Supreme Court No. 100152-5
(COA No. 81741-8-I)

IN THE SUPREME COURT FOR THE STATE OF WASHINGTON

KATHERINE FRAY OBO E.F.,

Respondent,

v.

Z.C.,

Petitioner.

PETITION FOR REVIEW

JASON B. SAUNDERS
Attorney for Petitioner

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TABLE OF AUTHORITIES

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A. IDENTITY OF PETITIONER.

Petitioner Z.C., the appellant below, asks this Court to review the Court of Appeals decision referred to in Section B.

B. COURT OF APPEALS DECISION.

Pursuant to RAP 13.4 (b), Z.C. seeks review of the Court of Appeal's published decision in *Katherine Fray obo E.F. v. Z.C.*, No. 81471-8-I, slip op. (Division One, August 2, 2021). The opinion was filed on August 2, 2021, and is attached as Appendix A to this petition.

C. ISSUES PRESENTED FOR REVIEW.

1. Under RCW 7.90.020, the petitioner must prove that at the time of sexual intercourse, through her words or conduct, she did not consent to sexual intercourse. In the instant case, the respondent told the petitioner he wanted to have intercourse with her. The petitioner followed the respondent to her bedroom, kissed him, undressed herself first, laid down on the bed first and then guided the respondent's penis into her vagina. At no time during the encounter, did the petitioner through any words or conduct indicate that she did not consent to intercourse. Did the petitioner comply with RCW 7.90.020, by failing to prove that at the time of the sexual encounter, she through her words or conduct let the respondent know the sex was not consensual?

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2. In order to enter a sexual assault protection order, the petitioner must prove that at the time of the sexual encounter, she did not consent to have sex with the respondent. Here, the petitioner testified she did not remember anything from the time the respondent went upstairs due to dissociation. Did the superior court erroneously rely on after the fact text messages to find that the petitioner did not give her consent to the January 28, 2020, sexual encounter?

3. "Nonconsensual" under RCW 7.90.010 (2) means a lack of freely given agreement. This definition harmonizes with the criminal code, which defines consent as "at the time of the act of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse. Here, through her conduct at the time of their sexual intercourse, the petitioner indicated freely given agreement to have intercourse. Did the trial court err in impliedly finding that E.F. must expressly state that she consents through words alone?

4. Consent at the time of a sexual encounter should be viewed at the time of the encounter. Here, E.F. could not recall whether or not she answered Z.C. question about whether she wanted to have sex with him, but the evidence showed she initiated the sexual encounter. Did the Court of Appeals and superior court

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err in ruling that solely post-incident statements are sufficient to find the encounter was nonconsensual?

D. STATEMENT OF THE CASE.

1. Trial facts. The facts are set forth in the Court of Appeals opinion, pages 1-5, and Appellant's Opening Brief ("AOB"), pages 3-28, and are incorporated by reference herein.

2. Argument on appeal. On appeal, Z.C. argued that E.F. failed to allege or prove that the January 28, 2020, sexual encounter was not consensual. AOB 28-40. Z.C. contended E.F. failed to prove facts and circumstances to prove non-consent at the time of the sexual encounter and that solely after-the-fact reporting to others is insufficient to prove a sexual assault in order to obtain a sexual assault protection order. AOB 30-40.

3. The Court of Appeals Decision. The Court of Appeals affirmed the court's finding that Z.C. sexually assaulted E.F. App. A at 1 (Slip Op. at 1). The Court found that substantial evidence supported a finding of nonconsensual sex because E.F. testified that she did not consent to sexual intercourse with Z.C. *Id.* at 7. E.F.'s therapist testified that E.F. had reported to her that she had not consented to the sexual intercourse. *Id.*

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The Court of Appeals ruled that when Z.C. asked E.F. "Are you sure you want to do this?" prior to the intercourse was insufficient to obtain consent, ruling

> there is nothing in the record indicating that E.F. answered the question. Without an answer, Z.C.'s inquiry gives rise to reasonable but competing inferences. A fair-minded person could infer that Z.C. asked this question because it was not his intention to have sexual intercourse with E.F. without her consent. However, and to the contrary, a fair-minded person could instead infer that Z.C. asked this question because he was unsure about whether E.F. wanted to have sexual intercourse based on her words and conduct up to that point.

Id. at 7-8. The Court found that this, "[c]ombined with E.F.'s testimony that she was so shocked and frightened that she was unable to speak," allows a fair-minded person to conclude that E.F. did not answer in the affirmative, did not consent to having sexual intercourse, and did not dispel Z.C.'s doubts. *Id.* at 8.

Lastly, the Court ruled that the trial court had no obligation to find Z.C.'s testimony convincing but did find that E.F. was credible concerning her description of events on January 28. *Id.* The court concluded that substantial evidence supported the trial court's finding that the incident was nonconsensual. *Id.*

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED.

