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NO. 67922-8-1

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

DONNA CHARBONNEAU ON BEHALF OF OLIVIA CHARBONNEAU

Respondents/Cross-Appellant

v.

TANNER FOSTER,

Appellant/Cross-Respondent

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

The Honorable Charles Snyder

BRIEF OF RESPONDENT/CROSS-APPELLANT

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A. ASSIGNMENT OF ERROR FOR CROSS APPEAL

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B. ISSUES PRESENTED

1. Should this court review the superior court decision to grant a Sexual Assault Protection Order pursuant to RCW 7.90 for abuse of discretion and based on substantial evidence.
2. Did the superior court properly apply de novo review on revision of a commissioner's decision?
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7. May the court disregard a declaration where the declarant subsequently testified, the testimony was at times inconsistent with the declaration, and the declaration was produced in violation of the Criminal Records Privacy Act?

8. Should the court strike a declaration written by law enforcement personnel when the declaration is in violation of RCW 10.97; and does the public policy of the protection order statutes and the Criminal Records Privacy Act meet the Ishikawa and GR 15 factors for sealing the record?

C. STATEMENT OF THE CASE

Tanner Foster, a seventeen year-old Blaine high school senior picked up fifteen year-old sophomore Olivia Charbonneau on Sunday July 17, 2011 at about 10 a.m., CP 140.

On that Sunday morning, Foster supplied Charbonneau with vodka, beer and wine. He and Charbonneau commenced to drink a substantial amount of alcohol at approximately 10:15 a.m. After consuming large amounts of alcohol, Foster and Charbonneau began to kiss. CP 151.

When Foster's actions moved past kissing Charbonneau objected. She told Foster "NO", told him he was hurting her and told him to stop. CP 140.

Charbonneau remembers physically and verbally rebuffing Foster although she did intermittently pass out. Charbonneau, slight of frame and build, drank so much alcohol that she vomited on Foster's couch. CP 97, 140.

The previous evening, on July 16, 2011 Mr. Foster texted Ms. Charbonneau inviting her to drink with him and his friend John Martinez. She accepted. The boys picked her up from her house at 6 p.m. They drank some shots in Foster's car. About 20 minutes later Charbonneau asked to be dropped off at her friend's house and Foster complied. CP 139. Later that same evening Charbonneau received repeated texts from Foster asking her to "finish the bottle" with Martinez and him the next day. She agreed.

It was not until she was picked up by Foster on Sunday morning that Charbonneau learned John Martinez would not be joining them at the Foster home. CP 140. Although Charbonneau was initially reluctant to be alone with Foster, she overrode her concerns when she informed friends of her whereabouts, relied on friends' good opinion of Foster, relied on her understanding that Foster had a girlfriend and would therefore not be looking for a romantic relationship and her previous innocuous interactions with Foster. CP 30, CP 140.

After Foster gave her the substantial amounts of alcohol, Charbonneau was the victim of nonconsensual sexual penetration. CP 140. Later that Sunday afternoon, Foster and Charbonneau drove to pick up Foster's friend, Martinez and returned to the Foster home.

Charbonneau was still very intoxicated and frightened. CP 140-141. Foster had forced himself on her on three occasions earlier that day. She responded to texts from her friends, but her responses were nonsensical. CP 22-23.

At one point she was talking on her phone with a friend, Foster was sitting next to her with his hand on her thigh. Charbonneau decided to act as though nothing was amiss until she was away from Foster and Martinez. CP 24-25.

Later that day, Foster drove Charbonneau to her friend's house whereupon Charbonneau immediately showered. She then told the friend she had been raped. She was still intoxicated and fuzzy in some of her recollections although very clear that she had had intercourse with Foster against her will. CP 26-27.

Although Charbonneau's friends soon learned of the events at the Foster home, Charbonneau was reluctant to report the incidents to the authorities or her parents. She felt shame, embarrassment and a sense of guilt for having willingly consumed alcohol. It was a teacher who contacted the police after hearing of the incident from a student. CP 30.

Whatcom County Sheriff Deputy Colin Bertrand was assigned to investigate the events of July 17, 2011. Deputy Bertrand reports that he

has been in law enforcement for over 20 years and but has investigated only approximately 12 allegations of rape. CP 70.

