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COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JEFFREY KIRKWOOD,
Appellant,

v.

MATTHEW ENGELBRECHT,
Respondent.

BRIEF OF APPELLANT

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TABLE OF CONTENTS

A. ASSIGNMENTS OF ERROR and ISSUES 1
 Assignments of Error 1
 Issues Pertaining to Assignments of Error 1

B. STATEMENT OF THE CASE 2

C. SUMMARY OF ARGUMENT 15

D. ARGUMENT 15

 I. JK’S STATEMENTS TO HER COUNSELOR, TO MS. McLEOD AND TO HER GRANDMOTHER AS TO WHAT MR. ENGELBRECHT DID TO HER SHOW DOMESTIC VIOLENCE AS DEFINED IN RCW 26.50.010(3) 15

 A. JK’s statements are evidence of assault and therefore meet the definition of domestic violence under RCW 26.50.010(3)(a) 16

 1. The legal definition of assault 16

 2. Mr. Engelbrecht touched JK inappropriately, including while sleeping next to her in bed 18

 3. Mr. Engelbrecht’s inappropriate touching made JK feel weird and uncomfortable and she didn’t know what to do 19

 4. Mr. Engelbrecht knew what he was doing and did not want JK’s father to know about it 19

 5. Mr. Engelbrecht’s actions constituted assault and were therefore domestic violence 20

 B. JK’s statements to her grandmother are evidence of sexual assault and therefore meet the definition of domestic violence 21

 II. COURT ABUSED ITS DISCRETION BY BASING ITS RULING ON A MEANINGLESS FACT/WRONG STANDARD 22

 A. The court ruling was based on a meaningless fact. 22

 B. The Commissioner had a history with Mr. Kirkwood and allowed irrelevant evidence to be presented 23

III. THE COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW JK TO TESTIFY	24
A. Did the Commissioner believe JK?	24
1. Some statements of the Commissioner suggest he believed what JK told at least to Ms. McLeod.	24
2. The Commissioner’s ruling shows he did not in fact believe JK, but determined de facto she was not credible in favor of Mr. Engelbrecht.	26
B. The court relied on a misunderstanding of the law in refusing to allow JK to testify	26
C. The court denied JK due process in refusing to allow her to testify	29
D. In refusing to allow JK to testify, the court chose to be wilfully blind to the question of whether Mr. Engelbrecht sexually assaulted JK.	31
IV. OTHER ISSUES	33
A. The court violated statutory requirements by failing to make the required written findings.	33
B. The court drew an improper conclusion regarding the absence of the video at the hearing	33
C. The court disregarded the danger to DK and AK as well as that to JK	36
V. APPELLANT IS ENTITLED TO ATTORNEYS FEES, COSTS.	36
E. CONCLUSION	36

TABLE OF AUTHORITIES

Washington Cases

Aiken v. Aiken, 187 Wn.2d 491, 387 P.3d 680 (2017) 12, 27–31

Garratt v. Dailey, 46 Wn.2d 197, 279 P.2d 1091 (1955) 18

Gourley v. Gourley, 158 Wn.2d 460,
145 P.3d 1185 (2006) 21, 28, 29, 31

In re Dependency of H.W., 70 Wn. App. 552,
854 P.2d 1100 (1993) 31

In re Marriage of Rideout, 150 Wn.2d 337,
77 P.3d 1174 (2003) 28-30

Juarez v. Juarez, 195 Wn. App. 880, 382 P.3d 13 (2016) 22

Kumar v. Gate Gourmet Inc., 180 Wn.2d 481,
325 P.3d 193 (2014) 17, 20

Maldonado v. Maldonado, 197 Wn. App. 779,
391 P.3d 546 (2017) 33, 36

State v. Elmi, 166 Wn.2d 209, 207 P.3d 439 (2009) 16

State v. Garcia, 20 Wn. App. 401, 579 P.2d 1034 (1978) 17

Thompson v. Lennox, 151 Wn. App. 479, 212 P.3d 597 (2009) 36

Federal Cases

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893,
47 L.Ed.2d 18 (1976) 29, 30

Other State Cases

Crawford v. Bergen, 91 Iowa 675, 60 N.W. 205 (1894) 17

Seigel v. Long, 169 Ala. 79, 53 So. 753 (1910) 17

Washington Statutes

RCW 9A.46.110	16
RCW 10.99.020	31
RCW 26.50	27, 29, 32
RCW 26.50.010(3)	1, 14-16, 31
RCW 26.50.010(3)(a)	16
RCW 26.50.010(3)(b)	16, 21
RCW 26.50.010(3)(c)	16
RCW 26.50.010(6)	16
RCW 26.50.030	31
RCW 26.50.035	31
RCW 26.50.060(1)(g)	36
RCW 26.50.060(7)	1, 14, 33

Washington Court Rules

ER 804(a)(4)	26
ER 1101(c)(4)	26

Other Authorities

6 Am.Jur.2d, Assault and Battery (1963)	17
R. Perkins, Criminal Law (2d ed. 1969)	17
Restatement of Torts § 13 (1934)	18
Restatement of Torts § 13(b) (1934)	18
Restatement (Second) of Torts § 13 (1965)	17
Restatement (Second) of Torts § 19 (1965)	17

Key to Record Designations

- CP = Clerks Papers
- 1RP = Oral Ruling of Commissioner Kortokrax, January 3, 2019
- 2RP = Heather McLeod testimony, September 19, 2018
- 3RP = Matthew Engelbrecht and Christine del Buono testimony, October 18, 2018

A. ASSIGNMENTS OF ERROR and ISSUES

Assignments of Error

1. The court erred in denying the petitioner's request to have the 12/13-year-old child victim testify.
2. The court erred in failing to state in writing, as required by RCW 26.50.060(7), particular reasons on the order for the court's denial of the petition for domestic violence protection order as to any child.
3. The court erred in denying the petition for domestic violence protection order as to all three children.

Issues Pertaining to Assignments of Error

1. Whether the testimony of Heather McLeod, whom the court found credible, described domestic violence as defined in RCW 26.50.010(3) by Mr. Engelbrecht to JK?
2. Whether the court abused its discretion by denying the petitioner's request to have the 12/13-year-old victim testify?
3. Whether the court in effect found the hearsay statements of JK to Heather McLeod, ARNP, SANE-A, to be not credible without giving JK the opportunity to speak for herself so the court could assess her credibility?
4. Whether, when the court denied petitioner's request to have 12/13-year-old victim testify, the court improperly disregarded the statements to her grandmother, Christine del Buono, by finding the grandmother not credible?
5. Whether, in finding the grandmother not credible and by denying Petitioner's request for JK to testify regarding Mr. Engelbrecht's actions, including sexual abuse as she related to her grandmother, the court abused its discretion by disregarding and/or refusing to receive JK's statements of sexual abuse by Mr. Engelbrecht when the court had reason to believe JK had made such statements?

B. STATEMENT OF THE CASE

Respondent Matthew Engelbrecht is married to Katrina Engelbrecht and is the stepfather of Petitioner Jeffrey Kirkwood's three children with Ms. Engelbrecht, JK, DK and AK.