Z.C. argues the issues are appropriate for review by the Court under RAP 13.4 (b), because the decision of the Court of Appeals is in conflict with a published decision of the Court of

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Appeals and the petition involves issues of substantial public interest that must be determined by this Court. RAP 13.4(b)(2) and (4).

THE PETITIONER BELOW FAILED TO ALLEGE OR PROVE THAT THE JANUARY 28, 2020, SEXUAL ENCOUNTER WAS NOT CONSENSUAL, AS REQUIRED UNDER RCW 7.90.020 (1)

1. Under SAPOA, a person sexually assaults another when the petitioner does not give consent through words or conduct. E.F. testified that for the December 10, 2019, encounter she did not want to have sex with Z.C. but she could not say no to him. RP 42. For that encounter the superior court ruled that E.F. was not credible and that E.F. did not establish that the encounter was nonconsensual. RP 65, 66.

The Court of Appeals ruled that E.F. testified that she did not consent to the January 28, 2020, sexual encounter. Slip Op. at 6. But nowhere in the record did E.F. testify that she did not consent. For the January 28, 2020, encounter, E.F. never testified that the encounter was nonconsensual. Instead, she testified that she could not recall what occurred. RP 47.

In fact, the Respondent on appeal argued that RCW 7.90.020 does not require any proof of the existence of nonconsensual sexual conduct or penetration. BOR 17. According to the Respondent, the petition describing the dates and where the

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event took place, what E.F. told her mother the following day was sufficient, even though there are no facts or allegations that indicate nonconsensual sex. While it is true that E.F. reported nonconsensual sex to her therapist the following day, E.F. in no way alerted Z.C. that E.F. did not consent to having sex with him. In fact, it was just the opposite – she initiated the sexual encounter.[1]

But verbal consent is not the only consent a person can give. What also matters during sexual intercourse in terms of consent, is that both participants at the time of the sexual encounter either use words to express consent or through their conduct show each other that they freely agree to having sex. In *Nelson v. Duvall,* the Court of Appeals held that "In order to obtain a sexual assault protection order, the petitioner must allege, and the court must find, that the sexual encounter was "nonconsensual" – in other words, that the petitioner did not give consent. 197 Wn.App. 441, 444, 387 P.3d 1158 (2017).

The *Nelson* Court recognized that "[e]ven though SAPOA was enacted in 2006, there is little case law considering its use and interpretation." *Id.* at 452-53. The Court ruled that because the

[1] The Court of Appeals also erred in ruling that the therapist testified. Slip op. at 7. But E.F.'s therapist never testified. Instead the therapist provided a declaration stating that she was contacted by E.F. the following day, indicating she did not want to have sexual intercourse with Z.C. and that she did not consent to intercourse. CP 116.

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Sexual Assault Protection Act focuses on sexual assault and rape, the terms of the statute must be read in harmony with the "sex offenses" under RCW 9A.44. *Nelson v. Duvall,* 197 Wn.App. at 454, citing *Hallauer v. Spectrum Properties, Inc.,* 143 Wn.2d 126, 146, 18 P.3d 540 (2001) (where statutes relate to the same subject matter they must be construed together). The *Nelson* Court held that because SAPOA and chapter 9A.44 RCW focus on sexual assault and rape their definition of "consent" must be construed together.

Under both RCW 9A.44.010 (7) and RCW 7.90.010 (1), "consent" and "nonconsensual" use the same language:

> In the criminal code, the term "consent" is defined to mean "that at the time of sexual intercourse or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse or sexual contact." RCW 9A.44.010 (7) (emphasis added). In SAPOA, the term "nonconsensual" is defined to mean "a lack of freely given agreement." RCW 7.90.010 (1) (emphasis added).

Nelson, 197 Wn.App. at 454. Accordingly, the focus of "consent" in a SAPOA case rests on evidence of words or conduct to show freely given consent at the time of the sexual encounter under RCW 7.90.010 (1).

In the instant case, the Court of Appeals can point to no evidence that E.F. did not consent to having sex on January 28th. Instead, the Court relied on the fact that Z.C. asked E.F. "Are you

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sure you want to do this?" prior to having intercourse, and when E.F. did not verbally answer the question, there was no consent. Slip Op. at 7. The Court ruled:

> A fair-minded person could infer that Z.C. asked this question because it was not his intention to have sexual intercourse with E.F. without her consent. However, and to the contrary, a fair-minded person could instead infer that Z.C. asked this question because he was unsure about whether E.F. wanted to have sexual intercourse based on her words and conduct up to that point.

Id.

But RCW 7.90.010 (1) does not require express consent. Consent can be shown through conduct as well.[2] Nowhere in the statute or under caselaw is there any requirement that consent must be expressed verbally or in writing. Instead, RCW 7.90.010 (1) requires a "lack of freely given agreement." Here, E.F. gave her consent to sexual intercourse through her actions and conduct.

