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COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By________

DIVISION III COURT OF APPEALS
STATE OF WASHINGTON

No. 32418-4

Spokane County Superior Court Case No. 14-2-00761-7
The Honorable Michael Price
Superior Court Judge

APPELLANT'S REPLY BRIEF

In Re:

MARLO COYLE, o/b/o B.J.C., APELLANT

V.

NIMSHA ASIA GOINS, RESPONDENT

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I. Facts

Mr. Goins indicates that because Ms. Coyle did not assign error to specific numbered findings that they are verities in the case at this time and there is nothing to challenge. However, he does not speak to the fact that what Ms. Coyle is challenging is how the court arrived at the finding, or the actual process that was due. As can be seen by the Assignment of Errors, the findings that have been reached are based on a faulty legal process and an abuse of the Court's discretion to interfere with the mother's, and the teenager's, presentation of evidence. In a more exaggerated description the judge not only interfered with due process, he at times performed cross examination of the mother for the Respondent, and severely crippled and limited the Appellants' presentation of those facts. The Appellant's Assignment of Error were as follows:

1. The judge committed error by allowing prejudicial and irrelevant evidence to come in about the Petitioner's mother and not striking that evidence;
2. The judge committed error by not allowing the Petitioner, who was a 16 year old boy, to testify about the sexual conduct of the Respondent;
3. The judge committed error by not applying RCW 7.90.010(4)(d) to the facts presented by the Petitioner, i.e. that the Respondent in the capacity of a state appointed counselor demanded to see the Petitioner's genitals in a courtroom

bathroom stall, after a clear history of sexual grooming (which corroborated that this was likely done for sexual gratification);

4. The judge committed error by concluding that the Petitioner's mother was a vexatious litigant and by controlling her filings for two years.

As can be seen, the first assignment goes to how the judge allowed prejudicial irrelevant evidence into the case that formed at least the finding that the Petition for a Sexual Assault Protection Order was non-meritorious. The second assignment is not allowing this teenager to testify, thereby affecting the findings in the entire case. Errors number 3 and 4 go to the judge's finding that the entire Petition had no merit because if he did not follow the process right and allow the child to testify about being commanded to show his genitals to the Respondent, how can the judge say the Petition has no merit. Mr. Goins and the child were the only ones present. That is why the statute is there; to get to the bottom of the facts, instead of making findings without following the due process.

II. Law and Argument

A. The technical requirements of RAP 10.3(g) that an appellant must cite the specific finding of fact in their assignment of errors (even by number) can be waived if the argument of the Appellant is clear as to what occurred in the decision.

RAP 10.3(g) states;

> Special Provision for Assignments of Error. A separate assignment of error for each instruction which a party contends was improperly given or refused must be included with reference to each instruction or proposed instruction by number. *A*

> *separate assignment of error for each finding of fact a party contends was improperly made must be included with reference to the finding by number. The appellate court will only review a claimed error which is included in an assignment of error or clearly disclosed in the associated issue pertaining thereto.* Emphasis added.

As can be seen this is a "Special Provision" as to the Assignment of Error and if the Appellant feels that given what was presented at trial that the findings of fact were incorrectly entered then he or she is instructed to place in those specific errors by number in their opening brief. However, the entire rule on how to draft an Opening Brief also does not limit what can be in the assignments of error. It also states clearly that error is not just limited to what findings were made, but references larger overall issues of error that may have affected how the findings were even made. Section (a)(4) states: "Assignments of Error. A separate concise statement of each error a party contends was made by the trial court, together with the issues pertaining to the assignments of error" shall be included. RAP 10.3(a)(4). That specifically leaves out the requirement of specifically to include findings. This is consistent with case law. Parenthetically it should be noted that what Mr. Goins is talking about when he specifically says "numbered findings of fact", is simply a cursory finding of fact that is not numbered and has limited explanation. This will be discussed later in the brief.

Case law on the issue of what should be in the Opening brief is clear, if the findings of fact are so extensive and are individually numbered that it would be confusing to Respondents to receive a brief without stating what

was wrong with each finding, it becomes unfair to the court and other party. However, as indicated these findings are not extensive and not numbered. All the Appellant's assignments of error specifically speak to not only the general finding in this case, but to the specific finding of how the evidence was tainted and that the mother should not be found as a vexatious litigant.

