Supreme Court No.

Court of Appeals No. 38552-3-III

SUPREME COURT OF THE STATE OF WASHINGTON

CARMELLA DESEAN

Petitioner/Appellant

v.

ISAIAH SANGER

Respondent

PETITION FOR DISCRETIONARY REVIEW

RACHEL JOHNSON, WSBA #49947
MARGARET MACRAE, WSBA #50783
Northwest Justice Project
1702 W. Broadway
Spokane, WA 99201
Tel. (509) 324-9128
Attorneys for Petitioner/Appellant

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I. IDENTITY OF PETITIONER

Petitioner, Carmella DeSean, is the Petitioner in the trial court, and the Respondent in the Court of Appeals.

II. COURT OF APPEALS' OPINION

The Court of Appeals, Division III, August 30, 2022, published opinion is attached as Appendix 1.

III. ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals (Division III) err by importing the affirmative defense of reasonable belief provided in the criminal code under RCW 9A.44.030(1) into civil sexual assault protection order actions, pursuant RCW 7.105, formerly RCW 7.90?

IV. STATEMENT OF THE CASE

The case presents an issue of first impression about the statutory interpretation of consent and incapacity as defined in civil sexual assault protection order proceedings and its interplay with a criminal affirmative defense. The Court of Appeals' opinion (hereinafter "Opinion") fundamentally diminishes the civil sexual assault protection order statute when a victim lacks the capacity to consent by erroneously interpreting the plain

language of RCW 7.90 and RCW 7.105 as ambiguous and looking to criminal law to resolve that ambiguity. *DeSean v. Sanger*, 516 P.3d 434, 2022 WL 3724137 (Wash. Ct. App. 2022). The Opinion and the plain language of the statute do not align, so going forward trial courts will struggle to determine which to follow.

Sexual assault victims who want to ensure the person who assaulted them stays away from them are able to petition for a civil protection order under RCW 7.105; formerly under RCW 7.90. In these special proceedings, victims are only required to prove that they have, "been subjected to nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent." RCW 7.105.225(1)(b); RCW 7.90.090(1)(a). Further, victims who lack capacity at the time of the assault due to intoxication are unable to consent to sexual conduct. RCW 7.105.010(5). Consequently, if the victim proves that they were incapacitated and sexual conduct occurred then the conduct was nonconsensual and the petition should be granted. In essence, both statutes

create a strict liability claim that does not require the victim to prove the respondent had a specific mens rea at the time of the assault. The plain language of both statutes show that the legislature never intended for the respondent's intent to be at issue in civil protection order cases.

The Opinion below imposes the statutory criminal affirmative defense of reasonable belief provided in RCW 9A.44.030(1) into the civil sexual assault protection order (hereinafter "SAPO") cause of action when a victim is incapacitated. This fundamentally changes the SAPO proceeding by shifting the focus of the trial court away from determining whether the petitioner proved that they were sexually assaulted to instead focusing on the respondent's belief about the victim's capacity at the time of the assault. If the Opinion is allowed to stand, the protection order statute will be rendered meaningless because victims who prove their case will likely be denied a protection order anytime alcohol is involved, as any incapacitated victim will struggle to prove the respondent's

intent. This will affect a majority of SAPO cases filed as an overwhelming number of sexual assaults between acquaintances involve alcohol.

The case before this Court is emblematic of this. On August 7, 2020, Respondent, Mr. Isaiah Sanger, sexually assaulted Petitioner, Ms. Carmella DeSean, while she was highly intoxicated. CP 1-6, 42-44, 58, 120-123, 177-179; RP 9, 66, 70. The parties met only 24 hours before the assault took place. RP 7, 9, 55. Petitioner was visiting Mr. Bailey Duncan and staying at the residence Mr. Duncan shared with Respondent. CP 4.

Petitioner consumed three alcoholic beverages that night. CP 39, 42; RP 33-34, 57, 69. Shortly after consuming the third drink, Petitioner blacked out and does not remember much of the night. CP 4, 42; RP 61, 69-70.

The following morning Petitioner woke up to pain throughout her body, and her vagina bleeding. CP 4, 28; RP 7-8, 65. When she spoke with Respondent he told her that he "fucked [her] against the wall." CP 4, 97-98; RP 8, 65-66. Only then did

she realize that Respondent had assaulted her when she was incapacitated. *Id*. Petitioner reported the assault to law enforcement, but a criminal case was not filed. CP 35.

Petitioner filed her Petition for a Sexual Assault Protection Order on August 31, 2020, under RCW 7.90. CP 1. Respondent requested a full evidentiary hearing. RP 17. At the full hearing on December 11, 2020, Petitioner's counsel argued that she did not consent to sexual contact and under *Nelson v. Duvall,* 197 Wn. App. 441, 387 P.3d 1158 (2017), could not have consented because she was incapacitated due to intoxication. CP 60-61; RP 117-118. Respondent's counsel argued that Petitioner did consent, relying on *Nelson v. Duvall,* asked the court to consider his affirmative defense under RCW 9A.44.030(1) that he reasonably believed Petitioner had the capacity to consent. CP 62-71.

The trial court found that Petitioner lacked the capacity to consent to sexual contact due to her high level of intoxication, and, therefore, she established by a preponderance of the

evidence that the penetration was nonconsensual. CP 120-122. The trial court also found that Respondent could not avail himself of the statutory criminal affirmative defense in the civil protection order context. *Id.* The trial court entered a one-year sexual assault protection order. CP 124-127. Respondent filed a Motion for Reconsideration that was denied. CP 177-179.

Respondent appealed the trial court's ruling claiming eight assignments of error. After the appeal was filed, but before the court released its opinion, the legislature repealed RCW 7.90 and adopted RCW 7.105 in its place, which took effect July 1, 2022.

The Court of Appeals, Division III, handed down its ruling in a published opinion on August 30, 2022, relying on the language in RCW 7.90 and holding that under *Nelson v. Duvall* the trial court should have considered Respondent's affirmative defense. Petitioner now respectfully submits that the Court of Appeal's ruling was a legal error that warrants review under RAP 13.4(b)(4).

V. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

In the Opinion below the Court of Appeals erroneously imposed a criminal statutory affirmative defense available to those charged with Second Degree Rape into the civil protection order statute when there was no statutory ambiguity. This ruling ultimately changes SAPOs from a strict liability claim to one that requires a showing of the respondent's intentional conduct. Strict liability laws exist to both rectify a wrong and to ensure that the harmed party does not face problems with proving the respondent's liability. *Siegler v. Kuhlman*, 81 Wn. 2d 448, 455, 502 P.2d 1181 (1972). The plain language of RCW 7.90 and RCW 7.105, case law, and legislative intent do not support changing the standard of liability in SAPO hearings.