Background Facts

On February 17, 2017, then 11-year-old JK was assaulted by her mother, Katrina Engelbrecht, CP 6. See also, 3RP 23:16–18 (“it was witnessed that Katrina was the aggressor.”) Commissioner Nathan Kortokrax¹ entered a domestic violence protection against her. 2RP 39. After the mother's assault, Mr. Kirkwood had full custody of the three children and the mother had supervised visits. Ex 4:3.² But at the time of the incidents in this matter, the mother had been allowed unsupervised visitation. *Id.*, 3RP 6.

On August 9, 2017, Child Protective Services received a report that Mr. Engelbrecht had physically abused the Kirkwood children and after investigation issued a founded letter to Mr. Engelbrecht. Ex 5:1. CPS found Mr. Engelbrecht had struck both JK and DK with a closed fist, had lifted them in the air by their underwear and had obstructed their breathing. Ex 5:2.

¹ Pronounced *cof'-tuh-cray*.

² Exhibit 4 is the single-page Declaration of Heather McLeod, ARNP, SANE-A, with her seven-page Sexual Assault Clinic and Child Maltreatment Center Evaluation of JK attached. The declaration was originally submitted in the domestic relations case between Ms. Engelbrecht and Mr. Kirkwood. Citations to Ex 4 herein are to the page numbers of the evaluation itself.

See also, Ex 4:4. The letter indicated Mr. Engelbrecht had also thrown DK. *Id.* CPS also issued a founded letter to Katrina Engelbrecht for neglect failure to protect her children. Ex 4:1. These incidents of physical abuse had occurred when the children had previously lived with their mother. Ex 4:4. Mr. Kirkwood had previously filed a Petition for Order for Protection against Mr. Engelbrecht on the facts for which the CPS found abuse but Commissioner Kortokrax³ denied that petition. 1RP 38:10–13, 38:23–39:20.

Facts of Present Case

After unsupervised visitation had been restored to Ms. Engelbrecht, the Engelbrecht family went to Leavenworth, Washington for a family weekend, staying in the Bavarian Lodge. 3RP 7–8.

On May 6, 2019 JK called her father after receiving a note from a stranger who had seen her and Mr. Engelbrecht in the motel hot tub the evening before. Ex 4:4, CP 5, CP 9, Ex 1.⁴ The note stated:

Good morning

I wanted to let you know that if someone is making you feel uncomfortable or is touching you in ways don't like (or is inappropriate) please tell an adult. And keep talking until someone listens. We saw how uncomfortable you were in the hot tub. If I am wrong, please ignore this & toss.

CP 9, Ex 1.

³ Judicial notice: *Jeffrey Kirkwood v. Matthew Engelbrecht*, 18-2-30078-34.

⁴ Ex 1 was not admitted. 1RP 4,1RP 2:7–9.

On May 8, 2018, Petitioner took JK to a counselor who met with JK alone at first. Ex 2:2. JK told her she had slept with her stepfather in a Leavenworth hotel. She said she felt “very uncomfortable” because “he would touch my legs, play with my hair, and rub my neck and like down my back, to like you know” then gesturing to her bottom. *Id.* She said he has also made her feel “very uncomfortable” in a hot tub by “telling me I am so pretty and pulling me on to him,” by which she indicated he made her sit on his private area. Ex 2:2. JK also told the counselor about the woman at the Leavenworth motel who had seen her in the hot tub and had given her a note to tell someone if she felt uncomfortable. Ex 2:2–3. She told the counselor she had fears about her mother getting in trouble. *Id.* The counselor noted that during her session JK “appear[ed] open, honest, genuine, and fully engaged.” Ex 2:3. The counselor made a referral to CPS. Ex 2:1.

On May 21, 2018 Petitioner Jeffrey Kirkwood filed a Petition for Order for Protection on behalf of his children against Matthew Engelbrecht. CP 1-2. CP 1. JK was then 12, DK was 9 and AK was 7. CP 2. The petition described JK’s phone call to her father on May 6 after the woman had passed her the note at the Bavarian Lodge and the actions of Matthew Engelbrecht towards JK at the motel.

CPS referred JK to Providence St. Peter Hospital Sexual Assault Clinic and Child Maltreatment Center, and on May 23, 2018, JK was seen by

Heather McLeod, ARNP, SANE-A. Ex 4:1. Ms. McLeod followed a medical process in her evaluation of JK, 2RP 9, and produced a seven-page report of her evaluation. Ex 4. Ms. McLeod is an experienced and trained medical evaluator. 2RP 6–9. JK related to her what had happened at the Bavarian Lodge and Mr. Engelbrecht’s physical contact with JK, saying he couldn’t “keep his hands off” her. Ex 4:1. JK said she kept trying to get away from him in the hot tub because she did not feel comfortable. Ex 4:4. JK also told Ms. McLeod about the woman giving her the note and JK told her what the note said. 2RP 16:14–17:2. JK showed her the note, and when shown Ex 1, Ms. McLeod said she saw it when she spoke to JK and that it was consistent with what JK had told her. 2RP 17:3–12.

Ms. McLeod testified JK testified with open affect, made good eye contact, had open body language, exhibited no distress or hesitance and gave no indication she did not want to speak with Ms. McLeod. 2RP 12:1–5. She said JK had a good vocabulary, 2RP 20, and “seemed to have excellent language skills and appeared to understand all questions asked.” Ex 4:5. Ms. McLeod testified that coaching was something she always considered in her evaluations and that JK exhibited “absolutely no red flags for coaching” and that she “was able to give very clear and consistent detail about not only the environment that she was in but the way that she felt and the issues that had occurred.” 2RP 19–20.

JK told Ms. McLeod it was “weird” sleeping with her stepfather the first night but it “got really weird” sleeping with him the second night, when she slept next to Mr. Engelbrecht, 3RP 15:18–19. This was when Mr. Engelbrecht began inappropriate physical touching of her. 2RP 13–20. Ex 4:3–5. Ms. McLeod testified:

She said that her stepfather had given her a neck and back massage that covered her entire back and down to her underwear line, including going under her underwear line. She actually drew a picture for me on an anatomical diagram of a female child that indicated the area that had been touched by the stepfather’s hands. She also indicated that this touch had been under her T-shirt and under her bra. She included in this area the entire buttocks region although stated that this was over her shorts.

2RP 13, Ex 3. She testified further about JK’s statements to her:

Well, she explained that he had also touched, in addition to the buttocks, the front of her thighs, and she showed me this touch by rubbing the palms of her own hands over her own thighs. She said that he had this time also repeatedly pulled her backwards into his -- towards his lap in the bed. She said that this time the lights were off. There was a light from I believe the TV, but it was dark in the room and that everyone else was asleep. She said that he repeatedly told her she was beautiful and played with her hair and that at one point she felt he’d tried to kiss her head or her neck but that she moved away from that touch.

2RP 14. In her report, Ms. McLeod stated JK said Mr. Engelbrecht pulled her in to him in the bed. Ex 4:5. When asked what JK meant when she told Ms. McLeod he “kept pulling me in,” Ms. McLeod testified:

So she described this at two different times. She described this in the bed in the hotel room. She also described this in a

hot tub or sauna at the hotel premises as well, and in both instances she described that she was in front of him and that he pulled her backwards into his lap, pulling her – essentially her hips and buttocks area in towards his groin area.

