73337-1

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Court of Appeals
Division I
State of Washington

No. 73337-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

MR

Appellant,

vs.

MD

Respondent.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE DOUGLASS NORTH

BRIEF OF RESPONDENT

SMITH GOODFRIEND, P.S.

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TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

I. INTRODUCTION

The Sexual Assault Protection Order Act, RCW ch. 7.90, authorizes courts to issue protection orders prohibiting sexual assailants from contacting their victims. As a predicate for obtaining a sexual assault protection order (SAPO), the petitioner must establish both that a sexual assault occurred and "a reasonable fear of future dangerous acts," based on "specific statements or actions made at the same time of the sexual assault or subsequently thereafter." RCW 7.90.020(1).

Here, the trial court properly declined to issue a SAPO because appellant MR[1] alleged only that a sexual assault had occurred and did not allege, let alone prove, specific statements or actions that created a reasonable fear of *future* dangerous acts. It was undisputed that respondent MD made no attempt to contact MR in the nine months between the parties' sexual encounter (the parties dispute whether it was consensual) and the hearing on MR's SAPO petition. Where, as here, the petitioner did not allege or prove specific statements or actions that made her reasonably fearful of future dangerous acts, and undisputed evidence

[1] Given the posting of appellate court briefs on an unsecured website that is not an official court record, this brief uses initials to protect the parties' privacy.

establishes the respondent has not and will not contact her, a SAPO should not be issued. This Court should affirm.

II. RESTATEMENT OF ISSUES

1. RCW 7.90.020(1) requires a SAPO petitioner to allege both that 1) a sexual assault occurred and 2) "specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought." Here, MR alleged only that a sexual assault occurred, without alleging any specific statements or actions that gave rise to a reasonable fear of future dangerous acts. Did the trial court correctly dismiss MR's petition for a SAPO because MR had not established both elements required by the statute?

2. Proceedings under RCW ch. 7.90 are not governed by the Civil Rules or Rules of Evidence. Does a trial court have discretion to deny a SAPO petition without the full testimony of both parties when the petition is deficient on its face and no additional testimony could change the undisputed fact that the respondent made no attempt to contact the petitioner in the nine months since the alleged assault?

3. A commissioner issued a temporary SAPO restraining MD at an ex parte hearing of which MD was provided no notice,

and at which he had no opportunity to be heard before the temporary SAPO was entered. Does a trial court presiding over a hearing for a permanent SAPO have the power to review the sufficiency of the petition or is it bound by the ex parte court's determination of sufficiency at an ex parte, uncontested hearing held without notice to the respondent?

4. MD has transferred to an out-of-state university, and this appeal will likely be finally resolved after the SAPO MR sought would have expired. Should this Court affirm because MR's appeal will be moot?

III. RESTATEMENT OF FACTS

A. MR and MD, both freshmen at the University of Washington, engaged in sex acts in May 2014. When MR accused MD of sexual assault four months later, the King County prosecutor declined to file any charges after a full investigation.

In the early morning hours of May 9, 2014, MR invited MD to her residence hall at the University of Washington. (CP 4; RP 18) MR and MD, both freshmen at UW, had met earlier that night at a party, where they drank, kissed, and exchanged phone numbers. (CP 4; RP 15-17, 19) Because MR's dorm room was occupied when

MD arrived, MR led him to an unoccupied restroom where they engaged in various sex acts. (RP 18-19; CP 4, 33-34)[2]

Four months later, on September 10, 2014, MR went to the UW police and accused MD of sexually assaulting her the previous spring. (CP 34) The police conducted a weeks-long investigation, interviewing many individuals.[3] (CP 34) The results of the investigation were given to the King County Prosecutor's Sexual Assault Unit. (CP 34) The prosecutor declined to file any charges against MD, finding MR's allegations were undermined by "both the lengthy delay in report as well as her equivocation between rejection and acquiescence." (CP 45, 80-81; *see* Report of Prosecutor Declining to File Any Criminal Charge, No. 14-002408)

MR then filed a complaint with the UW Office of Community Standards and Student Conduct (CSSC), which is responsible for

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[2] MD cites in part to his motion to dismiss MR's SAPO petition to support his factual assertions. Because the trial court granted MD's motion to dismiss, the hearing on the petition concluded before he could testify. Had MD testified, he would have denied MR's accusations. MD's reliance on his motion to dismiss is consistent with the informal nature of SAPO proceedings. *See* ER 1101(c)(4) (rules of evidence do not apply to SAPO proceedings).

[3] For example, the police interviewed the janitor who the next day cleaned the restroom where the parties' sexual encounter occurred, because MR claimed the assault left a "puddle of blood the size of a basketball hoop" on the restroom floor. The janitor had seen no blood. (RP 21; CP 4, 34)

prosecuting sexual misconduct complaints involving UW students. (CP 35) Based on MR's allegations, and without notifying MD, the CSSC on September 26, 2014, issued an order prohibiting either party from contacting the other. (CP 35, 48) MD never violated that order. (CP 35, 48)

B. After eight months, during which MD never attempted to contact her, MR sought a SAPO in January 2015.

On January 14, 2015, MR, through counsel, filed a petition for a SAPO under RCW ch. 7.90. (CP 1-5) MR's petition repeated her allegation that MD had sexually assaulted her. (CP 4) Without providing any specifics, MR alleged that she had "encountered the respondent several times on campus," that MR and MD "have mutual friends and can end up in [the] same places and similar areas of campus," and that, because she "did not know [him]," MR did "not know what [MD] is capable of." (CP 4)

