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73337-1

No. 73337-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

M.R.,

Appellant,

v

M.D.

Respondent.

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

The Honorable Judge DOUGLASS NORTH Presiding

REPLY BRIEF OF APPELLANT

Riddhi Mukhopadhyay
WSBA # 42759
Attorney for Appellant M.R.
Sexual Violence Legal Services - YWCA
2024 Third Avenue
Seattle, WA 98121
206.832.3632

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. The Showing of Reasonable Fear of Future Dangerous Acts is an Additional Element Not Required for a Full SAPO 2

B. A Single Act of Sexual Assault is Sufficient for Entry of a Full SAPO 8

C. The SAPO Appeal is Timely and Proper 17

III. CONCLUSION 20

TABLE OF AUTHORITIES

CASES

City of Bellevue v. Lorang, 140 Wn.2d 19, 992 P.2d 496 (2000) ... 6

Freeman v. Freeman, 169 Wn.2d 664, 239 P.3d 557 (2010).. 15

Harbison v. Garden Valley Outfitters, Inc. 69 Wash. App. 590 849 P.2d 669, 672 (1993) 16

In re Detention of A.S., 138 Wn.2d 898, 982 P.2d 1156 (1999)..... 4

Seven Sales LLC v. Beatrice Otterbein, __Wn.App.__, 356 P 3d 248 (2015) 7

State v. Keller, 98 Wash. 2d 725, 657 P.2d 1384(1983) 4

State v. *Lynn*, 67 Wash.App. 339, 835 P.2d 251 (1992) 18

State v. Naillieux, 158 Wn. App. 630, 241 P.3d 1280 (2010).. 18

The Erection Co. v. Dept. of Labor and Industries of State of Wn, 121 Wn.2d 513, 852 P.2d 288 (1993) 2

Whatcom City v. City of Bellingham, 128 Wn.2d 537, 909 P.2d 1303 (1996) 4, 6

STATUTES

RCW 10.14.080 5

RCW 26.50.010 16

RCW 26.50.030 9

RCW 26.50.060 3

RCW 26.50.070 .... 3, 7

RCW 7.90.005 .... 8, 9, 15

RCW 7.90.010 14

RCW 7.90.020 .... 5, 9, 10

RCW 7.90.090 .... 2, 3, 6, 8

RCW 7.90.110 3

RCW 7.90.121 4,19

RCW 7.92.100 5

RCW 7.92.120 .... 5, 7

I. INTRODUCTION

Sexual Assault Protection Order (SAPO) cases under chapter 7.90 RCW are special proceedings that are unique, even among protection orders, because a trial court lacks the discretion to deny protection where a petitioner has established evidence of nonconsensual sexual conduct or penetration. Statutes should not be interpreted in ways that make substantial parts of it meaningless, preventing those who qualify for relief from accessing the very remedy intended by the Legislature. If adopted by this Court, M.D.'s position that additional statements and conduct subsequent to the sexual assault are required for a showing of reasonable fear of future dangerous acts will create a loophole that invalidates the very purpose of the statute. M.D.'s argument should be rejected in favor of the position that in order to qualify for a final SAPO, the statute requires that a petitioner establish by a preponderance only that he or she has been a victim of nonconsensual sexual conduct or penetration.

II. ARGUMENT

A. The Showing of Reasonable Fear of Future Dangerous Acts is an Additional Element Not Required for a Full SAPO

The evidentiary burden on a Petitioner seeking a Sexual Assault Protection Order is explicit and simple:

> If the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court shall issue a sexual assault protection order....
> RCW 7.90.090(1)(a).

Trial judges lack the discretion to deny a SAPO if the Petitioner meets that standard, because "It is well settled that the word 'shall' in a statute is presumptively imperative and operates to create a duty. The word 'shall' in a statute thus imposes a mandatory requirement unless a contrary legislative intent is apparent." *The Erection Co. v. Dept. of Labor and Industries of State of Wn*, 121 Wn.2d 513, 519, 852 P.2d 288 (1993) (citations omitted). The SAPO mandatory grant is distinguishable from the requirement for a DVPO. A petition for a sexual assault protection order may be filed by a person "who does not qualify for a protection order under chapter 26.50 RCW and who is a victim of nonconsensual sexual conduct or nonconsensual sexual penetration, including a single incident of nonconsensual sexual

conduct or nonconsensual sexual penetration." RCW 7.90.030(1)(a).

