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SEP 19 2016

Supreme Court No. 93045.5

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

Court of Appeals No. 336492-III

SUPREME COURT OF THE STATE OF WASHINGTON

ESMERALDA RODRIGUEZ

FILED

Appellant

SEP 27 2016

v.

WASHINGTON STATE
SUPREME COURT

LUIS DANIEL ZAVALA

Respondent

PETITION FOR DISCRETIONARY REVIEW

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TABLE OF CONTENTS

	Page
I. IDENTITY OF PETITIONER-----	1
II. CITATION TO COURT OF APPEALS DECISION -----	1
III. ISSUES PRESENTED FOR REVIEW -----	2
IV. STATEMENT OF THE CASE -----	3
V. ARGUMENT -----	6
A. IT WAS AN ERROR OF LAW TO REQUIRE PROOF OF THE CHILD’S FEAR OF IMMINENT PHYSICAL HARM BEFORE INCLUDING THE CHILD ON THE PROTECTION ORDER -----	9
B. EXPOSURE TO DOMESTIC VIOLENCE IS HARMFUL TO CHILDREN AND THE COURT ERRED IN FAILING TO ADDRESS THIS ISSUE WHEN MS. RODRIGUEZ SPECIFICALLY SOUGHT RELIEF FOR L.Z. AS A VICTIM OF DOMESTIC VIOLENCE -----	13
1. Ms. Rodriguez Raised the Issue of Whether L.Z. Was a Victim of Domestic Violence as Defined By the DVPA When She Alleged that L.Z. Was in the Home During the Assault and Sought Relief for Him as a Protected Party -----	14
2. Exposure to Domestic Violence is Harmful to a Child’s Physical and Psychological Development and, Therefore, Constitutes Domestic Violence Against the Child-----	15
VI. CONCLUSION-----	19

TABLE OF AUTHORITIES

**Pages
Cited**

CASES

Barber v. Barber, 136 Wn. App. 512, 516, 150 P.3d 124 (2007)10

Danny v. Laidlaw Transit Serv., Inc., 165 Wn.2d 200, 209,
193 P.3d 125 (2008) (*citing* Laws of 1991, Ch. 301, §1)7, 17

Hecker v. Cortinas, 110 Wn. App. 865, 870, 43 P.3d 50 (2002)10

In re the Marriage of Stewart, 133 Wn. App. 545,137 P.3d 25,
rev. denied 160 Wn.2d 1011 (2006)15, 17

Muma v. Muma, 115 Wn. App. 1, 7, 60 P.3d 592 (2003).....10

Smith v. Shannon, 100 Wn.2d 26, 37, 666 P.2d 351 (1983).....14

Spence v. Kaminski, 103 Wn. App. 325, 334, 12 P.3d 1030 (2000).....10

State v. Dejarlais, 136 Wn.2d 939, 944, 969 P.2d 90
(1998) (*quoting* Laws of 1992, ch. 111, § 1)7, 17

State v. Engel, 166 Wn.2d 572, 575, 210 P.3d 1007 (2009).....9

State v. McDaniel, 185 Wn. App. 932, 937, 344 P.3d 1241 (2015)9

State v. W.S., 176 Wn. App. 231, 237, 309 P.3d 589 (2013).....9

Williams v. Tilaye, 174 Wn.2d 57, 60, 272 P.3d 235 (2012).....9

STATUTES AND REGULATIONS

RCW 26.50, *et seq.* passim

RCW 26.50.010(3)..... 10, 12, 17

RCW 26.50.020(1)(a)10, 12

RCW 74.34.020(2).....11

COURT RULES

RAP 13.4.(b)(4)1, 6

OTHER AUTHORITIES

Bair-Merrit, Megan, M.D., Zuckerman, Barry, M.D.,
Augustyn, Marilyn, M.D., Cronholm, Peter F., M.D.,
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to Domestic Violence*, 369 N. Engl. J. Med.
1673, 1673-1674 (2013)15, 16, 18

Edleson, Jeffrey L., *Children’s Witnessing of Adult
Domestic Violence*, 14 Journal of Interpersonal Violence,
839, 839-870 (1999)15, 16

Edleson, Jeffery L., Shin, Narae, Johnson Armendariz,
*Measuring Children’s Exposure to Domestic Violence:
The Development and Testing of the Child Exposure
to Domestic Violence Scale*, 30 Children & Youth Serv.
Review 502, 503 (2007)16

Hecht Schafran, Lynn, *Domestic Violence,
Developing Brains, and the Lifespan New
Knowledge from Neuroscience*, 53 Judge’s
Journal, 32, 34-35 (2014).....15, 16, 18

I. IDENTITY OF PETITIONER

Petitioner, Esmeralda Rodriguez, through her counsel of record, Jacquelyn High-Edward and Karla Camac Carlisle of the Northwest Justice Project, seeks discretionary review of the decision designated in Section II, below.

II. CITATION TO COURT OF APPEALS DECISION

Ms. Rodriguez respectfully requests that this Court grant discretionary review of the Court of Appeals, Division III, decision in *Rodriguez v. Zavala*, No. 33649-2-III dated August 18, 2016. Appendix A. Review is requested pursuant to RAP 13.4(b)(4).

Ms. Rodriguez endured years of domestic abuse at the hands of her former partner, Respondent Luis Zavala. In June 2015, she petitioned for a domestic violence protection order on behalf of herself and her four children. The trial court granted the order protecting Ms. Rodriguez and the three oldest children who are of a prior relationship. The court declined to protect the youngest and only child in common with Mr. Zavala .

The Court of Appeals upheld the trial court, finding that Ms. Rodriguez’s fear for her child was not a basis to include the child, with his

three sisters, on the protection order.¹ The Court held that the child could only be included on a protection order if there was evidence of the child's fear for himself or his mother. The mother's fear for her child is not sufficient. This decision leaves the most vulnerable children, children who are unable to perceive fear based on age, knowledge of events or cognitive abilities, unprotected.