2RP 15–16. JK said that he had wrapped his legs around the bottom half of her body and pulled her in to him and that JK said she tried not to feel and to “just act asleep.” Ex 4:5, 2 RP 18:22–24. was at this time Mr. Engelbrecht was touching her buttocks and thighs with his hands. 2RP 18–19.

JK told Ms. McLeod that Mr. Engelbrecht told her not to tell her father, stating, “I just had a feeling that he meant with like, all the touching stuff.” Ex 4:5.

JK also told Ms. McLeod she learned from her brother during a hike on the weekend at Leavenworth that Mr. Engelbrecht had taken pictures of her when she was not looking. JK later looked at Mr. Engelbrecht’s cell phone and saw he had taken many pictures of her but not many pictures of others, that he had favorited all the pictures of her, and that he told her she could not delete any of the pictures of her. JK told Ms. McLeod this made her feel uncomfortable.

Ms. McLeod’s opinion was that JK’s statements to her were consistent with grooming, 2RP 15, “inappropriate sexual touch”, 2RP 31, and that Mr. Engelbrecht placed JK in an unsafe situation, 2RP 25–26. She also addressed the harm to JK from contact with Mr. Engelbrecht:

So in my medical professional opinion, I believe that prolonged contact with an alleged offender is deleterious to the health and safety of a child, and I believe that there are clear negative outcomes that can occur from situations like this and that prolonged contact with someone who a child has disclosed has put them in an unsafe situation is in itself unsafe.

2RP 25:16–23. She recommended “no contact whatsoever between [JK] and her stepfather,” 2RP 22:9–11, and that Mr. Engelbrecht have no contact with any other vulnerable children in the home or elsewhere. Ex 4:6.

Ms. McLeod was also asked about situations where a child revealed more information about events as time went on, and she testified as follows:

Yes, it’s quite common for a child either to never disclose at all, to delay disclosure for a prolonged period of time, or to disclose incrementally, so to disclose certain events and then only disclose a more complete history of the event at a later date . . .

2RP 27–28. Some reasons given for this dynamic are embarrassment or fear that a disclosure recipient would be angry with them, *id.* at 28, as well as the relationship of the child to the offender, the relationship of the offender to the family system, and shame or fear of getting in trouble. Ex 4:6. JK had told her counselor that she had concerns and fears about her mother “getting in trouble,” Ex 2:3, and she told Ms. McLeod that she did not want her mother to think she was trying to get her in trouble “‘cause she’s thought things like that before.” Ex 4:4. JK also told her grandmother she was embarrassed and her mother would get “madder” at her. 3RP 39:5–7. While her mother was

not the disclosure recipient (at least not of abuse), she was nevertheless married to Mr. Engelbrecht and supportive of her husband. 1RP 8.

On August 11, 2018, JK also spontaneously disclosed additional abuse by Matthew Engelbrecht to her maternal grandmother Christine Del Buono while they were making a pie. JK was staying overnight at her grandmother's house for the evening. Prior to that JK had not provided any details to her grandmother about "that thing that happened". Ex 6:2. While her grandmother was cooking dinner, JK began giving her details about what had happened. But she also told her grandmother Mr. Engelbrecht had not only rubbed her back and her buttocks but that he had also reached under her bra and touched her breast ("boob", 3RP 42:2-3) and ran his hand over her stomach and into the waistband of her bottoms. Ex 6:2, 3RP 37:14-20. JK also told her that when he wrapped his legs around JK he told her, "This is how I touch your mom." Ex 6:2, 3RP 38:2.

Ms. del Buono is a mandated reporter and told JK she would have to call the CPS, which she did, and that JK would need to tell her father. Ms. del Buono also told JK she might have to tell the court if necessary and she said she would do it. Ex 6:2. Ms. del Buono called Mr. Kirkwood and he came over, at which time JK told him what she had told her grandmother the night before. Ex 6:2-3, 3RP 41-44.

Mr. Engelbrecht testified that JK had slept in the same bed with him and his son by another relationship, four-year-old Thor, 3RP 8–9, 11, and that the second night he slept next to JK. 3RP 15:18–19. He acknowledged the family had been in the swimming area. He said two-year-old Oakley was in the pool with supervision because he could not swim. 3RP 11:18–22. He had wrestled with the kids in the hot tub. 3RP 11. He also stated there were others in the hot tub, but that he had not done anything that an observer would consider inappropriate. 3RP 11:2–4. He answered “No” to questions whether in Leavenworth he had touched JK’s breast or had touched her inappropriately in any way. He also denied he had “ever touched her in an inappropriate way. 3RP 15:20–25. He explained that on Sunday morning, he had brushed JK’s hair to remove tangles from swimming and that he had brushed her hair in the past. He also testified he had told her she was pretty and rubbed her back that morning. 3RP 14–15. Mr. Engelbrecht testified he took photos of the children but that he did not “think” he took more photos of JK than of the others. Mr. Engelbrecht did not address whether he had “favorited” the pictures of JK or had told her not to delete the pictures of her.

Mr. Engelbrecht testified he had seen a motel surveillance video of the “swim area” and said it did not show him doing anything inappropriate. 3RP 12. At the end of direct examination, the Commissioner asked him

where the surveillance video was and he said his attorney advised him it was unnecessary because the burden of proof was on the Petitioner, who also had the video. 3RP 21–22. On re-cross, Mr. Engelbrecht was asked the question, “The video is not what you’d call good quality. Wouldn’t you agree with that?” to which he replied, “I agree, correct.” 3RP 28.

On cross-examination, Mr. Engelbrecht said Ms. Engelbrecht allowed him to play with her children in a playful manner. 3RP 25:12–15. He did say he observed from the surveillance video that “JK came over to wrestle with me, I grabbed and pulled her in to wrestle”. 3RP 24:18–23. He said that was “the only time that I saw from the video that I actually pulled [JK] in and tried to wrestle with her.” 3RP 25:3–5. However, when asked if he put JK on his lap while sitting in the hot tub, he said, “I don’t recall”. 3RP 24:16–18.

In addition, when asked if he had wrapped his legs around JK in bed, Mr. Engelbrecht stated he did not recall: “I don’t recall doing anything inappropriate with [JK] in bed, including wrapping my legs around her.” 3RP 26:24–25. And again he did not recall when asked if he pulled JK into him in bed, stating, “I don’t recall doing anything inappropriate, including pulling her into me as well.” 3RP 27:1–4.

Procedural Facts and Court’s Ruling

A temporary protection order was entered in this matter May 21, 2018, protecting JK, DK and AK from Matthew Engelbrecht. CP 13-16. The

temporary protection order was subsequently renewed May 31, 2018, CP 17, June 14, 2018, CP 18, June 27, 2018, CP 19, August 9, 2018, CP 20, August 17, 2018, CP 21, September 19, 2018, CP 22, October 10, 2018, CP 23, October 18, 2018, CP 24, November 15, 2018, CP 25, November 29, 2018, CP 26, and December 13, 2018, CP 27.