Deputy Bertrand testified in the SAPO hearing on September 15, 2011, but prior to even being subpoenaed, voluntarily submitted a personal declaration for the SAPO hearing. In his undated declaration, Deputy Bertrand states that Charbonneau disclosed her allegation of rape to her friend Emmy Johnson "a few days after the alleged rape took place." CP 147.

However, Charbonneau, Kayleigh Effinger, Christopher Poole, Dustin Effinger and Emmy Johnson have submitted declarations attesting to the knowledge of the accusation of rape on the same day as it occurred. CP 22-31; CP 140.

Indeed, Kayleigh Effinger declared Charbonneau made it known to her within minutes of arriving at the Effinger house. CP 26. Emmy Johnson's declaration notes that Charbonneau texted her at approx. 5:30pm on July 17, 2011 "I think I just got raped." CP 30. Bertrand did not contact any of these witnesses because he was leaving on vacation. CP 89.

A Temporary SAPO was issued on August 17, 2011 and reissued on August 31, 2011. CP 146. The SAPO Hearing was heard on September

15, 2011. After being denied the SAPO, Charbonneau requested revision of a commissioner's decision. CP 130-132.

At the revision hearing on October 28, 2011, the judge found sufficient basis in law and fact to issue the Sexual Assault Protection Order in accordance with the Sexual Assault Protection Order Act at RCW 7.90. That order was based on a de novo review of the record which included documentary evidence and a transcript of the testimony at the prior hearing. CP 4-6, RP 16-21.

D. ARGUMENT

1. Abuse of Discretion is the Standard of Review for the Decision to Grant a Protection Order.

The decision to grant or deny a protection order is reviewed for an abuse of discretion and findings will be upheld on appeal if supported by substantial evidence. In re Marriage of Stewart, 133 Wn.App. 545 at 550, 137 P.3d 25 (2006). Granting the Sexual Assault Protection Order (SAPO) to Charbonneau in accordance with RCW 7.90 was based on substantial evidence and was not an abuse of discretion.

2. De novo is the Standard of Review for Superior Court on revision of the commissioner's decision.

Charbonneau requested the Superior Court revise the decision of the court commissioner denying the SAPO. On revision, the judge

granted Charbonneau a SAPO. CP 4-6. Foster contends that because there was live testimony at the hearing with the commissioner, the commissioner's decision should be reviewed for substantial evidence. This argument is contrary to the court rules and case law and must be rejected.

Whatcom County Superior Court local rules provide, "All revisions of Commissioner rulings shall be de novo on the record...." WCCR 53.2. The standard of review for revision was clarified in State v. Ramer, 151 Wn.2d 106, 86 P.3d 132 (2004).

Prior to 2004, the review was de novo if the commissioner's ruling was based entirely on documentary evidence. If the commissioner also considered live testimony, the commissioner's findings were reviewed for substantial evidence. In 2004, however, the Supreme Court held that all review was on a de novo basis, regardless of the nature of the evidence considered by the commissioner.

14 Washington Practice, Civil Procedure § 3:13 at fn 14 [citing, State v. Ramer, 151 Wn.2d 106 (2004)].

The standard of review for revision as stated in Ramer is de novo. Id. at 113. Since Ramer, several cases have cited the standard of review as de novo where there was no testimony; none have overturned the standard for revision. The appellate standard of review was de novo for a case involving interpretation of a CR 2A agreement, post dissolution

damages, and conversion. In re Marriage of Langham, 153 Wn.2d 553, 106 P.3d 212 (2005). The cases cited in Langham, at Footnote 4 are pre-Ramer (2004) cases. In Bartolome, the standard for appellate review of a criminal trial on a stipulated record, the substantial evidence standard of review, rather than the de novo standard of review, was the appropriate standard. The court held that Defendants, who fail to exercise their right to trial or to cross-examine witnesses, are not entitled to de novo review, just as defendants who were convicted in live trials are not entitled to de novo review. State v. Bartolome, 139 Wn. App. 518 at 521, 161 P.3d 471 (2007). Bartolome cites to In re the Marriage of Rideout 150 Wn.2d 337, 77 P.3d 1174 (2003) for the substantial evidence standard of review for trials on stipulated or documentary evidence. Bartolome, at 520-521 citing In re Marriage of Rideout, 150 Wn.2d 337, 77 P.3d 1174 (2003). However, Rideout, addresses the proper standard of appellate review, not de novo revision. Rideout, at 350. The protected interests and the process due for protection orders is not as heightened as for criminal trials nor is the standard of review on revision the same as on an appeal.