This case and the Opinion are enmeshed with a change in the relevant statutes, and more specifically a change to the definition of "consent." Former chapter RCW 7.90 provided civil protection orders to victims of sexual assault who proved by a

preponderance of the evidence nonconsensual sexual conduct or nonconsensual sexual penetration occurred. RCW 7.90.090(1)(a). "Nonconsensual" was defined as lack of freely given agreement but did not address whether a person who lacks capacity is able to consent to sexual conduct. On July 1, 2022, RCW 7.90 was repealed, and the civil sexual assault protection order was codified in RCW 7.105. The new law maintains many aspects of the previous act while expanding the definition of "consent" to include, "Consent cannot be freely given when a person does not have capacity due to disability, intoxication, or age." RCW 7.105.010(5). The initial petition in this case was filed pursuant to RCW 7.90 in 2020, and the Opinion was issued less than two months after RCW 7.105 went into effect. The court below cites both statutes throughout the Opinion but does not acknowledge the change in definition or its effect on the Opinion. RCW 7.105 is not ambiguous, yet the Opinion relied on a repealed statute and inapplicable case law to support its ruling, and in doing so ignored the plain language of the new law. The

ruling should not stand for two reasons.

First, the court below relied on *Nelson v. Duvall*, 197 Wn. App. 441, 387 P.3d 1158 (2017), which analyzed the definition of "consent" provided in the previous statute, RCW 7.90. *Nelson v. Duvall* involved a statutory ambiguity and stemmed from the court needing to fill the gap in the definition of "consent," which at the time did not include "capacity." That gap no longer exists with the adoption of RCW 7.105 so there is no reason for the court to look to other statutes to provide clarity. In light of the new statute and its more complete definition of "consent," *Nelson v. Duvall* should not be used as support for the criminal law's encroachment into victims' civil protection orders. The Court of Appeals' analysis erroneously extends *Nelson v. Duvall* and weakens the integrity of RCW 7.105.

Second, by inserting the statutory criminal affirmative defense found in RCW 9A.44.030(1) into the civil sexual assault protection order process provided for in RCW 7.105, the court ignored that the legislature has twice chosen not to offer SAPO

respondents the affirmative defense, first in RCW 7.90 and now in RCW 7.105. The unwarranted insertion of a criminal statutory affirmative defense into RCW 7.105 acutely curtails the legislature's intent to provide victims—including those who are voluntarily intoxicated at the time of the assault—with a fast, efficient, and accessible remedy.

The Opinion, if left intact, will have grave consequences for sexual assault victims who seek protection orders due to their incapacity at the time of the assault because SAPOs are no longer a strict liability claim. By requiring the trial court to also consider the respondent's mens rea, victims who were incapacitated at the time of the assault will have a hard time providing proof of the respondent's intent. Ultimately, the Opinion will lead to trial courts denying relief even when victims have met their burden of proof and shown that they were sexually assaulted.

A. THIS CASE INVOLVES AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST THAT SHOULD BE DETERMINED BY THE

SUPREME COURT PURSUANT TO RAP 13.4(B)(4)

The Opinion by the court below misinterprets RCW 7.90 and RCW 7.105 when their plain language is clear. The court's ruling distorts the legislative intent in creating the civil protection order cause of action and misapplies the law. The ruling will prevent victims from receiving the relief they are entitled to under the law and providing protection to the victims of sexual assault who are disproportionately from marginalized communities is a substantial public interest warranting review by this Court.

1. **The Court of Appeals' Erroneous Opinion Requiring Trial Courts to Consider the Criminal Statutory Affirmative Defense Provided in RCW 9A.44.030(1) in Civil Sexual Assault Protection Order Actions is not Supported by Case Law or Statute**

The Opinion below conflicts with the plain language of RCW 7.105 and incorrectly states that successfully proving the reasonable belief affirmative defense means that an assault did not occur. The Supreme Court is needed to clarify that RCW

7.105 is not ambiguous, and *Nelson v. Duvall* is no longer applicable, thus there is no basis for a statutory affirmative defense in sexual assault protection order causes of action.

a. The Appellate Court's Opinion relies on statutory language that has been repealed and replaced causing the ruling to be in direct conflict with the current law under RCW 7.105, which is likely to cause confusion among the lower courts

When interpreting a statute, the court's goal is to "ascertain and carry out the legislature's intent." *Jametsky v. Olsen,* 179 Wn. 2d 756, 762, 317 P.3d 1003 (2014). "The 'plain meaning' of a statutory provision is to be discerned from the ordinary meaning of the language at issue, as well as from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole." *City of Seattle v. Winebrenner*, 167 Wn. 2d 451, 456, 219 P.3d 686 (2009) (quoting *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). However, a statute is ambiguous if it has more than one reasonable interpretation. *Winebrenner*, 167 Wn.2d at 456. Only if the statute is ambiguous may a court "resort to statutory

construction, legislative history, and relevant case law for assistance in discerning legislative intent." *Christensen v. Ellsworth*, 162 Wn.2d 365, 373, 173 P.3d 228 (2007).

In this case, the Court of Appeals' Opinion does not include a determination that RCW 7.105 is ambiguous before ruling that the statutory affirmative defense of reasonable belief applies in civil sexual assault protection order cases. The Appellate Court relied on RCW 7.90's legislative declaration finding "[t]he legislature's statement of purpose, which was clearly all about criminal sexual assault and rape, does not suggest the legislature intended to impose the stigma of a SAPO on a person who reasonably believed they were engaged in consensual conduct with a partner who had the capacity to consent." Opinion at 17. This conclusion ignores the plain language of both RCW 7.90 and RCW 7.105, and never analyzes whether RCW 7.90 or RCW 7.105 are ambiguous.

RCW 7.105 clearly separates civil protection orders from criminal law. At multiple points, it says that civil protection order

proceedings do not require criminal charges to be pending and are separate from the criminal process. *See* RCW 7.105.565(2); RCW 7.105.900(3)(b). The plain language of RCW 7.105, and the specific changes made from RCW 7.90 show that the legislature never intended for criminal law to be part of the SAPO process.

Further, RCW 7.105.225(3) provides an order may not be denied because "(a) the respondent was voluntarily intoxicated; (b) the petitioner was voluntarily intoxicated; or (c) the petitioner engaged in limited consensual sexual touching." This prevents a respondent from raising, as an affirmative defense, that he was too intoxicated to have the requisite mens rea. The legislature clearly did not intend for a respondent's mens rea to be at issue in SAPO hearings, and the plain language of RCW 7.105 is clear and unambiguous.