The Court also declined to protect the minor child based on the uncontroverted research that exposure to – not only witnessing – domestic violence is harmful to children. The Court held that because Ms. Rodriguez failed to inform the trial court that exposure to domestic violence hurts children, the Court could not consider the devastating effects of domestic violence on children when deciding whether the trial court erred in failing to protect the two-year-old child.

III. ISSUES PRESENTED FOR REVIEW

1. Whether a parent may petition for a domestic violence protection order on behalf of a child threatened with harm based on the parent's fear of imminent physical injury, bodily harm, or assault of the child, where there is no evidence of the child's fear.

¹ The three oldest children were included as protected parties in the DVPO without any proof of their fear beyond their mother's petition.

2. Whether the Court of Appeals erred in failing to consider harm caused to a child exposed to domestic violence when a parent sought relief for the child as a victim of domestic violence.

3. Whether exposure to domestic violence is harmful to children and constitutes domestic violence under the Domestic Violence Prevention Act (DVPA).

IV. STATEMENT OF THE CASE

At the time of filing her petition for a domestic violence protection order in Benton County Superior Court, Esmeralda Rodriguez had four minor children in her home: L.Z. (2), E.M. (11), M.M. (15), and Y.M. (17). CP 2. Luis Zavala is the biological father only of L.Z. RP 6. Mr. Zavala has a significant history of domestic violence against Ms. Rodriguez and her children. CP 1-7.

On June 16, 2015, Ms. Rodriguez filed a petition for a domestic violence protection order. CP 1-7. She asked the court to protect her and the children from Mr. Zavala. CP 1-7. In the petition, Ms. Rodriguez described an assault by Mr. Zavala that took place a few days earlier. CP 1-7.

In the early morning hours of June 14, 2015, Ms. Rodriguez awoke to Mr. Zavala pounding on her bedroom window. CP 5. Mr. Zavala, in

violation of a no contact order,² screamed at Ms. Rodriguez and demanded that she open the door or he would break the window and come inside.

CP 5. In an effort to prevent her children from being frightened, Ms. Rodriguez went to the back door and cracked it open to tell Mr. Zavala to leave. CP 5. Instead of leaving, Mr. Zavala slammed the door forward and forced his way inside. CP 5. Ms. Rodriguez again told Mr. Zavala to leave or she would call the police. CP 5. Mr. Zavala cornered Ms. Rodriguez, wrapped his hand around her throat and began choking her. CP 5; RP 7-8. Mr. Zavala told Ms. Rodriguez he was going to finally end what he had started. CP 5. Ms. Rodriguez feared Mr. Zavala was going to kill her and the children. She reached for a kitchen knife and stabbed Mr. Zavala in the stomach while screaming for her daughter to call 911. CP 5. The police arrested and charged Mr. Zavala for this assault. RP 3.

In the protection order petition, Ms. Rodriguez described numerous past acts of violence and threats by Mr. Zavala. CP 4-7. Ms. Rodriguez stated Mr. Zavala threatened to kill Ms. Rodriguez, all of the children, including L.Z., and then himself; threatened to kidnap L.Z. so Ms. Rodriguez would never see him again; pulled a knife on her and threatened to cut her into tiny pieces; pushed her to the floor when she was pregnant with L.Z.; tried to smother her with a pillow; and threatened to

² In June 2015, there was a criminal no-contact order in place protecting only Ms. Rodriguez not the children.

do something so horrific to Ms. Rodriguez's daughters it would make Ms. Rodriguez want to kill herself. CP 5-6. Ms. Rodriguez also stated Mr. Zavala belittled her, controlled with whom she could talk (including family members), and came to where she was if she did not return his multiple phone calls. CP 5-6. Based on this petition, the trial court issued a temporary order of protection protecting Ms. Rodriguez and all four children. CP 10-13.

At the protection order return hearing on June 26, 2015, Ms. Rodriguez recounted the events of June 14, 2015, and testified, upon questioning of the trial court, that L.Z. was asleep in the home when the most recent assault occurred. RP 6. Ms. Rodriguez told the court Mr. Zavala wanted to take L.Z. with him, but she did not want Mr. Zavala to take L.Z. because, in addition to his prior threats of kidnapping and killing L.Z., he appeared to be either intoxicated or had not slept all night. RP 7.

Mr. Zavala was present in court and admitted to breaking a no-contact order on the morning of June 14, 2015, because he wanted to see his son. RP 3-4. He denied Ms. Rodriguez's allegations of abuse and said Ms. Rodriguez stabbed him because she was jealous of the kiss marks on his neck. RP 10.

The trial court found Ms. Rodriguez credible and entered a DVPO for Ms. Rodriguez and her three daughters. RP 10. The trial court denied

Ms. Rodriguez's request to include L.Z. as a protected party stating that L.Z. was not "present" during the assault on June 14, 2015, and was not threatened in any manner. RP 10-11. When Ms. Rodriguez again asked the court to include L.Z. on the order because Mr. Zavala was sending threatening text messages, the court stated, "I'm not going to include your son in this order because he wasn't involved in any of this." RP 12.

Ms. Rodriguez timely filed her Notice of Appeal. On August 18, 2016, the Court of Appeals affirmed the trial court's decision holding the DVPA does not allow an order protecting a child because of the parent's fear of physical or psychological harm to the child or kidnapping of the child. The Court also refused to address Ms. Rodriguez's argument that a child's exposure to domestic violence is harmful and requires protection under the DVPA, stating that this was a new issue on appeal.

Ms. Rodriguez respectfully files this Motion for Discretionary Review to the Supreme Court.