To be clear, E.F. had no duty to say "No" or "Stop" either. Nor does silence alone equate to "freely given consent." Lastly, there need not be proof of forcible compulsion or that the victim must offer physical resistance. *Id.* But when a party engages in sex willingly, and in fact is the party that initiates sex with the other, that party (here E.F.) consents to having sex.

[2] Black's Law Dictionary defines "implied consent" as "[c]onsent inferred from one's conduct rather than from one's direct expression." BLACK'S LAW DICTIONARY 346 (9th ed. 2009).

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Z.C. asked E.F. whether she wanted to have sex. CP 59; RP 50. Z.C. went upstairs first, and E.F. followed. RP 46, 47, 51, 52. E.F. presented no evidence or testimony that she spoke to Z.C. about not going into her room or in any way tried to prevent him from entering her room. Through her action of following Z.C. into her bedroom, E.F. indicated that she wanted to have sex.

Inside the bedroom, E.F. again demonstrated that she wanted to have sex with Z.C. through her conduct. In the temporary petition as well as the SAPO petition, E.F. stated that inside the bedroom, E.F. and Z.C. kissed, and then E.F. was the first person to undress from the waist down. CP 5, 43; RP 51. E.F. conceded that she undressed herself. RP 47, 48. Z.C. asked E.F., "are you sure you want to do this?" CP 5, 43. Z.C. then disrobed from the waist down. CP 5, 43. Accordingly, through their actions, both E.F. and Z.C. each consented to be naked in E.F.'s bedroom at this point.

Through her conduct, E.F. initiated the sexual encounter and consented to it. After being naked and being asked by Z.C. whether she was sure she wanted to do this, E.F. then laid back on her bed. CP 59; RP 50. Z.C. then laid down on the bed with her. CP 59. E.F. parted her legs and used her hand to guide Z.C.'s penis into her vagina. CP 59; RP 51. Z.C. and E.F. had intercourse for two

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minutes until he ejaculated. CP 59. He did not restrict her in any way, and at no point did E.F. tell him to stop or show any sign of discomfort. *Id.*

2. E.F. had the ability through her words or conduct to let Z.C. know that she did not want to have intercourse, but she never did. E.F. had options available to her to not have a sexual encounter with Z.C. on January 28, 2020. First, her mother was home, and she could have told Z.C. that she did not want to have sex because her mother was home before Z.C. went upstairs. E.F. could ask her mother to tell Z.C. to come downstairs. E.F. could have simply not followed him upstairs. When Z.C. finally would notice that she was not going to go upstairs to join him, that simple action would indicate that she did not want to have sex with him. Any one of these actions would inform Z.C. that she was not going to have sex with him.

In the bedroom, E.F. had the ability to indicate that she did not want to have sex with Z.C. E.F. could have indicated that she did not want to have sex by telling Z.C. “no”, by telling him she was uncomfortable having sex with her mother downstairs, or by telling him to get out of her room. But E.F. did the opposite. She kissed him, undressed herself, laid down on the bed, parted her legs, and guided Z.C.’s penis into her vagina.

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Through her conduct in the bedroom, E.F. initiated the sexual encounter and never indicated in any way that she did not want to have sex. On appeal, E.F. conceded (as she must) that Z.C. never restricted E.F.'s movement during penetration. BOR 7, 8.

The Court of Appeals erred in ruling that E.F.'s testimony that she was frightened and unable to speak and therefore her failure to answer Z.C.'s question of whether she was sure she wanted to have sex with him in the affirmative is sufficient to show she did not consent to having sexual intercourse with Z.C. Slip Op. at 8. As mentioned above, Z.C. did not have to obtain E.F.'s verbal or written agreement to have sex with him. This would create an impossible scenario where a person who initiates sex with another can simply claim that she had not consented and without words agreeing to have sex, the other person would be committing a sexual assault.

E.F. testified that she could not recall whether she answered Z.C.'s question of whether she wanted to go upstairs. RP 50-51. Her very conduct of following him up the stairs shows her willingness to do so. Z.C. testified that E.F. laid down on the bed first and parted her legs. CP 59. E.F. then disrobed herself first, laid down on the bed first, spread her legs and guided Z.C.'s penis into

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her vagina. *Id.* These separate acts are proof that the sexual penetration was consensual through E.F.'s own conduct.

The Court of Appeals erred in ruling that the trial court had no obligation to find Z.C.'s testimony convincing. Slip Op. at 8. Z.C.'s testimony was uncontroverted, as E.F. could not recall what activities took place and could not say that she did not freely engage in sexual activity. CP 131; RP 30.