De novo review was used in the instant case. RP 16. Were it not, the requirement of de novo review where the standard of review for revision by the Superior Court was not clear, required remand to the

superior court for application of the correct de novo standard. In re Marriage of R.E., 144 Wn.App. 393, 183 P.3d 339 (2008).

Superior Court judges may appoint court commissioners “subject to revision by such judge...” Const. Art. 4 §23. On revision of a decision by a court commissioner, the superior court “has full jurisdiction over the case and is authorized to determine its own facts based on the record before the commissioner.” In re Marriage of Dodd, 120 Wn.App 644, 86 P.3d 801 (2004). On appeal, the court reviews the decision of the judge, not the commissioner. Williams v. Williams, 156 Wn.App. 22, 27, 232 P.3d 573 (2010).

If the trial court reviewing a commissioner’s ruling determines that additional evidence is required, the judge should remand to the commissioner for further proceedings. Perez v. Garcia, 148 Wn.App. 131, 198 P.3d 539 (2009). Perez cites to In re Marriage of Dodd for a substantial evidence review test on revision. However, Dodd held the revision court was not limited to the substantial evidence inquiry. Dodd, 120 Wn.App 644, 86 P.3d 801 (2004). Consideration by the judge of additional evidence not before the commissioner was improper and required remand to the superior court to consider either the limited evidence before the commissioner or if appropriate, remand to the court

commissioner for additional evidence. In re Marriage of Balcom and Fritchle, 101 Wn.App. 56, 1 P.3d 1174 (2000). In the Motion for Revision, Charbonneau requested the court issue a SAPO or remand for additional evidence. CP 130. The court declined to remand and issued the SAPO based on de novo review of the evidence before the commissioner. RP 16, 21. The decision of the Superior Court is reviewed for abuse of discretion and the issuance of the SAPO was not an abuse of the trial court's discretion.

3. The Sexual Assault Protection Order Act and de novo review of the Commissioner's decision meet due process requirements.

Foster contends that de novo review violates his right to due process and equal protection. These claims are without merit. To determine whether a procedure violates due process the court first considers whether a liberty or property interest exists entitling an individual to due process protections. "Second, if there exists such a constitutionally protected interest, we employ a balancing test to determine what process is due." Washington Independent Telephone Assn v. WUTC, 110 Wn. App 498 at 508, 41 P.3d 1212 (2002). Balancing the constitutionally protected interest, the court considers: the private interests affected by official action; the risk of an erroneous deprivation

of such interest through procedures used; and the Government's interest. Matthews v. Eldridge, 424 U.S. 319 at 321, 96 S.Ct. 893, 47 L.Ed 18 (1976).

A protection order does not constitute a substantial impairment of the restrained person's rights and the private interest at risk is minimal. A protection order is a reasonable exercise of police power requiring one person's freedom of movement to give way to another person's freedom to not be disturbed. Spence v. Kaminski, 103 Wn.App. 325, 336, 12 P.3d 1030 (2000). The SAPO is a summary proceeding like the Domestic Violence Protection Order Act at RCW 26.50 after which it is modeled. As with a DVPO, there is an initial determination of an ex parte temporary order followed by a hearing on whether to grant a more permanent order. RCW 7.90.110, RCW 7.90.050. Pursuant to RCW 7.90.040(5), jurisdiction of the courts over the SAPO proceeding shall be the same as for a DVPO under RCW 26.50.020(5).

The procedure in the SAPO Act at RCW 7.90 is nearly identical to those of the Domestic Violence Protection Order Act at RCW 26.50. In the nature of an injunction from the court, a protection order does not constitute a substantial impairment of Foster's rights. Civil protection orders do not interfere with the restrained person's legitimate freedom

of movement or right to travel. Spence, at 336, 12 P.3d 1030. The procedural protections of a DVPO are adequate. Gourley v. Gourley, 158 Wn.2d 460 at 468, 145 P.3d 1185 (2006).

Due process is “a flexible concept in which varying situations can demand differing levels of procedural protection.” Gourley, 158 Wn.2d at 467. The procedural protections of the Sexual Assault Protection Order Act at RCW 7.90 adequately protect Foster’s due process rights, particularly when considering the strong governmental interest articulated in RCW 7.90.005.