V. ARGUMENT

Discretionary review is appropriate and warranted in this case pursuant to RAP 13.4(b)(4). This request for discretionary review addresses the issue of protecting children who are victims of domestic violence. The Legislature found this to be a matter of substantial public interest.

In 1991, the Legislature enacted the Domestic Violence Prevention Act (DVPA). RCW 26.50, *et seq.* The Legislature recognized:

Domestic violence is a problem of immense proportions affecting individuals as well as communities. Domestic violence has long been recognized as being at the core of other major social problems: [c]hild abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug abuse. Domestic violence costs millions of dollars each year in the state of Washington for health care, absence from work, services to children, and more.

State v. Dejarlais, 136 Wn.2d 939, 944, 969 P.2d 90 (1998) (quoting Laws of 1992, ch. 111, § 1).

The Legislature also noted “children ‘are deeply affected by the violence’ in their homes ‘and could be the next generation of batterers and victims.’” *Danny v. Laidlaw Transit Serv., Inc.*, 165 Wn.2d 200, 209, 193 P.3d 125 (2008) (*citing* Laws of 1991, Ch. 301, §1).

The Legislature furthered the strong public policy of stopping domestic violence by taking “concrete actions to encourage domestic violence victims to end abuse, leave their abusers, *protect their children*, and cooperate with law enforcement and prosecution efforts to hold the abuser accountable.” *Danny*, 165 Wn.2d at 213, *citing* Laws of 1991, Ch. 301, §1 (emphasis added). One of these actions, filing a civil protection order, is a “valuable tool to increase safety for victims and to hold batterers accountable.” *Id.*

The Court of Appeals' decision is contrary to the legislative intent of the DVPA. Specifically, the Court ruled that the trial court did not abuse its discretion by removing L.Z. from the protection order because the DVPA does not allow an order protecting a child based solely on the parent's fear of physical and/or psychological harm to the child. Such a holding makes it impossible to protect a child where the child is unaware of the credible threats of harm against them and, therefore, does not express fear. Such a strained interpretation of the statute is contrary to the legislative purpose of the DVPA.

In addition, the Court refused to consider Ms. Rodriguez's argument that exposure to domestic violence is harmful to children and that further exposure should be prevented by including children on the protection order. This is despite universal knowledge of the harmful impact of adverse childhood trauma, particularly domestic violence, on children's psychological and physical health. Given Washington's strong public policy to stop domestic violence and end the cycle of abuse, the Court's decision is of substantial public interest.

A. IT WAS AN ERROR OF LAW TO REQUIRE PROOF OF THE CHILD’S FEAR OF IMMINENT PHYSICAL HARM BEFORE INCLUDING THE CHILD ON THE PROTECTION ORDER.

The Court erred when it interpreted the DVPA to require Ms. Rodriguez to prove L.Z.’s fear of imminent physical harm, bodily injury or assault. The DVPA allows a parent to petition on behalf of minor family members and such an interpretation is contrary to the legislative intent of the DVPA. Review of the interpretation of a statute is a question of law that is reviewed *de novo*. *State v. Engel*, 166 Wn.2d 572, 575, 210 P.3d 1007 (2009).

Interpreting statutes requires the court to discern and implement the Legislature’s intent. *Williams v. Tilaye*, 174 Wn.2d 57, 60, 272 P.3d 235 (2012). Statutory provisions “must be read in relation to other statutory provisions” to “achieve a harmonious and unified statutory scheme that maintains the integrity of the respective statutes.” *State v. W.S.*, 176 Wn. App. 231, 237, 309 P.3d 589 (2013) (citations omitted).

A reading of a statute that produces an absurd result should be avoided. *State v. Engel*, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009). An appellate court should avoid construing statutes in a way that produces an absurd result, because it is presumed that the Legislature does not intend such a result. *State v. McDaniel*, 185 Wn. App. 932, 937, 344 P.3d 1241

(2015). With all due respect, the Court of Appeals' decision produces an absurd result.

Consistent with the title of the statute, Domestic Violence *Prevention Act* (emphasis added), the intent of the statute is to prevent acts of domestic violence. *Spence v. Kaminski*, 103 Wn. App. 325, 334, 12 P.3d 1030 (2000); *Muma v. Muma*, 115 Wn. App. 1, 7, 60 P.3d 592 (2003). The DVPA specifically allows a petitioner to petition for protection on behalf of her minor children. RCW 26.50.020(1)(a). A petitioner must prove the existence of domestic violence. *Id.* Domestic violence is defined, in part, as, “physical harm, bodily injury, assault, or the *infliction of fear of imminent physical harm*, bodily injury or assault” RCW 26.50.010(3) (emphasis added). A finding of physical harm is not required; a finding of the infliction of present fear of imminent physical harm is sufficient. RCW 26.50.010(3); *Hecker v. Cortinas*, 110 Wn. App. 865, 870, 43 P.3d 50 (2002); *Barber v. Barber*, 136 Wn. App. 512, 516, 150 P.3d 124 (2007).