The same day, a King County Court Commissioner issued a temporary order, ex parte, restraining MD from contacting MR, and set a hearing for January 27, 2015, to determine whether to issue a final SAPO. (RP 5; CP 6-8) At the hearing on the temporary order, MR stated the "reason for the protection order" was that the UW CSSC process had "been taking several months." (RP 5; *see also* RP

63) Even though RCW 7.90.020(1) requires that "[p]etitioner and respondent shall disclose the existence of any other litigation or of any other restraining, protection, or no-contact orders between the parties," MR did not tell the Commissioner at the hearing that CSSC had issued a no-contact order, or inform the Commissioner that MD had never violated that order. (RP 4-11)

MD was not given notice of this ex parte hearing, and as a consequence did not appear at the hearing. He found out about the temporary SAPO, and MR's request for a permanent SAPO, when two police officers served the temporary SAPO on him the next day while he was in class at the UW. (CP 12)

On January 27, 2015, the temporary order was reissued and the hearing on whether to issue a final order was continued to February 10, 2015. (CP 14) On February 6, 2015, MR filed – but did not provide to MD or his counsel – eight declarations from friends in support of her petition. (CP 15-31; RP 23-26)

These new declarations recounted several chance encounters between MR and MD, on or near the UW campus. (*See, e.g.*, CP 16,

19, 23, 27, 30)[4] In each recounted instance, there is no claim that MD made any attempt to interact with MR, or that they even spoke. The most significant encounter was one in which MR "walked past [MD] and thought they made eye contact." (CP 23) Two of the encounters occurred when MR attended a social function despite knowing that MD was actively involved with the organization sponsoring the function. (CP 16, 19, 48)

MR testified at the February 10, 2015 hearing. (RP 14-23) When MR began relying in her testimony on the undisclosed declarations, MD objected and asked for a continuance so he could review the declarations. (RP 23-25) The temporary order was once again extended and the hearing continued to February 20, 2015. (RP 37-38, 45; CP 32)

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[4] None of the declarants set out any "statements or actions" by MD that could have put MR in reasonable fear of future dangerous acts. Instead, the declarants largely repeated what MR told them had occurred and "vouched" for her character. At the same time, the declarations of these third parties, none of whom had any personal knowledge of the claimed assault, also contained new allegations that MD had penetrated MR with his penis and forced her to engage in mutual oral sex – allegations MR herself had never made, either in her petition or police report. (CP 16, 18-19, 22) The declarations also claimed that MR's police report was prompted by her participation in summer 2014 in Eye Movement Desensitization and Reprocessing (EMDR) therapy, which she claimed allowed her to "recall what happened that night despite her intoxication." (CP 16, 18)

C. The trial court denied MR's request for a final SAPO because she failed to establish "a reasonable fear of future dangerous acts" based on "specific statements or actions," as required by RCW 7.90.020(1).

On February 17, 2015, MD moved to dismiss MR's petition for a final SAPO. (CP 33-43) MD argued that MR's petition should be dismissed because she did not allege in her petition or provide any evidence of "specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought," as required by RCW 7.90.020(1). (CP 42-43)[5]

King County Superior Court Judge Douglass North ("the trial court") presided over the hearing on February 20, 2015, to decide whether a final SAPO should be entered against MD. (RP 1, 48) Quoting RCW 7.90.020(1), the trial court asked MR what "statements or actions made at the same time of the sexual assault or subsequently thereafter" established "a reasonable fear of future dangerous acts, for which relief is sought," in light of the

[5] MD also argued that MR's claimed memories of the assault were inadmissible because they were recovered through EMDR therapy, a controversial therapy capable of implanting non-existent memories. (CP 39-40, 49-51, 57-60) At a minimum, MD argued that he should be allowed to discover the therapy records reflecting the "recovery" of MR's memories. (CP 39-41, 49-51, 57-60) The trial court did not rule on these arguments.

undisputed evidence that in the nine months since the alleged assault MD had not made any attempts to contact her. (RP 64-67) MR relied on the allegation in her petition and declarations that she and MD "can end up in the same place and similar areas of the campus," but conceded that MD was not "intentionally . . . in those areas." (RP 62-63) MR also argued that the assault alone, coupled with the fact that she did not know MD or "what he is capable of," established a reasonable fear of future dangerous acts. (RP 65-66)

The trial court granted MD's motion, denied MR's petition for a final SAPO, and allowed the temporary order to expire. (RP 76; CP 97-99) The trial court found that MR's allegations that she had "run into" MD (without interacting with him) and that she did not know "what he is capable of" did not meet the statute's requirement that she establish specific "statements or actions which give rise to a reasonable fear of future dangerous acts to which relief is sought." (RP 77; CP 98: "The Petitioner failed to establish that she had any reasonable fear of future dangerous acts from the Respondent")

The trial court reasoned, in part, that "the primary purpose of this act . . . . the whole point of a sexual assault protection order . . . is to protect from a future contact," and that MR had not

submitted any facts that showed MD would attempt to contact her. (RP 76-77) The trial court emphasized that its decision was based on the "unique" and "peculiar facts of this case," including that "eight months have gone by [and] there's been absolutely no attempt by [MD] to try to contact her in any way." (RP 77-78)

The trial court denied MR's motion for reconsideration. (CP 102-13, 118) MR appeals. (CP 119-20)

IV. RESPONSE ARGUMENT

A. The trial court correctly denied a final SAPO after finding that MR did not allege or prove specific statements or acts that made her reasonably fearful of future dangerous acts.