“Sexual assault inflicts humiliation, degradation, and terror on victims.... Some cases in which rape is reported are not prosecuted. In these situations, the victim should be able to seek a civil remedy requiring that the offender stay away from the victim.” RCW 7.90.005.

4. De novo review with credibility determinations and fact finding does not violate the due process and equal protections given the minimal infringement of the protection order.

Foster contends credibility findings made de novo on the record where there was live testimony at the prior hearing violates his constitutional rights. This is incorrect. Pivotal fact questions involving credibility do not trigger a requirement for live testimony. In re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003). Protection order

hearings are a special proceeding. In addition to the domestic violence and sexual assault protection order proceedings, there are other summary procedures. See e.g.: Unlawful Detainer at RCW 59.12, does not contemplate a full-blown trial, Peoples Natl Bank v Ostrander, 6 Wn.App. 28, 30, 491 P.2d 1058 (1971); and Frivolous Lien at RCW 60.04.081 is a summary proceeding to contest a real property lien and is “in the nature of trial by affidavit,” W.R.P. Lake Union Ltd. v. Exterior Services, 85 Wn.App. 744, 750, 934 P.2d 722 (1997). In summary proceedings, disputed issues including credibility determinations, are often decided on documentary submissions.

Given the minimal intrusion to Foster’s protected interests and the due process allowed by the statutes, a credibility determination made on a documentary record does not violate due process. In Gourley, a child accused her father of a sexual assault. The child’s mother petitioned for and received a domestic violence protection order. The Respondent, Mr. Gourley, argued that his due process rights in the protection order hearing were violated when the court improperly considered hearsay evidence and refused to allow him to elicit testimony from one of the child-victims. Gourley, 158 Wn.2d 460 at 467, 145 P.3d 1185 (2006).

“While Mr. Gourley has an important interest in the care, custody, and control of his children, the government has a compelling interest in preventing domestic violence or abuse.” *Id.* at 468. The procedural protections of Gourley and RCW 26.50 (domestic violence) are similar to those of RCW 7.90 (sexual assault) and this case. In Gourley the dissent argued that the trial court’s order targeted a fundamental liberty without affording the husband and father the right to live testimony. *Id.* at 477 (Sanders, J., dissenting). It cannot be seriously argued that requiring Foster to stay away from Charbonneau implicates a more important right than contact with one’s child.

The protected interest of Foster, requiring that he stay away from Charbonneau, is much less compelling than the interests in Gourley, including the right to remain in one’s home and see one’s children. The testimony presented by Foster at the initial hearing was transcribed for the record and considered by the Superior Court judge at the Revision hearing. A review of the Mathews factors elucidates the fact that the procedures of RCW 7.90 and the de novo review at a revision are constitutional.

The judge considered the testimony of Foster and the testimony of Bertrand. RP 16. Bertrand’s testimony was only an opinion. “It’s an

opinion only as to what he believes occurred based upon what people have told him....” RP 18. The judge’s decision was based on the documentary evidence before the court. That evidence included the transcript of testimony in addition to the pleadings and declarations. Even if the testimony of Foster and Bertrand were pivotal for fact questions, it did not trigger a requirement for live testimony. Rideout, 150 Wn.2d 337 at 352.

The decision of the Superior Court was based on a finding of fact that non-consensual sex occurred. RP 20. For the purposes of determining the facts of the case, the trial court may use declarations and admit hearsay. ER 1101. Effectuating the legislative intent is the overarching goal when construing a statute. Revision on the record of a protection order hearing is permissible because the Rules of Evidence do not apply. The ERs are either inapplicable or subject to the court’s discretion.

The procedural due process of the SAPO statutes and the specific process of the hearing and revision provide adequate due process. Foster received notice of the initial hearing and notice of the revision hearing. Foster had notice from the local rules that a revision is de novo on the record. WCCR 53.2.

Foster had full opportunity to provide evidence and he appeared with counsel. His procedural due process rights have been fully protected. The process due, the notice and opportunity for hearing should be appropriate to the nature of the case. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950). With the minimal curtailment of any liberty interest, a lower evidentiary standard and consideration by the court of all the documents and a transcript of any testimony, the Revision hearing was appropriate to the nature of the case and due process rights were protected.

5. Because of the minimal intrusion into Foster's protected interests and the procedures afforded, equal protection and due process are not violated.