The crux of the Appellate Court's ruling is that former chapter RCW 7.90 did not address incapacity as a basis for obtaining a protection order and had it addressed incapacity then

the court would have expected affirmative defenses to be included as well. Opinion at 16. The court ruled that because the statute was silent as to the issue of capacity and *Nelson v. Duvall* interpreted RCW 7.90 to require that "consent" means the petitioner has the capacity to consent, it followed that affirmative defenses must also apply. Opinion at 16. This conclusion does not make sense given that RCW 7.105.010(5) does include "capacity" in the definition of "consent," and does not include the statutory reasonable belief affirmative defense.

The court's erroneous reasoning in this case is particularly glaring given that it does look to RCW 7.105 to provide support for its conclusion. However, it does not look to any terms that apply to sexual assault protection orders. Instead, it focused on RCW 7.105.010(14)(c)'s definition of financial exploitation, which only applies to Vulnerable Adult Protection Orders (hereinafter "VAPO"). Unlike SAPOs, VAPOs require respondents know a vulnerable adult lacks capacity for a trial court to make a finding of financial exploitation. RCW

7.105.010(14)(c). VAPOs are also different than SAPOs because other remedies are available, if the VAPO is denied, due to the respondent acting unknowingly. In such cases, a guardianship may be established to ensure the vulnerable adult is safe from further unintentional financial harm, or if the harm involved a contract, it can be voided due to the person's incapacity. Whereas when a SAPO is denied, the victim has no other civil remedy to ensure their safety.

When deciding SAPO cases that involve incapacity, trial courts will likely be confused, as the Court of Appeal's ruling conflicts with the plain language of RCW 7.105 and does not even follow its own reasoning. Following the Opinion's own analysis, respondents in SAPOs cannot avail themselves of RCW 9A.44.030(1) because the definition of "consent" in RCW 7.105 addresses capacity in its plain language and still does not provide for affirmative defenses. Consequently, *Nelson v. Duvall* no longer applies and there is no basis to insert criminal law into RCW 7.105. The Opinion's failure to address the new definition

of "consent" will only create confusion for any trial court that tries to follow the ruling.

This confusion will lead to courts across the State applying the law differently. Victims with similar cases will have differing outcomes depending on the specific trial court they file in. This direct conflict among the statute and the Opinion's unfounded legal reasoning merits review by this Court to ensure equitable outcomes across the State.

b. The Court's assertion that a sexual assault did not occur when a respondent proves they reasonably believed the victim was not mentally incapacitated does not follow the plain language of RCW 7.105

The Court of Appeals' determination that when the affirmative defense in RCW 9A.44.030(1), "is proved, there *is* no criminal sexual assault" does not take into consideration what the statutory defense means in criminal procedure. Opinion at 16. (emphasis in the original). This assertion ignores both that SAPO petitioners have never been required to prove that a *criminal* sexual assault occurred, and that the affirmative defense excuses

criminal conduct, but does not change that the underlying crime in fact occurred.

The statutory affirmative defense of reasonable belief is a way for criminal defendants to offer an excuse for their criminal conduct in prosecutions for rape in the second degree. *State v. Lozano*, 189 Wn. App. 117, 124, 356 P.3d 219 (2015). This is a true affirmative defense. It does not shift the State's burden, proving each element of the crime, to the defendant, disproving a fact the State must prove. *Id*. "The 'reasonable belief' defense is merely an excuse for conduct that would otherwise be punishable." *Id*. As a result, in these cases, the State must still prove that the defendant had sexual intercourse with the victim when the victim could not consent by reason of being incapacitated. *Id*.; RCW 9A.44.050(1)(b). While at the same time, the defendant must prove that they reasonably believed at the time of the sexual intercourse the victim was not incapacitated. *Lozano*, 189 Wn. App. at 124.

Consequently, when the statutory affirmative defense is proven in a criminal case the defendant is not guilty, or punishable, but the victim was still assaulted. The Court of Appeals' conclusion that where the respondent proves the affirmative defense no sexual assault has occurred, and thus the SAPO should be denied, is not sustainable. RCW 7.105.225(1)(b)'s plain language is clear: when the victim proves the sexual assault, the trial court shall issue the protection order. There is no ambiguity here, and the respondent's reasonable belief or mens rea does not change whether the victim has met their burden.

The legislature supports the entry of civil protection orders, and the law is clear that courts must grant civil protection orders when victims prove they were assaulted. The Court of Appeals' Opinion stands alone in offering respondents an excuse for their harmful conduct and in preventing victims from ensuring their safety with civil protection orders.

2. The Court of Appeals' Opinion Undermines Washington's Leadership in Addressing the Prevalence of Sexual Assault and the Grievous Harm it Causes Victims

Washington is an acknowledged leader in adopting legal protections to ensure all victims of sexual violence can obtain civil protections from their abusers—not just victims whose assaults are prosecuted. RCW 7.105.900(1). This is clear from the plain language of RCW 7.90 and RCW 7.105. However, if the civil protection order statute was ambiguous the legislative intent was clearly to create a strict liability claim so sexual assault victims are not stymied from being granted relief due to anti-victim bias or because they were voluntarily intoxicated.

a. Sexual assault is a heinous act that detrimentally affects victims and often involves the consumption of alcohol

Historically, sexual assault victims have faced institutionalized skepticism and to this day must confront entrenched anti-victim bias, implicit sexism, and harmful misconceptions reinforced by rape culture. Tyler J. Buller, *Fighting Rape Culture with Noncorroboration Instructions*, 53

Tulsa L. Rev. 1, 2 (2017). In recent years the number of sexual assault survivors has increased. Victoria Brown et al., *Rape & Sexual Assault*, 21 Geo. J. Gender & L. 367, 374 (2020). "According to the centers for disease control and prevention, one in six men, one in three women, and one in two nonbinary persons will experience sexual violence in their lifetime." RCW 7.105.900(3)(b). Sexual violence has clear intersections with racial oppression that historically has left women of color particularly vulnerable to such harm. Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1265 (1991).

As part of its leadership, Washington recognizes that victims who do not have an ongoing relationship with the perpetrator still have a right to seek a protection order. RCW 7.105.900(3)(b); Graceann Carimico et al., *Rape and Sexual Assault*, 17 Geo. J. Gender & L. 359, 404 (2016) (Washington is one of the few jurisdictions that does not require some type of

relationship between a rape victim and perpetrator in a civil protection order proceeding). "[A]cquaintance rapes are often committed by way of verbal coercion, alcohol, and the subtle use of force, rather than brute violence or the use of weapons that might cause visible injuries." Buller at 6. Alcohol is more often than not involved in acquaintance rapes. Valerie M. Ryan, *Intoxicating Encounters: Allocating Responsibility in the Law of Rape*, 40 Cal. W. L. Rev. 407, 411 (2004). "There is an overwhelming correlation between alcohol use and non-consensual sex." Allison C. Nichols, *Out of the Haze: A Clearer Path for Prosecution of Alcohol-Facilitated Sexual Assault*, 71 N.Y.U. Ann. Surv. Am. L. 213, 217 (2015). Approximately one-half of all sexual assault victims report voluntarily consuming alcohol at the time of their assault. Ryan at 411.