The trial court did not find Z.C.'s testimony unconvincing or rule that that Z.C. lacked credibility. E.F.'s lack of memory does not negate in any way Z.C.'s testimony. E.F. testified that when Z.C. went upstairs she began to dissociate when he left the couch. RP 46. She did not recall what occurred during the sexual encounter. RP 47. When asked whether she planned to have sex after she undressed herself, E.F. responded that she could not remember. RP 48. E.F. did not know one way or another whether she used her hand to guide his penis into her vagina. CP 131; RP 48. E.F. indicated that although Z.C. said he did not restrict her movement, she "felt overpowered and overwhelmed by him, an older masculine figure on top of me, who was stronger than me." CP 131.

E.F.'s lack of memory does not negate the evidence that the sexual encounter was consensual through her conduct. E.F. never gave Z.C. any indication whatsoever that she did not want to have

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sex. In fact, her actions, as the initiator of the sexual encounter, showed just the opposite. E.F. kissed Z.C.; E.F. was the person who first undressed; she was the first person to lay down on the bed; she was the person who parted her legs; and she was the person who guided Z.C.'s penis into her vagina. These actions show more than consent, they show that E.F. was a willing participant and sexual initiator who invited Z.C. to have sex with her -- not through her words, but through her actions. Through her conduct, E.F. expressed the intercourse was consensual, and at no time did she indicate in any way that Z.C. should stop.

3. When E.F. demonstrated her willingness to have sex through her conduct, Z.C. very reasonably believed the sexual intercourse was consensual. Under both the criminal statute and SAPOA, "consent" must be read in harmony. Although this is not a criminal case, the lowest form of charge for nonconsensual sex, rape in the third degree, requires the State to prove that the victim did not consent to sexual intercourse. RCW 9A.44.060. To convict a defendant for third degree rape, a jury is required to find that not only did the victim not consent, but also that her lack of consent was expressed through words or conduct, in order to protect a perpetrator against the possibility of a reasonable

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misunderstanding. *State v. Mares,* 190 Wn.App. 343, 361 P.3d 158 (2015).

In *Mares,* the Court of Appeals ruled that in reading "RCW 9A.44.060 (1)(a) as a whole, it is clear that the legislature did not intend to criminalize sexual intercourse involving a perpetrator who reasonably but mistakenly believed that the victim was a willing participant." 190 Wn.App. at 353. But where lack of consent is clearly expressed by a victim's words or conduct, any asserted "misunderstanding" by a perpetrator is then unreasonable. *Mares,* 190 Wn.App. at 353-54, citing *State v. Higgins,* 168 Wn.App. 845, 854, 278 P.3d 693 (2012) ("Our focus, and certainly the jury's focus, is more properly on the victim's words and actions rather than [the perpetrator's] subjective assessment of what is being communicated.").

In *Mares,* the Court found sufficient evidence of a lack of consent because the victim had responded to Mares's advances during the time they knew each other by deflecting embraces, pushing his hands away, telling him that what he was doing was wrong, threatening to expose his conduct to her relatives, telling him to leave her room and yelling at him. 190 Wn.App. at 356. Accordingly, the victim informed Mr. Mares that she did not want to have sex with him through her conduct and words.

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Mares best describes how a person could reasonably believe the victim was a willing participant based on her words or conduct. Under SAPOA, the focus is the same. In order to protect Z.C. from reasonably believing E.F. wanted to have sex with him, E.F. must make some indication, however slight, that she did not want to have sex through her words or conduct. *Mares,* 190 Wn.App. at 353-54, citing *State v. Higgins,* 168 Wn.App. at 854.

In a footnote, the Court of Appeals ruled that the *Mares* decision is inapplicable, because the case interpreted former RCW 9A.44.060, proscribing third degree rape until July 28, 2019. Slip. Op. 7, n2. The Court ruled the current statute no longer requires that the victim clearly express a lack of consent by words or conduct. *Id.* But petitioner's argument is not solely that E.F. did not express that she did not want to have sex with Z.C., she in fact initiated the sexual encounter by undressing first, laying down on the bed, spreading her legs and guiding Z.C.'s penis into her vagina. Even if the statute no longer requires the victim to "clearly" express that she did not want to have sex with another, certainly a person who freely initiates the sexual encounter would not be a victim of rape unless, through her words or actions, she revoked her consent at any point during the encounter and the perpetrator continued anyway.

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4. Relaying to others that the encounter was not consensual does not in any way change what Z.C. reasonably believed at the time of the sexual encounter. Following the sexual encounter, Z.C. broke up with E.F. RP 52. Mrs. Fray then took E.F. to Overlake Hospital for a "rape kit exam." CP 6. E.F. told her therapist that she did not want to have sexual intercourse with Z.C. CP 116. E.F. had PTSD and was formerly abused by previous boyfriends. RP 32. This previous trauma was a factor in her lack of recollection and dissociative episode. RP 32.