Appellant – not the trial court – confuses the language, purpose, and function of RCW ch. 7.90. The statute's unequivocal purpose is to create a mechanism for requiring assailants to stay away from sexual assault victims. To obtain that remedy, the Legislature requires a petitioner to prove that a SAPO is needed, by establishing both a sexual assault and "specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts, for which relief is sought." RCW 7.90.020(1). The trial court correctly found that MR did not allege or prove specific statements or actions that created a reasonable fear of future dangerous acts,

particularly in light of MR's admission that she sought a SAPO not because she feared MD, but because she was dissatisfied with how long the CSSC proceedings were taking.

1. RCW ch. 7.90 authorizes protection orders only when a petitioner alleges a sexual assault *and* specific statements or actions creating a reasonable fear of future dangerous acts.

The Legislature enacted the Sexual Assault Protection Order Act, RCW ch. 7.90, in 2006. Laws of 2006, ch. 138. The SAPO Act created "a civil remedy requiring that the offender stay away from the victim," giving victims of sexual assault "safety and protection from future interactions with the offender." RCW 7.90.005. The persistent focus of RCW ch. 7.90 is on preventing future interaction between the parties. *See, e.g.*, RCW 7.90.090(2)(a) ("The Court may provide *relief* as follows . . . [r]estrain the respondent from having any contact . . ."") (emphasis added); RCW 7.90.020(1) (petitioner must allege specific statements or actions creating "a reasonable fear of *future* dangerous acts, *for which relief is sought*") (emphasis added); RCW 7.90.130(1) ("Any sexual assault protection order shall describe each *remedy* granted by the court") (emphasis added). An individual against whom a SAPO is issued is entered into the State's criminal database; violation of a SAPO is a gross misdemeanor. RCW 7.90.160; RCW 26.50.110(1)(a).

The remedy provided by RCW ch. 7.90 was intended to fill a gap in the statutes authorizing protection orders. The Domestic Violence Prevention Act provided protection for victims of domestic violence, but not for victims of sexual assault by someone not a family or household member. RCW 26.50.010(1). Other statutes protected victims of harassment or stalking falling short of sexual assault. RCW 10.14.040; RCW 7.92.030. The Legislature enacted RCW ch. 7.90 to protect victims of sexual assault from future contact with someone who is not a household or family member. *See* Final Bill Report SHB 2576 (2006) ("Although there is potential overlap, the [protection] orders generally differ in who they apply to and in what context.").

RCW 7.90.020(1) sets out two elements a petitioner must establish before a court may issue a SAPO. A SAPO petition "shall allege" 1) that a sexual assault occurred, and 2) "specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts":

> A petition for relief shall allege the existence of nonconsensual sexual conduct or nonconsensual sexual penetration, **and** shall be accompanied by an affidavit made under oath stating the specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give

> rise to a reasonable fear of future dangerous acts, for which relief is sought. . . .

RCW 7.90.020(1) (emphasis added). Contrary to MR's assertion that establishing an alleged sexual assault is the "one and only" element required for entry of a SAPO (App. Br. 25), this plain language requires a petitioner to establish *both* that a sexual assault occurred and that future protection is needed because something the respondent said or did, at the time of the alleged assault or afterwards, has made the petitioner reasonably fearful of future dangerous acts.

"When interpreting a statute, the court first looks to its plain language." *Pac. Cont'l Bank v. Soundview 90, LLC*, 167 Wn. App. 373, 382, ¶ 15, 273 P.3d 1009, *rev. denied*, 175 Wn.2d 1018 (2012). "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous." *Whatcom Cty. v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996) (cited App. Br. 8). Making an alleged sexual assault the only element required for entry of a SAPO would render meaningless the statute's requirement that a petitioner allege "specific statements or actions made at the same time of the sexual assault or subsequently thereafter, which give rise to a reasonable fear of future dangerous acts." RCW 7.90.020(1).

Allowing a petitioner to establish a reasonable fear of future dangerous acts by relying on allegations of assault alone also would make the second element of a SAPO petition redundant of the first, which already requires a petitioner to allege a sexual assault. *City of Bellevue v. Lorang*, 140 Wn.2d 19, 25, 992 P.2d 496 (2000) (courts avoid interpretations of statutory language that renders parts of the statute redundant). That the statute allows petitioners to allege statements or actions that occurred "subsequently thereafter" the assault as a basis for a reasonable fear of future dangerous acts proves that the assault itself is not the "one and only" requirement for a SAPO.

The statute's requirement that a petitioner establish specific statements or actions creating a reasonable fear is not, as MR contends, an impossible burden that would mean "virtually no victims of a sexual assault could qualify for a SAPO." (App. Br. 43) For example, a petitioner might allege that the respondent threatened her if she reports the assault, or threatened her after she reported the assault. Or the petitioner might allege that the respondent has purposefully contacted her after the assault. MR also is wrong in asserting that this interpretation of the statute would leave a victim of "flashing" without any protection. (App Br.

