

NO. 39752-8-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

AMY SCHORNO,

Appellant,

v.

KEVIN KANNADA et al.,

Respondents.

11 JUN 21 11 02 AM
BY [Signature]
Clerk of Court

FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Linda CJ Lee, Judge

REPLY BRIEF OF APPELLANT

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A. STANDARD OF REVIEW

1. ISSUES OF MATERIAL FACT

On review of summary judgment, we engage in the same analysis as the trial court. We can uphold the trial court's summary judgment grant only if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c). We must view the facts and the reasonable inferences from them in the light most favorable to the nonmoving party.

State Farm v. Treciak, 117 Wn. App. 402, 407, 71 P.3d 703 (2003), review denied, 151 Wn.2d 1006 (2004), citing Trimble v. Washington State University, 140 Wn.2d 88, 92-93, 993 P.2d 259 (2000).

Respondent appears to concede, for purposes of summary judgment, Ms. Schorno's version of facts. Respondent's Brief ("Resp. Br.") at 5-6, 27.¹ Nonetheless, he relies solely on selected pages from one deposition. He ignores all other facts before the trial court. Resp. Br. at 1, 5-19, citing only CP 71-98. And contrary to the legal standard of review, he argues all inferences favorably to himself, not to Ms. Schorno.

¹ Respondent also repeatedly claims Mr. Kannada disputes these facts, although there is nothing in the record supporting his contrary assertions. Resp. Br. at 5; at 6 n.1; at 13 n.3.

Contrary to Mr. Kannada's repeated assertions, Ms. Schorno did not submit to Mr. Kannada's sexual assaults because she was afraid merely of "having a difficult conversation with her husband." Resp. Br. at 25, 12, 14-16, 27, 37, 38, 41, 44, 45, 49. Nor did she ever "admit[] she could have decided not to engage in [contact and intercourse], but did because it was easier to have sex with the child than explain to her husband ... that she did not." Resp. Br. at 1-4, 26. These are inferences contrary to Ms. Schorno's testimony and declarations.

Fearing her husband would not believe her may be why Ms. Schorno did not tell her husband what was happening; but it was not why she submitted to Mr. Kannada. From his first coerced kiss, Mr. Kannada continually used force to impose himself physically upon Ms. Schorno. In the beginning, he may not have spoken explicit threats to inflict "immediate death or grievous bodily harm," the definition of duress. RCW 9A.16.060; Resp. Br. at 23.

But by his actions this "taller, heavier, and stronger" person demonstrated he would use force to

get what he wanted. He disregarded her verbal protestations. He followed her against her will into rooms away from others. He groped and fondled her, even though she told him no and pushed him away. He blocked the door so she could not leave until he had done what he wanted. All of this escalating coercion occurred in late 2000 to early 2001,² before he raped her and forced her to masturbate him. CP 140; Appellant's Brief ("App. Br.") at 11-12.

This evidence creates an issue of material fact.

2. INTERPRETATION OF STATUTE

This court is to review the trial court's interpretation of a statute de novo. Castro v. Stanwood Sch. Dist. No. 401, 151 Wn.2d 221, 224, 86 P.3d 1166 (2004); App. Br. at 15.

Mr. Kannada appropriately acknowledges his civil claims are dependent on criminal statutes, specifically RCW 9A.44.089 and RCW 9A.44.079. Resp. Br. at 20-21, 42. However he refuses to analyze the criminal statutes or the elements they

² Mr. Kannada agrees this is the relevant time period for this summary judgment motion. Resp. Br. at 5-12.

define and require, choosing to argue public policy instead. Resp. Br. at 20-45.

Respondent ignores his burden of proving, in the first instance, that Ms. Schorno perpetrated the crimes defined in RCW 9A.44.089 and RCW 9A.44.079. And he ignores Ms. Schorno's original claim, as plaintiff in this case, that he sexually assaulted and battered her, thereby perpetrating sex crimes against her. Furthermore, he analyzes the evidence within the paradigm that duress is the only possible defense to his claims. Resp. Br. at 26. Yet that is the legal issue before this Court for de novo review.