But even during this aftermath of the sexual encounter and splitting up as a couple, E.F. continued to have friendly emails and texts between the two of them. CP 60. Not until February 11, 2020, did E.F. first say anything about the sexual encounter not being mutual to Z.C. CP 132.

The superior court found that the text message on February 11, 2020, was proof that E.F. did not want sex on January 28, 2020. RP 66-67. But neither the superior court nor the Court of Appeals can point to anywhere in the record that showed a single time on January 28, 2020, that consent was not clearly given. Nowhere in the petitions or testimony of E.F. was there any evidence that through her words or conduct did she indicate in any way that she did not want to have intercourse with Z.C. As the

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initiator of the sexual encounter with Z.C., E.F. showed that she was a willing and active participant in the encounter. The trial court's findings lack any support in the record concerning consent at the time of the sexual encounter.

A Court reviews a superior court's findings for substantial evidence. *In re Knight,* 178 Wn.App. 929, 936, 317 P.3d 1068 (2014), citing *Scott v. Trans-Sys, Inc.,* 148 Wn.2d 701, 707-08, 64 P.3d 1 (2003). Because the record showed no evidence that the sexual encounter was nonconsensual at the time of the incident, the trial court's findings lack substantial evidence. This Court must accept review in order to make clear that a person cannot willingly engage in sexual intercourse and then turn around a day later or weeks later to say that the intercourse was nonconsensual.

The superior court agreed with Z.C. that E.F. had no recollection of whether or not she consented. RP 72. The court erred in concluding that E.R.'s lack of recollection of consenting combined with the text messages 14 days after the sexual encounter "is enough to establish by a preponderance of the evidence that that encounter was not consensual." RP 73. E.F. did not refute Z.C.'s testimony about the sexual encounter, because she had no recollection of the encounter. Z.C.'s testimony about what occurred at the time of the incident was not contradicted by

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E.F. With E.F. initiating the sexual encounter, Z.C. reasonably believed the sexual encounter was consensual. CP 136.

5. This matter is of significant interest, as there is no caselaw on whether a petitioner filing a petition for a sexual assault protection order must allege facts of nonconsensual sex at the time of the sexual encounter, nor is there any caselaw on what a respondent might consider consent. Review of Z.C.'s appeal should be accepted. Under RAP 13.4(b), review is warranted when 1) the decision of the Court of Appeals is in conflict with a decision from this Court; 2) the decision of the Court of Appeals is in conflict with another published decision of the Court of Appeals; 3) the issues raised are significant questions of law under the Washington and Federal Constitutions; and 4) the petition involves issues of substantial public interest that must be determined by the Supreme Court.

First and foremost, this is a case of first impression. The issue presented, whether a SAPO petitioner can obtain a SAPO without any proof whether the sexual encounter was nonconsensual at the time of the encounter, should be decided by this Court. Participants involved in sexual intercourse should not have to fear that without verbal or written consent they may be engaging in a sexual assault if they do not receive written or verbal

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agreement. There is no law requiring such consent, either through statute or through case law.

Secondly, this case conflicts with *Nelson v. Duvall,* wherein the Court recognized that "consent" under SAPOA focused on sexual assault, and therefore the term "consent", must be read in harmony with "sex offenses" under RCW 9A.44. 197 Wn.App. at 454. The Court ruled that under the criminal statute, "consent" is defined to mean that "at the time of the sexual encounter or sexual contact there are actual words or conduct indicating freely given agreement to have sexual intercourse. 197 Wn.App. at 455, citing RCW 9A.44.010(7). Under SAPOA, "nonconsensual" is defined to mean "a lack of freely given agreement." *Id.,* citing RCW 7.90.010.

In Z.C.'s case, the Court of Appeals erred in ruling that substantial evidence was presented to show the sexual encounter was nonconsensual, when the only evidence presented showed that at the time of the sexual encounter, E.F.'s conduct indicated freely given agreement to have sexual intercourse with Z.C. This Court should accept review under RAP 13.4(b)(2).

Lastly, under RAP 13.4(b)(4), review is also warranted because the petition involves an issue of substantial public interest that must be determined by this Court. The *Nelson* Court recognized that although "SAPOA was enacted in 2006, there is

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little case law considering its use and interpretation." Here, the superior court and Court of Appeals rely on the facts that E.F. reported to her therapist after the sexual encounter that the sex was nonconsensual and told Z.C. weeks later the encounter that the encounter was not mutual. A SAPO injures the respondent when a court orders the protection order, because it affects whether or not he will be able to attend college, his job opportunities and his ability to get housing with such a court record. This Court should accept review to provide guidance to superior courts as to whether a petitioner can obtain a SAPO without expressing non-consent to sex through spoken or written words or through their actions indicating non-consent at the time of the encounter.