The SAPO statute is fundamentally different from the DVPO statute in that the SAPO statute denies trial judges discretion over whether or not to grant relief; a SAPO case lacks that discretion, because the Sexual Assault Protection Order Act uses "shall," not "may." *Compare* RCW 26.50.070(1) ("Where an application under this section [for a DVPO] alleges that irreparable injury could result ... the court may grant an ex parte temporary order....") and RCW 26.50.060(1) ("Upon notice and after a hearing, the court may provide relief as follows....") *with* RCW 7.90.110(1) ("An ex parte temporary sexual assault protection order shall issue if the petitioner satisfies the requirements of this subsection by a preponderance of the evidence") and RCW 7.90.090(1) ("If the court finds by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court shall issue a sexual assault protection order....") (emphasis added). The legislature did not include any explanation for its decision to deprive SAPO judges of the discretion granted to DVPO judges. Statutes must be interpreted and construed so that

all the language used is given effect, with no portion rendered meaningless or superfluous. *Whatcom City v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996); *see also In re Detention of A.S.*, 138 Wn.2d 898, 911, 982 P.2d 1156 (1999) (the "primary objective in interpreting a statute is to ascertain and give effect to the intent of the Legislature" (citing *State v. Keller*, 98 Wash. 2d 725, 728, 657 P.2d 1384(1983)). However, the Legislative Purpose statute does indicate that rape too frequently goes unreported, and that even when it is reported it often does not result in criminal prosecution. Often, this is the result of "rape myths" (prejudicial bias against victims of rape) that could result in victims being unable to get protection from their assailants if judges are not mandated to protect petitioners who have proven, by a preponderance, that sexual assault occurred.

If the "may/shall" distinction in these statutes does reflect the level of discretion, the DVPO statute is the outlier. The new stalking protection order statute would make *ex parte* relief discretionary ("Where it appears ... that the respondent has engaged in stalking conduct and that irreparable injury could result if an order is not issued immediately without prior notice, the court may grant an ex parte temporary order for protection...." RCW

7.92.120(1)), but not the final order ("If the court finds by a preponderance of the evidence that the petitioner has been a victim of stalking conduct by the respondent the court shall issue a stalking protection order"). RCW 7.92.100(1)(a) (emphasis added). Likewise, Anti-Harassment Protection Orders use the permissive "may" in the ex parte standard, and "shall" in regard to final orders. RCW 10.14.080(1), (3).

M.D. confuses the requirements of a petition, for an *ex parte* order, and the requirements for a final finding for a full order. M.D. incorrectly posits that a petitioner must establish both a sexual assault and separate action by the Respondent that gives rise to a reasonable fear of future dangerous acts to be granted a full order. Resp Br. at 10-12. The statute clearly requires that an affidavit accompanying the petition for relief (not even the petition itself) shall allege the conduct or statements causing reasonable fear of future dangerous acts. RCW 7.90.020. However, the requirements for a petition to be accepted for the issuance of a temporary order are not the same as the requirements for a final SAPO. M.D. completely ignores the statute specifying a petitioner's burden of proof for the issuance of a full sexual assault protection order, which unequivocally states that "If the court finds

by a preponderance of the evidence that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court shall issue a sexual assault protection order…" RCW 7.90.090(1)(a).

Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous. *Whatcom City v. City of Bellingham*, 128 Wn.2d 537, 546, 909 P.2d 1303 (1996). Making allegations of a sexual assault the only requirement for the entry of a SAPO does not render the statute's requirement of reasonable fear meaningless as alleged by M.D. or redundant (citing *City of Bellevue v. Lorang*, 140 Wn.2d 19, 25, 992 P.2d 496 (2000)). Resp Br. at 13-14. M.D.'s interpretation of the statute—requiring a second, separate element of reasonable fear of future dangerous acts—renders meaningless and superfluous the burden of proof for a final protection order, which clearly states that the court finds by a preponderance that the petitioner has been a victim of nonconsensual sexual conduct or nonconsensual sexual penetration by the respondent, the court shall issue a sexual assault protection order. RCW 7.90.090(1)(a).