41) A trial court could easily find that a man who exposed himself to a woman on more than one occasion had engaged in specific actions that created a reasonable fear of future dangerous acts. *See also* RCW 10.14.040 (anti-harassment petition); RCW 7.92.030 (anti-stalking petition). But the statute does not permit a petitioner to seek, as MR did below (and does again on appeal), a SAPO based solely on allegations of sexual assault.

2. The statute's requirement that a petitioner allege specific statements or actions giving rise to a reasonable fear of future dangerous acts ensures SAPOs are issued only when needed.

The Legislature (sensibly) required a petitioner to establish a need for a SAPO by proving that something the respondent had said or done has made the petitioner reasonably fearful of *future* dangerous acts. The purpose of RCW ch. 7.90 is to provide a civil remedy requiring the respondent to stay away from the petitioner to protect "from *future* interactions with the offender." RCW 7.90.005 (emphasis added); *see also* App. Br. 26-27 (purpose of the Act is "to give victims of sexual assault a legal mechanism to enforce their desire to avoid any contact with their assailants"). The purpose of RCW ch. 7.90 is not to adjudicate allegations of sexual assault (in a

forum with greatly relaxed evidentiary rules),[6] nor to provide monetary compensation. RCW 7.90.090(5) ("Monetary damages are not recoverable as a remedy."). Where a petitioner does not demonstrate a need for the single remedy the SAPO Act provides – an order prohibiting future interaction with the petitioner – the Act simply does not apply.

Case law confirms that a protection order should be employed "when the facts require it;" that is, when a petitioner establishes specific statements or acts that create a reasonable fear of future dangerous acts. *Freeman v. Freeman*, 169 Wn.2d 664, 674, ¶ 21, 239 P.3d 557 (2010). In *Freeman*, the Supreme Court reversed the trial court's refusal to lift a protection order issued under the Domestic Violence Prevention Act, RCW ch. 26.50, reasoning that "time and distance" (the respondent lived in another

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[6] Neither the Civil Rules nor the Rules of Evidence apply to SAPO proceedings. (*See* § IV.B, *infra* at 27-28) This case demonstrates the risks of adjudicating such a serious accusation as sexual assault – including branding the respondent a rapist, registering respondent in a criminal database, and making any contact between the parties, regardless of respondent's intention, a gross misdemeanor – without the protections of trial. MR sought to establish the assault not with physical evidence (which the police found nonexistent), but with "testimony" from herself and from eight friends, none of whom witnessed the alleged assault. Her friends' testimony repeating what MR told them occurred (recitals inconsistent with her petition and police report) and "vouching" for her character would have been inadmissible in a trial of any other civil (much less criminal) action. *See* ER 404, 802.

state and had not contacted the petitioner for ten years) established there was not a continuing need for the protection order, because there was not a "[r]easonable likelihood of imminent harm." 169 Wn.2d at 674, ¶ 21.[7]

As *Freeman* recognized, the cases cited by MR confirm that protection orders should be issued only where the petitioner demonstrates a need for one. 169 Wn.2d at 674-75, ¶ 22 (citing *Barber v. Barber,* 136 Wn. App. 512, 150 P.3d 124 (2007), and *Spence v. Kaminski,* 103 Wn. App. 325, 12 P.3d 1030 (2000))[8] (App. Br. 32-33). In those cases, the Court of Appeals affirmed trial court decisions to issue domestic violence protection orders because the petitioner established a need for protection, *i.e.*, "showed a

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[7] The Legislature amended RCW 26.50.130 to reject language in *Freeman* requiring a petitioner to prove "he or she has a current reasonable fear of imminent harm by the respondent" to prevent lifting of a protection order that was initially entered for more than two years. *See* Laws of 2011, ch. 137. But the Legislature did not eliminate the requirement that a petitioner establish "fear of imminent physical harm" in the initial petition. RCW 26.50.010(1). Nor did it alter *Freeman's* holding that a DVPO should remain in place only if a reasonable present likelihood of violence exists – confirming that both time and distance remain relevant factors for that determination. *See* RCW 26.50.130(3)(c)(i)-(ii), (viii) (directing court to consider respondent's actions and whether he has relocated since entry of a DVPO).

[8] *Spence* is a decision of the Court of Appeals, not of the Supreme Court as MR asserts. (App. Br. 32) The appellate court there did not give "great deference" to "the petitioner's expression of fear," as appellant argues – instead, it deferred to the trial court's findings regarding that fear.

reasonable present likelihood of violence." *Freeman*, 169 Wn.2d at 675, ¶ 22; *Spence*, 103 Wn. App. at 332 (DVPO was "based on a demonstrated need to protect Ms. Spence from domestic violence"); *see also Muma v. Muma*, 115 Wn. App. 1, 6, 60 P.3d 592 (2002) (respondent contacting petitioner "in direct violation of the parenting plan's requirements" established a "current fear"), *rev. denied*, 149 Wn.2d 1029 (2003) (App. Br. 32-33).[9]

MR's reliance on cases interpreting RCW ch. 26.50 also ignores an important distinction between SAPOs and DVPOs. By definition, domestic violence arises in the context of an established relationship. RCW 26.50.010(1) (defining domestic violence as "between family or household members"). Thus, establishing the existence of domestic violence also establishes the likelihood of future contact. In contrast, a SAPO petitioner does not have an existing relationship with the respondent, and thus the Legislature

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[9] Other protection order statutes likewise require the petitioner to establish a need for the order. *See, e.g.*, RCW 10.14.040 (anti-harassment petition "shall allege the existence of harassment and shall be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought"); RCW 7.92.030 (stalking petition "shall allege the existence of stalking conduct and shall be accompanied by an affidavit made under oath stating the specific reasons that have caused the petitioner to become reasonably fearful that the respondent intends to injure the petitioner or another person, or the petitioner's property or the property of another").

reasonably required a SAPO petitioner to establish specific acts or statements by the respondent that create a reasonable fear of future dangerous acts, thus ensuring that SAPOs are issued only when needed.