During the course of the hearings, Mr. Kirkwood requested several times to have JK testify but the Commissioner denied each request. 1RP 13–14. JK turned 13 before the hearing ended. Ex 3. The Commissioner based his ruling on his belief that *Aiken v. Aiken*, 187 Wn.2d 491, 387 P.3d 680 (2017), gave the court the discretion whether to have a minor testify, giving as his specific reason that it would have been highly inappropriate “given the high level of conflict.” 1RP 14:8–17. The court did not identify any particular conflict between the parties.

The court acknowledged that “we delved way too much into the family law case” and that it “tried to rein the parties in to focus on the issues at hand” 1RP 5:11. The court went on to say:

I recognize there’s some crossover issues, unfortunately, a lot of the testimony that I heard was not particularly helpful in terms of making my decision. However, it was also important that while I have a significant history with these parties in terms of live testimony, any judicial officer that would be reviewing this file or the transcripts may not have that same understanding or history, and that’s why I wanted to provide some of the background context information through the admission of the evidence by the parties.

In “delving” into the family law case, the Commissioner allowed Mr. Engelbrecht’s attorney to ask Ms. McLeod, over Mr. Kirkwood’s objections, questions about Mr. Kirkwood and domestic violence.⁵

The court found ARNP McLeod credible and that she clearly and reported what JK had told her, 1RP 6:1–6, and that her testimony was accurate and credible. 1RP 6:24–25. But the court said it had to dig deeper than her credible testimony because Ms. McLeod “doesn’t have the benefit of hearing from the parties, from the additional witnesses, et cetera, doesn’t have the background, doesn’t have all of that information.” 1RP 6:16–24.

Though the court did not find the maternal grandmother credible. 1RP 7–8, it also “[did not] know whether or not the statement [JK] made to her

⁵ The following is submitted in the nature of a Narrative Report of Proceedings, RAP 9.3. The court admitted Ex 8, a Domestic Violence Screening Report of Mr. Kirkwood which was ordered in the custody modification case, Thurston County No. 12-3-01140-1, in 2017 when the children were placed in Mr. Kirkwood’s custody after Ms. Engelbrecht assaulted JK on February 17, 2017. See page 2, *supra*. The report included that Mr. Kirkwood was convicted of domestic violence against Ms. Engelbrecht (then Mrs. Kirkwood), in 2008 but that he had not completed the treatment ordered in 2008. Mr. Kirkwood and Ms. Engelbrecht continued to live together after the conviction, had their second and third children, and were divorced in 2013. The report contains no evidence of violence toward any child by Mr. Kirkwood.

Ex 8 was not designated to the Court of Appeals because it was not relevant and was not mentioned by the Commissioner as a basis for his ruling. See, 1RP. Ex 8 is mentioned here to help explain the Commissioner’s explanation of why family law matters between Mr. Kirkwood and Ms. Engelbrecht were admitted and to explain counsel’s cross-examination of Ms. McLeod regarding Mr. Kirkwood and domestic violence.

grandmother during their cooking session [. . .] occurred.” 1RP 7:24–8:1.

The court did not find Mr. Kirkwood credible, 1RP 9–10, but explicitly did not find that Mr. Kirkwood coached JK, 1RP 9:14–10:3. The court did find Ms. Engelbrecht credible despite her having admitting to perjuring herself in a previous case regarding Mr. Kirkwood. 1RP 8.

The court stated there was no evidence of stalking under prong (c) (stalking) of the RCW 26.50.010(3) definition of domestic violence, 1RP 5:1–3, but the court never addressed prong (a) (physical harm, assault, etc.) or prong (b) (sexual assault). Nor when it entered the order on January 3, 2019 denying the Petition, CP 28–30, did the court “state in writing on the order the particular reasons for the court’s denial” as required by RCW 26.50.060(7). Rather, it gave as its only reason the following:

It’s not that I don’t believe Jade. It’s that I don’t believe Mr. Kirkwood and I do believe Mr. Engelbrecht. And because of that, I’m going to sign the denial order.

1RP 12:12–15. The only facts stated hereinabove with Mr. Kirkwood as the source are at page 4 in the paragraph regarding his filing the Petition; and those few general facts are set forth in detail in Ex 2, in Ex 4, in the testimony of Ms. McLeod, and even in the testimony of Mr. Engelbrecht.

This appeal timely followed.

C. SUMMARY OF ARGUMENT

JK spoke regarding assault (unwanted touching), grooming, inappropriate sexual touch, and possible stalking by Mr. Engelbrecht—to her father, to her counselor, to CPS and to the sexual assault nurse examiner at Providence St. Peter Hospital Sexual Assault Clinic and Child Maltreatment Center, Heather McLeod, ARNP, SANE-A. JK later told her grandmother and then her father of sexual contact by Mr. Engelbrecht. Mr. Engelbrecht denied assault or sexual abuse. The court found Heather McLeod credible and found Mr. Engelbrecht credible. The court found the grandmother and the father not credible. The court refused to allow JK to testify.

The court abused its discretion by failing to recognize the unwanted touching constituted assault and was therefore domestic violence as defined in RCW 26.50.010(3).

The court further abused its discretion by implicitly finding JK not credible but yet not allowing her the opportunity to testify personally. The court's finding Mr. Engelbrecht credible was thus made by precluding the testimony of the only other witness to his acts of assault and sexual abuse.

D. ARGUMENT

- I. JK'S STATEMENTS TO HER COUNSELOR, TO MS. McLEOD AND TO HER GRANDMOTHER AS TO WHAT MR. ENGELBRECHT DID TO HER SHOW DOMESTIC VIOLENCE AS DEFINED IN RCW 26.50.010(3).

RCW 26.50.010(3) states:

“Domestic violence” means: (a) Physical harm, bodily injury, assault, or the infliction of fear of imminent physical harm, bodily injury or assault, between family or household members; (b) sexual assault of one family or household member by another; or (c) stalking as defined in RCW 9A.46.110 of one family or household member by another family or household member.

There is no question JK and Mr. Engelbrecht are family or household members, RCW 26.50.010(6), because Mr. Engelbrecht is JK’s stepfather.

The court found there was no evidence that Mr. Engelbrecht stalked JK as stated in prong (c) of the statutory definition. Appellant believes Mr. Engelbrecht’s taking many pictures of JK when she was not aware, “favoriting” them and telling her not to delete any of them could constitute stalking, especially since it made JK feel uncomfortable when she learned of it, Ex 4:5, it is not necessary to address this prong to show domestic violence.

A. JK’s statements are evidence of assault and therefore meet the definition of domestic violence under RCW 26.50.010(3)(a).

JK’s statements show contact with JK’s person by Mr. Engelbrecht that was intentional on his part, that was unpermitted by JK or occurred under duress, and that was offensive to JK.

1. The legal definition of assault includes offensive touching done without consent or under duress.

Unlawful touching or actual battery constitutes assault. *State v. Elmi*, 166 Wn.2d 209, 215–16, 207 P.3d 439 (2009). “A ‘battery’ is an intentional

and unpermitted contact with the plaintiff's person." *Kumar v. Gate Gourmet Inc.*, 180 Wn.2d 481, 504, 325 P.3d 193 (2014).