M.D. also erroneously argues that requiring a showing of reasonable fear only at the *ex parte* level and not for the full permanent order is a reading of the statute that would lead to absurd results (citing *Seven Sales LLC v. Beatrice Otterbein*, __Wn.App.__, 356 P.3d 248, 250 (2015)). Resp Br. at 34. Requiring a petitioner to make a greater evidentiary showing (of a reasonable fear of future dangerous acts) at the *ex parte* level than for the full protection order is logical. It gives the *ex parte* court a specific basis for issuing an immediate order against a respondent who has not yet been given notice of the allegations, the hearing and the temporary order. Similarly, the DVPO and the stalking protection order statutes include *ex parte* burdens of proof that include a requirement of the petitioner to demonstrate a meaningful safety risk prior to being provided relief without giving the Respondent an opportunity to respond. RCW 26.50.070(1); RCW 7.92.120(1).

Moreover, it is reasonable for the legislature to have concluded that requiring a showing of reasonable fear of future dangerous acts for the full order is unnecessary in the case of sexual assault. The legislative declaration identifies sexual assault as "the most heinous crime against another person short of

murder... Sexual assault inflicts humiliation, degradation, and terror on victims." RCW 7.90.005. In other words, the legislature correctly determined that the violation of a person's sense of dignity and safety caused by sexual assault inherently causes reasonable fear in a victim. Where the legislature has already identified a sexual assault as a "most heinous crime" and as inflicting "terror on victims," in contrast to crimes like domestic violence or harassment, which include no such language in their legislative purpose sections, a petitioner who has established by a preponderance that a sexual assault occurred need not further prove their terror, humiliation and degradation in order to establish their reasonable fear of future dangerous acts. Requiring a petitioner to provide further detail about their fear, humiliation and terror due to the sexual assault would be redundant.

B. A Single Act of Sexual Assault is Sufficient for Entry of a Full SAPO

The SAPO statute's purpose is to create a mechanism to protect sexual assault victims who "desire safety and protection from future interactions with the offender" by granting stay-away restrictions on the offender who has subjected them to humiliating, degrading and terrifying acts. RCW 7.90.005. The purpose is not

solely to prevent future dangerous acts, as M.D. would have the Court believe.

M.D. asserts incorrectly that a SAPO petitioner must allege events occurring "subsequently after" the assault which would give rise to reasonable fear of future dangerous acts. Resp Br. at 22. He further argues that M.R. would and should not have received an *ex parte* order if she had informed the *ex parte* commissioner that M.D. had not violated the University of Washington on-campus order during the four months before M.R. filed the SAPO. Resp Br. at 31. However, RCW 7.90.020(1)(a) states that the specific statements or actions that give rise to reasonable fear of future dangerous acts can be "made at the same time of the sexual assault <u>or</u> subsequently thereafter..." (emphasis added). Separate incidents are not required, and a SAPO petition (like a DVPO) may be filed based on a single act of sexual assault. RCW 7.90.030(1)(a); RCW 26.50.030(1)("a petition for relief shall allege the existence of domestic violence"). The injuries and violence that M.D. inflicted on M.R. and that she described in her petition are sufficient for an issuance of a SAPO.

M.D. argues that M.R. never alleged reasonable fear in her petition based on statements or conduct by him. Resp Br. at 15.

This is clearly wrong. M.R. specifically states in her petition how during the sexual assault M.D. penetrated her mouth with his penis with such force that she started choking, and that he bit her and penetrated her vagina so violently that it left her bleeding. CP 4. M.D. offers no argument to explain why these specific actions by the respondent at the time of the sexual assault were insufficient to give rise to reasonable fear of future dangerous acts. RCW 7.90.020(1)(a).