Less than a quarter of sexual assaults are reported to law enforcement, and false reports are rare. Brown at 375-6. "It is estimated that out of every 1,000 rapes, 995 rapists will walk free, and only forty-six of those estimated 1,000 rapists will even

be arrested." *Id*. at 376. Prosecutors are uninclined to pursue a sexual assault case when the victim was voluntarily intoxicated at the time of the assault because it is not "perceived as 'real rape.'" Michal Buchhandler-Raphael, *The Conundrum of Voluntary Intoxication and Sex*, 82 Brook. L. Rev. 1031, 1044 (2017). Acquaintance rape also rarely conforms with the prevalent misconception that most victims are assaulted by strangers. Michelle J. Anderson, *Diminishing the Legal Impact of Negative Social Attitudes Toward Acquaintance Rape Victims*, 13 New Crim. L. Rev. 644, 646 (2010). The majority of sexual assaults are committed by someone the victim knows and "most often happens in the victim's own home or in the home of a friend, relative, or neighbor." *Id*. at 646-7.

Victims who were voluntarily intoxicated often blame themselves for their assault. Antonia Abbey, *Alcohol-Related Sexual Assault: A Common Problem Among College Students*, 14 J. Stud Alcohol Suppl. 118, 124 (2002). Sexual assault victims report high rates of PTSD, depression, and compromised mental

health, as well as higher than average rates of alcohol and drug abuse. Carimico, 17 Geo. J. Gender & L. 359 at 376. Costs to rape victims, including medical care, counseling, and lost wages, total approximately $127 billion per year. Shawn E. Fields, *Debunking the Stranger-in-the-Bushes Myth: The Case for Sexual Assault Protection Orders*, 2017 Wis. L. Rev. 429, 439 (2017).

Offering sexual assault victims remedies, including a process to seek protection from future harm or traumatization—even if they were voluntarily intoxicated at the time of the assault—is an important public interest. Likewise, it is vital that victims who do seek protection orders are not stymied by historical and systemic anti-victim bias. The legislature's intent is best accomplished by ensuring SAPOs are a strict liability action so that anti-victim bias does not seep into the proceedings, and RCW 7.105's language clearly supports this intent.

b. <u>The legislature's intent to ensure victims fast, efficient, and accessible protection outside of the criminal legal system does not support the</u>

insertion of the criminal affirmative defense provided in RCW 9A.44.030(1)

In enacting civil protection orders, the legislature was direct and specific that victims should be able to seek SAPOs "independent of the criminal process and regardless of whether related criminal charges are pending". RCW 7.105.900(3)(b); RCW 7.105.565(2). By inserting RCW 9A.44.030(1) into RCW 7.105 the court fundamentally eroded the legislature's intent to keep civil protection order proceedings independent from the criminal process.

The civil protection order statute and criminal code were created independently of each other and requiring the laws to be read as one would compromise both statutes' integrity. Statutory construction requires that the integrity of the statutes be maintained when read in harmony. *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453 (1974).

The legislature clearly did not intend for the two statutes to be read together since RCW 7.105.900(3)(b) explicitly provides that SAPOs are independent of the criminal process.

Aside from RCW 7.105's clear language, there is serious discord between the criminal code and civil protection order statute that makes it impossible to read them as one. As an example, the statutes have very different burdens of proof showing that the laws are not intended to be applied in concert. In criminal cases, the State must prove its case beyond a reasonable doubt, whereas a petitioner seeking a SAPO must prove the assault by a preponderance of the evidence. RCW 9A.04.100; RCW 7.105.225(1). Further, protection order hearings are special proceedings, and not subject to the rules of evidence or the full breadth of the civil rules. ER 1101(c)(4); CR 81; see *Scheib v. Crosby*, 160 Wn. App. 345, 352–53, 249 P.3d 184, (2011). The admission of evidence in criminal matters is subject to the rules of evidence and such matters are subject to the criminal court rules. ER 1101(a); CrR 1.1.

The legislature was clear that victims are entitled to relief when they meet their burden, and the omission of the respondent's state of mind is equally intentional. The plain

language of RCW 7.90 and RCW 7.105 show the legislature intended for SAPOs to be strict liability actions. Inserting criminal law into RCW 7.105 when there is no gap or ambiguity creates discord in the statute that diminishes its clarity and application. If the legislature intended for trial courts to evaluate respondents' mental state in SAPO hearings, then the legislature would have included the statutory criminal affirmative defense in the civil protection order process. However, the legislature did not, and the Court of Appeals erred in its ruling.

VI. CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that this Court accept review, under RAP 13.4(b)(4).

CERTIFICATE OF COMPLIANCE

I certify that the word count for this brief, as determined by the word count function of Microsoft Word, and pursuant to Rule of Appellate Procedure 18.17, excluding title page, tables, certificates, appendices, signature blocks and pictorial images is 4,482.

RESPECTFULLY SUBMITTED this 29th day of September 2022.

NORTHWEST JUSTICE PROJECT

RACHEL JOHNSON, WSBA #49947
MARGARET MACRAE, WSBA #50783
Attorneys for Petitioner/Appellant
1702 West Broadway
Spokane, WA 99201
Tel. (509) 324-9128

CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on this 29th day September 2022, I caused the foregoing document to be filed with the Supreme Court of the State of Washington, and to be served to all participants via the Washington State Appellate Courts' Portal.

SIGNED at Spokane, Washington, this 29th day of September 2022.

NORTHWEST JUSTICE PROJECT

s/ *Ayla Hernandez*

Ayla Hernandez, Legal Assistant
1702 W. Broadway Ave.
Spokane, WA 99201
Ph: (509) 324-9128
Fax: (206) 299-3185 (Temporary)
Email: ayla.hernandez@nwjustice.org

APPENDIX

Tristen L. Worthen
Clerk/Administrator

(509) 456-3082
TDD #1-800-833-6388

The Court of Appeals of the State of Washington Division III

500 N Cedar ST
Spokane, WA 99201-1905

Fax (509) 456-4288
http://www.courts.wa.gov/courts

August 30, 2022

Margaret Macrae
Attorney at Law
1702 W Broadway Ave
Spokane, WA 99201-1818
margaret.macrae@nwjustice.org

Nicole Terece Dalton
Dalton Law Office PLLC
2904 Main St
Vancouver, WA 98663-2722
nicole@daltonlawoffice.net

Rachel Lynn Johnson
Attorney at Law
2220 H Street #1
Vancouver, WA 98663
bryantr@seattleu.edu

Mark W. Muenster
Attorney at Law
1601 Lincoln Ave
Vancouver, WA 98660-2758
markmuen@ix.netcom.com

CASE # 385523
Carmella Margarita Louise Desean, Respondent v Isaiah Sanger, Appellant
CLARK COUNTY SUPERIOR COURT No. 2020167406

Counsel:

Enclosed please find a copy of the opinion filed by the Court today.