3. The trial court correctly applied the statute, and substantial evidence supports its finding that MR did not establish specific statements or acts that gave rise to a reasonable fear of future dangerous acts.

The trial court correctly adhered to the plain language of RCW 7.90.020(1) by declining to issue a SAPO because MR did not allege or prove "specific statements or actions . . . which give rise to a reasonable fear of future dangerous acts."[10] MR's petition alleged sexual assault, and that she "did not know the Respondent . . . [or] what he is capable of." (CP 4) A petitioner cannot obtain a SAPO based on allegations of assault alone. (§ IV.B.1) MR's assertion that she does not "know what [MD] is capable of" likewise does not justify a SAPO. (App. Br. 13, 39) The statute requires a petitioner to allege the "*specific statements or actions* made at the same time of the sexual assault or subsequently thereafter, which give rise to a

[10] This Court gives great deference to factual findings, reviewing only for substantial evidence and accepting the "fact finder's views regarding credibility of witnesses and weight to be given reasonable but competing inferences." *Edelman v. State*, 160 Wn. App. 294, 304, ¶ 16, 248 P.3d 581 (2011).

reasonable fear of future dangerous acts." RCW 7.90.020(1) (emphasis added). Allegations that a respondent might engage in unspecified conduct at an unspecified time cannot satisfy this statutory mandate.

MD's demonstrated commitment to avoiding contact with MR confirms that MR could not establish a reasonable fear of future dangerous acts.[11] In the nine months between the alleged assault (May 9, 2014) and the hearing on MR's petition (February 20, 2015) MD made no attempt to contact MR, despite having her phone number and knowing where she lived on campus. He fully complied with the UW's no-contact order issued in the fall of 2014, as well as the temporary orders in this matter. MR did not – and could not – dispute this evidence. Indeed, MR admitted that she sought the SAPO not because any specific acts or statements of MD made her fear him, but because she was dissatisfied with how long the CSSC proceedings she had initiated were taking. (RP 5: "it's been taking several months, which is the reason for the protection order") The trial court did not err in relying on this undisputed

[11] Indeed, when pressed by the trial court on what specific acts made her fearful, MR admitted "it may be the level of fear may not be in place." (RP 68)

evidence in finding that MR did not have a reasonable fear of future dangerous acts.

Nor can "chance encounters" (App. Br. 36) between MR and MD establish her need for a SAPO. In every "encounter" alleged by MR, MD did not speak with MR; the most significant interaction MR claimed was that in one instance she "thought they made eye contact." (CP 23) As the record here overwhelmingly demonstrates – and as MR conceded – her encounters with MD were accidents,[12] not intentional efforts by MD to contact MR.

The purpose of the statute is not to prevent chance encounters; it is to "requir[e] that the offender stay away from the victim." RCW 7.90.005. A respondent cannot "stay away" from chance encounters – they are happenstance, not intentional. The trial court was well within its fact-finding role to find that MR could not rely on these "chance encounters," unmediated by any statements or actions by respondent, to establish the "reasonable fear" required by the statute. (*Compare* RP 77 *with* App. Br. 40) *Cf. State v. Cerrillo*, 122 Wn. App. 341, 348, 93 P.3d 960 (2004) (reasonable person standard is objective).

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[12] At least on MD's part. MR's evidence showed that on at least two occasions she attended functions despite obtaining a mutual no-contact order and knowing that MD was likely to be there. (CP 16, 19, 48)

MR distorts the trial court's reasoning in asserting that it declined to enter a SAPO "on the basis that too much time had passed for her to seek protection." (App. Br. 1) The trial court made clear the basis for its decision was not delay in seeking a SAPO, but the lack of evidence "in that ensuing period of time to think that there's . . . reasonable fear of future dangerous acts for which relief is sought." (*Compare* RP 78-79 *with* App. Br. 33) If in the intervening nine months MD had tried to contact MR, she surely would have made that fact known to the trial court, and the court would have rightly considered it. On the same reasoning, the trial court rightly considered that MD had made no attempts to contact MR for over nine months.

MR again ignores the language of the statute in arguing that the trial court erred in considering what happened (or did not happen) between the alleged assault and her SAPO petition. RCW 7.90.020(1) directs a petitioner to allege events occurring "subsequently thereafter" the assault; the statute would not direct petitioners to allege what occurred after the assault if trial courts could not consider it. MR also overlooks the sections of the statute that specify the evidence the trial court *cannot* consider in denying a SAPO. RCW 7.90.090(4) provides that "[d]enial of a remedy may

not be based . . . on evidence" that either party was intoxicated, or that the petitioner engaged in limited consensual sexual touching. RCW 7.90.080 also limits the admissibility of evidence of prior sexual activity. Had the Legislature intended to also preclude trial courts from considering events following the alleged assault, it would have said so. *City of Seattle v. Sisley*, 164 Wn. App. 261, 265-66, ¶ 13, 263 P.3d 610 (2011) ("When a statute lists the things upon which it operates, we presume the legislature intended the omissions"), *rev. denied*, 173 Wn.2d 1022 (2012).[13]