The Court of Appeals held that the DVPA does not allow entry of an order protecting a child evidenced only by the parent's fear of physical or psychological harm to the child. It came to this holding by interpreting the language in RCW 26.50.010(3) – “fear of imminent physical harm, bodily injury or assault, between family or household members” – to only

mean the fear possessed by the one seeking protection, not the fear that another family member has of harm to the one for whom protection is sought. Such an interpretation requires parents to prove the child's actual fear of imminent physical harm in order to obtain protection. It prohibits, even where the trial court has found the threats to harm the child credible, obtaining protection for a child where the child is shielded by the protective parent from actual knowledge of the threat. It would also prohibit protection from credible threats against a child when the child cannot express fear or is not cognizant, due to age or disability. It essentially leaves the most vulnerable children - infants, babies, toddlers, and disabled children - without protection no matter how credible the threat.³

The Court of Appeals' interpretation of the DVPA means that if an abuser held a gun to a parent and told her that he was going to kill her and her child, who is in the same room, and the child did not hear the threat, see the gun, or was not old enough to understand the danger *and express fear*, the child would be denied protection under the DVPA unless he was hurt by the gun. This cannot be what the DVPA intended. The Court of Appeals' interpretation of the DVPA is contrary to the plain language of

³ This position is juxtaposed with the Vulnerable Adult Protection Act which finds that "[i]n instances of abuse of a vulnerable adult who is unable to express or demonstrate physical harm, pain, or mental anguish, the abuse is presumed to cause physical harm, pain, or mental anguish." RCW 74.34.020(2).

the DVPA that provides a parent with the ability to petition the court for a protection order on behalf of a child when there is fear of imminent harm to the child. RCW 26.50.010(3); RCW 26.50.020(1)(a).

It is an absurd result to leave a child unprotected because a parent is unable to prove the child comprehended the threats of an abuser. The child remains in danger regardless of whether he or she is able to understand and articulate fear of the threatened harm. Many children will not understand threats made by an abuser because the child will not hear the threat or does not have the ability to comprehend the threat. To require a protective parent to prove the child feared harm means a parent can never protect a child who has not explicitly expressed fear unless the child has been physically assaulted.

In this case, Mr. Zavala not only physically assaulted Ms. Rodriguez but also placed L.Z. at risk of imminent physical harm, bodily injury, and assault because Mr. Zavala was intent on taking L.Z. by force on June 14, 2015. CP 5-6; RP 5-8. Unfortunately, Mr. Zavala's actions in the early morning hours of June 14, 2015, were not out of character. CP 5-7. On prior occasions, Mr. Zavala made threats to kill Ms. Rodriguez, all the children and himself and, during the June 14, 2015, assault on Ms. Rodriguez, he stated he was going to finally end what he had started. CP 5-6.

Ms. Rodriguez was not required to wait until L.Z. was physically harmed before seeking a protection order. Mr. Zavala's threat to kill Ms. Rodriguez, as well as L.Z. and his sisters, combined with his willingness to take L.Z. by force, is sufficient to establish her fear of imminent physical harm of L.Z. One of the most important roles of a parent is to keep their child safe. To require Ms. Rodriguez to prove L.Z. was actually in fear of imminent physical harm from Mr. Zavala or, worse, wait until L.Z. is harmed, leaves L.Z. without protection in direct contradiction to the purpose of the DVPA; to prevent domestic violence

B. EXPOSURE TO DOMESTIC VIOLENCE IS HARMFUL TO CHILDREN AND THE COURT ERRED IN FAILING TO ADDRESS THIS ISSUE WHEN MS. RODRIGUEZ SPECIFICALLY SOUGHT RELIEF FOR L.Z. AS A VICTIM OF DOMESTIC VIOLENCE.

A child's exposure to domestic violence causes psychological and physical harm and puts the child at significant risk of future harm sufficient to warrant protection under the DVPA. Here, despite the fact that Ms. Rodriguez sought relief for L.Z. as a victim of domestic violence, the Court refused to address the issue stating that Ms. Rodriguez's failure to present persuasive, scientific evidence to the trial court on the harm caused by exposure to domestic violence precluded review. This is an error. The Court erred in failing to address this issue and determine

whether a child exposed to domestic violence is entitled to protection under the DVPA.

1. Ms. Rodriguez Raised the Issue of Whether L.Z. Was a Victim of Domestic Violence as Defined By the DVPA When She Alleged that L.Z. Was in the Home During the Assault and Sought Relief for Him as a Protected Party.

Generally a party may not raise new issues on appeal that were not presented to the trial court. *Smith v. Shannon*, 100 Wn.2d 26, 37, 666 P.2d 351 (1983). However, whether L.Z. was a victim of domestic violence under the DVPA because he was present at the home during the assault was squarely raised at the trial court.

In her petition, Ms. Rodriguez specifically alleged that L.Z. was a victim of domestic violence and sought relief for him under the DVPA. CP 1-2. She further petitioned for immediate relief stating that Mr. Zavala “continues to harass me and has made numerous threats to hurt me and my children.” CP 4. Ms. Rodriguez alleged that L.Z. was a victim of domestic violence because Mr. Zavala wanted to take L.Z. and was willing to assault Ms. Rodriguez in order to do so, and because L.Z. was in the home at the time of the assault. CP 1-2; RP 6-7. She requested that the Court determine whether these facts met the definition of domestic violence. Argument on appeal that exposure to domestic violence is harmful to children and constitutes domestic violence, as defined under

the DVPA, was just that; argument, not a new issue. The Court erred by failing to address whether a child's exposure to domestic violence constitutes harm and warrants protection under the DVPA.

2. Exposure to Domestic Violence is Harmful to a Child's Physical and Psychological Development and, Therefore, Constitutes Domestic Violence Against the Child.

Exposure to domestic violence can cause psychological, developmental, and physical harm to children and, therefore, constitutes domestic violence under the DVPA. *In re the Marriage of Stewart*, 133 Wn. App. 545, 137 P.3d 25, *rev. denied* 160 Wn.2d 1011 (2006).

Multiple uncontroverted scientific studies show that exposure to, and not just witnessing, domestic violence has profound psychological, developmental, and physical impacts on children.^{4 5} Children are exposed to domestic violence in many ways.⁶ Exposure to domestic violence not only includes directly seeing the violence inflicted on a loved one, but also hearing the violence and observing the aftermath (bruises on a parent,

⁴ Bair-Merritt, Megan, M.D., Zuckerman, Barry, M.D., Augustyn, Marilyn, M.D., Cronholm, Peter F., M.D., *Silent Victims – An Epidemic of Childhood Exposure to Domestic Violence*, 369 N. Engl. J. Med. 1673, 1673-1674 (2013).