The concept of due process is flexible and should be afforded as the situation demands. Buffelen Woodworking v. Cook, 28 Wn.App 501, 505, 625 P.2d 703 (1981). In Buffelen, the court found a worker's interest in worker's compensation benefits a substantial interest, that was adequately protected by a jury trial de novo on the record. Id. at 505, 507. Protective orders such as the one limiting Foster's contact with Charbonneau are in the nature of an injunction. Blackmon v. Blackmon, 155 Wn.App. 715 at 721, 230 P.3d 233 (2010). The remedy of a protection order, an order prohibiting contact, is not a "massive

curtailment of liberty.” Id. The statutory safeguards and the revision process are commensurate with the interests protected.

Although nonconsensual sexual conduct is the basis for the SAPO, the remedy of a protection order is not “a massive curtailment of liberty amounting to incarceration and is not criminal in nature.” Id. As such, the respondent in a protection order hearing does not have a clear legal right to equal protection with criminal defendants or defendants in quasi-criminal hearings where the risk of erroneous deprivation and the protected property interest are greater.

It does not violate equal protection for prosecutor to have the discretion to elect whether to charge civil protection order violations as misdemeanors or contempt since the purpose of a particular charge may be to coerce rather than punish. State v. Horton, 54 Wn.App. 837 at 840, 776 P.2d 703 (1989). Protection orders are in the nature of an injunction. Blackmon, 155 Wn.App. 715 at 721, 230 P.3d 233 (2010).

“Further, the legitimate purpose of the Domestic Violence Prevention Act-to prevent domestic violence-is rationally related to the issuance of a protection order....” Spence v. Kamininski, 103 Wn.App 325 at 335, 12 P.3d 1030 (2000). Kaminski held that the protection order violates no constitutional rights: not due process, not equal protection,

and not the First Amendment. Id. at 335-336. The right of free movement is a First Amendment protected liberty interest but may be restricted in the public interest. Civil protective orders curtail the right to freedom of movement because that right must give way to another person's freedom not to be disturbed. Id.

6. RCW 7.90.090(4) promotes the legislative intent of the SAPO Act, does not violate equal protection and does not impermissibly infringe on the fact finder.

Foster claims RCW 7.90.090(4) which prohibits the court from denying a SAPO because of intoxication, is void for vagueness and because it takes credibility determinations from the trier of fact. Neither vague nor depriving the fact finder of credibility determinations, the statute is constitutional. The statute only requires that the court not use voluntary intoxication to deny the SAPO. A statute is presumed constitutional and Foster must show that RCW 7.90.090 is unconstitutional beyond a reasonable doubt. Washington Fed'n v. State, 127 Wn.2d 544, 558, 901 P.2d 1028 (1995).

When construing a statute, if possible, it must be construed to preserve its constitutionality. Tellevik v. 31641 W. Rutherford St., 120 Wn.2d 68, 78, 838 P.2d 111 (1992). When reviewed in context, RCW 7.90.090(4) lists remedies and gives direction to the court that a

protection order should not be denied because of: intoxication, failure to report the assault to law enforcement, lack of physical injury or because either party is a minor. It does not remove those considerations from the fact finder, merely requires that they not be the basis for a denial.

A court will issue a SAPO if the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual penetration by the respondent. RCW 7.90.090(1)(a). "Nonconsensual means a lack of freely given agreement." RCW 7.90.010(1). The petitioner is not required to prove that she said, "no," only that she did not freely consent. Freedom to consent can be impaired by drugs or alcohol. In a criminal case, intoxication, whether involuntary or not, may make the sexual conduct nonconsensual.

.... rape by drugs or other intoxicants, which actually encompasses two separate although related offenses. The first offense consists of administering an intoxicant to the victim, which incapacitates her, and then engaging in nonconsensual sexual intercourse with her (i.e., administration of intoxicant + incapacity to consent due to intoxicant + nonconsensual sexual activity). The second offense involves sexually assaulting a victim who has become incapacitated by alcohol or drugs by self-administration or for reasons unrelated to the defendant (i.e., incapacity to consent due to intoxicant + nonconsensual sexual activity). Both methods of sexual imposition are probably as old as rape law itself; certainly very early formulations of Anglo-American rape law took them into account.

Patricia J. Falk, Rape by Drugs: A Statutory Overview and Proposals for Reform, 44 AZ L. Rev. 131 at 134-135, (2002).