F. CONCLUSION.

For the reasons stated above, Z.C. respectfully requests this Court grant his petition for review and reverse the trial court and Court of Appeals rulings.

Undersigned counsel hereby certifies that this brief contains 4,576 words and is thus in compliance with RAP 18.17.

DATED this 31st day of August, 2021.

Respectfully submitted,

JASON B. SAUNDERS (24963)
GORDON & SAUNDERS, PLLC
Attorney for Petitioner

CERTIFICATE OF SERVICE

I, Robert J. Gross, state that on the 31st Day of August, 2021, I caused the original **Petition for Review** to be filed in the **Washington State Supreme Court** and a true copy of the same to be served on the following in the manner indicated below:

Sungeun Julie Kim and Jesse Owen Franklin IV Schlemlein Fick & Franklin, PLLC 66 S Hanford St Ste 300 Seattle, WA 98134-1867	( ) U.S. Mail ( ) Hand Delivery (X) CoA Efiling System ( ) Email ( ) _____

I certify under penalty of perjury of the laws of the State of Washington the foregoing is true and correct.

Name: _____ Date: 8/31/2021

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APPENDIX A

FILED
8/2/2021
Court of Appeals
Division I
State of Washington

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

KATHERINE FRAY obo E.F., Respondent, v. Z.C., Appellant.	DIVISION ONE No. 81741-8-I UNPUBLISHED OPINION

DWYER, J. — Z.C. appeals from a sexual assault protection order entered against him. Z.C. contends that the trial court erred by making a factual finding that he sexually assaulted E.F. Because substantial evidence supports the trial court's finding, we affirm.

I

Fifteen-year old E.F. and sixteen-year-old Z.C. dated from November 2019 through January 2020. During this period, two sexual encounters occurred. According to E.F., both were sexual assaults. According to Z.C., both were consensual.

On December 10, 2019, Z.C. and E.F. were at E.F.'s home. According to Z.C., E.F. led him upstairs to her bedroom where they undressed themselves and engaged in sexual intercourse. Z.C. heard the garage door open, indicating that E.F.'s mother had arrived home. The teens stopped sexual contact, went downstairs, and spent the rest of the afternoon in E.F.'s living room. E.F. testified that on December 10 she did not want to have intercourse with Z.C. But

she concedes that she did not say anything to "indicate to him that this was not something [she] wanted." Later that evening, E.F. and Z.C. had the following exchange via text message:

> E.F: Wow today was like
> E.F: Wow
> Z.C: Yeah it was
> . . .
> E.F.: I love you
> Z.C.: I love you too babe
> Z.C.: How are you feeling?
> E.F.: I'm feeling pretty HAPPY

E.F. testified that when she texted "Wow," she "meant it in a negative-like way because [she] was not happy with [herself]." In reference to her text message stating that she was "feeling pretty HAPPY," E.F. testified that she was happy that her father had driven her to school that morning.

On January 28, 2020, Z.C. and E.F. were in E.F.'s living room. According to E.F, Z.C. told her that "I just want to stick it in you once" before going upstairs. E.F. testified that she began having a dissociative episode. E.F. followed Z.C. upstairs and into her bedroom in her dissociative state and they each undressed. E.F. testified that the next thing she remembered was looking down at herself and seeing semen seeping out of her vagina, while Z.C. quickly got up from on top of her and left the room. E.F. also stated that she believes that prior to intercourse, Z.C. asked "Are you sure that you want to do this?" But she did not remember if or how she responded. E.F. testified that she felt overpowered and overwhelmed, and was unable to speak because she was in shock and "extremely fearful."

Z.C. testified to a somewhat different course of events. According to Z.C., before they went upstairs, E.F. and Z.C. were kissing and "touching each other sexually." Z.C. asked E.F. if she wanted to have sex, and E.F. replied that she could not do so because her mother was in the next room. E.F. then led Z.C. to an upstairs bathroom, where she performed oral sex on Z.C.[1] Afterward, E.F. and Z.C. went to E.F.'s bedroom, where they undressed and lay down on E.F.'s bed. E.F. guided Z.C.'s penis into her vagina, and they engaged in brief sexual intercourse before Z.C. ejaculated. Later that evening, Z.C. ended his relationship with E.F. by means of the following exchange of text messages:

Z.C.: hey
E.F.: hey
Z.C.: i'm sorry
Z.C.: idk,
E.F.: why babe
Z.C.: i shouldn't of done what i did
E.F.: are you mad at me tho?
Z.C.: with someone i don't love
Z.C.: no
Z.C.: i'm mad at me
Z.C.: like i hate myself rn
E.F.: i don't know what to say
Z.C.: same
Z.C.: …
Z.C.: i shouldn't of done that I'm sorry
Z.C.: it's nothing you did
Z.C.: your perfect
Z.C.: pretty, and smart
E.F.: yea…
Z.C.: i don't want to hurt you
Z.C.: I'm sorry
E.F.: what are you saying?
Z.C.: …
Z.C.: after we like, you know
Z.C.: it made me feel like sick to the core, like i shouldn't be doing that with you

[1] E.F. denies that fellatio took place and the alleged act of fellatio was not relied upon by the trial court to support the order entered.