B. ISSUES PRESENTED IN REPLY

The issues before the Court are clear:

1. Can a teenager below the age of 16 be the perpetrator of rape in the third degree against an adult victim?

2. Is an adult victim of sexual assault held to "strict liability" for sexual contact a minor forcefully imposed on her against her will, unless she can prove the affirmative defense of duress?

Mr. Kannada says the former is not legally possible unless the teenager used sufficient force

to constitute the statutory defense of duress. Any other holding, he says, is "legally and morally repugnant." Resp. Br. at 32-33.

Yet under Mr. Kannada's interpretation, a minor could grab an adult's crotch or a woman's breast, then bring criminal charges and collect civil damages for "child sexual abuse" -- unless the minor displayed sufficient force to meet the definition of "duress." RCW 9A.16.060.

Under Mr. Kannada's interpretation, the minor would be immune even from a charge of rape in the second degree, as "forcible compulsion" does not require as much force as "duress." Compare: RCW 9A.44.010(6) (forcible compulsion) with 9A.16.060 (duress); see App. Br. at 18, 21-22, and authorities therein.

Such an interpretation of our civil and criminal statutes is erroneous and untenable.

C. STATEMENT OF CASE IN REPLY

1. THE FULL RECORD PRESENTS MATERIAL ISSUES OF FACT.

Mr. Kannada pretends his "exquisitely narrow" characterization of the record controls this case. Resp. Br. at 1. However, the trial court had before it, and considered, far more than the

selected pages from Ms. Schorno's deposition on which Mr. Kannada continues to rely. CP 207-08.

The trial court considered the Declarations of Amy Schorno, CP 102-07, 136-55; of Lang Taylor, CP 172-82;³ and of Dr. Vincent Gollogly, CP 108-22, 156-59.⁴ See generally App. Br. at 2-14.

Thus it is utterly inaccurate to characterize Mr. Kannada's version of "facts" as "undisputed." Resp. Br. at 5-19. He relies solely on inferences drawn favorably for himself from pages he selected from Ms. Schorno's deposition, CP 71-98, completely ignoring the legal standard of review and all other sources of facts. See Standard of Review, supra.

2. THIS COURT MUST CONSIDER THE DECLARATIONS.

Mr. Kannada claims this Court should disregard the evidence in this record beyond the deposition

³ The court struck paragraph 2 from Lang Taylor's Declaration, CP 172; and six lines from page 3 of Ms. Schorno's first Declaration, CP 138. CP 205-06. Appellant has not relied on any of these portions in this appeal.

⁴ The independent medical examination of Mr. Kannada is completely relevant to the activities of 2000. Resp. Br. at 46. It specifically related back to when he was 14, considering his other behaviors at the beginning of his abuse of Ms. Schorno. CP 108-22, 156-59, esp. 157, 159.

pages he submitted, although the trial court had the other evidence before it. Resp. Br. at 25, 46-47.

In Marshall v. A C & S Inc., 56 Wn. App. 181, 185, 782 P.2d 1107 (1989), the plaintiff's single answer to a deposition question -- the year he learned he had asbestosis -- placed his claim beyond the statute of limitations. He later submitted an affidavit contradicting that specific date, not only as given in his deposition, but also as supported by his medical records. The court granted summary judgment, refusing to permit this direct contradiction to create a genuine issue of material fact.

Although Mr. Kannada appears to rely broadly on this Marshall rule, his authorities do not support his position.⁵ The appellate courts have applied it quite narrowly.

⁵ McCormick v. Lake Washington School Dist., 99 Wn. App. 107, 111, 992 P.2d 511 (1999), agrees an affidavit's contradiction raises an issue of fact if it explains the contradiction, as Ms. Schorno's does. CP 138. Smith v. Ohio Casualty Ins. Co., 37 Wn. App. 71, 73, 678 P.2d 829 (1984), merely held that bare allegations included in counsel's brief are insufficient to raise an issue of fact. It had no affidavit.