In the case of *Skagit County Public Hosp. Dist. No. 1 v. State, Dept. of Revenue*, 242 P.3d 909, 158 Wn.App. 426 (Wash.App. Div. 2 2010) discussed this same argument posed by Mr. Goins as follows:

> The Department is correct that finding of fact 7 is a verity on appeal. But the Department is incorrect; finding of fact 4 is not a verity on appeal.[8] Skagit Valley did not assign error to findings of fact 4 and 7, so they would normally be a verity on appeal. Harris v. Urell, 133 Wash.App. 130, 137, 135 P.3d 530 (2006), review denied, 160 Wash.2d 1012, 161 P.3d 1026 (2007). *We will waive technical violations of RAP 10.3(g) where the appellant's brief makes the nature of the challenge clear.* Harris, 133 Wash.App. at 137, 135 P.3d 530. *Skagit Valley sets out in its brief a clear argument that it is entitled to a waiver of interest because of circumstances beyond its control. But Skagit Valley did not present any argument on equitable estoppel. Accordingly, finding of fact 4 is not a verity on appeal*, but finding of fact 7 is a verity. (Emphasis added). *Id.* at 446-447.

In this case again, there are no numbered findings of fact and no conclusions of law, but rather a simple statement first typed standard language with a hand written section that says: "After reviewing the case record, and the basis of the motion, the court finds that: The court dismissed the Petition with prejudice and makes a finding that the Petition is completely non-meritorious." There is no real finding in the order except that the Petition is non-meritorious in this order. In fact the statement that the court dismissed the action from the bench is not a finding of fact nor a conclusion of law, but ironically is a statement of what the judge did, which

substantiates one of Ms. Coyle's statements of error that the judge basically took over the entire case as if he was the adversary and disallowed evidence and/or argument in violation of the statute and due process.

There is another finding in the actual form order about the dismissal and that is on page two it is hand written as follows. ". . . and the court finding: Other: The Petition for Sexual Assault Protection is dismissed with prejudice and the court finds in is entirely non-meritorious" basically repeating the other order. Again, only the finding that it was non-meritorious is a true finding and that is specifically dealt with clearly in the Appellant's assignment of errors. Those assignment of errors speak to how the court inappropriately came to the conclusion that this Petition was without merit. Therefore, the Appellant's Opening brief sets out a very clear description of the error caused by the judge's failure to both consider testimony, by not even allowing the 16 year old boy to testify about what only he and Mr. Goins knew happened in the Men's room at the Juvenile courthouse, and by basically trying the mother for this case. The Respondent's entire Responsive brief is without merit since it not only misstates the law, it does not tell the truth about the facts of the Appellant's position in this case. At the very least his brief should be found non-meritorious and he should have to pay the Appellant's fees for having to respond to this unsupported argument that does not comport with case law interpretation and application of the RAP rules and law.

B. Mr. Goins is wrong in questioning the Appellant's argument that the court allowed irrelevant evidence of reputation of the mother in

without focusing on potentially obtaining evidence directly from the 16 year victim about the "Men's room" sexual conduct.

RCW 7.90.080 is very specific in that it does not allow evidence in of either prior sexual activity or of reputation unless the court finds through either testimony or offer of proof that the evidence will not be prejudicial to the Petitioner/Victim. The statute also seems to clearly contemplate some form of in camera evidence from the child, in this case a teenager, to respond to such allegations of reputation are made. This seems clear not only from the statute itself at (1)(b), but from case law.

The Statute specifically says that no evidence about reputation (for example) shall be admitted without a specific order outlining how the Petition will be examined on this issue. In this case what had to be done by statute was for the court to specifically allow the boy to testify about Mr. Goins' bathroom sexual conduct to see if the actions as described by the teenager about Mr. Goins' conduct fit with the statutes definition of conduct, but rather the hearing/trial became a finding of fact discussion about how the mother of the teenager did all this to get at Mr. Goins. All of which was about the mother's reputation, which is totally irrelevant from the things that are required by the statute.

Put another way, the entire purpose of this statute as described in RCW 7.90.005 indicates in part that ". . . the victim should be able to seek a civil remedy requiring that the offender stay away from the victim." RCW 7.90.090(1)(b) also states that ". . . The petitioner shall not be denied a sexual assault protection order because the petitioner or the respondent is a

minor . . ." RCW 7.90.070 further states at (2) that "A petition for relief may be made regardless of whether or not there is a pending lawsuit, complaint, petition, or other action between the parties." And finally, the statute states that a protection order is required to be issued if there is found to be "sexual conduct", which can be defined as "Any forced display of the petitioner's genitals, anus, or breasts for the purposes of arousal or sexual gratification of the respondent or others". See RCW 7.90.010(4)(d).