Taking MR's argument that a trial court cannot consider events after the assault to its logical conclusion demonstrates its absurdity. Under appellant's logic, a petitioner could obtain a SAPO years or even decades after the alleged assault, and long after the two year civil statute of limitations for assault expired, if she alleged a sexual assault had occurred. Although MR is correct that the statute "sets no time limitation on when a SAPO petitioner must seek relief," and that victims can and should take the time they need to recover, she is wrong in asserting that a trial court is prohibited

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[13] MR mistakenly asserts that events after the alleged assault are irrelevant because RCW 7.90.121 authorizes renewals of SAPOs, ignoring that a petitioner must establish a need for the renewal by "stating the reason for the requested renewal." (App. Br. 33-34)

from considering events after the alleged assault (App. Br. 31-37) in determining whether the requirements for a SAPO have been met.

MR likewise distorts the trial court's reasoning in alleging that it denied a SAPO because MR could not "predict and prove the respondent's likely future behavior." (App. Br. 41) The trial court did not require MR to "predict" MD's future behavior, or that MD "was actually likely to use sexual or physical violence against her." (App. Br. 40) It only asked – as the statute requires – what specific statements or actions gave rise to a reasonable fear of future dangerous acts. And the only answer it got was that MR was dissatisfied with the speed with which the University's CSSC (which had already issued a restraining order with which MD had fully complied) was processing her complaint. (RP 63) That is neither a specific statement or action of the respondent, nor a basis for a reasonable fear of future dangerous acts.

Finally, MR is also wrong in asserting that "it is not even clear what sort of motion the trial court" granted. (App. Br. 22) MD's motion argued that MR's petition should be dismissed because she failed to allege or establish specific statements or actions that created a reasonable fear of future dangerous acts. (CP 42) The trial court agreed, finding after a review of the parties'

declarations, pleadings, and MR's testimony that because there was no "evidence of a reasonable fear of future dangerous acts for which relief is sought . . . I just don't think we've got a statutory basis to proceed," and entered an order denying MR's petition for a final SAPO. (RP 78-79; CP 99: "The request for a full order is denied, and the petition is dismissed.") That is precisely the procedure anticipated in SAPO proceedings, which MR acknowledges are informal proceedings with "more procedural flexibility than other civil cases." (App. Br. 24; *see* § IV.B)

As the trial court made clear, its decision was based on the "unique" and "peculiar" facts of this case, most notably that MR did not allege any specific acts other than the assault that made her fearful, and that MD had made no attempt to contact her since the alleged assault. (RP 77-78) The trial court's interpretation and application of RCW ch. 7.90 was consistent with its language, purpose, and common sense.

B. The trial court did not abuse its discretion in denying a final SAPO without further testimony when it is undisputed that MD made no attempts to contact MR.

MR's complaints of procedural irregularity are without merit. As MR concedes (App. Br. 24), a hearing on a SAPO petition is an informal proceeding, and the trial court is vested with wide

discretion in controlling the presentation of evidence and testimony. The trial court did not abuse its discretion in allowing MR to explain why she felt she needed a SAPO (in her written pleadings, oral argument, and live testimony) and in then finding that she had not established specific acts or statements that created a reasonable fear of future dangerous acts – particularly in light of the undisputed fact that MD made no attempts to contact her after the alleged assault.

As an initial matter, MR expressly invited the "error" of which she now complains, having asked the trial court before the February 20 hearing to resolve her petition on documentary evidence alone without further testimony. In response to MD's motion to dismiss her petition, MR argued that her SAPO petition could "be properly determined by a court on documentary evidence alone," and that "live testimony is not required." (CP 77-79) Because MR expressly invited the trial court to resolve her petition without hearing the full testimony of both parties, she cannot complain on appeal that the trial court did as she asked. *Det. of Rushton*, No. 32396-0-III, 2015 WL 5612789, at *7 (Wash. Ct. App. Sept. 24, 2015) ("The doctrine of invited error prohibits a party

from setting up an error at trial and then complaining of it on appeal.").

Regardless, the trial court did not abuse its discretion in resolving MR's petition based on the record before it. Neither the Civil Rules nor Rules of Evidence apply to SAPO proceedings. *See* CR 81; *Scheib v. Crosby*, 160 Wn. App. 345, 352, ¶¶ 15-16, 249 P.3d 184 (2011) (protection order proceedings are special proceedings under CR 81); ER 1101(c)(4). Accordingly, a trial court's (already considerable) discretion in controlling the proceedings is even greater at a protection order hearing, as MR concedes. *Sanders v. State*, 169 Wn.2d 827, 852, ¶ 35, 240 P.3d 120 (2010) (trial courts have "wide latitude to control the presentation of argument and evidence"); ER 611; *see* App. Br. 24 ("a SAPO is a special proceeding under CR 81, and allows more procedural flexibility than other civil cases"). The trial court was well within its discretion to deny a SAPO when no additional testimony from MR could have changed the deficient nature of her petition, or the undisputed fact that MD never tried to contact her, as she had already conceded. (RP 63)

Nothing requires trial courts to allow all testimony a party wishes to present (or, on appeal, claims she wished to present) at a SAPO hearing, particularly where that party does not explain the

proposed testimony in an offer of proof. RCW 7.90.050 states that "[u]pon receipt of the petition, the court shall order a hearing which shall be held not later than fourteen days from the date of the order." But the Act gives no specific instruction on the form the hearing must take, and it does not require any particular evidence be admitted. Our Supreme Court in interpreting the Domestic Violence Prevention Act noted that, like RCW ch. 7.90, RCW ch. 26.50 does not "explicitly set[] forth the form the hearing must take or define[] what is meant by 'full hearing,'" holding that a "full hearing" did not require cross-examination of the victim. *Gourley v. Gourley*, 158 Wn.2d 460, 469-70, ¶¶ 25-27, 145 P.3d 1185 (2006).