An assault is an attempt to commit a battery, which is an unlawful touching; a touching may be unlawful because it was neither legally consented to nor otherwise privileged, and was either harmful or offensive. See R. Perkins, *Criminal Law*, ch. 2, s 2.A.1, at 107-08 (2d ed. 1969); 6 Am.Jur.2d, *Assault and Battery*, s 5, 10 (1963).

State v. Garcia, 20 Wn. App. 401, 403–04, 579 P.2d 1034 (1978). *Kumar*

went on to say:

A defendant is liable for battery if (a) "he [or she] acts intending to cause a harmful or offensive contact with the [plaintiff or a third party], or an imminent apprehension of such contact, and (b) a harmful or offensive contact with the [plaintiff] directly or indirectly results." Restatement (Second) of Torts § 13 (1965). "A bodily contact is offensive if it offends a reasonable sense of personal dignity." Restatement (Second) of Torts § 19. Thus, an offensive contact does not have to result in physical injury to constitute a battery. See *Seigel v. Long*, 169 Ala. 79, 53 So. 753 (1910) (facts established claim for battery where defendant pushed plaintiff's hat back in order to see his face); *Crawford v. Bergen*, 91 Iowa 675, 60 N.W. 205 (1894) (facts established claim for battery where defendant placed his hand on the plaintiff's shoulder and asked him an insulting question).

Id. at 504–505. The "intent" element of battery is satisfied where a defendant knows to a "substantial certainty" that his actions will result in the harmful or offensive touching. *Id.* *Kumar* concluded its explanation as follows:

A person therefore commits a battery where he or she performs " '[a]n act which, directly or indirectly, is the legal cause of a harmful contact with another's person' " and that act is intentional, is not consented to, and is otherwise

unprivileged. [*Garratt v. Dailey*, 46 Wn.2d 197,] 200, 279 P.2d 1091 [(1955)] (quoting Restatement of Torts § 13 (1934)). These elements are met where the plaintiff's consent to the contact " 'is procured by fraud or duress.' " *Id.* at 201, 279 P.2d 1091 (quoting Restatement of Torts § 13(b)).

Id. at 505.

2. Mr. Engelbrecht touched JK inappropriately, including while sleeping next to her in bed.

In the present case JK was sleeping in bed next to a grown man. 3RP 15:18–19. She told Ms. McLeod Mr. Engelbrecht massaged her neck and entire back including going under her underwear waistband skin to skin, Ex 4:4, and including under her T-shirt and under her bra, as well as the entire buttocks region over her shorts. 2RP 13, Ex 3. He touched her upper shoulder on the front of her chest above her breasts. Ex 4:3. He rubbed his hands on her thighs. In bed he repeatedly pulled her hips and buttocks area in towards his groin area in bed when the lights were off and everyone else was asleep. 2RP 14. He wrapped his legs around the bottom half of her body and pulled her in to him while touching her buttocks and thighs with his hands, 2RP 18–19, during which time JK said she tried not to feel and to "just act asleep." Ex 4:5, 2 RP 18:22–24. He repeatedly told her she was beautiful, played with her hair, 2RP 14, and told her her hair was beautiful. Ex 4:3. He tried to kiss her head or her neck. 2RP 14.

Moreover, though Commissioner had previously denied JK, DK and AK protection from Mr. Engelbrecht, 1RP 38:10–13, 38:23–39:20, his prior

abuse of the children was also a part of the current Petition. CP 6. JK was still bothered by Mr. Engelbrecht's physical abuse (assault) of her and her brothers. She said Mr. Engelbrecht would throw her and her brothers down and wrestle, "But it wasn't like fun wrestling, it would hurt." He would lift them up by the underwear all the way to the ceiling, Ex 4:4, pulling the underwear "up her butt crack" which really bothered JK. CP 6. He pulled covers over her head such that she couldn't breathe. Ex 4:4.

3. Mr. Engelbrecht's inappropriate touching made JK feel weird and uncomfortable and she didn't know what to do.

With all the above actions JK said being in bed next to Mr. Engelbrecht "got really weird." When he rubbed her back and went below her waistband she said, "I did not know what to do." "He would just like touch me in weird places." When he pulled the covers over both of them, she said "it was just so weird for me." It was "so awkward." Ex 4:3. She was uncomfortable, Ex 4:1, 4. In the hot tub she said "she kept trying to get away because she did not feel comfortable" and other people in the hot tub saw she was uncomfortable. Ex 4:4., CP 9. When he tried to kiss her head or neck, she said her mouth went in towards her but did not contact her because moved away from him to avoid it. 2RP 14, Ex 4:4.

4. Mr. Engelbrecht knew what he was doing and did not want JK's father to know about it.

JK also said Mr. Engelbrecht told her not to tell her dad, JK had “a feeling that he meant with like, all the touching stuff.” Ex 4:5.

5. Mr. Engelbrecht’s actions constituted assault and were therefore domestic violence.

The foregoing shows assault of JK by Mr. Engelbrecht because battery is assault. Mr. Engelbrecht’s touching of JK in bed, and particularly under her bra, wrapping his legs around her lower body in bed, pulling her hips into his groin area, rubbing her thighs and touching her chest above her breasts—among other acts—all constitute battery. There is no question he committed these acts intentionally and he knew with “substantial certainty” his actions would result in offensive touching. The contact was certainly offensive, for it offended JK’s reasonable sense of personal dignity. It was unprivileged and not legally consented. JK tried to get away from him, showing lack of consent. And Mr. Engelbrecht as her stepfather had no privilege to engage in “inappropriate sexual touch”. 2RP 31:23. Moreover, the lack of consent is not only seen in JK’s trying to get away but in the fact that his actions occurred under duress while they shared a bed with her mother’s approval. Mr. Engelbrecht’s actions were certainly more offensive than the examples given in *Kumar, supra*: pushing a person’s hat back in order to see his face or placing a hand on a person’s shoulder and asked him an insulting question. In addition, Mr. Engelbrecht’s attempt to kiss JK’s

head or neck—which she evaded—was an assault because it was an attempt to commit unwanted touching. As one court opinion has stated:

The fact that a father either concedes or does not contest that he put lotion on an intimate part of the body of his 13-year-old daughter is sufficient under the circumstances. Whether or not there was sexual motivation is immaterial for the purposes of this protective order.

Gourley v. Gourley, 158 Wn.2d 460, 471–72, 145 P.3d 1185 (2006) (Fairhurst, concurring). A similar statement might be said of Mr. Engelbrecht. The fact that a step-father sleeps in a bed next to his 12-year-old step-daughter and “[does not] recall” if he put JK on his lap in the hot tub, 3RP 24:16–18, and “[does not] recall” doing anything inappropriate in bed with JK, including wrapping his legs around her or pulling her into him, 3RP 26:24–27:4, is sufficient for a protective order, whether there was sexual motivation or not (even though a certified medical expert said there was inappropriate sexual touch.) 2RP 31:23.

B. JK’s statements to her grandmother are evidence of sexual assault and therefore meet the definition of domestic violence under RCW 26.50.010(3)(b).