These statutes are important in the context of this case. The mother of the 16 year old victim states that the victim said that Mr. Goins forced the child to show him his penis, using his power and status as the child's counselor, while they were both at the courthouse alone in the Men's bathroom. There is only one way to get at this occasion and fact and that is to test it by the veracity of the witnesses. This could only be done by interviewing the child, as is allowed by statute, having him testify in court, or appointing a GAL to investigate this claim. It could not be proven simply by saying it happened. At that point, when this case narrowed to that issue, the judge simply ignored the proper process outlined in the statute at RCW 7.90.010, and .040 to .090. Failure of the judge to narrow down this case and allow for irrelevant information about the victim's mother, and about other cases involving the child is and was a total distraction and not allowed. This process biased the outcome and totally forgot the purpose of the act, having a chilling effect on the child and the process.

Had there been at least an in-camera interview with the child to see if he felt threatened by Mr. Goins in the bathroom enough to not feel forced to show his private parts, then this case and the mother's appeal would be different, instead the judge failed to follow the statute and the orders should be over turned.

C. Case law suggests that the definition of being forced to do something can and does include a look at who is making the request, their stature in regard to the person being asked, their legal position to the victim, and the victim's vulnerability.

First, in order to define a term some history of the court's usage of the term can help. In the case of *In re Detention of Botner*, 28417-4-III, a 2012 unpublished opinion the Appellant and the court described PPG testing in sexual predator testing as "forced sexual conduct" because it was "forced" by a State worker in authority to test for arousal. The case actually described it as follows: a procedure that involves placing a pressure-sensitive device around a man's penis, presenting him with sexual images of women and children of various ages involved in sexual activity, and determining his level of sexual attraction by measuring minute changes in his erectile responses. *In re Det of Halgren*, 156 Wn.2d 795, 800, 132 P.3d 714 (2006); *United States v. Weber,* 451 F.3d 552, 554 (9th Cir. 2006). Basically the defendant could not say no because he was court ordered to do so.

It is clear in the case of PPG testing it is "forced" because the state via an officer or someone in authority forces or tells the suspect to participate by revealing his penis. Thus the description of forced showing of private parts would naturally include the victim's perception that the one asking

him to show his privates is someone who he has to comply with. However, these case do not related directly to the issue of what it means to force a teenager to show their private parts.

Next we can look at criminal cases that involve forcing someone to do something sexually to see what constitutes "force". In the case of *State v. Robinson*, 947 P.2d 1257, 89 Wn.App. 56 (Wash.App. Div. 1 1997), the defendant "forced" the lady to take off her clothing, drink alcohol and perform sexual acts. He had beaten her up and showed his force over her with threats of further retaliation if she did not comply in this little motel room. In the case of *In re Dyer*, 283 P.3d 1103, 175 Wn.2d 186 (Wash. 2012), the defendant was the estranged husband of the victim and had repeatedly raped her and was violent with her and "forced" her to take a shower at their home. In the case of *State v. Vaster*, 659 P.2d 528, 99 Wn.2d 44 (Wash. 1983), the lady was forced at gun point to lift up her skirt it what was clearly a precursor to a sexual act. In another non-criminal case, the issue of publication of police who used their authority to accept their sexual harassment indicated that if the officers used the color of their authority to do these things, that this was a misuse of their authority to force those who saw them as an authority to comply with their sexual innuendos and requests. See *Cowles Pub. Co. v. State Patrol*, 724 P.2d 379, 44 Wn.App. 882 (Wash.App. Div. 3 1986).

As the analysis continues as to what is meant by forced sexual contact, it may be best to see what our state says "sexual contact" means

and in that regard we can become bogged down in the semantics of the words. However, RCW 7.90.010 may help us with this particular instance. For example, the section of the statute that the Appellant says was violated was Mr. Goins demanding in a very authoritative setting that this teenager show him his private parts in a men's room at the court house. Assuming, given the case law below that indicates that clearly someone in an authoritative position can "force" someone who is less strong socially or personally to do something related to their private parts, then we have to look at what the statute calls for in determining if there was sexual conduct.

Given the above question and specifically looking at the statute itself, the two operative parts of the definition of sexual conduct are in section (4)(d) that any "forced display" is a problem. First, by simple definition, one cannot force themselves to violate a statute, so this term related to the defendant or respondent in such hearings. Secondly, section (4)(f) indicates that if the touching is "coerced" it is a violation. Therefore, it must mean the use of threats or precursors to coerce the victim into forcing the victim to consent to touching. Finally, Section (6) also defines contact in these situations to include emails, notes, letters, etc., all of which implies that even sexual content in such non-verbal communications as notes can be and may be the subject of investigation by the court. For example, this could apply to a situation where a note is passed by a perpetrator to the child that they needed to meet the child after school at a certain place and be ready to take their clothing off for them, or they would be harmed or in trouble.

Then the issue is what power does the person have that is asking, or "forcing" if you will, the child to show their privates to that person, instead of just looking at physical force.