In Safeco Ins. Co. v. McGrath, 63 Wn. App. 170, 817 P.2d 861 (1991), review denied, 118 Wn.2d 1010 (1992), the court rejected the Marshall rule

because (1) the later statements were not "flat contradiction(s)" of the first and (2) the defendant offered an explanation for the inconsistencies. ... Finally, the court held that the jury decides whether the explanation was plausible.

...

Here, although Treckiak's declaration differs from his earlier testimony, he provides an explanation for the contradiction. The jury should determine his statements' plausibility. ... [W]hen equivocal statements are further explained in later testimony, we review those statements along with all the evidence presented to see if there is an issue of fact for the jury.

Treckiak, 117 Wn. App. at 409.

As in McGrath and Treckiak, here Ms. Schorno's Declarations do not present any "flat contradictions" from her deposition. At most, they fill in gaps that the deposition did not cover⁶ -- gaps that Mr. Kannada prefers to fill with his own inferences.

Ms. Schorno's Declaration also clearly explains the fallacy of Mr. Kannada's inferences

⁶ From the beginning, Mr. Kannada framed his summary judgment issue in the trial court within the context of duress being the only possible defense. CP 198.

from what she did not say while answering deposition questions. See, e.g., Resp. Br. at 17.⁷ At the deposition, she was following her attorney's advice to answer only the question asked and not to offer any additional information. CP 138.

Mr. Kannada obviously disagrees with Ms. Schorno's testimony when he uses the word "confabulate." Resp. Br. at 16,⁸ 25, 44. That disagreement, however, demonstrates the material issue of fact. As in Treciak, it is for the jury to decide whether to believe Ms. Schorno's explanations or Mr. Kannada's argued inferences.

3. MR. KANNADA DENIES THE VERY FACTS PRESENTED ON THIS RECORD.

While reciting what seem to be the facts of this case, Mr. Kannada argues they are not.

A more difficult case -- not presented here -- would be if the man or

⁷ Without citing the record, Mr. Kannada claims "[s]he was asked to describe the event in great particularity." Counsel was unable to find any reference to this request. Nonetheless, he focuses on what she did not say in response to questions. Resp. Br. at 17.

⁸ Ms. Schorno never claimed Mr. Kannada's threat to her daughter forced her to submit to his sexual assaults, Resp. Br. at 16; rather his threat to her daughter finally gave her the courage to seek a protection order against him. This threat was in 2005, long after 2001. App. Br. at 2.

woman did exert some minor physical resistance to disengage and the child responded with some physicality. Under different facts not presented here, it might create a question of fact whether the resistance used by the adult, and the counter-resistance used by the child, was sufficient to create a question of fact of whether the adult's ultimate acquiescence was compelled by an "immediate" threat of "death" or "grievous bodily injury."

However, that is not this case. Ms. Schorno was clear Kevin exerted no physicality and she made no attempt to disengage regarding the events at issue. The record does not present even a scintilla of a question of fact.

Resp. Br. at 29 (emphases in original). Respondent makes no citations to the record to support these assertions. Indeed, he cannot.

Ms. Schorno testified that Mr. Kannada began physically grabbing, pushing, explicitly threatening to break her bones, hitting her and putting his hands around her throat **after** he already had physically imposed his larger self onto her. But **before** these greater uses of force, he groped, kissed and fondled her, followed her into rooms and blocked her exit, forced her to masturbate him, and raped her. CP 97.

After he forced kisses on me, but before he raped, forced me to masturbate him, struck me or verbally threatened to [strike me], he would follow me into rooms (the laundry room, garage, etc...)

fondle me, **even though I would tell him no, and push him away.** He would block the door keeping me from escaping until he had done what he wanted. He was bigger and stronger, I had no say, and I was afraid of him.

CP 140; App. Br. at 11-12 (emphasis added).

This evidence clearly presents an issue of material fact for the jury -- of who was "the perpetrator" of any sexual contact. And it demonstrates Ms. Schorno's fear was of Mr. Kannada, not of her husband.

4. MR. KANNADA ADDS FACTS NOT CONTAINED IN THE RECORD.

Mr. Kannada, via his counsel, claims this Court's actions have "irreparably harmed this young victim." Resp. Br. at 50. There is nothing in the record to support this assertion.