M.R. further stated that she did not know M.D. prior to the sexual assault and therefore, did not know what he could be capable of, other than that she knew that he was capable of violently raping a fellow student he had never met before. CP 4. M.D. failed to respond to M.R.'s argument that unlike a DV relationship (in which the victim may be able to reasonably predict the future behavior of a well-known abuser), the inability to prediction an acquaintance/stranger rapist's behavior is itself a basis for having a reasonable fear of that person's potential future behavior.

The record also clearly indicates that after the assault, there were continued interactions with M.D. that left M.R. in fear, including running into him on campus and social events, and being

afraid of ending up in the same places because of mutual friends. CP 4, 16, 18-19, 30. This specifically supports the mechanism of a protection order requiring a respondent to stay away. M.D. states that it is undisputed that he made no attempt to contact M.R.. Resp Br at 20. Yet he continued to appear and remain at events M.R. was present at. CP 4, 16, 18-19, 30. His mere presence, regardless of whether there was communication, caused fear in M.R. to the point where she could not move. CP 18, 30. M.D. implies that the no-contact order issued by University of Washington as a part of the student conduct investigation is sufficient, so M.R. has no ongoing reason to fear M.D.. However, the alleged interactions with M.D. occurred after the issuance of the UW no-contact order, and there appeared to be no enforcement mechanism for the university's no-contact order. CP 4, 16, 18-19, 30. It was only after M.R. filed for the civil SAPO that she finally stop encountering M.D.. Moreover, the university no-contact order serves a separate purpose and does not prevent M.R. from applying for a SAPO, as the jurisdictional authority and protections are quite different in each order. It is also counterintuitive to RCW 7.90 that victims seek only a single remedy such as only the university student conduct process or

only the civil SAPO. Where the SAPO seeks to protect more victims, M.D.'s position essentially limits victims to rolling the dice on getting protection in one venue and foregoing other sources of relief, irrespective of the efficacy of the relief granted by the initial venue.

M.D.'s and the trial court's interpretation of the SAPO statute would prevent most sexual assault victims from accessing the remedy of a protection order, because few petitioners could prove that a respondent is likely to engage in additional physically or sexually dangerous acts in the future, particularly when the sexual conduct that gave rise to the order is not physically or sexually "dangerous" (such as a flasher). M.D. responds that under his and the trial court's interpretation, the SAPO relief would still be available, because the petitioner could argue that the flasher might flash the victim again. Resp Br. at 15. This argument makes two critical concessions: (1) "dangerous" in this context cannot mean posing a danger of physical harm to the victim, and (2) a petitioner may prove a propensity for future "dangerous" acts based purely on the respondent's alleged sexual conduct rather than on any evidence of a propensity to behave any particular way in the future. Nevertheless, M.D. fails to respond to M.R.'s

argument that her allegations of very specific physically harmful behaviors during the rape—biting her, causing her to bleed, sexually assaulting her orally so violently that she choked on M.D.'s penis—caused her reasonable fear of future dangerous acts.

Additionally, under M.D.'s interpretation, most petitioners actually would not qualify for protection under the SAPO statute, despite meeting the definition of nonconsensual sexual conduct, because the reasonable fear of future dangerous acts requirement, if imposed, would be too restrictive as most would not be able to predict future acts beyond the sexual assault. The legislature defined "sexual conduct" to include a wide range of sexual behaviors, divided into six categories:

> (a) Any intentional or knowing touching or fondling of the genitals, anus, or breasts, directly or indirectly, including through clothing;
> (b) Any intentional or knowing display of the genitals, anus, or breasts for the purposes of arousal or sexual gratification of the respondent;
> (c) Any intentional or knowing touching or fondling of the genitals, anus, or breasts, directly or indirectly, including through clothing, that the petitioner is forced to perform by another person or the respondent;
> (d) Any forced display of the petitioner's genitals, anus, or breasts for the purposes of arousal or sexual gratification of the respondent or others;
> (e) Any intentional or knowing touching of the clothed or unclothed body of a child under the age of thirteen, if done

> for the purpose of sexual gratification or arousal of the respondent or others; and
> (f) Any coerced or forced touching or fondling by a child under the age of thirteen, directly or indirectly, including through clothing, of the genitals, anus, or breasts of the respondent or others.