All of these definitions also speak to power and authority gone bad when it comes to children. For example, if a police officer told a child to sit on his lap sexually the child likely would comply out of respect for his authority. This too is seen, by analogy only, in the work place where our courts have similarly focused on those who are <u>in authority</u> in deciding whether there was sexual harassment in the workplace. Se e.g. *Francom v. Costco Wholesale Corp.*, 991 P.2d 1182, 98 Wn.App. 845 (Wash.App. Div. 3 2000).

Finally, a look at criminal cases on these issues may be helpful. For example, the case of *State v. Muonio*, 45016-0-II (2014) although an unpublished case, it does speak to the issues in this case and the application of the statute, it is therefore helpful to at least see another court's interpretation of the SAPO laws. This case helps dovetail the crime of "communication with a minor for immoral purposes" with SAPO and its definition section of a "victim", and shows that the legislature had this criminal code in mind when they developed this protection statute.

In looking at the SAPO statute it is clear that there is only really one statutory definition that is close to this crime of communication for immoral purposes and that is section RCW 7.90.010(4)(d) and that is where it is inappropriate for someone to "force" a child to "display" their "private

parts". Therefore, it seems logical to assume that there can be a potential violation of this statute, and thus the issuance of a protection order, if the Respondent tried to force this boy to show him his private parts for sexual gratification. In this regard it was uncontested that the Respondent was alleged to have viewed this 16 year old boy romantically given that the boy heard him ask him about a "gay" experiment; that the boy said he kissed his head; that he basically told him to show him his private parts while in the court bathroom. All of which needed to be explored by testimony, and in particular by testimony from the child. Instead the judge focused entirely on irrelevant prejudicial things "his mother did", which is not the purpose of SAPO. This should have never happened the way it did. It distracted from getting to the truth of what really happened in this case and completely ignored the intent and purpose of the statute. The case should be remanded for further testimony from this child and of course, Mr. Goins.

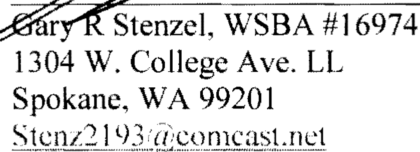
D. The mother's appeal is in no way frivolous.

The respondent has asked for fees in this matter because he feels this appeal, "like the original Petition" is frivolous under RAP 18.9. In this case, the Respondent suggested that "none of the findings" were assigned error, therefore, with the findings of fact the way they are as a verity, there is nothing to this appeal. However, as can be seen that statement in and of itself is wrongly stated. There was no "list" of findings of fact, there was only one; and that one finding simply was that there was no merit to the Petition. Well, the issues then are what the court did to explore the facts,

which were varied and detailed in the Petition, to come to that finding. The Appellant says that the court did nothing to verify the findings but have a colloquy with the child's mother. Basically, the court did nothing to test the facts as is required by the statute in many sections, therefore, it was an abuse of discretion to come to that conclusion without due process and specifically following the instructions of the statute to explore the information available by testimony, and weed out irrelevant prejudicial evidence. That is what this appeal is about, protecting the child's rights from sexual predation and/or conduct.

Under RAP 18.9(a) sanctions may be imposed where an appeal is brought solely for the purpose of delay and the other party is harmed by the delay. *Millers Cas. Ins. Co. v. Briggs*, 100 Wash.2d 9, 665 P.2d 887 (1983). An appeal is frivolous "where no debatable issues are presented upon which reasonable minds might differ and it is so devoid of merit that no reasonable possibility of reversal existed". *Id.* at 15. Clearly there are debatable issues have been presented by the Appellant and this was not filed to delay anything, sanctions should not be imposed for a frivolous appeal. *Youngblood v. Schireman*, 765 P.2d 1312, 53 Wn.App. 95 (Wash.App. Div. 1 1988).

Respectfully submitted this 27th day of February 2015.



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Affidavit of mailing

I, Gary R. Stenzel, being first duly sworn upon oath deposes and says:

That she is now and all times hereinafter mentioned was a citizen of the United States and a resident of the State of Washington, over the age of eighteen years; that on the 27th day of February 2015, affiant enclosed in an envelope a copy of the following document: Appellant's Reply Brief to:

Robert Cossey
Attorney at Law
902 N. Monroe Street
Spokane, WA ~~99223~~ 99201

Said addresses being the last known addresses of the above-named individual, and on said date deposited the same so addressed with postage prepaid in the United States Post Office in the City of Spokane, State of Washington.

I declare under penalty of perjury pursuant to the laws of the State of Washington that the foregoing is true and correct.

Gary R. Stenzel, WSBA #16974