A party need not file a motion for reconsideration as a prerequisite to discretionary review by the Supreme Court. RAP 13.3(b); 13.4(a). If a motion for reconsideration is filed, it should state with particularity the points of law or fact which the moving party contends the court has overlooked or misapprehended, together with a brief argument on the points raised. RAP 12.4(c). Motions for reconsideration which merely reargue the case should not be filed.

Motions for reconsideration, if any, must be filed within twenty (20) days after the filing of the opinion. Please see word count rule change at https://www.courts.wa.gov/wordcount, effective September 1, 2021. Please file the motion electronically through this court's e-filing portal or if in paper format, only the original motion need be filed. If no motion for reconsideration is filed, any petition for review to the Supreme Court must be filed in this court within thirty (30) days after the filing of this opinion. The motion for reconsideration and petition for review must be <u>received</u> (not mailed) on or before the dates they are due. RAP 18.5(c).

Sincerely,

Tristen Worthen
Clerk/Administrator

TLW:jab
Attachment

c: **E-mail**—Hon. Jennifer K. Snider

FILED
AUGUST 30, 2022
In the Office of the Clerk of Court
WA State Court of Appeals, Division III

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

CARMELLA DESEAN, Respondent, v. ISAIAH SANGER, Appellant.	)	No. 38552-3-III PUBLISHED OPINION

SIDDOWAY, C.J. — Former chapter 7.90 RCW, the Sexual Assault Protection Order Act (SAPOA),[1] provided a civil protective remedy to victims of sexual assault who sought to avoid future interaction with their assailant. The petitioner was required to allege and the court to find that sexual conduct or sexual penetration suffered by the victim was "nonconsensual." Former RCW 7.90.050, .090. The remedy is now provided by a civil protection order act codified in chapter 7.105 RCW, which reflects the same requirements at RCW 7.105.100(1)(b) and .225(1)(b).

[1] Legislation passed in 2021 addresses six types of civil protection orders in a single chapter—chapter 7.105 RCW. It generally took effect, and the provisions of former chapter 7.90 RCW were repealed, effective July 1, 2022. LAWS OF 2021, ch. 215, §§ 87, 170.

In some cases, a person may feel sure they were the victim of unconsented-to conduct but lack the ability to so testify because they were incapacitated when the conduct occurred. The SAPOA has been construed to implicitly provide that the contact or penetration is nonconsensual if the victim lacks the capacity to consent. *Nelson v. Duvall*, 197 Wn. App. 441, 387 P.3d 1158 (2017). Where there is evidence of excessive alcohol consumption by a petitioner or the petitioner was otherwise impaired, the trial court has an obligation to determine whether the petitioner had the capacity to consent. *Id.* at 444.

Isaiah Sanger appeals a sexual assault protective order (SAPO) obtained against him by Carmella DeSean, challenging procedural rulings by the trial court and the sufficiency of the evidence to support the court's finding that Ms. DeSean lacked the capacity to consent. While the evidence is conceivably sufficient to support the trial court's issuance of a SAPO, the lack of evidentiary support for the court's finding of the amount of alcohol consumed by Ms. DeSean and the court's refusal to consider an affirmative defense require that the trial court consider the evidence anew. We reverse and remand for further proceedings.

FACTS AND PROCEDURAL BACKGROUND

On awakening on the morning of August 8, 2020, Carmella DeSean became concerned that Isaiah Sanger, the roommate of Bailey Duncan, a young man she had traveled to Henderson, Nevada, to visit, might have had sexual intercourse with her the

night before. She recalled that the night had started with her, Mr. Duncan, and Mr. Sanger having dinner and then drinking margaritas by the pool. After her third drink, Ms. DeSean could only remember a few things: she recalled Mr. Sanger having her take a shower and washing her hair, him taking her to Mr. Duncan's room to get her a shirt and underwear, and her sitting on the floor and telling Mr. Sanger, "No we can't do this because of Bailey." Report of Proceedings (RP) at 8.

On waking on August 8, she noticed bruising on her body, her vagina was bleeding and hurt, and the room where she awoke "smel[led] like condom[s] and sex." Clerk's Papers (CP) at 4. Ms. DeSean questioned Mr. Sanger, whom she claims first told her he did not know what happened but later, having found condoms, said, "'I think we had sex.'" RP at 66. When she approached him again later to ask about what had happened, she claims Mr. Sanger laughed and said he had intercourse with her against the bathroom wall.

Confident she would not have consented to the sexual relations, Ms. DeSean asked Mr. Duncan to take her to a hospital for examination two days later. There, she was examined by a sexual assault nurse examiner and interviewed by Detective Kari Skinner of the Henderson Police Department. After speaking with Ms. DeSean, Detective Skinner also questioned Mr. Duncan at the hospital, but he told the detective he did not know what had happened between Ms. DeSean and Mr. Sanger because he had been intoxicated and had passed out on the sofa. The detective submitted the results of her

investigation to the district attorney's office, which closed the case after concluding that probable cause to charge was lacking.

On August 31, 2020, Ms. DeSean, who had returned home to southeastern Washington, completed and filed a handwritten petition for a SAPO. A temporary SAPO issued ex parte that day.

After being served with the petition and temporary SAPO, Mr. Sanger submitted a 29-page typewritten statement with attachments. The attachments included a redacted incident report from the Henderson Police Department that reflected the decision to close the investigation without charges. In Mr. Sanger's statement, he asserted he and Ms. DeSean had a consensual sexual encounter that began after the two of them came upstairs from the pool. He stated that Ms. DeSean had originally felt ill but threw up and felt better, and the two decided to take a shower. He stated that the two had consensual sex on the bathroom floor and against the bathroom wall. Mr. Sanger also claimed Ms. DeSean suggested having a threesome with Mr. Duncan, and Mr. Sanger went downstairs to ask Mr. Duncan if he wanted to join them. Mr. Duncan was lying on the couch, did not want to come upstairs, and according to Mr. Sanger said, "[H]ave at it." CP at 94.

Mr. Sanger stated that the next morning, Ms. DeSean asked him if they had sex the night before, which worried him because it suggested she might regret what had happened. Describing himself as "panick[ing] a bit," he said, "I don't know, I think we did," and then returned shortly to tell Ms. DeSean that they must have had sex because

there were two condoms in the garbage. CP at 97. He claimed that later that day, Ms. DeSean agreed with him that what had happened between them was consensual. He admitted, however, that over the next couple of days she became angry and upset.