The legal and factual issue of this case begs the question: Who is the victim?

D. ARGUMENT

1. IN PROVING A CLAIM OF RAPE OF A CHILD OR CHILD MOLESTATION, THE CLAIMANT MUST PROVE WHO WAS THE PERPETRATOR.

Mr. Kannada argues that giving effect to the statute's words "perpetrator" and "victim" creates a new defense to a crime against children. Resp. Br. at 22. These statutes do not create a

"defense." They clearly define what a plaintiff must prove to support his claim: that the defendant was "the perpetrator" and the claimant was "the victim" of the act complained of.

Rather than cite any authority regarding these terms, Mr. Kannada cites Black's Law Dictionary for the definition of "engage." He acknowledges "engage" was in the former laws defining statutory rape. Resp. Br. at 35. The Legislature however removed that word when it rewrote the statutes defining rape of a child and child molestation. See RCW 9A.44.079, 9A.44.089, quoted in App. Br. at 17. Without citing any other authority, he baldly claims that change of language cannot have any meaning. Resp. Br. at 30-38.

Our courts have recognized that these terms are significant and have separate meaning.

RCW 9A.44.073(1) (rape of a child in the first degree) requires the State to establish that "the person [had] sexual intercourse with another who is less than twelve years old and not married to the perpetrator and the perpetrator is at least twenty-four months older than the victim." Implicit in this statute is that **the perpetrator** is defined as **one who causes the other person to engage in the act** amounting to rape of a child in the first degree.

State v. Bobenhouse, 166 Wn.2d 881, 889, 214 P.3d 907 (2009) (emphases added) (defendant who caused two children to have sexual contact with each other was "the perpetrator" and legally responsible). Accord: State v. BJS, 72 Wn. App. 368, 371-72, 864 P.2d 432 (1994) (same for juvenile offender).

The court's definition of "perpetrator" thus is consistent with the other authorities appellant cited. App. Br. at 24-25. Respondent cites no other authority on this term.⁹

"**Causing** the other person to engage in an act" is different from "urging," "desiring," "asking for," "initiating," or "consenting," all terms Mr. Kannada uses in his brief to minimize and confuse the issue. Resp. Br. at 2, 21, 22, 27-28, 33. Ms. Schorno has never argued Mr. Kannada merely "urged," "desired," "initiated," or "consented" to sexual contact; she consistently has claimed he forced all contact upon her. An "initiator" is not the same thing as a "perpetrator." Resp. Br. at 21; Bobenhouse, supra. Not only did Mr. Kannada

⁹ The bare legislative history cited in 13B Wash. Pract. § 2405, with no specific references to language or analysis, can hardly be authority of what the Legislature did **not** intend. Resp. Br. at 42.

"urge" "desire," and "initiate" the sexual contact, he did so against Ms. Schorno's explicit lack of consent; and he did so using the fear this oversized, aggressive teenager engendered in Ms. Schorno. As such he was the perpetrator, she was not.

2. THE STATUTORY REQUIREMENT OF "PERPETRATOR" IS APPARENT WHEN COMPARED WITH OTHER RELATED STATUTES.

Mr. Kannada acknowledges the legal principle that the statutes governing sexual crimes must be read in relation to one another. Resp. Br. at 32. Yet he utterly fails to address any of those statutes. See App. Br. at 16-22.

Mr. Kannada's civil claims under RCW 4.16.340 are defined by the criminal statutes, RCW 9A.44.079 and 9A.44.089. Ms. Schorno's civil claims for assault and battery and intentional infliction of emotional distress are not defined by statute, but turn on her allegations of what Mr. Kannada did to her. Those underlying allegations coincidentally fit within the definitions of crimes identified in Appellant's Brief at 19-23.

By comparing these statutes with the unusual facts and competing claims of this case, the

meanings of "the perpetrator" and "the victim" become clear. The material issues of fact become even clearer: the parties dispute who was "the perpetrator."