⁵ Hecht Schafran, Lynn, *Domestic Violence, Developing Brains, and the Lifespan New Knowledge of Neuroscience*, 53 Judge's Journal, 32, 34-35 (2014).

⁶ Edleson, Jeffrey L., *Children's Witnessing of Adult Domestic Violence*, 14 Journal of Interpersonal Violence, 839, 839-870 (1999).

police intervention, moving to a domestic violence shelter).⁷ Exposure also includes the stress and trauma a child experiences when a parent is unavailable because of injuries, when the police arrest the abusing parent, or when a child lives in fear of the next episode.⁸

For children as young as L.Z., exposure to domestic violence negatively impacts the development of their brains leading to learning disabilities and emotional harm.^{9 10} Young children who are incapable of mounting a “fight or flight” reaction begin to disassociate and exhibit a “defeat response.”¹¹ Such exposure alone can lead to increased instances of asthma, persistent hyperarousal, exaggerated startle response, anxiety, serious sleep disorders, hyperactivity, attention deficit disorder, and post-traumatic stress disorder.^{12 13}

⁷ Edleson, Jeffrey L., Shin, Narae, Johnson Armendariz, *Measuring Children's Exposure to Domestic Violence: The Development and Testing of the Child Exposure to Domestic Violence Scale*, 30 *Children & Youth Serv. Review*, 502, 503 (2007).

⁸ Edleson, Jeffrey L., *Children's Witnessing of Adult Domestic Violence*, 14 *Journal of Interpersonal Violence*, 839, 839-870 (1999).

⁹ Bair-Merritt, Megan M.D., Zuckerman, Barry, M.D., Augustyn, Marilyn M.D., Cronholm, Peter F., M.D., *Silent Victims – An Epidemic of Childhood Exposure to Domestic Violence*, 369 *N. Engl. J. Med.* 1673, 1673-1674 (2013).

¹⁰ Hecht Schafran, Lynn, *Domestic Violence, Developing Brains, and the Lifespan New Knowledge of Neuroscience*, 53 *Judge's Journal*, 32, 34-35 (2014).

¹¹ *Id.*

¹² *Id.*

¹³ Bair-Merritt, Megan, M.D., Zuckerman, Barry, M.D., Augustyn, Marilyn, M.D.,

Psychological, developmental, and physical harm from exposure meets the definition of domestic violence under the DVPA and case law. RCW 26.50.010(3); *Stewart*, 133 Wn. App. at 545. Children who are exposed to domestic violence are already physically and/or psychologically harmed by the exposure or are at significant risk of future harm.

Protecting children from domestic violence is consistent with the legislative intent of the DVPA, which recognizes the short and long-term impacts exposure to domestic violence has on children. *Dejarlais*, 136 Wn.2d at 944 (quoting Laws of 1992, ch. 111, § 1). The Legislature has acknowledged that domestic violence is at the very “core of other major social problems” including “child abuse, other crimes of violence against person or property, juvenile delinquency, and alcohol and drug use *Id.* It also recognizes the link between preventing children’s exposure to violence and stopping those children from becoming the next generation of abusers and victims. *Danny*, 165 Wn.2d at 209 (*citing* Laws of 1991, Ch. 301, §1). In doing so, the Legislature understands that prevention is the key to ending the cycle of violence that is at the core of so many social issues.

Cronholm, Peter F., M.D., *Silent Victims – An Epidemic of Childhood Exposure to Domestic Violence*, 369 N. Engl. J. Med. 1673, 1673 (2013).

We now know that childhood exposure to domestic violence, whether witnessed or not, leads to a “myriad of physical health problems,” mental health issues, and learning disabilities in children.^{14 15} The DVPA is meant to prevent and protect children from harm.

Although L.Z. may not have witnessed the violence perpetrated by his father against his mother in the early morning hours of June 14, 2015, he was certainly exposed to it. RP 6-7, 9-10. We will never know what this little boy saw and heard from his crib. We do know that he was nearby when Mr. Zavala began choking Ms. Rodriguez in the kitchen and when he stated that he was “finally going to end” what he started. CP 5; RP 6-8. L.Z. was in the home when his mother, in fear for her life and the lives of all her children, stabbed Mr. Zavala to stop the assault; when she screamed for her daughter to call the police; when the police arrived and arrested Mr. Zavala; and when his mother recovered from the violent assault that occurred in their home and eliminated their sense of security. CP 5; RP 6-7.

¹⁴ Hecht Schafran, Lynn, *Domestic Violence, Developing Brains, and the Lifespan New Knowledge of Neuroscience*, 53 *Judge's Journal*, 32, 34-35 (2014).

¹⁵ Bair-Merritt, Megan, M.D., Zuckerman, Barry, M.D., Augustyn, Marilyn, M.D., Cronholm, Peter F., M.D., *Silent Victims – An Epidemic of Childhood Exposure to Domestic Violence*, 369 *N. Engl. J. Med.* 1673, 1673-1674 (2013).

It is this kind of exposure that the DVPA intends to prevent. The Court erred in not finding that the harm children incur as a result of exposure to domestic violence is domestic violence under the DVPA and is entitled to protection.

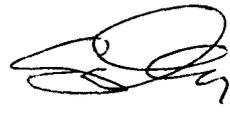
VI. CONCLUSION

For the reasons stated above, Petitioner Esmeralda Rodriguez respectfully requests that this Court grant discretionary review of the Appellate Court decision.

Respectfully submitted on September 19, 2016.