An initial hearing following issuance of the temporary SAPO took place before a court commissioner. Both parties appeared, neither represented by counsel. The commissioner heard testimony from Ms. DeSean but then continued the hearing upon realizing that Mr. Sanger had filed his 29-page submission the prior day, which the commissioner had not had the opportunity to review.

Both parties thereafter retained lawyers and a full evidentiary hearing was requested. After two continuances and extensions of the ex parte order, the matter proceeded to a full evidentiary hearing.

By the time of the hearing, the evidence that had been submitted by Ms. DeSean consisted of her handwritten petition, a declaration from Ms. DeSean submitted by her lawyer, and declarations from two of Ms. DeSean's female friends and Mr. Duncan. The evidence submitted by Mr. Sanger consisted of his original 29-page statement with the redacted incident report, a transcript of the original hearing, and a declaration from Mr. Sanger submitted by his lawyer. Collectively, the evidence addressed the events of the evening of August 7, the alcoholic drinks Ms. DeSean had consumed and her level of intoxication, Ms. DeSean's reported flashbacks of events that transpired between her and Mr. Sanger that night, what was going on with Mr. Duncan downstairs, and Ms.

DeSean's, Mr. Sanger's, and Mr. Duncan's communications over the next several days about what had taken place.

Live evidence presented at the hearing consisted of testimony from Mr. Duncan, whom Ms. DeSean called as a witness, testimony from Detective Skinner, whom Mr. Sanger called as a witness, and testimony from the parties themselves.

At the beginning of the hearing, Ms. DeSean's lawyer stated her understanding that there was no cross-examination of the parties. Asked for Mr. Sanger's position, his lawyer answered, "I will defer to what the Court prefers. I think the Court has a great deal of discretion in terms of how to conduct these hearings." RP at 28. The judge stated that typically, cross-examination of parties was not allowed, so that is how they would proceed. After Ms. DeSean testified, however, Mr. Sanger's lawyer requested cross-examination, ultimately explaining that "Ms. DeSean has said quite a few things that she didn't say before." RP at 71. The court stated it would allow cross-examination only into matters that were newly raised in Ms. DeSean's testimony. Defense counsel was permitted to question Ms. DeSean about the fact that she had sex with Mr. Duncan before returning to the northwest and could have visited the hospital a day earlier, but went sightseeing that day instead. When defense counsel began to inquire about the remainder of Ms. DeSean's stay in Henderson, the trial court sustained an objection to exceeding the scope of direct and added that the evidence was also irrelevant. Defense counsel did not object and asked no further questions.

At the conclusion of the evidence and argument, the trial judge took the matter under advisement and issued a written decision a few days later. The decision did not address many of the factual disputes about what had transpired on August 7 and the days that followed, because the trial judge found dispositive that sexual penetration was undisputed and Ms. DeSean lacked the capacity to consent to sexual contact or sexual penetration due to her high level of intoxication. Mr. Sanger moved for reconsideration, which was denied. He appeals.

ANALYSIS

Mr. Sanger makes eight assignments of error, which we reorganize and address as four. Mr. Sanger fails to demonstrate that the evidence is insufficient to support the trial court's entry of a SAPO. He does not demonstrate that he was denied due process by a limitation on his cross-examination. He does demonstrate that the trial court erred by refusing to consider his affirmative defense that he reasonably believed Ms. DeSean had the capacity to consent. He also demonstrates that substantial evidence does not support the trial court's material factual finding about how much alcohol was in the first two mixed drinks consumed by Ms. DeSean on August 7. The two errors require that we reverse the SAPO and remand for further proceedings.[2]

[2] Two of Mr. Sanger's assigned errors, his second and sixth, are not developed by his briefing and will not be reviewed. *See* Appellant's Br. at 1 (assigning error to denial of reconsideration and to the trial court's finding that Ms. DeSean said "no" three times). RAP 10.3(a)(6); *State v. Dennison*, 115 Wn.2d 609, 629, 801 P.2d 193 (1990).

I. MR. SANGER FAILS TO DEMONSTRATE THAT THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE TRIAL COURT'S ENTRY OF A SAPO

Two of Mr. Sanger's assignments of error and a portion of his opening brief advance the argument that the evidence presented by Ms. DeSean was insufficient to support the trial court's conclusion that Ms. DeSean was sexually penetrated by Mr. Sanger at a time when she lacked the capacity to consent.

Where the trial court has weighed the evidence, we review whether its findings are supported by substantial evidence and whether those findings support the conclusions of law. *State v. Coleman*, 6 Wn. App. 2d 507, 516, 431 P.3d 514 (2018) (citing *State v. Klein*, 156 Wn.2d 102, 115, 124 P.3d 644 (2005)). Substantial evidence exists where there is sufficient evidence in the record to persuade a rational, fair-minded person of the truth of the finding. *Hegwine v. Longview Fibre Co.*, 162 Wn.2d 340, 353, 172 P.3d 688 (2007). We defer to the trial court on the persuasiveness of evidence, witness credibility, and conflicting testimony. *In re Vulnerable Adult Pet. for Knight*, 178 Wn. App. 929, 937, 317 P.3d 1068 (2014). Unchallenged findings of fact are verities on appeal. *In re Estate of Jones*, 152 Wn.2d 1, 8, 93 P.3d 147 (2004); RAP 10.3(g).

In support of its conclusion, the court identified four categories of evidence on which it relied, within which it identified discrete pieces of evidence. Ms. DeSean does not challenge the following facts found by the trial court, which are verities. The court's first category included findings that Mr. Sanger prepared a third drink for Ms. DeSean,

total amount of alcohol unknown, and that she was asked to "chug" it; that when the parties left the pool area, Mr. Duncan observed Ms. DeSean stumbling, requiring assistance walking, crying, vomiting and dry heaving; later, when Mr. Duncan went upstairs to check on her, she was mumbling and not responding appropriately to his attempts to wake her; he described her as "incoherent"; finally, Mr. Duncan testified that Ms. DeSean's knees were bruised the next day and that she was nauseous. CP at 122. Ms. DeSean testified herself that she was intoxicated. Mr. Sanger testified that the three were "all highly intoxicated." *Id.*

The court's second category of findings included that Ms. DeSean's memories of what happened after she went into the house that evening consist of "flashbacks" of sitting on the bathroom floor, being in the shower with Mr. Sanger, and saying "no" three times. *Id.*

Its third category of findings included that Ms. DeSean's friend Gabriella Bloom communicated with her the evening of August 7 via Snapchat; she saw pictures of Ms. Desean with glossy heavy eyes, knew she had been drinking, was aware that she did not feel well, and Ms. DeSean stopped communicating early in the evening.

