

No. 44477-1-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

J.C.,
Appellant,

v.

S.C.,
Respondent.

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BRIEF OF APPELLANT J.C.

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ORIGINAL

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I. INTRODUCTION

The Appellant, J.C., appeals the issuance of a Sexual Assault Protection Order by the Superior Court for Thurston County, issued by the Hon. Anne Hirsch on January 25, 2013. (CP at 214-216).

On November 14, 2012, 14 year old S.C. and her mother filed a petition for a sexual assault protection order. The named respondent was 16 year old J.C. (CP at 4-7). J.C. filed a declaration in response to the Petition, which denied any non-consensual sexual misconduct. (CP at 12-14).

On December 19, 2012, a full evidentiary hearing was held before Pro Tem Commissioner Martin Meyer. Both S.C. and J.C. appeared and testified under oath at the hearing on December 19, 2012. At the conclusion of the hearing, Pro Tem Commissioner Martin Meyer issued an Order denying the petition for a sexual assault protection order. (CP at 15-17). Pro Tem Commissioner Martin Meyer also issued Findings of Fact and Conclusions of law. (CP at 186-188). Pro Tem Commissioner Martin Meyer made a specific finding regarding the credibility of the witnesses. (CP at 188).

Petitioner S.C. then filed a Motion for revision of Pro Tem Commissioner Meyer's decision denying the initial petition for a sexual assault order (SAPO). (CP at81-83).

II. ASSIGNMENTS OF ERROR

A. Assignments of Error (AOE)

1. The Superior Court Judge, Hon. Anne Hirsch, erred by excluding the testimony of S.C. and J.C. regarding conversations between the two parties surrounding the allegations of non-consensual sexual assault.
2. The Superior Court Judge, Hon. Anne Hirsch, was "arbitrary and capricious" by arbitrarily choosing to rely solely upon the testimony of S.C. regarding alleged non-consensual behavior as a basis for overturning the decision of Pro Tem Commissioner Meyer.
3. The Superior Court Judge, Hon Anne Hirsch erred when the Court ignored the credibility finding of Pro Tem Commissioner Meyer.

B. Issues Pertaining to Assignments of Error

1. Did the trial Judge err when she excluded the testimony of S.C. and J.C. regarding the conversations between the two parties surrounding the allegations on non-consensual sexual assault? (AOE 1) (AOE 2)
2. Was the trial Judge's decision to exclude all testimony but S.C.'s "arbitrary and capricious"? (AOE 2) (AOE 3)

3. Did the trial judge err when she ignored the credibility finding of Pro Tem Commissioner Meyer? (AOE 4)

III. STATEMENT OF THE CASE

S.C. filed a Petition for a Sexual Assault Protection Order (SAPO) on November 15, 2012. (CP at 4-7). J.C. filed a responsive Declaration under oath on November 21, 2012. A full evidentiary hearing was held on December 19, 2012. (CP at 101-181). (The verbatim transcript of the evidentiary hearing is appended to Brief of Petitioner in support of Motion for Revision. (CP at 84-181). Citations to the record of the evidentiary hearing before Pro Tem Commissioner Martin Meyer, which is different than the RP citations, will be identified by “ERP” for “evidentiary report of proceedings, to distinguish that hearing from the RP record, which is the oral decision of Judge Hirsch.)

At the evidentiary hearing, S.C. testified first and was cross-examined. J.C. then testified and was also cross examined. The pertinent facts that were testified to by both parties are as follows.

3.1 Summary of testimony of S.C. On direct examination, S.C. testified that she and J.C. rode the bus home from school. (ERP at 104). Both were students at Tumwater High School. (ERP at 106). S.C. and J.C. talked to each other “about their lives.” (ERP at 1040). J.C. had

met S.C.'s mother. (ERP at 105). S.C. was in 9th grade, and J.C. was a junior. (ERP at 106).

On November 8, 2012, S.C. and J.C. agreed to hang out in the Scott Lake Park together. (ERP at 106). S.C.'s mom was aware they would be hanging out together. (ERP at 106). After joining up at the Scott Lake Park, S.C. and J.C. decided to go to J.C.'s grandpa's house adjacent to the park. (ERP at 107). S.C. did not have her mom's permission to go to J.C.'s grandpa's residence. (ERP at 107)

S.C. and J.C. hung out and talked at grandpa's house up to half an hour. (ERP at 108). When S.C. was ready to leave, she testified that J.C. wanted to show her his penis to see if it was big. (ERP) S.C. testified that J.C. pulled out his penis and asked her if it was "bigger than Austin's," and she said yes. S.C. testified that J.C. grabbed her by the waist and made her touch his penis with the back of her hand. (ERP at 110). S.C. said she made a fist so she wouldn't have to touch his penis. (ERP at 110). S.C. testified that J.C. said you can give me a "hand job or a blow job to get back at A.F.." (ERP at 110).