> Z.C.: like i wanted it but, idk…i am naïve
> Z.C.: i just don't feel the same with you as I did a few months ago, like after we did it for the first time…idk everything changed

The following day, E.F. told her mother that Z.C. had sexually assaulted her. E.F. and Z.C. exchanged text messages conversationally in early February. At approximately 1:00 a.m. on February 11, after a conversation in which E.F. and Z.C. had each accused the other of "using" one another, they had the following discussion via text message:

> Z.C.: what we did, was it mutual?
> E.F.: no it wasn't mutual…please stop playing victim, you're the one who used me, also I'm not going to talk to you in person because this is finished, and there's no negotiating anything at all. I don't want anything to do with you, and i think that you should leave me alone from here on out for good, and that it's best to part ways and to avoid each other. i don't feel comfortable or have the want to be your friend or even in your life, and you need to just move on and i please leave me alone. i don't think there should be any more "talking" about any of this just over text. if you want to further talking about it i want an adult present in the room. i don't feel comfortable talking to you just alone. because if feel like you used me.
> Z.C.: i don't think you fully understand my side of the situation here…I'm not trying to play a victim here…you hurt me with all the talk behind my back…i didn't want to break up with you before the dance i was just hesitant because of what happened last year. if you want to move on then I'm fine with that, i want to move on as well, i never used you, i understand the timing was terrible and i am sincerely sorry for that.
> E.F.: look, I never talked anything behind your back and I have no idea what you're even talking about, so don't even put this on me. but I don't bother to even know so don't care to explain it to me. I'm glad you agree about moving on. So this is goodbye, don't ever approach me or talk to me again in person or over text please, and keep my name out of your mouth, and I'm not trying to be mean, I'm saying that to get this across to you. You deserve to be sorry for what you did to me. And I don't want you to ever associate with me ever again. So goodbye [Z.C.]
> Z.C.: [E.F.], I'm sorry about that, I was angry and I let my emotions get the best of me. I shouldn't of blamed you and I shouldn't have been angry and toxic toward you. I want you to understand that I never, never ever wanted you to feel like I used you. It never

> passed my mind that I would use you for that purpose. I can't possibly understand how much you must be hurt right now. I really want to tell you how stupid and how much of a jerk I was toward you. I thought we both wanted it that night and if I hurt you in any way, physically or mentally I take full responsibility. I know you hate me and you are entitled to that. I agree, we should take a long time apart and not intervene with each others life's. I am sorry. ~ [Z.C.]

Z.C. testified that he asked E.F. "was it mutual?" because he had heard a rumor around school that the encounter was not consensual.

On May 15, 2020, E.F.'s mother filed a petition for a sexual assault protection order on her daughter's behalf. The petition alleged that, since being sexually assaulted, E.F. has experienced flashbacks, panic attacks, and suicidal ideation, and that the sexual assault triggered posttraumatic stress disorder from another time in E.F.'s life. E.F.'s therapist, Spring Hecht, testified in a declaration. Hecht began treating E.F. in June 2019, prior to the incidents at issue. On January 29, E.F. contacted Hecht and expressed that she was "feeling 'stressed out' (fear/anxiety/shame) because she had intercourse with a boy from school named, [Z.C.]" and that she had not consented to intercourse. Hecht also testified that E.F. felt embarrassed to tell her parents, worried about the possibility of pregnancy, and that E.F. reported experiencing an anxiety attack at school.

The trial court found that E.F. was not credible with respect to the incident on December 10, 2019, and that she had failed to prove that the sexual encounter on that date was nonconsensual. However, the trial court found that the incident on January 28, 2020 was nonconsensual sexual conduct, and granted a sexual assault protection order.

Z.C. appeals.

II

Z.C. contends that the trial court erred by finding that the sexual encounter on January 28, 2020, was nonconsensual. Because substantial evidence supports the trial court's finding, we disagree.

When a superior court makes findings of fact, those findings are verities on appeal when they are supported by substantial evidence. Cowiche Canyon Conservancy v. Bosley, 118 Wn.2d 801, 819, 828 P.2d 549 (1992). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." Holland v. Boeing Co., 90 Wn.2d 384, 390-91, 583 P.2d 621 (1978).

