiley has failed to provide any such support, his claim should not be considered.

VI. THE TRIAL COURT DID NOT IMPROPERLY CONSIDER RELIGIOUS BELIEFS OR DEMONSTRATE BIAS AGAINST MR. WILEY BASED ON HIS RELIGIOUS BELIEFS.

Mr. Wiley seems to claim that the court's ruling was based on religious bias because the court asked him whether he was raising a freedom of religion argument. He cites to Evidence Rule 610, which states that "[e]vidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced." ER 610 (emphasis added). As is clear by the plain language of the rule, this rule does not prohibit the court from asking relevant questions about someone's religious beliefs but prohibits credibility determinations of the witness based on their religious beliefs. Further, as argued above, Evidence Rule 1101(c)(4) states that following the rules of evidence in protection order matters is not required. ER 1101(c)(4).

Asking Mr. Wiley to clarify whether he was raising an argument based on religious freedom was not inappropriate, particularly considering the procedural history of this case. Less than two months before the

hearing on February 1, 2016, Mr. Wiley submitted an argument to the court that prohibiting corporeal punishment violated his religious freedoms. *See* CP 792. Whether Mr. Wiley was again raising such an argument was reasonable under the circumstances and not an indication of any bias against Mr. Wiley.

Even if the commissioner did not agree with Mr. Wiley's religious beliefs, there is nothing in the record to indicate any bias in the court's ruling. In fact, the court's ruling directly counters this, as the protection order granted did not limit Mr. Wiley's time with the children or prohibit him from exercising his beliefs. *See, e.g.* CP 321-326. The court has discretion to order relief it deems necessary to protect the petitioner. RCW 26.50.060. It was reasonable for the court to order the fewest protections necessary to ensure Ms. Wiley's safety and to not restrain Mr. Wiley further.

There is nothing to support Mr. Wiley's claim that Ms. Wiley's attorney was permitted additional time for argument because of religious bias. There is no indication in the transcript of the hearing that any religious bias was exercised in the court's ruling. There is nothing in the record to indicate that the court relied on evidence of Mr. Wiley's religious beliefs to form the basis of its ruling. It relied on other evidence

to find that Mr. Wiley committed acts of domestic violence and to grant Ms. Wiley's petition for a protection order.

VI. THE COURT SHOULD AWARD MS. WILEY AN AWARD OF REASONABLE ATTORNEY FEES ON APPEAL.

Ms. Wiley has incurred substantial attorney's fees in responding to this appeal. As such, Ms. Wiley requests attorney fees under RAP 18.1 and RCW 26.50.060, the latter of which permits the court to order the respondent "to reimburse the petitioner for costs incurred in bringing this action, including reasonable attorneys' fees." RCW 26.50.060. Ms. Wiley requested that he pay the costs and fees associated with the action in her petition. CP 443.

Mr. Wiley has made numerous claims in his appellate brief that have no merit and are unsupported by any authority. Brief of Appellant. His requested relief in his motion (including revision of the temporary orders in the dissolution case and issuance of a parenting plan) is not appropriate in an appeal of a protection order. As such, Ms. Wiley should be awarded attorney fees and costs on appeal as allowable by RAP 18.1, due to the continued bad faith exhibited by this appeal.

D. CONCLUSION

The trial court did not abuse its discretion when it granted Ms. Wiley's petition for a protection order. There was substantial evidence

before the court to support its finding that Ms. Wiley satisfied the preponderance standard and the court did not err in permitting consideration of hearsay evidence. The court's ruling did not violate Mr. Wiley's due process rights or estoppel doctrines. There is no evidence in the record to indicate that the court's ruling was colored by any bias against Mr. Wiley. Therefore, the order granting Ms. Wiley a protection order should be affirmed. Ms. Wiley should be awarded attorney fees and costs on appeal.

DATED this 24th day of August, 2016.

Respectfully submitted,


Jessica S. Martin, WSBA #45244
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CERTIFICATE OF SERVICE

I hereby certify that on the date listed below, I served by email per electronic service agreement one copy of the foregoing brief on the following:

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