Even if the trial court did err by not holding a "full hearing," MR failed to preserve this issue for review because she did not make an offer of proof of the evidence she would have presented had the trial court allowed further testimony. (*See* CP 111: testimony "may have included additional evidence to support a finding of a reasonable fear") On appeal, MR does little more than identify the evidence already on the record, again asserting only that she would have presented additional "testimony regarding the reasonable basis for her fear of MD" (App. Br. 23) without any specific

explanation of what that testimony would have been, or how it would have differed from what she had already presented. This Court cannot assess whether a trial court erred in excluding evidence unless that evidence is actually presented to the trial court. *See Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 27, 864 P.2d 921 (1993) (offer of proof is "critical for the purpose of creating an adequate record for review").

Moreover, any additional evidence would certainly have been cumulative, and thus its exclusion harmless, because MR has only ever alleged three bases for a fear of future dangerous acts: 1) the alleged assault itself, 2) her chance encounters with MD, and 3) that she did not "know" MD. *Jones v. City of Seattle*, 179 Wn.2d 322, 356, ¶ 78, 314 P.3d 380 (2013) (excluding cumulative testimony is harmless error). MR argued these points in detail at the February 20 hearing. (RP 61-68; *see also* CP 4, 15-31; RP 12: trial court confirming at the February 10 hearing that it had read MR's materials, which had not been provided to MD)

Finally, it is disingenuous for MR to both complain that testimony was "cut short," and then to rely on the fact that MD never testified to claim her evidence is "uncontested." (App. Br. 27-29) Had MD testified, he would have denied MR's allegations that

their encounter was anything but completely consensual. MD, having had no notice of the ex parte hearing, had no opportunity to contest MR's allegations before the temporary SAPO was entered. The trial court recognized it was "hotly disputed whether, in fact, a sexual assault occurred," refuting MR's assertion that "the record does not reflect that the trial court had any doubt that the nonconsensual sexual conduct or penetration did in fact occur." (*Compare* RP 70-71 *with* App. Br. 30)[14] Indeed, in asking for a remand for a "full hearing" (App. Br. 43), MR tacitly recognizes that the evidence of an assault was contested.

The trial court held the hearing required by the statute, at which MR presented her version of the parties' encounter and explained why she felt she needed a SAPO. The trial court heard her out, recognized that her petition did not meet the requirements of the statute, and properly granted MD's motion to dismiss.

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[14] MR is also wrong in suggesting that MD somehow conceded "the sufficiency of MR's evidentiary basis for temporary relief" by agreeing to two limited extensions of the temporary order. (App. Br. 18) MD agreed to the first extension in an effort to reach an out-of-court agreement with MR. (CP 14; RP 25) Rather than reach an agreement, MR used that additional time to obtain declarations from eight friends, which she filed but did not serve on MD before the continued hearing. MD sought the second extension because he needed to review MR's surprise declarations, which he saw for the first time at the February 10 hearing. In short, at no point has MD conceded MR's evidence was "sufficient," or "waived" his right to object to the sufficiency of the petition.

C. A court presiding over a final SAPO hearing is not bound by an ex parte court's "findings" and, regardless, the trial court did not "reverse" the ex parte order.

MR misrepresents the nature of SAPO proceedings in asserting that an ex parte determination on the sufficiency of a petition is unassailable. (App. Br. 13-20) MR also misrepresents what actually happened in this case by asserting the trial court "reversed" the ex parte temporary order. (App. Br. 17)

RCW 7.90.110 allows a court to issue ex parte a 14-day temporary SAPO if the petitioner proves a sexual assault by a preponderance of the evidence and that "the harm which [the temporary order] is intended to prevent would be likely to occur if the respondent were given any prior notice."[15] Before a court may issue a final order, however, it must hold a contested hearing to resolve whether the petitioner has in fact been the victim of nonconsensual sexual conduct. RCW 7.90.090(1)(a); RCW 7.90.050.

MR is simply wrong in asserting that a court presiding over a hearing on a final SAPO is powerless to consider the sufficiency of

[15] Given that MR failed to tell the Commissioner who entered the temporary SAPO that MD had not violated the CSSC restraining order entered four months before, it is doubtful that the temporary SAPO should have been entered without notice in any event.

the petition, and must instead defer to a determination made at an ex parte hearing without either notice or an opportunity to be heard to respondent. (App. Br. 13-20) By requiring a contested hearing before a final SAPO may issue, the Legislature expressly empowered (and due process requires) the court presiding over that hearing to review the sufficiency of the petition. As MR recognizes (App. Br. 16), establishing a sexual assault at an ex parte hearing is little more than a formality when the respondent is not present and cannot present any evidence challenging the petitioner's allegations or the sufficiency of the petition. It would be patently unjust, and a violation of due process, if a subsequent court reviewing contested evidence for the first time was powerless to determine the sufficiency of a SAPO petition because a prior court had issued a temporary order at an ex parte hearing – especially when that temporary order was entered at an ex parte hearing at which the petitioner failed to fulfill her statutory obligation to inform the court that the respondent had never violated a restraining order that was already in place.