"Where there is conflicting evidence, it is not the role of the appellate court to weigh and evaluate the evidence." Burnside v. Simpson Paper Co., 66 Wn. App. 510, 526, 832 P.2d 537 (1992), aff'd, 123 Wn.2d 93, 864 P.2d 937 (1994). Rather, our "role is simply to determine whether substantial evidence supports the findings of fact and, if so, 'whether the findings in turn support the trial court's conclusions of law.'" In re Marriage of Greene, 97 Wn. App. 708, 714, 986 P.2d 144 (1999) (quoting Org. to Preserve Agric. Lands v. Adams County, 128 Wn.2d 869, 882, 913 P.2d 793 (1996)). "Questions of credibility are left to the trier of fact and will not be overturned on appeal." State v. Boot, 89 Wn. App. 780, 791, 950 P.2d 964 (1998). Moreover, in conducting our review, we view the evidence in the light most favorable to the prevailing party. Scott's Excavating Vancouver, LLC v. Winlock Props., LLC, 176 Wn. App. 335, 342, 308 P.3d 791 (2013).

Z.C. asserts that the only evidence presented that E.F. did not consent to the sexual encounter on January 28 was her text message several weeks later saying "no it wasn't mutual." But even if we accept Z.C.'s argument that E.F.'s text message after the fact is insufficient to prove that E.F. did not consent to the sexual encounter,[2] Z.C. is incorrect about the content of the trial court record.

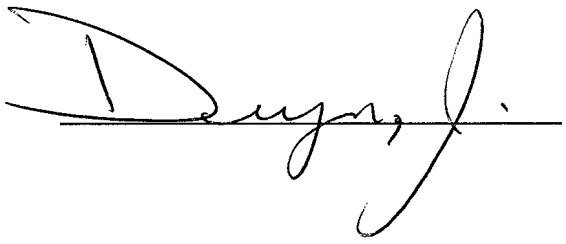
E.F. testified that she did not consent to sexual intercourse with Z.C. E.F.'s therapist testified that E.F. reported to her that she had not consented to sexual intercourse with Z.C. On appeal, Z.C. argues that testimony that he asked E.F. "Are you sure that you want to do this?" prior to intercourse indicates that E.F. did consent. However, there is nothing in the record indicating that E.F. answered the question. Without an answer, Z.C.'s inquiry gives rise to reasonable but competing inferences. A fair-minded person could infer that Z.C. asked this question because it was not his intention to have sexual intercourse with E.F. without her consent. However, and to the contrary, a fair-minded person could instead infer that Z.C. asked this question because he was unsure about whether E.F. wanted to have sexual intercourse based on her words and

[2] Z.C. avers that the trial court erred when it "erroneously focused on words expressed weeks after the sexual encounter rather than focus on whether at the time of the sexual encounter, E.F. through her words or conduct expressed to Z.C. at any time her lack of consent during the sexual encounter." Br. of Appellant at 32. According to Z.C., our decision in State v. Duarte Mares, 190 Wn. App. 343, 361 P.3d 158 (2015), requires evidence that E.F. clearly expressed her nonconsent at the time of the encounter through her words and conduct. Not so. Duarte Mares interprets the former RCW 9A.44.060, which proscribed rape in the third degree until July 28, 2019. See Duarte Mares, 190 Wn. App. at 353. The current statute proscribing rape in the third degree, which was in effect at the time of the events in this opinion, does not require that the victim clearly express a lack of consent by words or conduct. RCW 9A.44.060 ("A person is guilty of rape in the third degree when, under circumstances not constituting rape in the first or second degrees, such person engages in sexual intercourse with another person: (a) where the victim did not consent as defined in RCW 9A.44.010(7), to sexual intercourse with the perpetrator."). Accordingly, even assuming (without announcing) that a "nonconsensual sexual assault," as defined by the Sexual Assault Protection Order Act, chapter 7.90 RCW, is limited to acts that are codified as sex offenses under chapter 9A.44 RCW, Duarte Mares is inapplicable.

conduct up to that point. Combined with E.F.'s testimony that she was so shocked and frightened that she was unable to speak, a fair-minded person could conclude that E.F. did not answer in the affirmative, did not consent to having sexual intercourse with Z.C., and did not dispel Z.C.'s doubts. When inferences from the evidence conflict, we will not reassign the weight given to the evidence by the fact finder. Burnside, 66 Wn. App. at 526.

Moreover, the trial court was under no obligation to find Z.C.'s testimony convincing. The veracity of both Z.C. and E.F.'s testimony is a credibility determination. Here, the trial court determined that E.F. was not credible with regard to the incident on December 10, but was credible as to her description of events on January 28. It was entitled to do so. Accordingly, substantial evidence supports the trial court's finding that the incident on January 28 was nonconsensual.

Affirmed.



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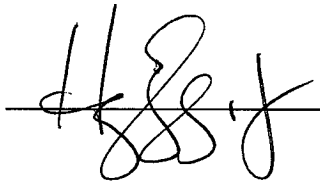

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