JACQUELYN HIGH-EDWARD
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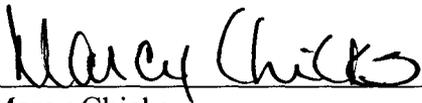
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for

KARLA CARLISLE
WSBA #40107
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on the 19th day of September, 2016, I caused a true and correct copy of this Petition for Discretionary Review to be served on the Respondent via first class U.S. mail:

Luis Daniel Zavala
DOC #391161
Monroe Correctional Complex
Intensive Management Unit (IMU)
PO Box 777
Monroe, WA 98272



Marcy Chicks

APPENDIX

App. 1-13

Court of Appeals Unpublished Opinion

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AUGUST 18, 2016

**In the Office of the Clerk of Court
WA State Court of Appeals, Division III**

**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE**

ESMERALDA RODRIGUEZ,)	
)	No. 33649-2-III
Appellant,)	
)	
v.)	
)	
LUIS DANIEL ZAVALA,)	UNPUBLISHED OPINION
)	
Respondent.)	

FEARING, C.J. — The trial court granted Esmeralda Rodriguez a domestic violence protection order restraining her former boyfriend, Luis Daniel Zavala, from contact with her or her three daughters. The trial court refused to include the parties' male minor child Lazaro as a protected party under the order. Lazaro is a fictitious name. The court found that Lazaro was not threatened or the subject of abuse. The trial court also refused to enter residential provisions restricting Zavala's access to Lazaro. Rodriguez appeals both rulings. We hold that the trial court did not abuse its discretion and affirm both rulings.

FACTS

Petitioner Esmeralda Rodriguez dated respondent Luis Zavala. The couple had

No. 33649-2-III
Rodriguez v. Zavala

one son in common, Lazaro. Lazaro was two years old in June 2015, the month that Rodriguez sought a protection order. Rodriguez also raised three daughters, born from an earlier relationship. During the relationship between Rodriguez and Zavala, Zavala repeatedly physically assaulted Esmeralda Rodriguez, threatened to kidnap Lazaro, and threatened to kill Rodriguez, her children, and himself.

Events in the early morning of June 14, 2015, precipitated the entry of a second domestic violence protection order favoring Esmeralda Rodriguez. We do not know when the first order was entered or the basis for the first order. On June 14, at 2 a.m., in violation of the existing no contact order, Luis Zavala appeared at Rodriguez's house and forcibly entered the home. He was drunk, sleep deprived, or both and wanted to talk to Lazaro. Rodriguez ordered Zavala to leave the premises or she would call the police. Zavala cornered Rodriguez and choked her. He threatened to end what he had started. Rodriguez yelled for a daughter to call 911. Rodriguez, in fear for her life, stabbed Zavala in the stomach with a knife.

PROCEDURE

On June 16, 2015, Esmeralda Rodriguez filed another petition for an order of protection. In the petition, Rodriguez sought a restraint against Luis Zavala from contact with her and her four children and from coming near the family home or any of the children's day care facilities or schools.

No. 33649-2-III
Rodriguez v. Zavala

Esmerelda Rodriguez's petition documented some of the abuse by Luis Zavala.

Rodriguez averred under oath, as part of the petition:

Luis has continued to harass me and has made numerous threats to hurt me and my children.

Clerk's Papers (CP) at 4. Rodriguez wrote:

On June 14th 2015 around 2:00 a.m. I woke up to Luis banging on bedroom window outside. I yelled to Luis to please leave us alone. Luis began to yell at me and demanded I open the door or he would break the window and come inside. I went to the door and opened it a little to tell him to leave and that [I] did not want my daughters to wake up. Luis pushed me away from the door. I told him to leave or if he didn't I would call the police. Luis cornered me to the wall and placed [his] hand on my face trying to choke me. Luis then told me—now [I] am finally going to end what I started. I feared he was going to kill me. I reached for kitchen knife stabbed him in the stomach area. I yelled at my daughter to call 911.

....
2007—When I was pregnant from our son[,] Luis pushed [me] to [the] floor because he was using drugs.

Luis got on top of me when I was laying on the bed and began to put a pillow over my head preventing me from breathing.

Luis is always telling me [that I am] at fault with everything going wrong with him.

CP at 5.

Luis has threatened he is going to [do] something to my daughter so terrible it [is] going to make me want to kill myself.

Luis has also threaten[ed] to kidnap our so[n] and I would never see him.

....
Luis will call numerous times and if I don't answer he will show up to see what I am doing.

....
Luis told me that once he is done with us (kill us) he will then kill

himself.

.....
Luis took a knife and told me [he] would cut me in tiny pieces.

CP at 6.

Due to Luis['] drug use it is best Luis is not allowed any dangerous weapons.

CP at 7.

On the basis of the petition, the trial court entered a temporary order of protection. The temporary order protected all four children, including Lazaro, from contact with Luis Zavala and barred Zavala from coming near the family home or the children's schools or day care centers. The order also scheduled a hearing for a permanent order of protection.

On June 26, 2015, the trial court conducted the hearing for a permanent order. Luis Zavala then resided in jail for violating the earlier restraining order. Law enforcement allowed him to attend the June 26 hearing in person. Zavala admitted entering the home despite the previous entry of a restraining order. Zavala denied injuring Esmerelda Rodriguez and accused her of harming him. According to Zavala, Rodriguez struck him after she saw kiss marks on his neck.

During the June 26 hearing, Esmerelda Rodriguez repeated the events that occurred on June 14. The trial court asked Rodriguez whether Lazaro observed the June 14 assault. Esmerelda Rodriguez answered no and that Lazaro slept through the attack.

No. 33649-2-III
Rodriguez v. Zavala

The trial court found Esmerelda Rodriguez's story more credible than Zavala's response. The trial court entered an order protecting Esmeralda Rodriguez and her three daughters, but not Lazaro. The order restrained Zavala from being near the family residence, Rodriguez's workplace, and the school of any of Rodriguez's daughters. The trial court struck a section of the proposed order that granted Rodriguez custody of the children and prevented visitation until a parenting plan was filed.