In any event, the trial court here did not "reverse" the ex parte temporary order. When it denied MR's request for a final SAPO, the trial court recognized that MR's petition failed to

establish the foundational element of specific statements or actions creating a reasonable fear of future dangerous acts (§ IV.B), and that as a consequence the commissioner should not have entered the temporary SAPO. (CP 98: "The Petitioner failed to establish that she had any reasonable fear of future dangerous acts from the Respondent and therefore the temporary order was invalid.")

Though the trial court indicated its disapproval of the temporary order, it did not "reverse" it, and simply let it expire the day of the hearing as it was already set to do. (CP 32, 99) Indeed, MR elsewhere recognizes that the trial court did nothing more than grant MD's "motion to dismiss and deny a final order SAPO." (App. Br. 19) Even had the trial court "reversed" the temporary order at the February 20 hearing, MR could not establish prejudice because the order would have expired that day without any action from the trial court. (CP 32)

MR's other arguments concerning the propriety of the ex parte order confirm a fundamental misunderstanding of the statute. For example, MR asserts that establishing a fear of future dangerous acts is necessary for ex parte temporary orders, but not for permanent orders. (App. Br. 17, 22, 37) MR's interpretation of the statute would lead to absurd results: a petitioner must establish

a fear of future acts for an order effective for 14 days, but not for a permanent order lasting two years and with profound and lasting effects on respondent, including entry into the State's criminal database. RCW 7.90.160. The Legislature could not have intended authorizing entry of an order restricting a respondent's freedom for two years based on *less* proof than required for an order lasting two weeks. *Seven Sales LLC v. Beatrice Otterbein*, ___ Wn. App. ___, 356 P.3d 248, 250 (2015) ("It is fundamental that in construing any statute we avoid absurd results.").

MR's argument that the trial court "mix[ed] up the standards for a sufficient petition, for ex parte relief, and for a final order" (App. Br. 37) likewise demonstrates her confusion, not the trial court's. RCW 7.90.020 establishes the foundational elements of a petition. Neither an ex parte temporary order nor a final order may be issued if its requirements are not met – including allegations of specific statements or actions that create a reasonable fear of future dangerous acts. RCW 7.90.090 sets forth what a petitioner must establish at the hearing for a final SAPO (that a sexual assault occurred), and RCW 7.90.110 explains what a petitioner must establish for an ex parte temporary order (sexual assault and that petitioner will be harmed if respondent is given prior notice of the

hearing). MR conflates these distinct sections by quoting language in RCW 7.90.110 and attributing it to RCW 7.90.020. (App. Br. 37; *see also* App. Br. 17: asserting that a "reasonable fear of future dangerous acts" is "the legal standard for an ex parte temporary SAPO")

Requiring a petitioner to comply with the foundational requirements of RCW 7.90.020 *and* to prove that the sexual assault occurred does not render meaningless the language in RCW 7.90.090 that a court "shall issue a sexual assault protection order" if it finds that a sexual assault occurred. (App. Br. 8, 24-26) Rather, it gives meaning to both sections. This Court should reject MR's allegations of error based on her confused interpretation of the statute.

D. MR's appeal is moot because MD has transferred to an out-of-state university and the SAPO would have expired by the time this appeal is resolved.

This Court should affirm for the additional reason that this appeal will be moot by the time it could be resolved. *ABC Holdings, Inc. v. Kittitas Cnty.*, 187 Wn. App. 275, 289, ¶ 34, 348 P.3d 1222 (2015) ("A case is moot if a court can no longer provide effective relief."). Because MD has transferred to an out-of-state university (CP 51-52) there is no chance that MR and MD will "end up" at the

same places on the UW campus (App. Br. 39) – the premise (along with her complaints about CSSC's process) of her SAPO petition. MR did not establish the need for a SAPO below, and she certainly could not do so on remand.

Moreover, had MR prevailed below, she would have received a SAPO effective from February 20, 2015, to February 20, 2017. This response brief was filed on October 16, 2015, and this case will likely be set for consideration no earlier than March 2016. Assuming an average time for disposition of this appeal and a petition for review by the losing party, in all likelihood this appeal will not be resolved before February 2017, when the relief MR seeks would have expired anyway. This appeal will be moot and the trial court's order should be affirmed on that basis as well.

V. CONCLUSION

Protection orders are a valuable and important tool. But they should be employed only when the petitioner establishes an order is needed to prevent future interaction between the parties. MR did not establish that need, as required by the statute, and this Court should affirm the trial court's dismissal of her SAPO petition.

Dated this 16th day of October, 2015.

SMITH GOODFRIEND, P.S.

By: _____
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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on October 16, 2015, I arranged for service of the Brief of Respondent to the clerk to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	___ Facsimile ___ Messenger ___ U.S. Mail ✓ E-File
Riddhi Mukhopadhyay Sexual Violence Law Center 2024 3rd Ave Seattle, WA 98121-2431	___ Facsimile ___ Messenger ✓ U.S. Mail ✓ E-Mail

DATED at Seattle, Washington this 16th day of October, 2015.

Tara D. Friesen