S.C. testified that A.F. was her ex-boyfriend. (ERP at 111). S.C. said she was able to break away from J.C. and went out the back door. (ERP at 112). S.C. testified that J.C. walked her home. (ERP at 112).

S.C. then testified that she let J.C. walk her home because she was scared. (ERP at 114). S.C. called the police the next day. (ERP at 114).

S.C. then testified about a text message or “instagram” that was not sent to her, but that one of her friends gave her. (ERP at 116-118; *See* Exhibit No. 1). Pro Tem Judge Meyer admitted Ex. 1, indicating the rules of evidence were relaxed, and it would clearly not be admissible under the Rules of Evidence. (ERP at 118). S.C. then testified she voluntarily touched J.C.’s penis. (ERP at 120).

3.2 Cross examination of S.C. S.C. testified that she and J.C. talked about their relationships with other people. (ERP at 121). S.C. testified that she and J.C. talked about their mutual friend A.F., who was S.C.’s boyfriend between August 8, and September 2, 2012. (ERP at 122). S.C. said she told J.C. about having sex with A.F. S.C. testified that she told J.C. how many times she had sex with A.F. (ERP at 123).

S.C. testified that J.C. discussed having sex with other females. (ERP at 123-124). S.C. testified that she and J.C. talked about personal and sexual relationships with other people while riding the bus home from school in September, October, and November. (ERP at 124). S.C. testified she was comfortable with these conversations as she and J.C. were friends. (ERP at 124).

S.C. testified that on November 8th she talked to J.C. about having sex in the Scott Lake Park with A.F. (ERP at 127). She pointed out places in the park where she had sex with A.F. (ERP at 127). S.C. testified that she talked to J.C. about having sex with A.F, as J.C. walked her home. (ERP at 127-128). S.C. also testified that she had these conversations with J.C. on the way home, because she considered J.C. to be her friend at that time. (ERP at 128). S.C. testified that J.C. did not attempt to stop her from going home, and that the walk home was about ten minutes. (ERP at 129).

3.3 Direct examination of J.C. J.C. testified he met S.C. on the school bus ride home. (ERP at 135). J.C. met S.C.'s parents two or three days before the 8th of November. (ERP at 136). After S.C. and J.C. met up, J.C. estimated their total time together as about an hour and one half. (ERP at 138).

During their time together at Scott Lake Park, S.C. discussed sex she had with A.F. in the park, pointing out locations, and where condoms were under leaves. (ERP at 139). Both decided to go to J.C.'s grandpa's house, and J.C. told S.C. his grandpa was not home. (ERP at 140). S.C. continued to talk about A.F. at grandpa's house. (ERP at 141).

When S.C. was getting ready to leave, J.C. testified there was so much sexual conversation between the two of them, he asked her to view his penis size. (ERP at 142). S.C. said she would look at J.C.'s penis, but

never touched it. (ERP at 142). J.C. testified there was no forced sexual contact between the two.

J.C. testified that S.C. was not upset on the walk home. J.C. asked S.C. if she wanted to do anything sexual, and she said no. (ERP at 143). J.C. then walked S.C. home. (ERP at 144). J.C. testified he did not send the instagram to S.C., and that he sent it to some friends because he was being wrongfully accused of sexual misconduct. (ERP at 45-46).

3.4 Cross examination of J.C. On cross examination J.C. denied touching or trying to even kiss S.C. There was no impeachment of J.C. by way of cross examination.

3.5 Court's decision. Judge Pro Tem Meyer stated that the issue of consent came down to the credibility of the parties. (ERP at 159). He found that the parties were very comfortable talking to one another about past sexual relationships. (ERP at 159). Pro Tem Judge Meyer found that S.C. had not met her burden of proof by a preponderance of the evidence. (ERP at 159). Pro Tem Judge Meyer issued Findings of Fact, Conclusions of Law, and denied the Petition for the sexual assault protection order. (CP 186-188, CP at 15-17).