In light of Ms. McLeod’s opinion that Mr. Engelbrecht committed “inappropriate sexual touch[ing]” of JK, 2RP 31:23, some of the acts of assault listed above would also constitute sexual assault. However the statements JK made to her grandmother are unquestionably evidence of sexual assault. Mr. Engelbrecht touched her breast under her bra and he slid

his fingers down the inside of her pants below JK's stomach. Though the court did not find Ms. del Buono credible, the court did not find that JK did not make those statements to her grandmother. 1RP 7:23–8:1.

II. COURT ABUSED ITS DISCRETION BY BASING ITS RULING ON A MEANINGLESS FACT/WRONG STANDARD.

An abuse of discretion is found when a trial judge's decision is exercised on untenable grounds or for untenable reasons.

Juarez v. Juarez, 195 Wn. App. 880, 890, 382 P.3d 13 (2016).

A. The court ruling was based on a meaningless fact.

The court based its denial of the Petition on one simple point: it did not believe Mr. Kirkwood and it did believe Mr. Engelbrecht. 1RP 12. The court also said, "It's not that I don't believe" JK. *Id.* By framing the evidence of the case as believing Mr. Kirkwood's testimony or believing Mr. Engelbrecht's testimony, the court set up a straw man that did not reflect the reality of the evidence. In fact, while Mr. Kirkwood is certainly the Petitioner, and while he submitted a declaration as part of his Petition, CP 5–8, and while he testified at trial, *none* of his own evidence is in the least bit necessary to prove his case against Mr. Engelbrecht.

Specifically, all facts showing domestic violence by Mr. Engelbrecht came from evidence other than Mr. Kirkwood. The primary source was Ms. McLeod's testimony, 2RP, and her report, Ex 4, 3. The next source was the counselor. Ex 2. These sources provide detailed evidence of what Mr.

Engelbrecht did to JK. Disbelieving Mr. Kirkwood was thus a meaningless gesture, and the fact the Commissioner named that as the basis for his ruling reveals that something other than the facts was motivating his decision.

B. The Commissioner had a history with Mr. Kirkwood and allowed irrelevant evidence to be presented.

The Commissioner allowed the hearing to drag on, CP 17–27, and “tried”, but was apparently unable, to “rein in” the parties to “focus on” the issues at hand. He blamed the parties as well, stating “we delved way too much into the family law case”. (Emphasis added.) Then he explained it was his plan—not for the case at hand, but for any future judicial officer that might see the case—to include what he knew from his “significant history with the parties in terms of live testimony.” IRP 6: 6–23. In other words, he had heard a prior case between Mr. Kirkwood and Mr. Engelbrecht and that helped him decide this case. It would appear Commissioner Kortokrax had already determined Mr. Kirkwood was not credible from when he denied the prior petition against Mr. Engelbrecht.

As to the facts of the prior case between Mr. Kirkwood and Mr. Engelbrecht, the CPS had issued Mr. Engelbrecht a founded letter for physical abuse to JK and DK. Ex 5. Though the Commissioner had denied that prior Petition for Order for Protection, JK was still upset about Mr. Engelbrecht’s physical abuse when she spoke with Ms. McLeod. Ex 4:4.

Having in mind “significant history with the parties in terms of live testimony” may explain the Commissioner’s admitting irrelevant evidence about Mr. Kirkwood’s domestic violence evaluation concerning his past relationship with his ex-wife, Ms. Engelbrecht. 2RP 39:24–44:19. Even the attorney was confused and, it might be said, got lost in the weeds of the family law case to which Mr. Engelbrecht was not a party. 2RP 41:11–24. The Commissioner also allowed Mr. Engelbrecht’s attorney to ask questions he said were hypothetical but were actually phrased as fact rather than as assumptions. 2RP 39:24–44:19. Mr. Kirkwood’s response was to object to the relevance of “delving” into the family law issues, 2RP 40:1, 41:1, finally stating, “Objection to the relevance. This is not about Mr. Kirkwood.” 2RP 42:12. Implicit in the objection is that the case is about Mr. Engelbrecht and JK, not—as the court stated—about Mr. Kirkwood and Mr. Engelbrecht.

III. THE COURT ABUSED ITS DISCRETION BY REFUSING TO ALLOW JK TO TESTIFY.

A. Did the Commissioner believe JK?

1. **Some statements of the Commissioner suggest he believed what JK told at least to Ms. McLeod.**

When the Commissioner said “It’s not that I don’t believe [JK],” did the Commissioner mean that he did believe JK? When the Commissioner said he found Ms. McLeod accurate and credible, does that mean that the things she testified to as stated by JK were true? If Mr. Kirkwood’s

testimony is unnecessary in the case, is the real question whether one believes JK or Mr. Engelbrecht? It appears the court believed that what JK told Ms. McLeod and her counselor was accurate. And even though the court did not find Ms. del Buono credible, the court said it couldn't say whether or not JK's made those later statements to her grandmother of sexual abuse as the grandmother testified. 1RP 7:23–8:1, Ex 6:2.

Ms. del Buono testified that JK told her two things.

[JK] said, "Matt touched me under my bra and touched my boob." And she demonstrated by sliding her hand under the strap of her sports bra . . . onto her breast.

3RP 36:15–37:8. One can see this statement by JK is generally consistent with what she told Ms. McLeod. The drawing in Ex 3:1 shows that Mr. Engelbrecht's hands were all over her upper chest, Ex 4:4, where JK's bra strap would have been. In addition, she had already told Ms. McLeod that Mr. Engelbrecht had put his hand under her bra when rubbing her back. *Id.*

The other thing Ms. del Buono testified was:

[JK] said "He touched my stomach and put his hands down the front of my bottoms," under the waistband is how she demonstrated it . . . She stuck her hands in the front of her bottoms so that like half of her fingers were inside the pants.

While these disclosures to Ms. del Buono came after JK had spoken to Ms. McLeod, Ms. McLeod testified clearly (and, of course, credibly, 1RP 6:1–6) that "incremental disclosure" is common. 2RP 27–28. And the reasons JK gave her grandmother were some of the reasons Ms. McLeod

gave for incremental disclosure—embarrassment and fear of another person.

2RP 39:2–40:10, 2RP 28, Ex 4:6.

2. The Commissioner’s ruling shows he did not in fact believe JK, but determined de facto she was not credible in favor of Mr. Engelbrecht.

Though the Commissioner found Ms. McLeod credible, he did not accept JK’s statements as accurately reported by Ms. McLeod. 1RP 6. To the degree the court chose to follow the Evidence Rules, *cf.* ER 1101(c)(4), JK’s statements to Ms. McLeod (and the counselor as well) were nevertheless admissible as hearsay exceptions because they were made for medical purposes. ER 804(a)(4). The Commissioner said Ms. McLeod’s testimony was not sufficient because she “doesn’t have the benefit of hearing from the parties, from the additional witnesses, et cetera, doesn’t have the background, doesn’t have all of that information.” 1RP 6:21–24. In effect by ruling Mr. Engelbrecht had not committed domestic violence etc, the court determined JK credible, notwithstanding the testimony of an expert who was experienced, trained, certified and well-qualified to interview children such as JK.