RCW 7.90.090(4) codifies the public policy that someone who has voluntarily consumed alcohol should not be denied the protection order because of their voluntary intoxication. Foster supplied excessive amounts of alcohol to Charbonneau to engage in nonconsensual sex. The judge found that Foster “acted in a highly immature and opportunistic fashion.” RP at 25. Effectuating the public policy of the statute, and addressing methods of sexual imposition as old as rape law itself, the statute is neither vague nor void.

7. The court properly disregarded Bertrand’s declaration.

The judge considered the opinion testimony of Bertrand, but declined to consider the Bertrand declaration. In ruling, the Judge stated testimony “can be questioned and brought into question if there’s something about it that is inconsistent or inappropriate.” RP 14.

Bertrand’s declaration (CP 147-149) was inconsistent with his testimony (CP 68-97). The testimony on cross-examination demonstrated the inconsistencies and an incomplete investigation.

In the Declaration he states Ms. Charbonneau told a friend, Emmy Johnson also a student at Blaine High School that Tanner Foster

had raped her a few days after the alleged rape took place. CP 147. In his testimony he stated he believed Amy (sic) Johnson was the first person Charbonneau told about the rape. Upon being questioned about other witnesses that Charbonneau told right after the rape, Bertrand stated, "Well, at this point nothing would surprise me." CP 87-88. When asked why he did not interview any of the other witnesses to whom Charbonneau disclosed she had been raped by Foster, Bertrand replied, "the reason I didn't is because I left for New York City the day after or two days afterwards so – and that is the reason why." CP 89.

In his declaration, Bertrand stated he interviewed Charbonneau twice. CP 147. On cross-examination when asked if he interviewed her on four dates, Bertrand stated, "Maybe yeah, you could clarify that for me." He admitted that it was absolutely possible he made an error in his declaration. CP 84.

In his declaration, Bertrand stated John Martinez was an important witness. CP 148. When asked on cross-examination if Martinez appeared honest and straight-forward, Bertrand answered, "I don't know. I never spoke with Mr. Martinez." The interview was done by another deputy.

Bertrand wrote in his declaration that Charbonneau could only remember one instance of sexual intercourse, and that was inconsistent with her petition. CP 149. In his testimony he stated the discrepancy did not concern him and that, "Ms. Charbonneau is a very small young lady and there was a lot of alcohol, so it would not surprise me if she didn't remember." CP 96-97.

With 20 years of experience in law enforcement, Bertrand was mostly a detective with the narcotics unit. CP 68. He had investigated only a dozen rapes. His declaration cited to the Martinez's observation that "all seemed normal" between Foster and Charbonneau. CP 148. Charbonneau "struck me as emotionless and very matter of fact and did not seem upset by the events that occurred." CP 149. This victim behavior is consistent with a rape victim and her survival instincts. In State v. Williams, the court held that a rape victim's statements to a friend and the friend's mother were an excited utterance exception to the hearsay rule even though the victim washed her hair, changed her clothes and collected her cell phone and camera before walking to a friend's house. State v. Williams, 137 Wn.App. 736, 154 P.3d 322 (2007).

Though pursuant to ER 1101 the Rules of Evidence do not apply at a protection order hearing, Bertrand impermissibly commented on the

ultimate issue, a determination best left for the trier of fact. ER 701, 702.

The declaration of Bertrand at CP 147-149 was properly disregarded by the judge.

8. Charbonneau Cross-Appeals the denial to strike, seal or redact Bertrand's declaration. In violation of RCW 10.97, Bertrand wrote a declaration naming a juvenile sexual assault victim and that declaration should be stricken, sealed or redacted.

At the initial hearing on September 15, 2011 and at the hearing on revision on October 28, 2011, Charbonneau requested the Declaration of Bertrand be stricken, sealed or redacted. CP 134-137, RP 2 The court erred by not striking, sealing or redacting the declaration.

In violation of GR 15 and RCW 9A.72.085, Bertrand's declaration is undated. CP 149. The declaration was filed with the court on August 31, 2011, well before a subpoena was issued on September 6, 2011. CP 144, 145 Bertrand's declaration does not appear to be a part of any law enforcement record. The court stated that, "Deputy Bertrand is entitled, I think, as a citizen to present an affidavit in a civil matter." RP 14. That ruling under these facts is an incorrect statement of law.

The court declined to consider the declaration, but rather considered the testimony as more reliable because cross-examination would bring into question information that is inconsistent or

inappropriate. RP 14. Nevertheless, that declaration should have been at a minimum, redacted to remove the name of the juvenile sexual assault victim.