RCW 7.90.010(4).

Several of these definitions encompass sexual assaults that are not forceful or coercive conduct, because sexual assault can include both violent and nonviolent conduct, and can take a myriad of forms, all of which are devastating to a victim's sense of dignity and safety, as described in the statue's legislative purpose section. An example of a petitioner who should qualify for a SAPC under these definitions but would not receive one under M.D.'s reasonable fear requirement would be victim of an alcohol-facilitated sexual assault, who was mostly unconscious during a sexual assault and had no memory of specific conduct or statements made by the offender during the sexual assault or subsequently thereafter, but who can prove that the sexual penetration occurred without consent (*e.g.*, if there is an eyewitness or video footage). Likewise, a petitioner with developmental disability who does not fully comprehend what sex is would be unable to articulate a reasonable fear of future

dangerous acts by the respondent, and would never qualify for protection despite being a victim of conduct that would meet the definition of sexual assault. Finally, children who have been groomed by their sexual abusers may not interpret their abuse as violent, violating, or dangerous, precluding them from proving a reasonable fear of future dangerous acts, so they could never qualify for a SAPO under the requirements asserted by M.D..

The legislative declaration makes it clear how rampant sexual assault is where "a woman is raped every six minutes" yet few cases get reported and fewer prosecuted. RCW 7.90.005. It is clear that the SAPO statute is meant to protect victims, not exclude them. Yet M.D. and the trial court's narrow reading contradicts this very clear legislative intent.

M.D. also attempts to define when a petitioner 'needs' protection. Citing to *Freeman v. Freeman*, 169 Wn.2d 664, 239 P.3d 557 (2010), M.D.'s reasoning under *Freeman* is incorrect. Resp Br. at 17. *Freeman* was a case involving a request to modify/terminate a DVPO that had been in place for 10 years. 169 Wn.2d at 666. Years had elapsed, allowing for the respondent to show changes in his circumstances (through deed, testimony, career) to demonstrate that he was no longer a threat to the

petitioner. *Id.* M.D.'s analysis of *Freeman* does not apply in this case. The history in domestic relationships are extremely different that histories of relationships that qualify for a SAPO, which is why a petitioner who has a qualifying relationship with the Respondent must file for a DVPO instead of a SAPO. RCW 26.50.010(1). M.D. acknowledges the difference in relationships that qualify for protection under the DVPO and parties seeking a SAPO. Resp Br. at 18. It is not clear why he cites to *Freeman* when the facts and statutory relief sought are so different.

M.R. very plainly has demonstrated her need for a sexual assault protection order based on having been a victim of a violent sexual assault by M.D.. Even if the Court should consider changes in circumstances in determining reasonable fear, M.D. states in this appeal that he is attending college out-of-state but has provided no proof, either through documentary evidence or testimony during the trial. Resp Br. at 35. Additionally, M.D. attempts to introduce new evidence mid-appeal that does not meet the criteria set out in *Harbison v. Garden Valley Outfitters, Inc.* 69 Wash. App. 590, 593-94, 849 P.2d 669, 672 (1993)("RAP 9.11 is a

limited remedy under which this court may direct that additional evidence may be taken if all of the following six criteria are met).[1]

The appeal record does not include evidence that M.D. no longer attends University of Washington, or is not a student at another campus in King County, or does not maintain a residence in King County, or does not intend to return to the area as soon as this case resolves, or will not reapply to the University of Washington while M.R. is still a student there. There is still reason for M.R. to fear future interactions with M.D.. Assurances by a respondent with no evidence supporting their legitimacy should not be a basis for denying a petitioner a SAPO.