B. The court relied on a misunderstanding of the law in refusing to allow JK to testify.

JK turned 13 on November 30, 2018, while there were yet two court days in the case. CP 27, 28. Mr. Kirkwood requested times to have JK

testify. 1RP 13–14. Jaden told her grandmother she was willing to repeat what she had said in court. Ex 6:2.

The reason the court gave for exercising its discretion to not allow JK to testify was :

[U]nder *Aiken*, it's this court's belief that this court has that discretion to determine whether or not to hear from a minor. And I'm going to reemphasize my concern with the emphasis on having a minor testify in these circumstances. Given the high level of conflict, I think that would have been highly inappropriate, and that is why I declined to do so.

1RP 14. However, *Aiken v. Aiken*, 187 Wn.2d 491, 387 P.3d 680 (2017), is inapposite. *Aiken* was a case under chapter 26.50 RCW where the respondent wanted to cross-examine his daughter who had accused him of sexual abuse. The court denied his request where there was significant evidence of the fear the child felt of her father:

[T]he evidence in this case reflects tangible fear of her father—fear he may suffocate her, fear of his unpredictable temper, and fear from his history of domestic abuse—a fear so consuming that R.A. attempted to harm herself to avoid contact with him.

It was well within the sound discretion of the commissioner to decide that cross-examination in this case was unnecessary and would likely have harmed R.A. The neutral GAL's report and the documentary evidence in the protection order hearing evinced sufficient facts of abuse by David against R.A. Cynthia's petition for the protection order contained R.A.'s hospital records from her attempted suicide and counseling records detailing R.A.'s suicidal ideation, depression, and posttraumatic stress disorder. . . . the record indicates that R.A. tried to hurt herself “ ‘so [she] would collapse and [she] wouldn't have to go with [her] Dad.’ “ CP

at 253. R.A. also revealed to her school counselor that her father held “her down and ‘pretends’ to suffocate her[, making] her feel very uncomfortable and scared.” CP at 254. The abundant independent evidence before the court supports the commissioner’s decision to deny cross-examination of the vulnerable child.

Aiken v. Aiken, 187 Wn.2d at 504–05 (brackets in original).

The present case is entirely different. First, JK told her grandmother she is willing to talk to the court. Ex 6:2. Ms. McLeod said she had excellent language skills. Ex 4:5. JK’s counselor stated she appeared “open, honest, genuine, and fully engaged.” Ex 2:3. Second, the request is by the Petitioner for JK to testify, not by the respondent to cross-examine her.

Aiken discussed the due process right of the child’s father, noting that the fundamental right to due process was to be heard at a meaningful time and in a meaningful manner. In this case, JK had the right to be heard but she was not heard in a meaningful manner. And contrary to the Commissioner’s vague reference of “high level of conflict”, *Aiken* makes a strong case for child witnesses:

This court has expressed a preference, but not a requirement, for live testimony and cross-examination of child victims. See *Gourley*, 158 Wn.2d at 470, 145 P.3d 1185 (“live testimony and cross-examination might be appropriate in other cases”); *In re Marriage of Rideout*, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003) (“where an outcome determinative credibility issue is before the court in a [family law related] contempt proceeding, it may often be preferable for the superior court judge or commissioner to hear live testimony of the parties or other witnesses, particularly where the presentation of live testimony is requested” (emphasis added)).

Aiken v. Aiken, 187 Wn.2d at 503. This case certainly presents “an outcome determinative credibility issue” and the live testimony of JK was requested. Notwithstanding the preference of the Supreme Court, stated in *Aiken*, for live testimony and cross-examination of child victims, the Commissioner abused his discretion in denying JK’s outcome determinative testimony, choosing instead to grant Mr. Engelbrecht the benefit of live testimony and thus finding, in actual effect, JK not credible.

[I]ssues of credibility are ordinarily better resolved in the crucible of the courtroom, where a party or witness’ fact contentions are tested by cross-examination, and weighed by a court in light of its observations of demeanor and related factors.

In re Marriage of Rideout, 150 Wn.2d 337, 352, 77 P.3d 1174 (2003).

C. The court denied JK due process in refusing to allow her to testify.

Whereas in *Aiken* the father asserted a right to due process as a respondent, JK also has due process rights as a victim of domestic violence.

As in *Gourley*, we hold that chapter 26.50 RCW does not require a trial judge to allow live testimony or cross-examination in every protective order proceeding. Instead, whether live testimony or cross-examination is required will turn on the *Mathews* balancing test. *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

Aiken v. Aiken, 187 Wn.2d at 499. *Aiken* went on to say:

Due process is a flexible concept; the level of procedural protection varies based on circumstance. [*Mathews*] at 334, 96 S.Ct. 893. In evaluating the process due in a particular situation, we consider (1) the private interest impacted by the government action, (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards,” and (3) the government interest, including the additional burden that added procedural safeguards would entail. *Id.* at 335, 96 S.Ct. 893.

Id. at 502. As to the private interests involved, this weighs in JK’s favor for her protection, whereas, as stated in *Aiken, id.*, the restraint on Mr. Engelbrecht is temporary, and length of time is an important factor, whereas the absence of protecting JK from harm could well have permanent consequences. The first factor favors JK testifying.

For the second factor, alternate procedures are not available when the credibility determination is outcome determinative and the preference is for live testimony so that the trier of fact can measure JK’s credibility. This factor favors JK’s testimony because, in its absence, Mr. Engelbrecht gets the enhanced value, as noted in *Rideout*, of live testimony—especially since it appears the Commissioner may have given Mr. Engelbrecht an automatic credibility “enhancement” due to his “significant history with these parties in terms of live testimony,” 1RP 6:17–18, and his mistakenly stating the issue as between Mr. Kirkwood’s and Mr. Engelbrecht’s credibility rather than between JK’s and Mr. Engelbrecht’s. Thus the risk of erroneous deprivation

of JK's right to protection from her step-father favors JK testifying. The court mentioned a "high level of conflict." That would favor JK's testimony in order to ensure no erroneous denial of the Petition for her protection.

The third factor also favors JK's live testimony, as stated in *Aiken*:

The government has an equally compelling interest in protecting children and preventing domestic violence or abuse. See *Gourley*, 158 Wn.2d at 468, 145 P.3d 1185 (citing RCW 26.50.035's findings; Laws of 1993, ch. 350, § 1); *In re Dependency of H.W.*, 70 Wn. App. 552, 555, 854 P.2d 1100 (1993) ("equally compelling interest in protecting the physical, mental and emotional health of the children").

Aiken, Id. at 502–503. See also, Laws of 1992, ch. 111, § 1 (Note following RCW 26.50.030) and Laws of 1991, ch. 301, § 1 (Note following RCW 10.99.020). The term "equally" in the foregoing language was as to the father's right to cross-examine his daughter. In the present case, the instances of "equally" should be read as "the same" since it is the protection of the child that is in issue.

JK's right to due process and to protection from domestic violence as defined in RCW 26.50.010(3) leads to the conclusion that the court abused its discretion in refusing to allow JK to testify, disregarding the value of live testimony as recognized by and preferred by the Washington Supreme Court.

D. In refusing to allow JK to testify, the court chose to be wilfully blind to the question of whether Mr. Engelbrecht sexually assaulted JK.