As Mr. Sanger points out, the court in *Nelson* rejected the proposition that incapacity caused by alcohol consumption renders a victim incapable of consent as a matter of law. 197 Wn. App. at 456. *Nelson* held that where there is some evidence of incapacity to consent, "[t]he court must consider whether a 'condition existing at the time

of the offense which prevents a person from understanding the nature or consequences of the act of sexual intercourse, whether that condition is produced by illness, defect, the influence of a substance or from some other cause.'" *Id.* at 457 (quoting RCW 9A.44.010(4)). Mr. Sanger argues there *was* evidence that Ms. DeSean was aware and understood the nature and consequences of his and her sexual relations. He points to the statements in her petition that she remembered telling him "no" at one point because of Bailey, and him telling her "'if I get you pregna[nt] I will be the father and marry you.'" CP at 4. Mr. Sanger also points to his testimony that Ms. DeSean insisted that he use condoms and that she initiated the sexual activity. But Ms. DeSean rejected the suggestion that she did or would have initiated sexual activity or asked that Mr. Sanger use condoms. And the trial court's ruling discounted Mr. Sanger's credibility. It found that he told Mr. Duncan in a text message on August 8 that he could not remember "much," only "bits and pieces" of what happened, and it was only later, in September and October, that Mr. Sanger provided 29 pages of details. CP at 122.

Mr. Sanger also argues that the trial court should not have relied on Ms. DeSean's testimony that she could not recall what happened, because lack of memory following alcohol consumption does not mean that one is not awake and consenting. A significant lack of memory is not without any evidentiary value, however. *Cf. State v. Thomas*, 123 Wn. App. 771, 782, 98 P.3d 1258 (2004) ("The effects of alcohol are commonly known and jurors can draw reasonable inferences from testimony about alcohol use." (citing

State v. Kruger, 116 Wn. App. 685, 692-93, 67 P.3d 1147 (2003); *State v. Smissaert*, 41 Wn. App. 813, 815, 706 P.2d 647 (1985))). Ms. DeSean was able to point to other evidence from which a fact finder could find it probable that she was intoxicated to the point of incapacity; perhaps most important was Mr. Duncan's testimony that he went upstairs and found Ms. DeSean to be unresponsive and incoherent near the time the sexual penetration took place.

Mr. Sanger fails to demonstrate that there is insufficient evidence to support a SAPO.

II. MR. SANGER DID NOT PRESERVE THE OBJECTION TO LIMITS ON CROSS-EXAMINATION THAT HE RAISES ON APPEAL

Former chapter 7.90 RCW did not provide that parties to a full evidentiary hearing have a right to call witnesses or engage in cross-examination. Notwithstanding the statutory silence, "'Procedural due process imposes constraints on governmental decisions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment'" to the United States Constitution. *Nguyen v. Dep't of Health*, 144 Wn.2d 516, 522-23, 29 P.3d 689 (2001) (quoting *Mathews v. Eldridge*, 424 U.S. 319, 332, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976)), *cert. denied*, 535 U.S. 904, 122 S. Ct. 1203, 152 L. Ed. 2d 141 (2002). In determining what process is due, a court weighs (1) the private interest affected by the official action, (2) the risk of an erroneous deprivation of that interest through the

procedures used, (3) the probable value of additional procedural safeguards, and (4) the government interest involved. *Mathews*, 424 U.S. at 335.

In the context of domestic violence protection order hearings, a six-judge majority of our Supreme Court agreed in *Gourley v. Gourley*, 158 Wn.2d 460, 468-69, 145 P.3d 1185 (2006) (plurality opinion), that due process may require cross-examination, although it held in that case that a respondent who sought to cross-examine his 14-year-old daughter about accusing him of sexual assault had not shown it was necessary in his case. *Aiken v. Aiken*, 187 Wn.2d 491, 498, 387 P.3d 680 (2017) (describing the plurality and concurring decisions in *Gourley*). The court held that while relevant statutes did not require a trial judge to allow live testimony or cross-examination in every protective order proceeding, whether live testimony or cross-examination is required "will turn on the *Mathews* balancing test." *Id.* at 499. It also held that "[a] bright line rule prohibiting cross-examination or live testimony in protective order hearings is inappropriate, as it is the province of the trial judge or commissioner to grant or deny cross-examination based on individualized inquiries into the facts of the instant case." *Id.* at 505-06.

We conclude it is also inappropriate for the superior court to have a practice that typically cross-examination of parties is not allowed. In this case, however, we find that Mr. Sanger's challenge to the limitation of cross-examination fails for a reason unrelated to his right to due process: defense counsel did not object to the limitations imposed by

the trial court. The due process objection raised on appeal was not raised in the trial court.

At the outset of the hearing, the trial court asked defense counsel her position on cross-examination and counsel deferred to the trial court, expressing belief that the court had a "great deal of discretion." RP at 28. After Ms. DeSean testified, defense counsel requested cross-examination, arguing in support that "Ms. DeSean has said quite a few things that she didn't say before," and asking for the opportunity to "speak with her somewhat." RP at 71. Defense counsel accepted the court's ruling that it would allow cross-examination into only matters that were newly raised in Ms. DeSean's live testimony. *Id.* This is consistent with ER 611(b). Defense counsel did not ask for the opportunity to call Ms. DeSean as a witness in the defense case. When the trial court perceived defense counsel to exceed the scope of the direct examination and sustained an objection, defense counsel stated, "Okay. No more questions," and thanked the court. RP at 75.

The general rule is that appellate courts will not consider issues raised for the first time on appeal. RAP 2.5(a); *State v. Kirkman,* 159 Wn.2d 918, 926, 155 P.3d 125 (2007). An objection that Mr. Sanger had a due process right to a broader cross-examination of Ms. DeSean was not preserved.