The Criminal Records Privacy Act, enacted in 1977, was amended in 1992 with the requirement that the names of juvenile sexual assault victims not be released except with permission of the child or guardian. RCW 10.97.130, Laws of 1992 ch. 188 §8. That information would also be exempt from a public disclosure request. RCW 42.56.240(5).

Bertrand provided the information in the undated declaration based on his employment as a deputy sheriff and his status as the investigating officer for the rape charges. CP 147. In violation of RCW 10.97, and not pursuant to a public disclosure request or a subpoena, Bertrand voluntarily gave his declaration to Foster. Charbonneau requested the declaration be stricken, or sealed, or redacted and subject to a protective order prohibiting its distribution. CP 134. As further grounds to strike the declaration, Charbonneau cited to ER 701, 702. Though the evidence rules to not apply to protection order proceedings pursuant to ER 1101(c)(4), a declarant is not entitled to give an opinion on the ultimate issue. Because of the privacy interest of a juvenile sexual

assault victim, the juvenile victim's name should be redacted and the declaration should be sealed pursuant to GR 15.

In a public disclosure request, a report containing a name can be redacted even though redaction of only the person's name was insufficient to protect the person's identity. Bainbridge Island Police Guild v. City of Puyallup, 172 Wn.2d 398 at 416, 417, 259 P.3d 190 (2011). Unlike the officer attempting to limit the dissemination of a report in Bainbridge Island, Charbonneau has specific protections in RCW 10.97.030; those protections excluding her name from being released by a law enforcement agency. Bertrand in his capacity as a law enforcement officer gave the information to Foster and impermissibly did not redact the name of the juvenile sexual assault victim.

GR 15 sets forth a uniform procedure for the destruction, sealing, and redaction of court records. Those procedures, along with the Ishikawa factors are to be considered when determining whether to redact a record. Indigo Real Estate v. Rousey, 151 Wn.App. 941, 215 P.3d 977 (2009), citing Seattle Times Co. v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982).

The court declined to seal or redact Bertrand's declaration because sealing the declaration "would not meet any privacy interests

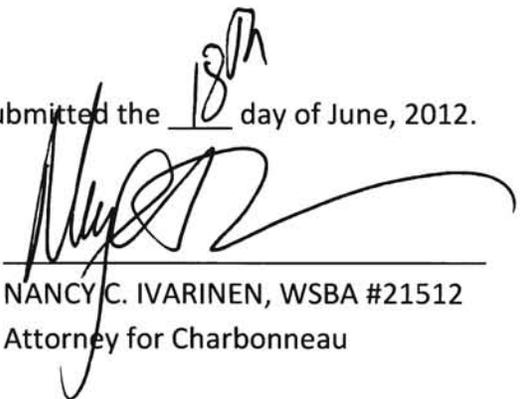
that haven't already been resolved by the nature of the case. Redacting the names...would not serve any further issue or value because the names are already in the record... to seal or something when the information is all available in an existing public forum is not consistent with the requirements of the rule." RP 15-16.

Since in 1992, the legislature has created a public policy protecting the privacy interests of juvenile sexual assault victims by not releasing their names; thus, the privacy interest and the factors in GR 15 and Ishikawa have been met by Charbonneau. The Declaration of Bertrand should be at a minimum redacted and sealed.

E. CONCLUSION

Charbonneau obtained a sexual assault protection order pursuant to RCW 7.90. The Superior Court judge determined on revision that the facts met the requirements of the statute and Charbonneau met the preponderance standard of proof. The protection order statutes and a de novo review on revision meet the due process requirements and do not violate equal protection. When produced in violation of the Criminal Records Privacy Act at RCW 10.97.050, the court should strike a declaration by law enforcement personnel.

Respectfully submitted the 18th day of June, 2012.



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DECLARATION OF SERVICE

I, Shelley Lunzer, declare under penalty of perjury under the laws of the State of Washington that the following is true and correct.

That on the 18th day of June, 2012, I caused a true and correct copy of the Brief of Respondent to be served on the party/parties designated below by personally delivering a copy to the following:

[X] William Johnston
401 Central Avenue
Bellingham, WA 98225

SIGNED AT Bellingham, WA this 18th day of June, 2012.



Shelley Lunzer, Legal Assistant