3. REQUIRING PROOF OF WHO WAS THE PERPETRATOR IS NOT "SEXIST."

Mr. Kannada asserts that Ms. Schorno's argument is "sexist." Resp. Br. at 3-4, 28-29. It is not. Although she applies the law to the facts of this case, which involve her claim that a larger, stronger, teenaged boy sexually assaulted her and so was the "perpetrator" of multiple crimes, her interpretation of the law is gender neutral. See App. Br. at 23-24 (setting out hypotheticals without regard to gender).

Kevin's relatively larger size is enormously relevant to Ms. Schorno's perception that he presented a physical threat to her. Resp. Br. at 4. See State v. Harvill, 169 Wn.2d 254, 234 P.3d 1166 (2010); App. Br. at 41-44. Mr. Kannada cites no authority to say that her sworn declarations that he was larger and stronger than her are insufficient for this court to rely on, nor did he contest this fact below.

4. THIS APPEAL IS NOT FRIVOLOUS.

Respondent moves "pursuant to RAP 18.9 and CR 11"¹⁰ for actual fees and costs in responding to the briefing in this appeal. Resp. Br. at 47-50.

RAP 18.9 provides:

(a) **Sanctions.** The appellate court on its own initiative or on motion of a party may order a party or counsel, or a court reporter or other authorized person preparing a verbatim report of proceedings, who uses these rules for the purpose of delay, files a frivolous appeal, or fails to comply with these rules to pay terms or compensatory damages to any other party who has been harmed by the delay or the failure to comply or to pay sanctions to the court.
...

This Court granted appellant's Motion for Discretionary Review, knowing it was interlocutory. Presumably it would not have granted review of a "frivolous" issue. Appellant's briefing consistently cites to the record; she has not misrepresented the facts. Although Respondent is vociferous with his displeasure at having this case before the appellate court, he cites no rules whatsoever that Appellant has violated.

Furthermore:

¹⁰ CR 11 applies only in superior courts.
CR 1.

(a) **Interpretation.** These rules will be liberally interpreted to promote justice and facilitate the decision of cases on the merits. Cases and issues will not be determined on the basis of compliance or noncompliance with these rules except in compelling circumstances where justice demands, subject to the restrictions in rule 18.8(b).

(c) **Waiver.** The appellate court may waive or alter the provisions of any of these rules in order to serve the ends of justice, subject to the restrictions in rule 18.8(b) and (c).

RAP 1.2.

Respondent's rant continues to implicate this Court's decisions. Resp. Br. at 48-50. Nothing in RAP 18.9 suggests this Court can impose sanctions against a party for decisions this Court has made. Ms. Schorno respectfully asks that it not do so.

E. CONCLUSION

In a claim for child sexual abuse or rape in the third degree, the law requires the claimant to prove the defendant was "the perpetrator." In this case, that is an issue of fact. Taking the evidence in the light most favorable to the non-moving party, Amy Schorno, there is sufficient evidence to present that factual issue to a jury.

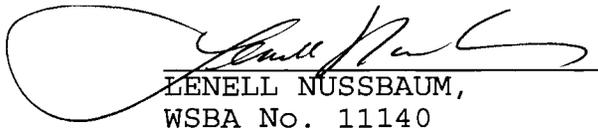
The law does not limit a woman to the claim of duress, to fear or physically resist at the risk of

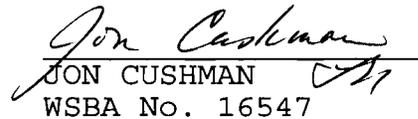
placing herself in greater physical danger, to resist a sexual assault. The trial court erred by interpreting these statutes and this record to hold that duress is the only defense available to Amy Schorno for the claimed child sexual abuse. If a jury finds she was the victim of sexual assault, she cannot be a "perpetrator" of child sexual abuse.

This Court should reverse the partial summary judgment and remand for trial to the jury on the issue of who was the perpetrator.

DATED this 16th day of June, 2011.

Respectfully submitted,


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DECLARATION OF SERVICE

On this date I sent a copy of the Reply Brief of Appellant by United States Postal Service, postage prepaid, addressed as follows:

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I declare under penalty of perjury under the laws of the state of Washington that the above statement is true and correct to the best of my knowledge.

6/17/2011 - Seattle, WA
Date and Place

Alex Fast
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