At the end of the June 26 hearing, Esmerelda Rodriguez asked the trial court for an order of custody over Lazaro. The trial court denied the request and recommended to Rodriguez that she file a parenting plan.

The domestic violence protection order expired on June 26, 2016.

LAW AND ANALYSIS

Esmeralda Rodriguez assigns two errors on appeal. First, the trial court erred when refusing to include her son, Lazaro, as a protected party under the domestic violence protection order. Second, the trial court erred when refusing to enter an order with residential provisions when the court entered the protection order. In response, Luis Zavala commented, among other remarks, that he would reside in jail for a long time and he wished not to be contacted again regarding the lawsuit and appeal. Child Justice, Inc. filed an amicus brief in support of Rodriguez's first argument that the trial court should have protected Lazaro under the protection order.

No. 33649-2-III
Rodriguez v. Zavala

The domestic violence prevention act creates “an action known as a petition for an order for protection in cases of domestic violence.” RCW 26.50.030. The operative section of the act, RCW 26.50.020(1)(a), provides:

Any person may seek relief under this chapter by filing a petition with a court alleging that the person has been the victim of domestic violence committed by the respondent. The person may petition for relief on behalf of himself or herself and on behalf of minor family or household members.

Thus, Esmerelda Rodriguez could file her petition for protection on behalf of herself, her daughters, and Lazaro. The petition must be accompanied by a sworn affidavit, setting forth the facts supporting the request for relief. RCW 26.50.020(1); RCW 26.50.030(1); *State v. Karas*, 108 Wn. App. 692, 697, 32 P.3d 1016 (2001).

The domestic violence prevention act covers Esmerelda Rodriguez, her daughters, and Lazaro from violence imposed by Luis Zavala. The act covers domestic violence between family or household members:

“Domestic violence” means: (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(1). In turn, “family or household members” means:

. . . spouses, domestic partners, former spouses, former domestic partners, persons who have a child in common regardless of whether they have been married or have lived together at any time . . . and persons who

No. 33649-2-III
Rodriguez v. Zavala

have a biological or legal parent-child relationship, including stepparents and stepchildren and grandparents and grandchildren.

RCW 26.50.010(2). An order may restrict contact between a parent and child, in which case the restraint may not exceed a maximum period of one year. RCW 26.50.060(2).

RCW 26.50.060 authorizes the trial court, after notice and a hearing, to issue a protection order. *Hecker v. Cortinas*, 110 Wn. App. 865, 869, 43 P.3d 50 (2002). The court may restrain the respondent from committing domestic violence, from entering the petitioner's residence or workplace, from entering a child's school or day care center, and from contacting the petitioner. RCW 26.50.060(1); *Spence v. Kaminski*, 103 Wn. App. 325, 331, 12 P.3d 1030 (2000).

The trial court holds discretion when entertaining petitions for domestic violence protection orders. *Hecker v. Cortinas*, 110 Wn. App. at 869 (2002). We will not disturb such an exercise of discretion on appeal absent a clear showing of abuse. *Hecker v. Cortinas*, 110 Wn. App. at 869. Thus, Esmeralda Rodriguez must show an abuse of discretion in challenging the trial court's rulings. Discretion is abused only when no reasonable person would have decided the issue as the trial court did. *State v. Rice*, 110 Wn.2d 577, 600, 757 P.2d 889 (1988).

Protection for Lazaro

Esmeralda Rodriguez argues that the trial court should have included Lazaro on

No. 33649-2-III
Rodriguez v. Zavala

the protection order because exposure to domestic violence constitutes domestic violence itself. Rodriguez also contends that she was in imminent fear of harm to Lazaro and that her fear for her son suffices for him to be a protected party. Finally, she contends that rampant domestic violence in a home necessarily results in psychological injury to a child, regardless of whether the child observes the violence, and the psychological injury inevitably leads to physical symptoms and harm.

We return to the statutory definition of “domestic violence.” The definition includes, in relevant part:

“Domestic violence” means: (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). An act of violence is not necessary. *Hecker v. Cortinas*, 110 Wn. App. at 870 (2002); *Spence v. Kaminski*, 103 Wn. App. at 334 (2000). The infliction of fear of physical harm suffices. *Hecker v. Cortinas*, 110 Wn. App. at 870. Fear of an assault causes psychological harm and is domestic violence. *In re Marriage of Stewart*, 133 Wn. App. 545, 551, 137 P.3d 25 (2006). A finding that a victim fears imminent physical harm suffices for a domestic violence protection order. *Spence v. Kaminski*, 103 Wn. App. at 334.

During their relationship, Luis Zavala repeatedly physically assaulted Esmeralda Rodriguez, threatened to kidnap Lazaro, and threatened to kill Rodriguez and Lazaro.

No. 33649-2-III
Rodriguez v. Zavala

Nevertheless, Rodriguez presented no testimony that Zavala physically harmed Lazaro or that Lazaro witnessed any altercation between his mother and father. The domestic violence prevention act does not cover fear of a kidnapping. The act also does not allow an order protecting a child because of the parent's fear of physical or psychological harm to the child.

Domestic violence, under RCW 26.50.010(1), embraces "fear of imminent physical harm, bodily injury or assault, between family or household members." We construe this language to be the fear possessed by the one seeking protection, not fear that another family member has of harm to the one for whom protection is sought.