III. FOLLOWING *NELSON V. DUVALL*, THE TRIAL COURT SHOULD HAVE CONSIDERED MR. SANGER'S AFFIRMATIVE DEFENSE

Under former RCW 7.90.010(2) and .090, a trial court issued a SAPO upon a finding by a preponderance of the evidence that a petitioner had been a victim of nonconsensual sexual contact or nonconsensual sexual penetration, with "nonconsensual" meaning a "lack of freely given agreement." The statute did not provide that a SAPO should issue if sexual contact or sexual penetration took place when the complaining petitioner lacked the capacity to consent. In *Nelson*, however, this court construed the SAPOA to implicitly require that the petitioner have the capacity to consent. 197 Wn. App. at 456. In arriving at this conclusion, this court observed that a legislative statement of intent can be "'crucial to interpretation of a statute,'" *id.* at 453 (quoting *Towle v. Dep't of Fish & Wildlife*, 94 Wn. App. 196, 207, 971 P.2d 591 (1999)), and reviewed the legislature's declaration in creating the SAPO remedy:

> *Sexual assault* is the most heinous *crime* against another person short of murder. *Sexual assault* inflicts humiliation, degradation, and terror on *victims*. According to the FBI, a woman is *raped* every six minutes in the United States. *Rape* is recognized as the most underreported *crime*; estimates suggest that only one in seven *rapes* is reported to authorities. *Victims* who do not report the *crime* still desire safety and protection from future interactions with the *offender*. Some cases in which the *rape* is reported are not prosecuted. In these situations, the *victim* should be able to seek a civil remedy requiring that the *offender* stay away from the *victim*. It is the intent of the legislature that the *sexual assault* protection order created by this chapter be a remedy for *victims* who do not qualify for a domestic violence order of protection.

Former RCW 7.90.005 (emphasis added).

Because the SAPOA "is focused on sexual assault and rape," *Nelson* held, "its terms should be read in harmony with the 'sex offenses' chapter of the Washington Criminal Code, chapter 9A.44 RCW." 197 Wn. App. at 454. And "[u]nder the criminal code, a person is guilty of rape in the second degree when he or she engages in sexual intercourse with another person '[w]hen the victim is incapable of consent by reason of being physically helpless or mentally incapacitated.'" *Id.* at 455 (alteration in original) (quoting RCW 9A.44.050(1)(b)). Concluding that the SAPOA "was intended to provide a civil protective remedy to all rape victims recognized under criminal law, without exclusion," this court held that when deciding whether to grant a SAPO, the trial court is required to consider evidence that the victim lacked the mental capacity to consent. *Id.* at 456.

Relying on *Nelson*, Mr. Sanger argued at the hearing and in moving for reconsideration that the trial court must bear in mind that a rape is not committed where the victim is physically helpless or mentally incapacitated if the defendant

> prove[s] by a preponderance of the evidence that at the time of the offense the defendant reasonably believed that the victim was *not* mentally incapacitated and/or physically helpless.

RCW 9A.44.030(1) (emphasis added). The trial court refused to consider the affirmative defense in its original decision or on reconsideration, however, reasoning that "neither RCW 7.90 or *Nelson* mention affirmative defenses." CP at 178.

Former chapter 7.90 RCW does not mention the affirmative defense, but it also does not say that a petitioner who lacks the mental capacity to consent may obtain a SAPO. It was this court's decision in *Nelson* that interpreted the SAPOA to provide a civil remedy for all criminal sexual assaults. The affirmative defense is relevant because where it is proved, there *is* no criminal sexual assault.

Ms. DeSean defends the trial court's refusal to consider the affirmative defense on appeal, arguing that the "point of a civil case" is "much different" from a criminal case; it is "to address the petitioner's harm." Br. of Resp't at 20. She also argues, "[I]f the legislature intended for the criminal code's affirmative defense to apply . . . then it would have been reflected in the statute's plain language." *Id.*

If the plain language of former chapter 7.90 RCW addressed incapacity as a basis for obtaining a SAPO, we agree that one would expect the affirmative defense to be addressed as well. But the chapter said nothing about incapacity, so there was no reason to address the affirmative defense. In an analogous context, a protective order is *not* available against a respondent who unwittingly takes advantage of a nonconsenting party. *See* RCW 7.105.010(13)(c) (defining "financial exploitation" to include obtaining or using a vulnerable adult's property without lawful authority, but only "by a person or entity who *knows or clearly should know that the vulnerable adult lacks the capacity to consent* to the release or use of the vulnerable adult's property" (emphasis added)). Since it was this court, in *Nelson*, which implied that criminal sexual assaults based on a

victim's lack of capacity are a basis for the civil SAPO remedy, we must look to *Nelson*'s reasoning to determine if the affirmative defense should apply. And given *Nelson*'s reasoning—that the SAPOA "was intended to provide a civil protective remedy to all rape victims recognized under criminal law," 197 Wn. App. at 456,—the affirmative defense should apply.

As for Ms. DeSean's argument that the purpose of the civil remedy is not to punish the respondent but to address the petitioner's harm, it is crucial to focus on the narrow context that is at issue: we are talking about a defendant who has proved by the required burden of proof that he reasonably believed the victim was not mentally incapacitated or physically helpless. The legislature's statement of purpose, which was clearly all about criminal sexual assault and rape, does not suggest the legislature intended to impose the stigma of a SAPO on a person who reasonably believed they were engaged in consensual conduct with a partner who had the capacity to consent.

Following *Nelson*, the trial court should have considered Mr. Sanger's affirmative defense.

IV. THE RECORD DOES NOT SUPPORT THE TRIAL COURT'S FINDING OF FACT ABOUT THE AMOUNT OF ALCOHOL CONSUMED, WHICH IS MATERIAL

Finally, Mr. Sanger assigns error to the trial court's finding that "Bailey Duncan prepared the first two drinks which contained 8 ounces of tequila in a 20 oz. glass." CP at 121. The finding is clearly erroneous. The evidence on which the court necessarily

relied was Mr. Duncan's testimony about how much liquor he poured when he made Ms. DeSean's first two drinks; his was the only testimony that addressed a measure of the amount. He estimated that in each case, he poured in "an eighth of a twenty-ounce glass, maybe less" of tequila, which would equate to 2.5 ounces of tequila, or less, in each drink. RP at 34. Since the trial court's finding refers to the amount of tequila "in a 20 oz. glass," the court evidently believed there were 8 ounces of tequila in each of Ms. DeSean's first two drinks. CP at 121.

This is an extraordinary amount of alcohol and more than three times the amount testified to by Mr. Duncan. As argued by Mr. Sanger, at Ms. DeSean's weight as testified to at trial, the 16 ounces of liquor would result in a fully absorbed blood alcohol content of about .40 without allowing for burn-off. *See* Appellant's Reply Br. at 5 n.2. And this is before Ms. DeSean even began to consume her third drink.

Immaterial findings that do not affect a trial court's conclusions of law are not prejudicial and do not warrant reversal. *Coleman*, 6 Wn. App. 2d at 516 (citing *Cowiche Canyon v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992)). But this evidence is material. It is true that the trial court made other findings that could support its conclusion that Ms. DeSean lacked the capacity to consent. But a finding that the first two drinks consumed by Ms. DeSean collectively contained a pint of hard liquor is such compelling evidence of excessive alcohol consumption that it could have been heavily weighted and even colored the court's perception of other evidence.

We reverse the SAPO and remand for further proceedings consistent with this opinion.

Siddoway, C.J.

WE CONCUR:

Fearing, J.

Lawrence-Berrey, J.

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