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IV. ARGUMENT

4.1. The trial court erred when it excluded all the evidence of conversations between S.C. and J.C. other than the testimony of whether there was consensual contact between S.C. and J.C. (AOE 1, AOE 2)

The Court at the initial evidentiary hearing cannot decide factual issues, unless all relevant testimony is presented for consideration. Realizing that the issue of what is relevant is within the ultimate province of the fact finder, no case, whatever the subject matter is, can be tried in a vacuum. For the initial evidentiary hearing officer to be barred from considering the conversations between the parties, leading up to the ultimate fact issues to be decided, would be a fraud upon the court.

RCW 2.24.050 states that a “revision” proceeding is a record appeal to a Superior Court Judge. The case law seems to be that the review is done on the record on a “de novo” basis. *In Re Marriage of R.E.*, 183 P.3d 339, 144 Wn. App. 393, at 406 (2008).

The trial judge’s review reveals a total misapplication, if not a misunderstanding, of the rules of evidence that address prior sexual conduct or misconduct. The rules of evidence for Superior Court are relaxed in the SAPO calendars, as well the domestic violence calendars

and the anti-harassment calendars. This primarily relates to the admissibility of hearsay evidence. (ER 1101 (c)(4).

ER 412 and RCW 7.90.080 still must be addressed, if applicable. The analysis begins with the question of what was the evidence at issue offered for. Before ER 412 and RCW 7.90.080 are addressed, this question must be answered. All of the evidence testified to by the parties was testimony about conversations between the parties on the day in question, and surrounding the testimony of consensual contact between the parties. ER 412 and RCW 7.90.080 traditionally address extrinsic evidence from third parties relating to the predisposition to engage in sexual behavior or credibility of the complaining party. In this case, the Court should find that neither ER 412 or RCW 7.90.080 come into play, as the evidence is the direct testimony between the adverse parties, setting the stage for the fact-finder to address the ultimate fact issues to be decided on the issue of consent.

Use of ER 412 . Even if the Court addresses ER 412 on the issue of whether the rule applies, the evidence in the evidentiary hearing below is admissible. ER 412 states as follows:

“(c) Exceptions. In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm

to any victim and of unfair prejudice to any party.” ER 412(c). (Emphasis added).

The Superior Court ruled that the evidence of S.C.’s past relationship with A.F. was “irrelevant, and it was highly prejudicial.” (RP at 12, lines 2 and 3.) This ruling evidences a clear misunderstanding of what ER 412 says on its face. All evidence is “prejudicial” to the extent it harms the testifying party. “Highly prejudicial” evidence only comes in to play when it has to do with some evidence that is not directly related to the ultimate issues before the fact finder, or is collateral to the evidence between the two parties to the litigation.

“Rule 403 authorizes the exclusion of relevant evidence “if its probative value is substantially outweighed by the danger of unfair prejudice.” Nearly all evidence is prejudicial in the sense that it is offered for the purpose of inducing the trier of fact to reach one conclusion and not another. This is not the sense in which the term “prejudice” is used in Rule 403. Nothing in Rule 403 authorizes the exclusion of evidence merely because it is “too probative.”

5 Wash. Prac., Evidence Law and Practice §403.3 The balancing process – Unfair Prejudice

As was previously stated, to exclude the conversations between S.C. and J.C. leading up to and subsequent to the activities at J.C.’s grandpa’s house would be nothing less than a fraud upon the Court to determine the ultimate facts. What is clearly relevant is what happened, and what was discussed on November 8, 2012. (See ER 401, 402, 403.)

The Superior Court's decision simply pretended that all the relevant evidence should be excluded or disregarded, and the total evidence for the fact finder be limited to just a very few statements by the two litigants, about non-consensual or consensual conduct. None of the evidence excluded by the Superior Court was provided by anyone but S.C. and J.C. None of the excluded evidence was extrinsic, or provided by third persons who were not litigant parties.

If A.F. had appeared as a witness, to establish his sexual relationship with S.C. for the purpose of establishing sexual predisposition of S.C., this would clearly be excludable under ER 412 or RCW 7.90.080, the SAPO statute. S.C., as the alleged victim, is not afforded the opportunity under the rules of evidence to testify as to what occurred between her and J.C. on November 8, 2012, and then say, none of this is relevant and should be excluded. This result would be absurd and would be a fraud upon the court. The Superior Court was wrong as a matter of law.