Esmerelda Rodriguez and amicus contend that a child necessarily suffers psychological, and, in turn, physical injury, when domestic violence runs rampant in a home. Both present this court with psychological studies supporting this argument. Nevertheless, Rodriguez did not present this scientific evidence to the trial court, nor did she argue before the trial court that Lazaro suffered as a result of the domestic violence. A party may not generally raise a new argument on appeal that the party did not present to the trial court. *In re Det. of Ambers*, 160 Wn.2d 543, 557 n.6, 158 P.3d 1144 (2007). An appellate court will accept new evidence only on a motion pursuant to RAP 9.11(a) and the fulfillment of all six conditions of the rule. *State v. Ziegler*, 114 Wn.2d 533, 541, 789 P.2d 79 (1990). Rodriguez filed no motion for additional evidence on review.

No. 33649-2-III
Rodriguez v. Zavala

We know domestic violence to be a most serious problem and a blight on American society. We acknowledge that Esmerelda Rodriguez represented herself at the trial court and was not learned in the law. We also recognize that domestic violence protection order petition hearings move quickly. Nevertheless, these considerations do not overcome the rule requiring a party to present all arguments and evidence before the trial court, if the party wishes to forward the contentions and evidence on appeal. The trial court deserves to hear the evidence first. We also observe that the legislature may amend the act on a legislative determination that domestic violence in the household always causes injury to a child such that the child should automatically be shielded from the parent committing the domestic violence.

Esmerelda Rodriguez relies on *In re Marriage of Stewart*, 133 Wn. App. 545 (2006). Nichole and Wilson Stewart begat two minor children. As part of a divorce decree between the parties, the trial court entered a parenting plan granting Nichole primary custody and allowing Wilson visitation of both children. During visitation exchanges, Wilson assaulted Nichole in the presence of the children. During a domestic violence protection order hearing, Nichole presented evidence that both children witnessed multiple acts of domestic violence against Nichole, and they were afraid for her. Nichole did not allege that Wilson assaulted the children. This court wrote, however:

No. 33649-2-III
Rodriguez v. Zavala

In short, there was ample evidence that Wilson caused his children to fear he would assault Nichole. Such fear is indeed psychological harm, as the trial court termed it. It is also domestic violence, and is a statutory basis for an order of protection.

In re Marriage of Stewart, 133 Wn. App. at 551. The court concluded protecting the children under the order was proper.

In the case on appeal, the trial court decided not to include Lazaro as a protected party because Lazaro did not witness the attack. Esmeralda Rodriguez presented no evidence that Lazaro was fearful of harm to his mother. Admittedly such evidence would be difficult to present because of the tender age of Lazaro.

In short, we conclude that the trial court did not abuse its discretion in withholding protection from Lazaro under the domestic violence protection order entered in favor of Esmeralda Rodriguez and her daughters.

Residential Provisions

Esmeralda Rodriguez next argues that the domestic violence prevention act mandates the entry of an order of residential provisions for children in common as part of a hearing on a petition for a domestic violence protection order. Therefore, Rodriguez contends the trial court erred when failing to enter residential placement provisions that also restricted Luis Zavala's contact with the common son, Lazaro. We disagree.

RCW 26.50.060 reads in pertinent part:

- (1) Upon notice and after hearing, the court *may* provide relief as

follows:

....
(d) On the same basis as is provided in chapter 26.09 RCW, the court *shall* make residential provision with regard to minor children of the parties. However, parenting plans as specified in chapter 26.09 RCW shall not be required under this chapter.

(Emphasis added.)

As a general rule, the word “shall,” when used in a statute, is imperative and operates to impose a duty which may be enforced, while the word “may” is permissive only and operates to confer discretion. *Spokane County ex rel. Sullivan v. Glover*, 2 Wn.2d 162, 169, 97 P.2d 628 (1940). Esmeralda Rodriguez argues that the word “shall” in RCW 26.50.060(1)(d) demands that the trial court enter residential provisions any time the protected party and the restrained party have a minor child in common.

In giving effect to the legislature’s intent, we look to the statute’s plain and ordinary meaning, reading the enactment as a whole, harmonizing its provisions by reading them in context with related provisions. *Segura v. Cabrera*, 184 Wn.2d 587, 593, 362 P.3d 1278 (2015); *Quadrant Corp. v. Cent. Puget Sound Growth Mgmt. Hr’gs Bd.*, 154 Wn.2d 224, 238-39, 110 P.3d 1132 (2005). Therefore, we must read subsection (1)(d) of RCW 26.50.060 with the entire statute. The opening line of RCW 26.50.060 grants discretion to the trial court to grant a number of alternatives for relief. Use of the word “may” in RCW 26.50.060(1) confirms the legislature’s grant of discretion to enter

No. 33649-2-III
Rodriguez v. Zavala

one or more of the enumerated versions of relief including entry of residential provisions. The word "shall" in RCW 26.50.060(1)(d) only controls the trial court's decision after exercising discretion to enter a plan with residential provisions. The language of subsection (1)(d) mandates that, if the court chooses to impose residential provisions, the court must follow the requirements of chapter 26.09 RCW.

In short, RCW 26.50.060(1)(d) did not mandate the entry of residential provisions at the request of Esmerelda Rodriguez. The trial court did not violate its discretion in rejecting Rodriguez's request of custody and limitation of visitation rights.

CONCLUSION

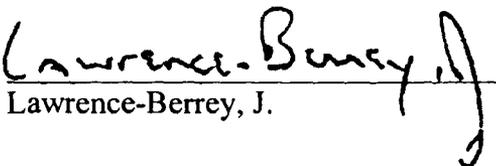
We affirm all rulings of the trial court.

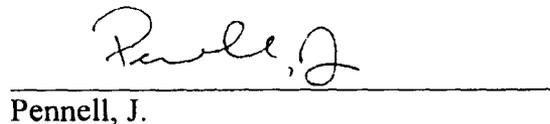
A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.



Fearing, C.J.

WE CONCUR:



Lawrence-Berrey, J.

Pennell, J.