The court found Ms. del Buono not credible but did not know whether JK had actually told her that Mr. Engelbrecht had sexually assaulted her by touching her breast and putting his hands in her pants. Because her disclosure of sexual assault, as opposed to her having told Ms. McLeod of inappropriate sexual touching, occurred after she had spoken with Ms. McLeod, the court denied JK protection from sexual assault without considering the available facts—which were only available from JK. It appears the court may have been committed to Mr. Engelbrecht’s credibility such that it did not need to consider JK’s testimony of sexual assault.

The same blindness resulted as to the note given to JK. CP 9, Ex 1. By refusing to allow JK to testify, the court was able to say it had significant concerns as to the note’s authenticity and veracity. 1RP 2:7–9. Again, the court finds JK not credible in fact. JK alone can vouch for the note, even if she doesn’t know the name of the woman who gave it to her. The woman’s name and the author’s name are immaterial to this case. The fact of the note having been given to JK by a woman she had seen in the hot tub, and who confirmed the discomfort to which JK herself could testify, is all the foundation necessary in any hearing, even where hearsay is not allowed.

Again, the court, in denying JK the opportunity to testify, also denied her the opportunity of the protection intended by chapter 26.50 RCW.

IV. OTHER ISSUES.

- A. The court violated statutory requirements by failing to make the required written findings.

RCW 26.50.060(7) states:

If the court declines to issue an order for protection or declines to renew an order for protection, the court shall state in writing on the order the particular reasons for the court's denial.

“The court should have stated in writing its particular reasons for the denial. ... The lack of written reasons hampers our review.” *Maldonado v. Maldonado*, 197 Wn. App. 779, 790, 391 P.3d 546 (2017) (citing RCW 26.50.060(7)).

- B. The court drew an improper conclusion regarding the absence of the video at the hearing.

The commissioner drew an incorrect conclusion regarding the video of the Bavarian Lodge hot tub, as if the video was the only evidence of Mr. Engelbrecht's actions. Mr. Engelbrecht acknowledged the video was not good quality, in answer to a somewhat in artful question. When the Commissioner learned the Petitioner had the video but had not submitted it for the hearing, he concluded it must support Mr. Engelbrecht. The commissioner might just as well have concluded Mr. Engelbrecht did not submit the video because it did corroborate JK's statements.

The court stated: “Mr. Engelbrecht's reference to what occurred on

that video virtually was unchallenged.” 1RP 10:9–10. Yet Mr. Engelbrecht’s testimony is in fact very consistent with JK’s statements to Ms. McLeod :

[JK] also described this in a hot tub or sauna at the hotel premises . . . she was in front of him and that he pulled her backwards into his lap, pulling her – essentially her hips and buttocks area in towards his groin area.

2RP 15–16. Mr. Engelbrecht testified to a similar act: “

Q. And you put Jaden on your lap while you were sitting in the hot tub; isn’t that correct?

A. I don’t recall. I believe from the video and what I remember is Jaden came over to wrestle with me, I grabbed her and pulled her in to wrestle, Thor, my oldest son, was around my neck, and Azaiah was actually grabbing onto my right arm at that time. That’s what I observed from the hot tub video.

Q. What do you mean, “pulled her in to wrestle?”

A. She was trying to wrestle with me and take play from the pool into the hot tub, into the essential safe area, and we wrestled a little bit in the hot tub with the other two boys, and that would be the only time that I saw from the video that I actually pulled Jaden in and tried to wrestle with her.

Q. When you say pull in, you mean put on your lap, correct?

A. Yes. . . .

3RP 24:16–25:8. For the court to say Mr. Engelbrecht’s account of what the video showed was “virtually unchallenged” is immaterial because his description of “what the video showed” was consistent with what JK said—not only about the hot tub but also about when Mr. Engelbrecht lay next to her in bed later that same night.

One could just as easily conclude Mr. Engelbrecht's testimony was actually self-protective spin to cover up what he was actually doing, especially since the video was not good quality. Rather than imply—as might be inferred from the court's comments—that Mr. Kirkwood and his attorney did not produce the video because they knew it did not show what JK stated—the court could just as well infer from Mr. Engelbrecht's testimony that he had decided on an explanation that would be plausible if the video was shown. The court said:

And that, to me, with the lack of the video evidence, supports the fact that Mr. Engelbrecht's testimony was consistent with what would be shown on that video and thereby bolsters his credibility as to all of the other issues that he testified to.

By disregarding that JK was very consistent with what Mr. Engelbrecht said the video showed, it would again appear that the Commissioner was biased in Mr. Engelbrecht's favor.

The consistency of statements about the hot tub is yet another reason the court should have allowed JK to testify. She was present. She was the victim of Mr. Engelbrecht's actions. And she could testify that the woman who gave her the note Sunday morning was also in the hot tub with them on Saturday evening. And the note would corroborate JK's discomfort that would likely not have been visible on the not good quality video.⁶

⁶ There was no testimony as to where the video camera was located, how far it was from Mr. Engelbrecht and JK, or what angle it showed.

C. The court disregarded the danger to DK and AK as well as that to JK.

The court found Ms. McLeod credible yet it disregarded her strong recommendation as to Mr. Engelbrecht:

I recommend no contact whatsoever between [JK] and her stepfather, and further advise that her step-father have no contact with any other vulnerable children in the home or elsewhere.

Ex 4:6, 2RP 22:9–11. See, *Maldonado*, 197 Wn. App. at 790.

V. APPELLANT IS ENTITLED TO ATTORNEYS FEES, COSTS.

RCW 26.50.060 states in relevant part:

(1) Upon notice and after hearing, the court may provide relief as follows:

(g) Require the respondent to pay the administrative court costs and service fees, as established by the county or municipality incurring the expense and to reimburse the petitioner for costs incurred in bringing the action, including reasonable attorneys' fees . . .

The appellant requests the court award him attorneys fees and costs in this appeal. *Thompson v. Lennox*, 151 Wn. App. 479, 484, 212 P.3d 597 (2009).

E. CONCLUSION

Based on the foregoing, the appellant requests this court to reverse the trial court and remand for entry of a protection order or alternatively remand for the taking of JK's testimony; and to award attorney fees on appeal.

Respectfully submitted this 31st day of July, 2019.

/s
GARY A. PREBLE, WSB# 14758
Attorney for Appellant

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Court of Appeals
Division II
State of Washington
8/1/2019 8:00 AM

IN THE COURT OF APPEALS
STATE OF WASHINGTON DIVISION II

In re:	NO. 53058-9-II
JEFFREY ROBERT KIRKWOOD, Appellant,	CERTIFICATE OF SERVICE
vs.	
MATTHEW PAUL ENGELBRECHT, Respondent.	

CERTIFICATE OF SERVICE

The undersigned certifies that on July 31, 2019, he caused a copy of the below-identified document to be served on the party listed below by the methods indicated:

Document: Brief of Appellant

Counsel/Party	Contact Information	Method of Service
Matthew Engelbrecht, Respondent Pro Se	18436 Vylan Lane SE Rochester, WA 98579	US Mail

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct. Signed July 31, 2019, at Olympia, Washington.



DANIEL PREBLE, paralegal

PREBLE LAW FIRM, P.S.

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