C. The SAPO Appeal is Timely and Proper

M.D. improperly argues that M.R. should be denied relief under the doctrine of invited error. Resp Br at 25. "[I]t is only certain errors that may be asserted for the first time on appeal. Limiting the constitutional claims that may be raised for the first

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[1] (1) additional proof of facts is needed to fairly resolve the issues on review, (2) the additional evidence would probably change the decision being reviewed, (3) it is equitable to excuse a party's failure to present the evidence to the trial court, (4) the remedy available to a party through post judgment motions in the trial court is inadequate or unnecessarily expensive, (5) the appellate court remedy of granting a new trial is inadequate or unnecessarily expensive, and (6) it would be inequitable to decide the case solely on the evidence already taken in the trial court." RAP 9.11(a); *State v. Ziegler,* 114 Wash.2d 533, 541, 789 P.2d 79 (1990).

time on appeal places responsibility on trial counsel to properly prepare their cases and will reduce claims that are discovered solely for purposes of appeal." *State v. Lynn*, 67 Wash.App. 339, 343, 835 P.2d 251 (1992). The function of an appellate court is to "review the validity of claimed errors by a trial judge who presided over a trial. That function assumes that counsel preserve the error by objecting to something the trial judge did or did not do. [The courts] do not, and should not, be in the business of retrying these cases. It is a wasteful use of judicial resources." *State v. Nailiieux*, 158 Wn. App. 630, 638, 241 P.3d 1280 (2010).

M.R. has consistently submitted to the trial court that the "burden of proof is clear on when a SAPO should be granted; a single act of nonconsensual sexual conduct or penetration by a preponderance of the evidence is sufficient" and that M.R. met her burden for a full SAPO. CP 72, 76; RP 53, 61-64. M.D.'s argument about invited error does not follow. He ignores that fact that M.R. did raise these errors asserted in this appeal not only during the hearing but also in her motion to reconsider filed with the trial court. CP 102-113.

Finally, M.D. erroneously argues that this appeal is moot because if M.R. had been granted a protection order, it would have

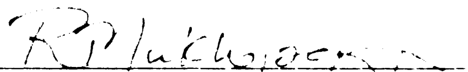
expired by the time there is a decision issued in this appeal. Resp Br. at 36. This argument mischaracterizes protection order proceedings, by relying on the inaccurate assumption that a petitioner would have no basis to request a renewal of the order. SAPOs are renewable as many times as deemed necessary. RCW 7.90.121(1). M.D. cannot prove at this time that M.R. would not, if granted her final order, have filed and been granted renewal of her order. Moreover, under M.D.'s reasoning, no petitioner who had been denied a protection order could appeal the denial, because the statute limits relief to two years, so every protection order would have theoretically expired by the time the appellate court issued a decision. M.D.'s position does not favor respondents either. Under his reasoning, a respondent could not appeal a trial court's decision to grant a protection order as the initial order would have expired by the time the appellate court had reached a decision. This confusing argument benefits neither respondents nor petitioners, and sets a dangerous precedent for any party in a protection order case.

III. CONCLUSION

M.R. presented detailed and corroborated instances of nonconsensual sexual penetration and conduct by M.D.. M.D failed to provide evidence that he did not commit those acts. The information provided by M.R. in her petition and through the filed evidence also established that she had a reasonable fear of future dangerous acts. If this Court were to adopt M.D.'s position, the majority of the Sexual Assault Protection Order Act will become meaningless and unenforceable. The trial court erroneously confused the legal standards for a sufficient petition, *ex parte* temporary relief, and a final order. Therefore, M.R. respectfully requests that this Court find in her favor, reverse the denial and remand for an entry of a full SAPO.

Dated this 16th day of November, 2015.

Respectfully Submitted,



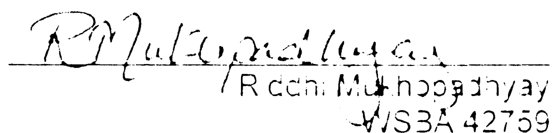
Riddhi Mukhopadhyay, #42759
Attorney for M.R.

CERTIFICATE OF SERVICE

I hereby certify that on the date listed below I served one copy of this brief on the Respondent's attorney by email, pursuant to our agreement to accept service by email:

Catherine Smith
Smith Goodfriend, P.S.
1619 8th Avenue North
Seattle, WA 98109
cate@washingtonappeals.com

Dated this 16th day of November, 2015.



/ Riddhi Mukhopadhyay
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