Use of RCW 7.90.080. The same reasoning that is set forth above regarding ER 412 is applicable to the SAPO statute. The SAPO statute allows evidence of past sexual conduct between the parties if the evidence is either constitutionally required to be admitted, or if the probative value of the evidence outweighs the danger of unfair prejudice to a party. RCW

7.90.080(1)(b); RCW 7.90.080(2). In this case, there was no previous sexual contact between the parties, which is another reason this provision of the SAPO statute does not apply.

The faulty premise of the Superior Court Judge was based on the erroneous assumption that sexual contact between both parties with other persons, brought the SAPO statute into play. The SAPO statute does not apply to testimony of the two litigant parties as to one another.

Judge Pro Tem Meyer stated the situation accurately when he made the following ruling:

“COURT: I think it’s directly relevant here to these proceedings both as a matter of what exactly happened and number two just establishing some credibility with the witness. I understand under the statute that sexual activity is not generally admissible for the respondent but it’s part and parcel of what gave rise to this entire proceeding so I don’t think I can ignore it in this context.” (ERP at 23.)

The decision of the reviewing Superior Court Judge is wrong as a matter of law, and should be reversed.

4.2 The Trial Judge’s exclusion of all testimony of both parties about sexual relations with third parties was “arbitrary and capricious.”

In addition to being wrong on the evidence rules and the SAPO statute concerning relevant evidence, the ruling of the trial Judge was “arbitrary and capricious.” The Court abuses its discretion if the decision

is manifestly unreasonable or is made on untenable grounds. *State v. Ray*, 167 Wn. 2d 644, 222 P.3d 86 (2010). The trial court must exercise its discretion in conformity with the law. *State v. Grayson*, 154 Wn. 2d 333, 336-7, 111 P.3d, 1183 (2005).

For the foregoing reasons, that the Court clearly applied the evidence rules contrary to the law, its decision was an “abuse of discretion.”

4.3 The reviewing Superior Court Judge erred by ignoring the credibility finding of Pro Tem Judge Meyer.

Pro Tem Judge Meyer made a specific Finding of Fact regarding the credibility of the testimony of S.C. and J.C. (RP at 187). Pro Tem Judge Meyer was able to observe the two witnesses first hand giving live testimony under oath. The Superior Court Judge’s review is confined to the record on appeal. *In Re Marriage of R.E., supra*, 183 P.3d 339, 144 Wn. App. 393, at 406 (2008).

Judge Hirsch did not have the ability to determine credibility of the witnesses on a record appeal. The credibility of witnesses is usually within the sole province of the fact finder, whether it be a jury or judge. *Bale v. Allison*, 294 P.3d 789 (2013), ____ Wn. App. ____.

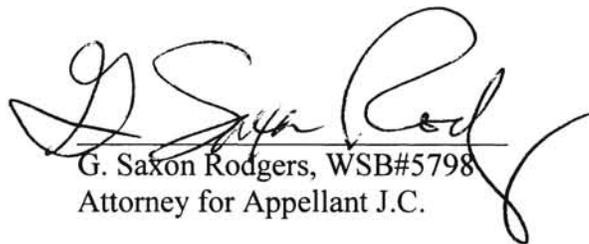
In this case, the Superior Court just ignored this aspect of the proceeding it was reviewing. Even in a “de novo” review on the record,

there is no legal authority allowing the reviewing court to simply ignore this part of the evidentiary hearing process. This case clearly had to turn on the fact finder's observations of the credibility of S.C. and J.C. The failure of the trial Judge to exercise any discretion on this issue, is an "abuse of discretion". A court's failure to exercise its discretion is an abuse of discretion. *Hook v. Lincoln County Noxious Weed Control Board*, 166 Wn. App. 145, 269, P.3d 1056 (2012).

V. CONCLUSION

In conclusion, the Superior Court reviewing judge erred as a matter of law when she excluded all evidence regarding the conversations between the litigant parties. The decision of the Superior Court reviewing judge was arbitrary and capricious and should be reversed, and the Order of Pro-Tem Commissioner Meyer reinstated.

Respectfully submitted this 18th day of April, 2013.


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DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington that on the below date, I caused delivery as noted below, of a true and correct copy of the foregoing document to:

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DATED at Olympia, Washington, this 18th day of April, 2013.

Catherine Hitchman
Catherine Hitchman